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ANNOTATED

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VOL. 28

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CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

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CASES REPORTED, VOL. XXVIII., PART 1.

MARGACH v. MACKENZIE, MANN & CO.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Walsh and McCarthy, JJ. May 11, 1916.

1. RAILWAYS (§ II D 7—75)—DUTY TO CLEAR RIGHT OF WAY—FIRES—ORIGINATION—NEGLIGENCE—ONUS.

Sec. 297 of the Railway Act (R.S.C. 1906, ch. 37), which requires railway companies to keep the right of way free from dead grass, weeds and unnecessary combustible matter, applies only to a line of railway under operation, not whilst it is under construction; to charge a company with common law negligence, while constructing a railway, for causing fires by sparks escaping from locomotives, and from burning logs and rubbish necessary for clearing the right of way, the onus is upon the plaintiff to prove that the fire originated from the sparks, and that the defendant was guilty of negligence in setting out the fire or allowing it to escape.

Per McCarthy, J.:—A person lighting a fire is not bound to prevent injury in all events, but only that injury shall not occur through his negligence.

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, considered; *Margach* v. *Mackenzie & Mann*, 32 W.L.R. 162, affirmed. See also *Dutton* v. *C.N.R. Co.* 23 D.L.R. 43, 19 Can. Ry. Cas. 72.]

Statement.

APPEAL from the judgment of Ives, J., dismissing an action for damages from fires caused in the course of construction of a railway.

Alex. Stuart, K.C., for plaintiff.

S. B. Woods, K.C., and *N. D. Maclean*, for defendant.

Stuart, J.

STUART, J.:—The nature of the circumstances out of which this action arose was such that contradictory evidence was inevitable and the possibility of different witnesses describing the same occurrences in different ways was very great. We all know that forest or prairie fires run hither and thither and owing to the changes in the wind and the flying of sparks and cinders, what one witness may treat as one fire another witness may consider to be two different fires. The plaintiff undertook a difficult task, it seems to me, when he undertook to convince a trial Judge with sufficient certainty to justify a verdict for damages, that the defendants were responsible for the burning of his property. Much was necessarily dependent upon the view the trial Judge would take of the length it was permissible to go in making inferences of fact. For examples of the different views that may be entertained by different judges on such a question, I would refer to *Beck* v. *Cana-*

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dian Northern R. Co., 2 A.L.R. 549, and *Rex* v. *C.P.R. Co.*, 5 D.L.R. 176. For myself, I think the plaintiff made out a very strong case, particularly with reference to the fire of August 4. But when it comes to saying that the trial Judge was clearly wrong and should have been convinced in the plaintiff's favour, it seems to me that this Court must seriously hesitate in view of the nature of the evidence to take that step. I concur therefore in dismissing the appeal.

Walsh, J.

WALSH, J.:—I have read with care and more than once the evidence in this case, and I do not see how it is possible to disturb the result at which the trial Judge, Ives, J., arrived. He has given the plaintiff the benefit of the inference which he draws from the evidence that the fire of July 18 originated in a spark from a locomotive. I am not sure that I could go even as far as that in the plaintiff's favour with reference to that fire, for there is to be found in the evidence of the plaintiff's own witnesses plenty to justify a finding that that fire did not start on the Canadian Northern right of way at all, and having regard to the direction of the wind at that time that it could not have started where these witnesses say that it did from a spark from a locomotive. Be that as it may, there is so much in the evidence not only of the witnesses for the defendant but of those for the plaintiff to indicate that the fire which destroyed the plaintiff's buildings on August 1, did not originate in the fire of July 18 that I do not see how we can say that the trial Judge should have reached the conclusion that he did. The plaintiff's whole case with reference to that fire is built up on the theory that it did, and if that theory will not stand the test, that branch of his case must, as I think it does, collapse.

The plaintiff's case as to the origin of the fire which destroyed the mill on August 4, is in my opinion much stronger than it is with reference to that of the 1st. The evidence of the plaintiff's witnesses Grady, Barr, Ferguson, Pike and Donald Margach as to the existence of the fire at the gravel pit for a couple of days before the destruction of the mill and as to its spread to the mill by the northwesterly wind that sprang up on the 4th is pretty strong though there are contradictions amongst them. The plaintiff's witness Hancock, and the defendant's witnesses Wocks and O son, however, are just as strong in their assertion that there was

no fire at the gravel pit at the times mentioned. And in the contradictions of testimony between these two sets of witnesses, and in the contradictions *inter se* of the plaintiff's own witnesses, it is impossible for me to say that the Judge was wrong in refusing to find that the fire which destroyed the mill came from fire set out by the defendant at the gravel pit.

Walsh, J.

And so without discussing the legal questions that would remain for decision had the findings of fact been the other way I would dismiss the appeal with costs.

SCOTT, J., concurred.

Scott, J.

McCARTHY, J.:—This is an appeal from the judgment of Ives, J., dismissing the plaintiff's action to recover damages from the defendants occasioned by two fires on August 1, 1914, and August 4, 1914. The defendants were constructing the Northern Alberta Railway and in the course of construction fires were started and escaped to the plaintiff's land, burning his buildings and occasioning the damage complained of. The plaintiff contends that the fire of August 1, 1914, was occasioned by the emission of sparks from a railway locomotive operated by the defendants igniting combustible matter about mileage 42 on the railway right of way and escaping therefrom southerly and westerly and across the tracks of the Grand Trunk Pacific which parallels to the south the line of railway under construction.

McCarthy, J.

By sec. 297 of the Railway Act (ch. 37 R.S.C.), it is enacted:—

> The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds, and other unnecessary combustible matter.

The plaintiff contends that on the evidence the defendants are shewn not to have complied with the statutory duty. The question arises does the section apply to a construction company, if so, it is difficult to see how the work of construction which necessitates clearing of the land could be successfully carried on and comply with the statute.

While I have been unable to find any direct authority to assist me in arriving at a conclusion, it seems to me this section applies to a line of railway under operation, but not whilst it is under construction through a country of the nature the evidence discloses this to be, and the plaintiff therefore, must depend upon his common law remedy in an action for damages for negligence.

From the plan used by the parties at the trial of the action, it

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will be observed that the fire of August 1, 1914, is alleged to have started at a point on the right of way under construction about a mile and a half northeasterly from the buildings destroyed by fire, it is also to be observed that these buildings practically adjoin the G.T.P. right of way, but south of it, and if the fire started at the point alleged by the plaintiff, to reach the plaintiff's buildings, the fire must have crossed both lines of railway. There is evidence of fires raging south of the destroyed buildings about the dates in question. Upon the evidence I cannot see how the trial Judge could have found with any degree of certainty that the destruction of the buildings on August 1, 1914, was occasioned by a fire emanating from the line of railway under construction by the defendants, it would be equally possible and locally more probable that the damage was occasioned by fires raging to the south of the G.T.P. line or from sparks emitted from their locomotives which passed quite close to the destroyed buildings. The trial Judge, I think, was right in refusing to speculate as to the origin of the particular fire that occasioned the damage and was justified in dismissing the plaintiff's claim for damages occasioned by the fire of August 1, 1914.

The destruction by fire of the plaintiff's mill on August 4, 1914, it is contended was occasioned by the defendants setting out a fire close to a gravel pit at mileage 47, on the right of way under construction and allowed to spread south of the G.T.P. right of way to a point south of mileage 43 where the plaintiff's mill that was destroyed by fire, was located.

As to the plaintiff's claim for damages occasioned by the fire of August 4, 1914, I cannot conclude that the trial Judge would have been justified in finding that the fire which eventually burned the plaintiff's mill started from the fire that was kindled by the defendant's workmen in the gravel pit at mileage 47 on the right of way. To my mind the plaintiff has not satisfied the onus of proof and furthermore assuming that the fire which was started in the gravel pit eventually spread to the plaintiff's mill. Under the cases as I read them, the plaintiff must go further and shew that the defendants were guilty of negligence in kindling the fire in the gravel pit for the purpose of disposing of the trees and rubbish that would necessarily be collected in clearing the land for the right of way. The evidence is not quite clear as to whether

or not the gravel pit was located on the right of way, but as it was being used by the defendant for the purpose of taking gravel therefrom for ballasting, we must assume that the defendants had the right to occupy the land when there was no evidence to the contrary.

The cases then which discuss the liability of a party setting out fire for the purpose of clearing land would seem to me to be applicable and the onus would be on the plaintiff to shew negligence in the defendants

Judgment is moved against as being against the weight of evidence and we should require a strong case when the judgment is for the defendant to grant a second trial in such an action. We ought not indeed to do it unless we are clearly of the opinion that the trial Judge upon the evidence before him ought to have given judgment for the other party.

The cases do not hold that the person lighting the fire must take care *at all events* that it does not injure his neighbor, but that he must take care that it shall not do so *through his neglect*.

There was evidence at the trial that the defendants were clearing a right of way for a railway and had set fire to log heaps in the gravel pit at mileage 47. The question of fact was whether the defendants had not acted with due care and caution in setting out the fire in the gravel pit under the circumstances, and whether they did all in their power to prevent injury to their neighbours.

It is sought here to hold the defendants liable upon the application of the doctrine laid down in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, every man must so use his own as not to injure another, but the legal maxim therein followed is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately and in view of the consequences, seeks an advantage to himself at the expense of a certain injury to his neighbour.

In the case before us there can be no doubt it was necessary to clear the land for the right of way and the usual course pursued is to burn the logs and rubbish. So the plaintiff must establish that the defendants were guilty of negligence in setting out the fire or allowed the fire to escape. The evidence in this case, to my mind, does not establish negligence in the defendants unless it can be assumed from the result.

When you come to apply the maxim to acts where accident

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has in part produced the injury, we must see that a great part of the business of life could not be carried on under the risks to which parties would then be exposed. It would be dangerous to go so far as to hold that when the act of kindling a fire has been imprudent or not must be taken to be proved by the result alone. In this case one or two innocent parties must bear a serious loss and it does not necessarily follow that it must fall upon the party setting the cause of injury in motion.

I think, therefore, that the trial Judge was justified in holding that defendants were not liable for the damages occasioned by the fire of August 4, 1914. I would dismiss the appeal with costs.

Appeal dismissed.

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LUMBER MANUFACTURING YARDS LTD. v. WESTERN JOBBERS CLEARING HOUSE.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Brown, Elwood and McKay, JJ. March 18, 1916.

1. ASSIGNMENTS FOR CREDITORS (§ I—1)—INCOMPLETE DIVESTING OF TITLE —EQUITY OF REDEMPTION —PREFERENCE.

Where there is reserved to a debtor a right to redeem or reclaim property, a trust extension agreement and a chattel mortgage conveying such property to a trustee, for the benefit of such creditors only as shall sign the agreement, are void, as against creditors who do not sign, as constituting a preference to the former; there being no complete divesting of the property by the debtor, there is no assignment for the general benefit of creditors.

[See also *Foster* v. *Trusts and Guarantee Co.*, 27 D.L.R. 313, 35 O.L.R. 426.]

Statement.

APPEAL from a judgment in an interpleader issue between a trustee and execution creditor.

P. M. Anderson, for appellants.

P. E. MacKenzie, K.C., for respondents.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—One Thomas W. Colley, a merchant at Swanson, Sask., became indebted to the plaintiffs in 1912 for building material, and plaintiffs recovered judgment for same in the amount of $770.45 on November 5, 1913.

In March, 1913, Colley found himself in difficulty, being unable to meet his liabilities, and, upon meeting a number of his creditors in Winnipeg, he executed what is termed a trust extension agreement. This agreement is in part as follows: —

This agreement made (in duplicate) this 18th day of March, A.D. 1913. Between:

THOMAS COLLEY, of Swanson, in the Province of Saskatchewan, hardware merchant, hereinafter called "the debtor," of the first part, and

THE SEVERAL PERSONS, FIRMS AND CORPORATIONS who are creditors of the debtor hereinafter called "the Creditors," of the second part,

and

WESTERN JOBBERS CLEARING HOUSE, hereinafter called "the trustee," of the third part.

Whereas the debtor has heretofore carried on a general hardware business at Swanson, in the Province of Saskatchewan, and has become indebted to divers creditors;

And whereas the debtor has requested the creditors to extend the time for payment of the said indebtedness until July 1, A.D. 1913, with interest payable thereon in the meantime at the rate of 8 per cent. per annum;

And whereas the debtor has agreed in consideration of the said extension and in consideration of the execution by such creditors of these presents to give to the trustee a chattel mortgage on his stock in trade, fixtures and fittings, in Swanson, both present and future, and to assign to the said trustee all the book accounts, promissory notes and choses in action now or hereafter owing to the said debtor and to transfer and convey to the trustee as further collateral security to the said indebtedness the following lands, namely:

Parcel No. 1.—Lot one (1) block two (2) in the townsite of Swanson, Saskatchewan.

Parcel No. 2.—An undivided one-half interest in the north half of section twenty-two (22) in township thirty-one (31) and range nine (9) west of the third meridian in the Province of Saskatchewan; and further assign to the trustee all insurance policies on his stock-in-trade and buildings.

And whereas the said creditors have agreed to execute the said extension in consideration of the execution of the said chattel mortgage and other securities above referred to and in consideration of the due, punctual and faithful performance of all the covenants, agreements and conditions herein contained on the part of the debtor and upon the terms hereinafter mentioned.

Now therefore this agreement witnesseth that in consideration of the premises and the sum of one dollar of lawful money of Canada, receipt whereof is hereby acknowledged, the said debtor hereby covenants, promises and agrees to and with the said creditors and the said trustee as follows:—

Then follows an undertaking on the debtor's part to execute the chattel mortgage and transfer his real estate. The debtor, further, by the agreement assigns to the trustee all moneys due or accruing due to the debtor in connection with his business, and also all promissory notes, bills of exchange, chattel mortgages and choses in action. He undertakes to remit to the trustee and account to the trustee for all moneys received in connection with the business. He agrees that the trustee may at any time place a man in charge of the business. He further agrees that, in case the trustee decides that it would be in the best interest of the creditors to sell the assets of the debtor, the trustee may then enter into possession and sell the estate, both real and personal, at public or private sale and on such terms as the trustee may see fit. It is also agreed that all moneys received by the trustee under the agree-

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ment, or under the assignment of the book accounts or in connection with the securities, shall be paid out first: in payment of all costs or charges of the trustee; secondly, in payment of new goods purchased by the debtor with consent of the trustee; and thirdly, in payment pro rata of the indebtedness of the debtor to such creditors as execute the agreement.

There is a further provision whereby the trustee shall not in any way be responsible for any loss or damage arising by reason of the conduct of the trustee, even though such conduct amount to negligence.

This agreement was signed by less than one-half the number of the creditors. It was not signed by the plaintiffs. The trust agreement covered all the property of the debtor, and, pursuant to the agreement, a chattel mortgage was executed in favour of the trustee, and the real estate was conveyed to the trustee. The trustee, subsequently, under the powers conferred, took possession of the debtor's business and, apparently, proceeded to wind it up. The plaintiffs issued a writ of execution on their judgment, and they, through the sheriff, seized the goods, or part of the goods, which were covered by the trust agreement and chattel mortgage, and which the trustee was in possession of. The trustee claimed the goods and interpleader proceedings followed, with the result that the following issue was set down for trial:—

The Lumber Manufacturers Yards, Ltd., affirms and the Western Jobbers Clearing House denies that certain goods or chattels and effects in and about a certain store premises, to wit, the buildings situate on Lot number one (1) in Block number two (2) in the townsite of Swanson, in the Province of Saskatchewan, in the occupation of one Thomas Colley of the said Village of Swanson, seized in execution by the sheriff of the Judicial District of Saskatoon, under a writ of *fieri facias* dated on or about November 5, 1913, and issued out of the Supreme Court of Saskatchewan, Judicial District of Saskatoon, in respect to a judgment of this Honourable Court for $770.45 recovered on or about November 5, 1913, by the said The Lumber Manufacturers Yards, Ltd., in an action at its suit against the said Thomas Colley, were at the time of the said seizure the property of the said Thomas Colley and being attached by the said execution became the property of The Lumber Manufacturers Yards, Ltd., as against the Western Jobbers Clearing House.

The Lumber Manufacturers Yards, Ltd., affirms and the Western Jobbers Clearing House denies that a certain chattel mortgage dated March 18, 1913, and made between Thomas Colley aforesaid, the mortgagor of the first part, and the Western Jobbers Clearing House, the mortgagee of the second part, is null and void as against the Lumber Manufacturers Yards, Ltd.

The Lumber Manufacturers Yards, Ltd., affirms and the Western Jobbers Clearing House denies that a certain trust extension agreement dated

March 18, 1913, in which the said Thomas Colley is called the debtor of the first part and the Western Jobbers Clearing House is called the trustee of the third part is null and void as against the Lumber Manufacturers Yards, Ltd.

In the alternative, the Lumber Manufacturers Yards, Ltd., affirms and the Western Jobbers Clearing House denies that the Lumber Manufacturers Yards, Ltd., are entitled to their share of a *pro rata* distribution of any goods and chattels held in trust by the Western Jobbers Clearing House.

Upon this issue, judgment was given for the defendants with costs, and the plaintiffs appeal.

The appellants contend that the trust agreement and chattel mortgage constitute an assignment for the general benefit of creditors, and, not being made to an official assignee, are void; or, in the alternative, they contend that these documents constitute and were intended to constitute a preference in favour of certain creditors, to the prejudice of the appellants, and for that reason are void as against the appellants.

It is not an answer, that the trust agreement itself does not amount to an assignment; the several documents executed must be read together and interpreted as one transaction:—

An assignment for the benefit of creditors may consist of several instruments, in different forms and bearing different technical names, which, when read together in the light of the surrounding circumstances, are seen to constitute in fact but one transaction, indicating an intention on the part of the debtor to assign his property. The several instruments may be made to one or more persons at different dates, provided the circumstances warrant the conclusion that they are all the result of a pre-existing purpose to assign the insolvent's property for the benefit of his creditors. 5 C.J. 1119.

To constitute an assignment for the general benefit of creditors, there must be a complete divesting of title on the part of the assignor. The law in this respect seems to be correctly laid down in 4 Cyc. at 126, as follows:—

In such an assignment there can be reserved no right, nor equity of redemption nor of defeasance, express or implied, remaining in the debtor, or any creditor of his, that may be availed of by any process of law or in equity. It is a complete divesting of title and a surrender of all right and control over the property appropriated, with a contingent interest in any surplus that may remain after payment of debts and expense of administering the assigned estate.

In my opinion, the documents in question herein do not amount to such a complete divesting of title. It is true that the effect of these documents, under the circumstances, was to place the trustee in almost complete control of the debtor's affairs, but there was, nevertheless, reserved to the debtor at least the right to redeem and reclaim all the property affected.

As to the second contention: the respondents, prior to the

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interpleader proceedings, were apparently willing and even desirous that the appellants should become a party to the trust arrangement, and the appellants went so far as to forward their claim to the trustee. It is not, in my opinion, necessary to consider the events which finally led to interpleader proceedings being taken, or to the form of the interpleader issue; it is sufficient that the respondents, by the interpleader issue and on this appeal, denied the appellants' right to share pro rata in the goods in question.

They contend that the appellants had an opportunity of coming under the agreement and participating therein on an even basis with all other creditors, but, not having done so, are shut out.

The trial Judge's finding in this respect is not clear, but I take it he must have held this contention correct in view of the fact that he gave judgment in favour of the respondents with costs.

While it appears clear, not only from the documents themselves but also from the extrinsic evidence, that all creditors had the right and were expected to come in and become parties to the arrangement, it is, in my opinion equally clear that only such creditors as did come in and become parties to the agreement could take any advantage therefrom; and that such was the intention of the debtor and all the parties to the arrangement. The trust agreement itself, wherein it provides for distribution, states:—

Thirdly.—*In payment pro rata of the indebtedness of the party hereto of the first part to the parties of the second part who execute this agreement* as such indebtedness exists on the date of this agreement, together with interest at eight per centum per annum.

The affidavit of the manager for the trustee which was filed on the interpleader proceedings, in par. 7 thereof states:—

(7) The claimant seized and entered into possession of the said goods as trustee for and on behalf of the aforesaid creditors of the aforesaid Thomas W. Colley and to the best of this deponent's information, knowledge and belief, no one except the said trustee and the said creditors had any right, title or interest of any nature whatsoever in or to the said goods at the time when they were seized by the sheriff as aforesaid.

The creditors referred to in that paragraph are previously set out in the affidavit and consist only of those who executed the agreement. The debtor, Colley, on this point says as follows:—

Q. Who was to participate in any of the proceeds handled by the trustee under the extension agreement and the chattel mortgage? A. All the creditors that had signed it.

The counsel for the respondents in his factum on the appeal puts the case as follows:—

As a matter of fact, it was given with the intention of letting all the creditors benefit by it if they so wished, but the question whether they would benefit by it, in fact, depended upon the individual decision of the creditors themselves. If any of them chose to come in, they were at liberty to do so, but if they did not choose to come in, they could not take advantage of the chattel mortgage. The effect of the extension agreement and chattel mortgage, therefore, was only to benefit those creditors who took the necessary steps to take advantage of them.

It is clear, under the evidence, that if the appellants are shut out from sharing in the benefits of this agreement, there is nothing out of which their claim, or any part of it, can be realised, and that the effect will be to prefer the creditors who became parties to the agreement.

It is not sufficient, except under certain circumstances which do not apply to this case, that such should be the effect; it must also have been so intended. Was it so intended?

The evidence shews that the debtor thought, when he executed the documents, that if all his creditors would give him the extension he would be able to pull through, and that he, at least, hoped that all his creditors would become parties to the arrangement. On the other hand, it is equally clear from the evidence that the debtor felt that if any of his creditors refused to come in and proceeded to attempt to realise on their claims, he would not be able to pull through; and in this connection it is to be noted that the trustee is, under the agreement, given the power to execute an assignment for the general benefit of creditors. There was, however, no provision or intention that, in the event of any of the creditors refusing to come in, the agreement should be effective. On the contrary, as already stated, it was in that event intended that only such creditors as did come in would share in the estate. To examine the transaction more c osely:—

We find the debtor meets certa'n of his creditors; these creditors arrange with him as to what extension he should have and the terms on which he should have it. They nominate a trustee of the estate and define his powers and responsibilities, to the extent even of relieving him from any responsibility for damages where such result from the trustee's own negligence. Then, as to all the rest of the creditors, they say: "You must come into this arrangement and accept the terms which we have agreed to,

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whether you like them or not, otherwise you will be put in the position of being unable to realise anything out of this estate."

That is, undoubtedly, in my opinion, the effect of the documents, and the intent with which they were entered into by the debtor and such creditors as were parties to the arrangement.

What right has a debtor, or any number of creditors, to place the balance of the creditors in that position? If any number of creditors have such right, what is to prevent any individual creditor from exercising the same right? These documents were intended to prefer and do prefer certain creditors over others, unless such others agreed to something which no one had any right to ask them to agree to. The deed, therefore, in my opinion is void as against the appellants.

It is contended, on behalf of the respondents, that the appellants acquiesced in the condition of affairs by sending in their claim. In my opinion it is not necessary to consider that matter, in view of the position taken by the respondents denying the appellants any right to share in the proceeds.

In the result, therefore, the appeal should, in my opinion, be allowed. There should be an order that the trust agreement and chattel mortgage are void as against the appellants; and the appellants should have their costs of the appeal and of the interpleader proceedings.

Appeal allowed.

MAN.

C. A.

RICHARDSON v. URBAN MUTUAL FIRE INSURANCE CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 11, 1916.

1. LANDLORD AND TENANT (§ II C—24)—HOLDING OVER TERM—RENEWAL—LEASE OF CORPORATION—SEAL.

In order to establish a tenancy from year to year, or the tacit renewal of the term, there must be a valid lease for a year at least, and a holding over by consent of the parties, from which the continuance could be implied; a verbal lease for the term of a year, entered into by an official of a non-trading corporation without the corporate seal and not under a by-law, creates no valid tenancy capable of an implied renewal by holding over and the holding over creates no liability except for use and occupation.

[*Finlay* v. *Bristol & Exeter R. Co.*, 7 Ex. 409, followed.]

2. INSURANCE (§ I D—22)—POWERS OF AGENTS—LEASE—CORPORATE SEAL.

The provisions of the Companies Act (R.S.M. 1913, ch. 35), do not apply to a company incorporated under the Mutual Fire Insurance Act, R.S.M. 1913, ch. 101, and the powers of its officers and agents to bind the company must be gathered from the latter Act, or as they exist at common law; an agent's authority to make a lease of an office for the company's use, or an agreement for such lease, is not within the term "regulations" mentioned in sec. 27 of the Mutual Fire Insurance Act; to constitute a valid lease it must be under the corporate seal.

3. INSURANCE (§ I A—7)—AS TRADE OR COMMERCE—MUTUAL COMPANIES —POWERS.

The business of insurance, carried on by a mutual benefit association not for the sake of profit, is neither trade nor commerce, and, therefore, the common law powers of agents of trading corporations are not applicable to a company or association of that kind.

[*Citizens Insurance Co.* v. *Parsons*, L.R. 7 App. 96; *Paul* v. *Virginia*, 75 U.S. 163, applied.]

APPEAL from the judgment of Ryan, Co. Ct. J., in favour of defendant, in an action for rent upon the implied renewal of a tenancy. Affirmed.

Statement.

C. P. Fullerton, K.C., for plaintiff.

H. J. Symington, for defendant.

HOWELL, C.J.M., concurred with PERDUE, J.A.

Howell, C.J.M.

RICHARDS, J.A.:—The defendant's manager and the plaintiff in part by letter and in part verbally, agreed that the company should become plaintiff's tenant for property in Portage la Prairie for a year from August 1, 1910, at a yearly rental payable in monthly instalments. No formal written lease was entered into, and there was no document executed under the company's seal.

Richards, J.A.

On July 2, 1910, a resolution was passed at a meeting of defendant's directors, as follows:—

Moved by D. McKillop, seconded by Mr. Marshall, that the manager make arrangements with William Richardson for the office on south side Saskatchewan Ave., lately occupied by himself and Mr. Ferris, and to use discretion as to rental at $360 or $400, with plumbing and whatever may be required for heat extra, and that Mr. T. B. Miller be notified of the company's intention to vacate present office 3rd August.

W. W. Miller, Prs. R. H. M. Pratt, secretary.

On October 28, 1910, the following appears in the defendant's minute book:—

Moved by Mr. Rundle, seconded by Mr. McKillop, that the rent question be laid over.

On November 24, 1910, the minute book has this entry:—

Moved by W. P. Rundle, seconded by C. Graban, that the account for office rent be paid at the rate of $400 per annum and in future to be paid monthly.

None of the above were under the company's seal, and no by-law of the company was passed affecting the matter.

The company took possession on August 1, 1910, and paid the plaintiff monthly, at above rate of $400 per annum, till the end of September, 1914, when they left the premises, paying the plaintiff at the above rate till they so left.

The plaintiff claims that there was created an original tenancy for one year, that, by holding over and paying monthly at the

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same rate after the first year, the defendants became tenants from year to year, and that he was therefore entitled to 6 months' notice of the intention to end the alleged tenancy. This action is brought to recover $200 which the plaintiff claims he is entitled to as 6 months' rent in default of such notice.

If there was a tenancy from year to year then there remained 10 months unexpired of the then current year when the defendants gave up possession. But, as plaintiff got a tenant for the property at the end of 6 months from such giving up, he sued for 6 months' rent only.

The trial Judge gave judgment in defendant's favour, following *Finlay* v. *Bristol & Exeter R. Co.*, 7 Ex. 409. From that decision, the plaintiff appeals.

The company is incorporated by warrant under the Mutual Fire Insurance Act (R.S.M. 1913, ch. 101), The date of incorporation is not shewn, and as no suggestion is made that the Act, as it existed at that date, differs from that now in force, I refer to the latter. The provisions of the Companies Act do not apply. So that any powers of its officers to bind the company must be gathered from the Mutual Fire Insurance Act, or exist at common law.

No question was raised by defendants as to the effect of sec. 70 of the Act, and it is doubtful if this case would come within it.

Sec. 27 is the only one that appears to me to require comment. It provides that the Board of the company may

> make and prescribe such regulations or by-laws . . . respecting . . . the duties of the officers, agents and assistants . . . the effectual carrying out of the objects contemplated by the company . . . and such other matters as appertain to the business of the company and are not contrary to law.

It is apparent that an authority to make a lease of an office for the company's use, or an agreement for such a lease, is not within the term "regulations," and none of the above quoted extracts from the company's minutes amount to a by-law. So that nothing in sec. 27 helps the plaintiff's case, and he must, I think, shew a lease or tenancy at common law.

It is suggested that the defendants are a trading corporation, and that, therefore, at common law, their officials had power to bind them by arranging, on their behalf, to become plaintiff's tenants and that such agreement, at least when coupled with the

taking of possession under it, created the tenancy so arranged for.

Whether, if the defendants were a trading corporation, they could be so bound under that common law, need not, I think, be here discussed. In my opinion, they were not traders in any sense of the word.

The defendants are simply an association to assist one another in case of loss by fire. They have no stockholders, and of course, pay no dividends and make no profits. They only deal with their own members and are merely a mutual benefit association.

In *Citizens Insurance Co. of Canada* v. *Parsons*, L.R. 7 App. 96, the judgment of the Judicial Committee of the Privy Council at p. 111 says:—

> A question was raised . . . whether the business of insuring buildings against fire was a trade. This business, *when carried on for the sake of profit*, may, no doubt in some sense of the word be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts nor were insurers who made them held to be traders under the English bankruptcy laws; they have been made subject to those laws by special description.

Their Lordships did not, in fact, in that case, definitely hold whether the business of insuring for profits was, or was not, a trade. But it will be noticed that their language refers only to the case of insurance carried on for the sake of profit, which was the fact as to the company then under consideration. So that, even if they had held it a trade I cannot see how such decision could affect a case like the present where, from the very nature of the company no profits could be made.

It may further be pointed out that the words above quoted seem to favour the view that even a company insuring to make profits would not be a trader.

That view was distinctly taken by the Supreme Court of the United States in *Paul* v. *Virginia*, 75 U.S.R. 168. Field, J., delivered the judgment of the Court and at 183, dealing with the argument that the business of insurance is commerce in the case of a company insuring for the sake of profits, said:—

> Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporation and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word.

If the above is good law then, unquestionably, in a case like that before us, where the defendants merely dealt with their members without profits, they cannot be called traders.

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If I am right in the foregoing, then as there was no lease under seal, the plaintiff can only shew a tenancy by bringing the case within the common law exceptions to the need of the corporate seal, to bind a non-trading corporation.

These exceptions are stated in *Lawford* v. *Billericay Rural Council*, [1903] 1 K.B. 772, and in effect are:—

1. Where work done for the corporation is of a trivial nature. 2. Where the claim relates to a matter of so frequent occurrence that it must of necessity be complied with without waiting for the formality of a seal. 3. Where work is done in respect of matters for the doing of which the corporation was created, and the benefit of the work is accepted by the corporation.

The first two exceptions clearly do not apply. In so far as the principle of the third can apply—if it does apply, as to which I express no opinion—it could only extend to making the defendants liable for use and occupation, and to that extent the plaintiff has been paid in full by the defendants.

Finlay v. *Bristol & Exeter R. Co.* (1852), 7 Ex. 409, which the trial Judge follows, is, it seems to me, exactly in point in the present case, and holds that, where the corporation never executed a valid lease, then, taking possession, and paying the equivalent of a rent creates no tenancy but only a liability for use and occupation so long as they actually occupy.

It was argued that the *Finlay* case is no longer law, and a foot-note, at p. 157 of Pollock on Contracts, and expressions used by Garrow, J., in *National Malleable Castings* v. *Smith's Falls, etc.*, 14 O.L.R. 22, and by Riddell, J., in *Young* v. *Bank of Nova Scotia*, 23 D.L.R. 854, 34 O.L.R. 176, are cited in support of that contention.

National v. *Smith's Falls, supra*, was an action on a contract by a trading corporation to manufacture and deliver goods of a kind that it had been incorporated to make. In *Young* v. *Bank of Nova Scotia, supra*, the holding over and paying rent, which was relied on as shewing a tenancy from year to year, followed upon a tenancy for a year created by a binding lease. In each of these cases it was, I think, unnecessary to say more as to the *Finlay* case than that it did not apply, even if still good law. With deference, what was said beyond that seems to me to be *obiter*.

Any statement of law by Sir Frederick Pollock demands respect-

ful consideration. But I cannot see how he finds (as I think he does in the foot-note at p. 157 of this book), that the *Finlay* case is overruled by *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, and L.R. 4 C.P. 617. There the party against whom it was sought to enforce the contract was an individual, and a seal was not required to bind him. He based his defence on the ground that the plaintiffs being a corporation could not contract otherwise than under seal, and it was argued that, therefore, he was not bound, as there would be no mutuality in the contract. The case turned against him, as I understand it, on the holding that the contract was one entered into by the plaintiffs—a trading corporation—to carry out purposes for which they were incorporated, and that they were therefore bound under the circumstances of the case, though they had not contracted under seal.

With every deference, I cannot see how that decision affects the *Finlay* case. I am supported in that view by the judgment of Boyd, C., in *Garland Man. Co.* v. *Northumberland Paper Co.*, 31 O.R. 40, at 47.

As against the above view in Pollock on Contracts, I find the *Finlay* case referred to, as stating the existing law, in the following text books: Leake on Contracts, 6th ed., 476; Chitty on Contracts, 9th ed., 309, 367; 5 Hals. Laws of England, 711; Fry on Specific Performance, 5th ed. 320; Lindley's Law of Companies, 269; Woodfall on Landlord and Tenant, 19th ed. 640; Foa on Landlord and Tenant, 4th ed. 408; Redman on Landlord and Tenant, 6th ed. 14.

It is also approved as good law by Gwynne, J., in *Bernardin* v. *North Dufferin*, 19 Can. S.C.R. 581, at 598, and it is also followed by Boyd, C., in the *Garland* case mentioned above.

I think the trial Judge was right in holding that no tenancy arose in this case and that the defendants had incurred no liability beyond that for use and occupation, which liability they had discharged. I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff seeks to recover against the defendants as yearly tenants to him certain rent claimed to be due. The defendants are a corporation and occupied the premises in question under parol lease at $400 per annum payable monthly. There was no formal lease and no document was

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executed under the seal of the corporation. After occupying the premises for several years the defendants moved out, giving only a month's notice of their intention to vacate. The plaintiff must in order to establish a tenancy from year to year prove a valid lease for a year at least, and that there was a holding over by consent of the parties from which the continuance could be implied. The doctrine governing such a case is laid down by Lord Mansfield in *Right* v. *Darby*, 1 T.R. 159, at 162 as follows:—

> If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year.

This exposition of the law is approved by the Court of Appeal in *Dougal* v. *McCarthy*, [1893] 1 Q.B. 736. There must, therefore, be a valid lease for a year in the first place, before a tenancy from year to year can be implied from the continuance of the tenant in possession after the expiration of the term created by the lease and the payment and receipt of rent. Now, apart from the fact that the defendants were liable for use and occupation of the premises during the period they remained in possession, was there a valid lease created for a year under which the defendants entered upon the premises?

The defendants were incorporated under the Mutual Fire Insurance Act, R.S.M. 1913, ch. 101. I can find nothing in that Act which authorizes the directors to delegate their powers to an agent and to dispense with the affixing of the corporate seal to a contract entered into by the company. There is no provision in the Act similar to those contained in sec. 66 of the Companies Act, R S.M. 1913, ch. 35. The company cannot, I think, be regarded as a trading corporation in the full sense of that term. Its powers are restricted to those of mutual fire insurance amongst the members with very limited powers of general insurance. The authority given to officers and agents would naturally be confined strictly to such operations and to matters necessarily growing out of them.

In *Finlay* v. *Bristol & Exeter R. Co.*, 7 Ex. 409, an incorporated railway company agreed by parol to take certain premises for a year. They occupied and at the end of the year continued to occupy the premises for another year at the expiration of which they left without notice, but paid rent up to the end of the fol-

lowing quarter. It was held that the company was not liable for the remaining three quarters of the year. Parke, B., said:—

> In order to render them liable, it is sought to make out a constructive occupation; but that can only arise from contract, and the defendants cannot contract unless under seal, or in the statutory mode.

Sir Frederick Pollock in his work on Contracts, 8th edition, p. 157, expresses the view that the *Finlay* case was overruled by *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, in Ex. Ch. 4 C.P. 617. The latter was a suit by a trading corporation in respect of the non-delivery of pumping machinery The statute and articles of association under which the company was incorporated enabled the board of directors to execute agreements. The tender of the defendants was accepted by resolution of the board and a part of the price of the machinery had been paid. The decision in the Court of Common Pleas proceeded upon the grounds that the plaintiffs were a trading corporation, that the contract had in fact been adopted and acted upon by both parties and that power to enter into the contract for the company was given to the directors by the articles of association of the company, under the Companies Act, 1862. In the Exchequer Chamber the decision was upheld on the ground that,

> the old rule as to corporations contracting only under seal does not apply to corporations or companies constituted for the purpose of trading.

It appears to me that the question turns altogether upon the powers conferred by the Act of incorporation. If the directors, or agents appointed by them, are empowered by the statute to bind the corporation or company to a contract made in connection with its business, without affixing the corporate seal, then the objection to the want of a seal would be futile. But if there is no such statutory authorization then the contract must be under the seal of the corporation or company, especially if the contract is an unusual one, not necessarily arising out of the ordinary business of the company, such as a lease for a term of years. I would dismiss the appeal.

CAMERON, J.A. (dissenting):—The defendant company is incorporated under the provisions of The Mutual Fire Insurance Act, ch. 101, R.S.M. Under sec. 3, when thirty or more persons have signed a declaration binding themselves to form a mutual fire insurance company and have filed such declaration with the Provincial Secretary and with the Registrar of the Land Titles

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District, in which it is intended to have the head office of the company the Lieutenant-Governor in Council may grant a warrant constituting such subscribers a company. Thereupon a meeting shall be held and certain resolutions passed upon filing which the subscribers and the persons thereafter effecting insurances "shall be a body corporate and politic." Sec. 5. Provisions are made for the election of directors who are to appoint a president, vice-president, manager, secretary, treasurer, and other officers as may seem necessary. The Board of Directors may pass regulations or by-laws

respecting the funds and property of the company, the duties of the officers, agents and assistants thereof, the effectual carrying out of the objects contemplated by the company, the holding of the annual meeting, and such other matters as appertain to the business of the company and are not contrary to law. (Sec. 27).

The method of insurance upon the mutual assessment plan is prescribed. By sec. 71

Every company may hold lands, but such lands only as are requisite for the accommodation of the company in relation to the transaction of its business and may deal with the same by way of sale or otherwise.

The provisions which are of importance in this case are those referring to the powers of the directors and to the authority of the company to hold lands. Of these and the other provisions of the Act and of the warrant issued thereunder the plaintiff is to be taken as having notice; further he cannot be expected to go. *McEdwards* v. *Ogilvie*, 4 Man. L.R. 1, 6.

The defendant company occupied the premises as tenants from August 1, 1910, to October 1, 1914. The manager of the company on August 29, 1914, notified the plaintiff that the company would not require the premises after October 1, 1914, and vacated them accordingly.

The plaintiff brings this action to recover $200, being 6 months' rent, which he claims to be entitled to in lieu of 6 months' notice. The company says the notice it gave was sufficient and that it has no liability for any period during which it did not actually occupy.

The case came up for trial before Ryan, J., who, in his judgment, deals with the facts, and says:—

Although the rent was paid monthly, I am inclined to hold, keeping in view the letter of the plaintiff to the president of the defendant company, dated June 30, 1910, that the tenancy was, at least, a yearly one, and that the company

by remaining in possession after the end of the first year became a tenant from year to year, unless the law, in cases where the tenant being a corporation and there being no lease under the corporate seal, prevents the continuance in possession after the expiration of the first year, from having the same effect as it would have in case the tenant was an individual and not a corporation. He then held that the case comes within *Finlay* v. *Bristol & Exeter R. Co.*, 7 Ex. 409, and gave judgment for the defendant.

I agree with the Judge that, on the evidence, a yearly tenancy was created. The company evidently acted on the plaintiff's letter of June 30, 1910, in which he said "I will rent the office lately occupied by Richardson and Ferriss for one or three years at $400 per year." The plaintiff was justified in assuming that the requisite preliminaries had been duly performed: Hals., vol. V. 302, and the cases there cited, particularly *Royal British Bank* v. *Turquand*, 6 E. & B. 327, and *Reuter* v. *Electric Telegraph Co.*, 6 E. & B. 341, where a verbal contract by an agent was upheld, the constitution requiring special formalities. When a company has occupied land pursuant to a parol contract, the Court may presume such a contract duly made: *Lowe* v. *London & N.W.R. Co.*, 18 Q.B. 632, 638, followed in *Pauling* v. *L & W.R. Co.*, 8 Ex. 867; Hals., vol. V., 711, 712.

I refer also to the judgment of Killam, J., in *McEdwards* v. *Ogilvie*, 4 Man. L.R. 1 at p. 6, where Angell and Ames on Corporations is cited.

The authority of an agent to bind a corporation need not be shewn by a resolution or other written evidence, but may be implied from circumstances.

This company is a commercial corporation, or a trading corporation. An insurance corporation is spoken of as being such "in some sense of the word" in *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, 111. I take it that the term "trading" as applied to companies in the English cases, for instance, in *South of Ireland Colliery Co.* v. *Waddle*, L.R. 4 C.P. 617, is not used in a narrow sense. And even if this company be not, strictly speaking, a trading corporation, the general result of the decisions is that, in the absence of enabling or restrictive statutory provisions,

A non-trading corporation, so far as it is incorporated for special purposes, may make without seal any contract incidental to those purposes: Pollock on Contract, p. 163.

Where such a corporation makes a contract relating to objects or purposes for which it was incorporated, the formality of a seal is no longer required: Hals., V., 710, citing the last mentioned case.

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See also Halsbury VIII., 383, where there are cited, amongst other cases *Australian Royal Mail Co* v. *Marzetti*, 11 Ex. 228, and *Henderson* v. *Australian Royal Mail Co.*, 5 E. & B. 409. The first was an action by the company and the second against it. In the first it was held the company had the right to bring the action, though there was no seal,

a corporation may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience and is in accordance with common sense, per Pollock, C.B., p. 234.

In the second case, precisely the same view was taken.

But in later times, the decisions have sanctioned a much more extensive relaxation, rendered necessary in consequence of the general establishment of trading corporations. The general result of those cases seems to me to be that, whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced though not under seal, per Wightman, J., p. 415.

Erle, C.J., says—

It is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal, p. 416.

It appears to me that the leasing of premises, for the purpose of using them as the head office of the company, was a matter directly within the scope of the company's statutory powers, essential, in fact, for the transaction of its business. It was a matter properly incidental or ancillary to the carrying on of the business of the company to use the language of Lord Campbell in *Copper Miners Co.* v. *Fox*, 16 Q.B. 229, cited with approval in *Henderson* v. *Australian Royal Mail Co.*, at p. 412. Under the authorities plaintiff was entitled to assume, in the circumstances, the authority of the president of the defendant company to make the contract.

In the much discussed case of *Finlay* v. *Bristol & Exeter R. Co.*, *supra*, upon which the County Court Judge based his judgment, it was held that a railway company was not liable for use and occupation of premises, where it had ceased to occupy them where they had been previously held under a parol agreement and that no tenancy could be inferred from the payment of rent inasmuch as the company could not contract under seal. This was held without regard to the question whether the origina agreement was binding or not. Parke, B., at pp. 415, 416.

Now this case was decided in 1852, before the *Australian Royal*

Mail Co. v. *Marzetti*, *supra* (1855), in which it was referred to in the argument but not directly, though clearly impliedly, dealt with in the judgments. In *Henderson* v. *Australian Royal Mail Co.*, *supra*, decided also in 1855, the *Finlay* case does not appear to have been mentioned. I have already set forth the effect of these decisions, which is decidedly adverse to that in the *Finlay* case.

There can be no question that the judgments of Judges in the Court of Exchequer in the *Finlay* case are based upon the narrow view as to the method by which the powers of corporations to enter into contracts may be exercised.

No case (says Parke, B.) has gone the length of saying that a corporation may bind itself by a contract not under seal, which does not range itself within either the small services excepted by the common law, or contracts authorized by parliamentary charter. This (railway) company can only bind themselves by their common seal, or in the statutory mode (*i.e.*, by a writing signed by three directors under 147th sec. of the Company's Act, set out at p. 410). These defendants, being a corporation, cannot contract by conduct, but only by a binding agreement under seal, or in the statutory mode (*i.e.*, by a writing signed by three directors): so that no fresh interest was created at the expiration of the second year, and the company are only bound to pay for the time that they actually occupied (and Platt, B., says): If they are incapable of contracting by parol, how can the circumstances of their holding over be evidence of a contract.

He mentions two previous cases in the Exchequer Court, *Lamprell* v. *Billericay*, 3 Ex. 283, and *Diggle* v. *London & Blackwall*, 5 Ex. 442, as barriers to the plaintiff's recovery on general principles, and points out that the provision of the Private Act above quoted was not complied with and has no application. But *Lamprell* v. *Billericay Union* and *Diggle* v. *London & Blackwall*, were subsequently expressly disapproved in *Henderson* v. *Royal Mail Co.*, 5 E. & B. 409, 414. Moreover, the dictum that a corporation can contract only by deed or by the statutory mode is quite at variance with other and later decisions, particularly in the case of trading corporations acting within the scope of their powers. So that that insuperable impediment alluded to by Martin, B., p. 420, in the *Finlay* case against the jury drawing a conclusion that the relation of landlord and tenant existed is not by any means as insuperable as it then appeared to be. In fact the impediment can have no force or effect where the corporation is entering into a contract having a relation to its corporate purposes or incidental or ancillary thereto for in such cases the corporation can contract by parol and needs not the formality of a seal.

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It was held by Bovill, C.J., in *South of Ireland Colliery Co.* v. *Waddle*, L.R., 3 C.P. 463, referring to the exceptions to the common law rule as to the liability of corporations on contracts, that:—

> These exceptions apply to all contracts by trading corporations entered into for the purposes for which they were incorporated. A company can only carry on business by agents, managers and others; and if the contracts made by these persons are contracts which relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal.

This view was upheld on appeal, unanimously, by an eminent Court without hearing respondent's counsel, L.R. 4 C.P. 617. Cockburn, C.J., said the defendant was asking the Court to reintroduce a relic of barbarous antiquity. On the argument in the Common Pleas and on appeal *Finlay* v. *Bristol & Exeter*, 7 Ex. 409, was referred to and though not expressly, was surely impliedly, dealt with in the judgments.

In Pollock on Contracts, 8th ed., p. 157, it is stated that the effect of the *South of Ireland Colliery* case was to overrule *Finlay* v. *Bristol & Exeter R. Co.*

In *Bernardin* v. *North Dufferin*, 19 Can. S.C.R. 581, Gwynne, J. considered the law laid down in the *South of Ireland Colliery* case as binding. The question before him was whether the rule applied not only to trading corporations but to municipal corporations where the benefits of the contract had been received, p. 589. Along with a large number of cases he refers to *Finlay* v. *Bristol & Exeter*, but the only conclusion he makes with regard to it is that it has no application to the case before him.

In *Bain* v. *Anderson*, 27 O.R. 369, Meredith, C.J., refers to the *Finlay* case which he considers was overruled by the *South of Ireland Colliery* case or, at any rate, was so affected by it as to make it no longer applicable to a modern trading corporation.

In *Garland* v. *Northumberland*, 31 O.R. 40, Boyd, C., followed *Finlay* v. *Bristol*. See his judgment at p. 47, where that and other cases are reviewed. Boyd, C., seems to doubt whether there was a lease at all, pp. 45, 46. Ferguson, J., holds directly that there was not, p. 53. The question, therefore, arises whether, if there never was a lease, there could be an overholding.

In *National Malleable Co.* v. *Smith's Falls Co.*, 14 O.L.R. 22, the question was whether the defendant's managing director whose

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authority was not defined by law, and who did not consult the Board of Directors in the matter, and whose action had not been ratified by their formal approval, bound the company by a letter "accepted" by the plaintiff company. Falconbridge, C.J., at the trial, held the plaintiff company entitled to assume that the managing director had authority and bound the company, following *South of Ireland Colliery Co.* v. *Waddle, supra*. The Court of Appeal sustained this judgment to the extent of orders already given, Meredith, J.A., dissenting as to this, and expressing as his view that the whole relief should be given as was done by Falconbridge, C.J. But there was no division of opinion on the question of the liability of the defendant company on the contract so entered into by the managing director by letter and without seal or formal authority from the directors.

The judgment of the majority of the Court, in which Moss, C.J., and Osler and Maclaren, JJ. concurred. (Meredith, J., assenting except to the extent indicated above) was given by Garrow, J., who says, p. 31:—

> There may be reasons for refusing to imply a parol contract in the case of a trading corporation which would under similar circumstances be implied between individuals. The cases before referred to of *Finlay* v. *Bristol and Exeter R. Co.*, and *Garland Man. Co.* v. *Northumberland Paper Co.*, are no doubt authorities for that position, but if the before quoted rule laid down in *The South of Ireland* v. *Waddle* case is to be fully adopted, and I think it should be, these cases seem to me to be at least illogical, survivals in fact of the older and narrower rule of the common law. For if a trading corporation may be bound by an express contract not under seal, I am unable to understand why it should not also be bound by a similar contract implied by law in the interests of justice—always providing, of course, that the contract to be implied would have been unobjectionable if it had been under seal.

A case in point arose recently in Ontario in *Young* v. *Bank of Nova Scotia*, 23 D.L.R. 854, 34 O.L.R. 176, where the judgment of the Appellate Division was delivered by Riddell, J., who held that, a valid tenancy actually subsisting, the consequences of overholding and paying rent is the same for a corporation tenant as for any other. He distinguished *Finlay* v. *Bristol & Exeter* and *Garland* v. *Northumberland*, on the grounds referred to by him at p. 858, but while so distinguishing them, as I read his judgment, he considers them no longer good law though he does not state this positively, p. 859.

In the text books the *Finlay* case appears to be generally cited as still being the law. Leake, 5th ed. 418; Chitty, 324; Wood-

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fall, 622. The authors make no reference to the bearing on it of the judgments in the *South of Ireland* case. In Foa, p. 408, it is also cited, but in a note it is said, "See, however, in this case, Pollock on Contracts, p. 150, 7th ed." I refer to Parker & Clark on Company Law, p. 243, where the cases are assembled and discussed.

Lowe v. *L. & N.W.R. Co.*, 18 A. & E. (N.S.), 631, was decided in 1852, on May 26. *Finlay* v. *Bristol & Exeter*, in the same year Feb. 11 and 12. In the *Lowe* case a railway company was held liable in *assumpsit* for use and occupation though there was no contract under seal. This liability was not only statutory but based on the implied promise to pay. Lord Campbell (p. 636), expressly held as *Dean & Chapter of Rochester* v. *Pierce*, 1 Camp. 466, and *Mayor of Stafford* v. *Till*, 4 Bing. 75, had decided that a corporation might sue in *assumpsit* for use and occupation, where the land had been occupied by their consent, that the right is reciprocal and that the party by whose permission a corporation has occupied lands may sue them in *assumpsit* for use and occupation. In *Hall* v. *Swansea* (1844), 5 Q.B. 526, a corporation was held liable to an action for money had and received in respect of sums which the law implied a promise to repay. "That was not a case where the doctrine of necessity applied: the only necessity was the obligation which lies on a corporation to pay its debts; and that necessity exists here."

The judgment in *Lowe* v. *London & N.W.R. Co.* was followed in *Pauling* v. *London & N.W.R. Co.* (1853), 8 Ex. 867. There the agent of a railway company agreed by parol to make a purchase of certain sleepers, which were received and used. It was held that as the goods were furnished under a contract made with an agent of the company, there was reasonable evidence of an undertaking by the company to accept the goods on the terms of the contract, p. 877.

In *Doe dem. Pennington* v. *Taniere*, 12 Q.B. 998, it was held that a demise of land from year to year may be presumed against a corporation. Lord Denman said, p. 1013:—

> The presumption arising from such payment and acceptance (of rent), is the same in the case of a corporation as of other persons,

and Riddell, J., in citing this dictum in *Young* v. *Bank of Nova Scotia*, at p. 859, says he is unable to see how the presumption against a landlord corporation can be different from that against a tenant corporation.

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The defendant company is a commercial or trading corporation, a company organized for the purposes of gain. According to the great weight of authority, it can bind itself by parol in matters relating to the exercise of its corporate powers and in matters incidental or ancillary thereto. Why then should it not be bound by a similar contract to be implied in law? This is the question suggested by Garrow, J., in the passage I have cited, and his conclusion was that such a contract would be implied and that the contract in the case before him, though not under seal, came within the *South of Ireland Colliery* case and was binding in law. Sir Frederick Pollock's conclusion (Contracts, p. 163), is that

A corporation is bound by an obligation implied in law whenever under the like circumstances a natural person would be so bound.

Upon consideration, it is my humble judgment that the authority of *Finlay* v. *Bristol & Exeter*, has been undermined by other and subsequent decisions of Courts of high authority. It and the *Garland* case, so far as it follows the *Finlay* case, are, as Garrow, J., observes, illogical survivals of the old and narrow common law rule. The old rule that corporations can contract only under seal in all but certain small and inconsiderable matters has been greatly relaxed, as is shewn by the increasing weight of authority, in the case of corporations acting within their powers and for the purposes of their incorporation. That being the case, the reason for the decision in the *Finlay* case loses its force.

I am, therefore, prepared to hold, with all due deference, that the authority of *Finlay* v. *Bristol & Exeter*, is no longer applicable, that the appeal should be allowed and judgment entered for the plaintiff.

Haggart, J.A.

HAGGART, J.A.:—The grounds for the plaintiff's appeal are that the trial Judge erred in holding that there could be no implied agreement for the payment of the rent claimed, and that an implied contract was created whereby the defendant became liable to pay the rental claimed.

I agree with the specific finding of the trial Judge where he says:—

Although the rent was paid monthly, I am inclined to hold, keeping in view the letter of the plaintiff to the president of the defendant company, dated June 30, 1910, that the tenancy was at least a yearly one, and that the company, by remaining in possession after the end of the 1st year, became a tenant from year to year unless the law in cases where the tenant being a corporation and there being no lease under the corporate seal prevents the con-

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tinuance in possession after the expiration of the 1st year from having the same effect as it would have in case the tenant was an individual and not a corporation.

The whole question here is whether *Finlay* v. *Bristol & Exeter R. Co.*, 7 Ex. 409, is good law.

Inasmuch as an ordinary individual would be held liable for the claim sued on herein if he had acted as the defendant company had done and as the plaintiff had suffered what in my opinion was an injustice, I tried to find reasons for reversing the judgment given in the Court below.

Finlay v. *Bristol* was an action of *assumpsit* for use and occupation. An incorporated railway company agreed by parol to take certain premises for a year. They occupied and at the end of the year continued to occupy for another year at the expiration of which period they removed their goods without any previous notice to quit, but paid rent up to the end of the following quarter. It was held that they were not liable in an action for use and occupation for the remaining three quarters of a year, since they did not occupy during that period; and that no tenancy could be inferred from the payment of rent inasmuch as they could not contract except under seal.

During the course of the argument Baron Parke interjected some pertinent observations when he said:—

It is difficult to see how these defendants can be made responsible for they have not occupied during the time for which the rent is sought to be recovered. They could not become tenants from year to year except by contract and they are incapable of contracting unless under seal or in the mode prescribed by the statute (and again he proceeds): No doubt if the defendants had occupied by permission of the plaintiff they would have been bound to pay, but they have not occupied. Then the question is whether there is any holding and in order to establish that, the plaintiff must prove a contract valid in law (and on p. 414): That proposition cannot be established unless it is shewn that there was a binding agreement on the part of the defendants to occupy for a longer period than they have done. The objection here is that there was no proof of such a contract as the law considers binding. Payment of rent is only a circumstance from which a contract may be implied.

and in his formal judgment on p. 415, he reasons in this way:—

The defendants, a corporation, aggregate, originally agreed by parol to take the premises in question for a year. Whether or no that agreement is binding it is not necessary to determine for having occupied they became liable according to the authorities to pay rent for the period they occupied and in respect of that an action for use and occupation would lie . . . In order to render them liable it is sought to make out a constructive occupation, but that can only arise from contract and the defendants cannot contract unless under seal or in the statutory mode.

The other Judges, Platt, B. and Martin, B., gave similar reasons and concurred with Parke, B.

The facts in *Finlay* v. *Bristol*, are substantially those in the case before us.

Garland Mfg. Co. v.. *Northumberland Paper Co.*, 31 O.R. 40, was a similar case, decided by the Divisional Court, composed of Boyd, C., Ferguson and Robertson, JJ., where it was laid down that there is a broad and well marked distinction between contracts executed and contracts executory in the case of incorporated companies, whether trading or not, and where a contract is executory a company is not bound unless the contract is made in pursuance of its charter or under its corporate seal. There the defendant company had occupied certain premises under a verbal agreement and paid rent for a year, continued in possession after the year and then went out paying rent for the time they were actually in possession. It was held as there was no lease under seal the company were not liable as tenants from year to year, but only for use and occupation while actually in possession.

Boyd, C., discusses *Finlay* v. *Bristol*, and three other authorities cited by the plaintiff herein, namely, Pollock on Contracts: *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, and L.R. 4 C.P. 617, at 46, 47, and *Bain* v. *Anderson*, 27 O.R. 369, 373; 24 A.R. (Ont.) 296, and 28 Can. S.C.R. 481, in these words:—

I think it may be safely said that when the contract is executory a corporation cannot be held bound by the Court unless that contract is made in pursuance of its charter or is under the corporate seal.

As to the general observations as to the power of corporations to contract without seal made in *South of Ireland Colliery Co.* v. *Waddle*, I would infer that they do not receive the concurrence of other judges who expressed themselves generally in *Hunt* v. *The Wimbleton Local Board*, 4 C.P.D. 48. The *South of Ireland* case does not seem to touch the decisions in *Finlay* v. *Bristol & Exeter R. Co.*, which, if law, concludes the appeal adversely to the plaintiffs. Alderson, B., there said that "It cannot be contended that the occupation of premises for a year is either a matter of daily occurrence or of so trivial a character as to require the dispensation with the corporate seal' . . . . .

It is suggested in Sir Frederick Pollock's book, 6th ed., p. 146, that *Finlay* v. *Bristol*, has probably been overruled and that result is favoured by Sir W. Meredith's observations in *Bain* v. *Anderson*, 27 O.R., p. 373. That case. was itself reversed in appeal, though this particular view may not have been touched.

With the exception of Pollock, I think I am correct in saying that the text writers on Landlord & Tenant, Company Law and Contracts, give *Finlay* v. *Bristol* as an authority for the proposi-

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tions laid down by Parke, B., and their observations are practically to the same effect as the following, the only one I will cite, viz., Woodfall on Landlord & Tenant, 18th ed., p. 622:—

> We have seen that corporations aggregate may receive compensation for the use and occupation of their property. They may also be liable for the same as tenants when they have actually used and occupied the land for a corporate purpose by permission of the owner. But they cannot bind themselves by an executory contract not under their common seal. They will be liable for use and occupation during such period as they occupy and not afterwards under any implied tenancy from year to year.

For which proposition the author cites *Finlay* v. *Bristol*, and *Copper Miners Co.* v. *Fox*, 16 Q.B. 229.

Of course there are exceptions to the rule of the common law that a body corporate is not bound by a contract not under its corporate seal. Such as where the matters are of a trivial nature, where it does that particular thing for which it was created, where there has been a part performance and where, if all the parties were ordinary individuals and the circumstances were such as would induce a Court to decree specific performance. This is not the case here. The making of a lease for years is not a trivial matter. The making of leases is not the business of the company. Its business is to sell insurance.

By the Mutual Fire Insurance Act, ch. 101, sec. 71, the defendants can hold lands requisite for the business, but they must acquire them in the usual way. The judgment of the trial Judge should be affirmed. I would dismiss the appeal.

Appeal dismissed.

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S.C.

Re ONTARIO AND MINNESOTA POWER CO., Ltd., AND TOWN OF FORT FRANCES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. January 24, 1916.

1. TAXES (§ III B 2—125)—ASSESSMENT—"ACTUAL VALUE" OF LAND—SPECIAL ADAPTABILITY—WATER POWER.

In assessing land at its "actual value" within the meaning of sec. 40 (1) of the Assessment Act, R.S.O. 1914, ch. 195, it is proper to take into consideration its special adaptability, such as its use in developing a valuable water power, and whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power.

[The valuation rule settled in expropriation cases applied: *Cedars Rapids & Mfg. Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *Pastoral Finance Assoc.* v. *The Minister*, [1914] A.C. 1083, referred to.]

APPLICATION by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board,

dated the 25th November, 1915, confirming the assessment of the real property of the company in the town. Refused.

Glyn Osler, for the company.

G. H. Watson, K.C., for the town corporation, respondent.

MEREDITH, C.J.O.:—This is an application by the Ontario and Minnesota Power Company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the 25th November, 1915, respecting the assessment of the real property of the company in the town of Fort Frances, and the leave is asked only as to the assessment of that part of the land designated as "Water Power Block 2," which was assessed at $400,000, and the assessment of it was confirmed by the Board.

Water Power Block 2, with other lands, was acquired by Edward Wellington Backus and those associated with him, called the purchasers, from the Crown, under the terms of an agreement between His late Majesty King Edward VII. and them, which bears date the 9th day of January, 1905.

The agreement recites that the Rainy river in the neighbourhood of Fort Frances "forms a valuable and extensive water power" and that application had been made by the purchasers for "a grant in fee of such lands adjacent to the said river and of such lands covered by said river and of such privileges as are necessary to enable the purchasers to develope the said water power and to render the same available for municipal, manufacturing, and milling purposes."

The agreement also recites that this water power can be more advantageously developed and more power be produced by works embracing the entire width of the river and dealing with it as a whole, than by an independent development on the Canadian side of the international boundary, and that it was therefore in the public interest to adopt that plan of development; that the purchasers were the owners in fee simple of the lands and water power on the Minnesota side of the international boundary, opposite Fort Frances, and were desirous of obtaining from the Government of Ontario a grant in fee of the lands and power on the Canadian side of the international boundary, "for the purpose of developing the water power to the full capacity of the stream from side to side at high water mark, and of utilising such storage facilities as may be available for maintaining the river at such high water mark, thereby rendering available a large amount of power on the

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Canadian side of the river for municipal purposes and for the operation of pulp or paper mills, flour and grist mills, and other manufacturing establishments."

By the agreement the Government agrees to sell and the purchasers agree to buy certain lands in and adjacent to Fort Frances, including Water Power Block 2, "together with all water powers and privileges and all rights, easements, and appurtenances thereto belonging or appertaining."

By the agreement the purchasers covenanted to erect "a dam conduit, or such other works on or near the river at Fort Frances, in accordance with plans attached to" the agreement, "sufficient to develope power to the full capacity of said river (including any increased capacity of said river by reason of the construction of storage dams or works)," and provision is also made as to the character and mode of construction of the dam and works.

Provision is also made for the formation of a joint stock company to which the rights of the purchasers under the agreement were to be transferred; and there are other provisions to which, for the purpose of the motion, it is unnecessary to refer.

In pursuance of the agreement, the purchasers applied for and obtained letters patent under the Ontario Companies Act, incorporating them by the name of the Ontario and Minnesota Power Company Limited.

The letters patent bear date the 13th day of January, 1905, and the purposes and objects for which the company is incorporated are declared to be, among others, "the production of electricity and of electric, pneumatic, hydraulic, or other power for any purposes for which electricity or power can be used," the storing, using, supplying, furnishing, distributing, selling, leasing, and otherwise disposing of the same, and entering into, performing, and carrying out any agreement with any power company authorised to do or perform or exercise any of the powers conferred upon the company, "for the purchase by and sale to the company of the whole or part of the rights, powers, franchises, assets, property, business, and undertakings of such other company . . . ;" but the company was not empowered to carry on any manufacturing business.

By supplementary letters patent issued in 1911, the company obtained an extension of its powers, enabling it to carry on the

business of manufacturers of any kind of manufactured products in the manufacture of which hydraulic or electrical power can be used, and other businesses, including those of general merchants, traders, and dealers in all kinds of merchandise.

As we were given to understand upon the argument, a similar company was incorporated in Minnesota, and to it all the lands and rights in that State of the purchasers were transferred.

The dam and works mentioned in the agreement with the Government of Ontario have been constructed, and the applicant has erected on part of the land acquired under it a power-house, a pulp and paper mill, and other buildings.

The dam and works have been constructed by the two companies under an arrangement the terms of which do not appear in evidence, and by means of the dam and works more than 30,000 horse power has been developed, 5,000 of which has been developed on the Canadian side of the river, most of which is used in connection with the applicant's mills, and some of it is transmitted to the Minnesota side for use in the mills which the Minnesota company has in operation there, and some is supplied to purchasers on the Canadian side.

The two companies are, no doubt, separate entities, but both of them are controlled by the same persons, who, if I may use that expression with regard to a company, practically own them.

In assessing the lot in question, the assessor took into consideration the increased value beyond that of mere town or agricultural land which it had by reason of its special adaptability to the use to which it is put, and its having been put to that use, and that was held by the Board to have been proper, and in confirming the assessment the Board has acted upon the same view.

It was argued by Mr. Osler that this view is erroneous, and that what are called the "scrap-iron" cases are applicable.

In the view I take, it is necessary to determine whether, in the light of such cases as *Great Central R.W. Co.* v. *Banbury Union*, [1909] A.C. 78, and *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee*, [1913] 1 K.B. 612, and in view of the change that was made in the Assessment Act in 1904, the "scrap-iron" cases are now binding upon us.

In the first of the cases to which I have just referred, it was decided that in assessing the ratable value of a section of a railway

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link line within a parish, connecting two great systems, the cost of the construction of the link line is not as a matter of fact and business experience a measure of the rent at which that section of the line may be reasonably expected to let, and in stating what method should be adopted the Lord Chancellor said (p. 85): "It follows that the rent must be fixed in accordance with the real value of the section to the company concerned, because that is the footing on which a tenant would base his offer of rent if he be not exposed to extortion. And the method usually adopted for arriving at that real value is to ascertain the net earnings of the section by allocating to it a mileage proportion of all rates and fares received for the whole journey in respect of all traffic passing over the section, after making from the receipts proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenants' capital, and the statutory deductions. That is for present purposes a sufficient description of the usual method. I do not pretend to define it. No doubt this method is not ordered by the statute. It is, to use Lord Watson's phrase, a 'formula.' Nevertheless, though Courts of law have never said that it must be adopted, it is in ordinary cases a sound way of fixing the true value. When adopted by quarter sessions, the proper judges of this question of fact, Courts of law have repeatedly allowed it. It does not treat all the miles on the line as of equal value. On the contrary. The measure of the value is the sum which is in fact earned by each mile, so that a much used mile will pay more, exactly according to its profit-earning use. Without saying that this formula is imperative, or usurping a right to decide on questions of fact, I do think it has been so long and so constantly applied that the tribunal which decides the fact would not depart from it without good reasons."

Again, after pointing out that it would not be proper, because the link line was indispensable for through traffic from the north of England to the south and west, to determine the ratable value of it on the basis that the railway companies occupying the other portion of the line would give a great rent in order to occupy it also, the Lord Chancellor said that it would be equally reasonable for the railway company to say: "Here is a mile of railway line; you are to isolate it from the rest of the system, for all you are to rate is this single mile; no one would give a sixpence for an isolated mile of railway; therefore the ratable value is nil;" and

that the true view seemed to lie between these extremes, that "each section is regarded as a profit-earning part of the system to which it belongs; each section is indispensable to the working of the system," and the resulting inquiry is, "If the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant would give for the whole is applicable to the particular section which is to be assessed? That depends on profit-earning."

In the other case— the *East London* case—the question was as to the mode of assessing a link line joining up the systems of six railway companies, which was leased in perpetuity to a joint committee of these companies, at a rental of 56 per cent. of the gross profits of the line, with a minimum of £30,000 per annum. It was contended by the railway companies that what is termed the "parochial principle," which is practically the same as the "scrap-iron" principle, should be applied, but that contention was rejected by a Divisional Court and by the Court of Appeal, and it was held that the Court of Quarter Sessions in determining the ratable value of the link line had properly taken into consideration: (1) the geographical position of the line and the advantages afforded by it; (2) the connections and accommodation of the line; (3) the fact that the line was rented, occupied, and used in common by a number of railway companies; (4) what rent, in view of the position, connections and accommodation of the line, a tenant might reasonably be expected to pay for the use of it, taking one year with another. Farwell, L.J., in stating his reasons for judgment, said (p. 624): "It is obviously impossible to disregard the position, *i.e.*, the local situation, of the line: a mile of line in the abstract or at large is impossible of consideration for any practical purpose: its connections are of the essence, for its use depends on the access to it just as the value of a retail shop depends to a great extent on its accessibility; and its accommodation is the element of value arising from the fact that it is of value as an accommodation to the lessee lines: all these are elements of value which the hypothetical tenant may fairly be assumed to take into consideration."

It is true that in these cases what was to be determined was not the "actual value" of the subject of the assessment, but its "rental value." The principle of the decision, however, is, in my opinion, just as applicable in the one case as in the other. I refer

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also to what was said by Anglin, J., in *Irwin* v. *Campbell* (1915), 23 D.L.R. 279, 51 S.C.R. 358, 372.

The change in the assessment law to which I have referred was the substitution for the provision that, "Except in the case of mineral lands hereinafter provided for, real and personal property shall be estimated at their actual cash value, as they would be appraised in payment of a just debt from a solvent debtor" (R.S.O. 1897, ch. 224, sec. 28 (1)), of what is now found in R.S.O. 1914, ch. 195, sec. 40 (1)—"Subject to the provisions of this section, land shall be assessed at its actual value."

It may be that the Commissioners by whom the Assessment Act of 1904 was drawn, in recommending this change, had in view the "scrap-iron" decisions, and that their purpose was to prevent them from being afterwards applied, for I find that in their report, giving the reasons for recommending the change, they say: "In assessing land the assessor would naturally have to regard its condition, situation, and other advantages, and the use to which it is or may be applied . . . It is thought that the requirement that the land shall be assessed at its 'actual value' will include every consideration which under varying circumstances should be weighed."

With great respect for the eminent Judges by whom the "scrap-iron" cases were decided, I venture to think that they placed too narrow a construction on the provisions of the Assessment Act then in force, which they had to apply; and I am clearly of opinion that those cases, if still binding upon us, should not be extended to subjects of assessment with which they did not deal; and I may, I trust not improperly, point out the extraordinary results which would follow if they were held to apply to the assessment of buildings. The Assessment Act requires that each lot shall be assessed separately, and that the whole or a portion of a building on it in the separate occupation of any person shall be separately assessed: sec. 22 (1) (*e*). One can imagine what would be the effect of applying the "scrap-iron" principle in these cases, especially now that land and buildings are required to be separately assessed, in a city like Toronto, in which there are hundreds and probably thousands of buildings which occupy the whole or parts of two or more lots and a vast number of buildings parts of which are separately occupied, to say nothing of the "sky

scrapers," with their hundreds of tenants separately occupying rooms in them.

As I have said, we are not called upon to determine whether the "scrap-iron" decisions are now to be followed. The subject of the assessment in them was not land, in its ordinary sense, but the poles and wires of a telephone company, in *In re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351; the rails, poles, and wires of a street railway company, in *In re London Street R.W. Co. Assessment* (1900), 27 A.R. 83; a bridge crossing the Niagara river, in *In re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114; and rails, poles, wires, and other plant of electric light companies and a telephone company erected or placed upon highways, in *In re Toronto Electric Light Co. Assessment* (1902), 3 O.L.R. 620.

In none of these cases was the Court called upon to determine the question which is before us, viz., whether in assessing land it is proper to take into consideration its special adaptability to such a use as Water Power Block 2 is being put to—its use in developing a valuable water power which without it could not have been developed.

I have no doubt that it was proper, in determining the "actual value" of the block, to consider whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power which has been developed and to assess it accordingly.

If the block had been expropriated before being so utilised, in determining the compensation to be paid to the owner its value would have been taken to consist in all advantages which it possessed, present or future, in so far as the possession of them enhanced the then value of the block. That is settled by numerous cases, to two of which, and those the most recent, I may refer: *Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, and *Pastoral Finance Association Limited* v. *The Minister*, [1914] A.C. 1083, both decisions of the Judicial Committee of the Privy Council.

That the same principle must be applied in ascertaining the "actual value" of land for the purpose of assessment, subject to the qualification that it may be that in expropriation proceedings the fact that the land is taken without the consent of the owner

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may be considered, is not, I think, open to question. In both cases what is to be determined is the same—the actual value of the land.

If, in ascertaining the value of land which has not yet been used for the purpose for which it is specially adapted, its adaptability for that use must be considered, it is, I think, an *â fortiori* case that, where the land is used for that purpose, its enhanced value by reason of its being so used must be taken into account. That appears to be covered by the second of the two propositions stated by Lord Dunedin in the *Cedar Rapids* case, where he says that the value "consists in all advantages which the land possesses, present or future" (p. 576).

The fact that, before the land could be put to the use for which it was especially adapted, the consent of another person would be needed, is a factor to be considered, and in some cases it might be that it was so improbable that the consent could be obtained that nothing ought to be allowed on account of the special adaptability, but that is a question of fact for consideration in determining the value of the land.

In this case no such difficulty exists. Practically the same persons own the land on both sides of the river. The recitals of the agreement seem to indicate that a dam extending beyond the international boundary line was not essential to the development of the water power on the Canadian side. I refer to the recital that "the said water power can be more advantageously developed and more power produced by works embracing the entire width of the river and dealing with it as a whole than by an independent development on the Canadian side of the international boundary."

This, it is to be remembered, is the language used in an agreement to which the owners of the land on the Minnesota side of the river were parties: for, as the agreement states, the purchasers were the owners of the land on both sides of the river, and the very object of acquiring the land on the Canadian side was that the purchasers should be enabled to build their dam from bank to bank, and that they covenanted with the Crown to do.

I have no hesitation in coming to the conclusion that the assessor and the Board rightly took into consideration the enhanced value which Water Power Block 2 had by reason of its adaptability for the use to which it has been put and by reason of its having been put to that use.

If that be the proper conclusion, the application for leave to appeal must be refused. The question of the amount by which the value of the land has been so enhanced is a question of fact and not of law; and, even if the Board had in our opinion allowed too much, as to which it is unnecessary to express an opinion, it is its judgment, not ours, that must prevail, as no appeal lies except as to matters of law.

It is not necessary to refer to the numerous cases which support what I have said as to a question of quantum being a question of fact and not of law. It will be sufficient if reference is made to the two rating cases I have mentioned and to the cases of *Re Bruce Mines Limited and Town of Bruce Mines*, 20 O.L.R. 315, and *Re Coniagas Mines Limited and Town of Cobalt*, 20 O.L.R. 322.

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The motion must be refused with costs. As we have come to the clear conclusion that there is no error in law in the way in which the Board has dealt with the appeal to it, it would serve no good purpose to prolong the litigation by giving leave to appeal, especially in a case in which it is important that there should be no unnecessary delay in finally revising the assessment roll.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Garrow, J.A.
Maclaren, J.A.
Magee, J.A.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice of Ontario, except in the opinion therein expressed that the same principles should be applied in ascertaining assessment value as in fixing compensation value.

Hodgins, J.A.

The point was not argued; but, when it is presented for decision, the fact that the municipality appraises the land each year as it then is, and in that way gets the benefit, from time to time, of each realised possibility as it occurs, must be considered. The reason for the rule in compensation cases that "all advantages which the land possesses, present or future," must be paid for, is that the land is finally taken, and the owner loses both those present and future advantages, and the taker gets them.

In the case of assessment the situation is so different that I prefer to place my decision in refusing the application upon the ground that the actual value in this case may properly include the advantageous position of this lot in relation to the other works. Consequently, the propriety of the amount fixed is at best a question of fact.

Application refused.

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C. A.

MILLS v. SMITH SHANNON LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Gallihier and McPhillips, JJ.A. April 3, 1916.

1. LOGS AND LOGGING (§ I—10)—WOODMAN'S LIEN AGAINST PURCHASER—WORK BEFORE AND AFTER DATE OF CONTRACT.

Secs. 37 and 38 of the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 245, under which a workman is entitled to a right of action for his wages against the person for whom logs are supplied under a contract, if the latter fails to require, before making any payment, the production of the employer's payroll, apply only to contracts which contemplate the employment of labour after the date of the contract, and not to a purchase of logs manufactured and ready to be taken possession of by the purchaser at the date of the contract; to entitle a workman to recover under these sections for work done subsequently to the date of the contract he must be able to prove that the subsequent work was performed in respect of the particular logs under the contract.

Statement.

APPEAL from the judgment of McInnes, Co.Ct.J., in an action under the Woodman's Lien for Wages Act (R.S.B.C. 1911, ch. 243).

MacInnes, for appellant, plaintiff.

J. H. Senkler, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff was a woodman employed by the Pacific Slope Lumber Co., Ltd., in the manufacture of logs. The said employers, after the logs were manufactured, sold them to the defendant company. The wages of the plaintiff and other woodmen being unpaid, they commenced proceedings under the Woodman's Lien for Wages Act, whereupon an agreement was arrived at whereby in consideration of the undertaking of the defendants to pay the contract price of the logs to the liquidator of the said Pacific Slope Lumber Co., Ltd., the lien proceedings were stayed. A month later another agreement was entered into apparently in substitution for the first one between the defendant company and the said liquidator, and assented to by the solicitors for the woodman, whereby the ownership of the logs was acknowledged to be in the liquidator and whereby the defendant company as agent for the liquidator and the woodman agreed to sell the logs and account to the liquidator for the proceeds as set out in the letter evidencing the agreement. The defendant company sold the logs as agreed, but withheld the sum of $2,200, being the amount which they claimed to have paid to the said Pacific Slope Lumber Co. under the original agreement of purchase. The plaintiff then brought this action not to enforce his claim of lien, nor to enforce his rights under the said agency agreement, nor for damages for breach of that agreement, but

under and by virtue of secs. 37 and 38 of the said Woodman's Lien for Wages Act. Sec. 37 provides that every person entering into an agreement with another for supplying or obtaining logs by which it is necessary to employ workmen, shall, before making any payment, require the production of the employer's payroll. And sec. 38 provides that where the preceding section has not been complied with, a workman shall have a right of action for his wages against the person for whom the logs were supplied under the contract. In a proper case these sections would enable the workman to sue the purchaser in a personal action as if he were the employer and debtor, but in my opinion the sections apply only to contracts which contemplate the employment of labour after the date of the contract. The contract in question here was for the purchase of logs already manufactured and ready to be taken possession of by the purchaser except that some were to be removed from Hauskin Lake to Turnbull Cove, which would involve some work and labour.

And this brings me to the second submission made by plaintiff's counsel, namely, that in any event the plaintiff is entitled to recover his wages for the time he was employed after the date of the contract. His difficulty, however, as I see it, is that he was not employed in removing the logs from the lake to the cove, as his own evidence I think shews, or if he was it does not appear whether his labour in that connection was in respect of logs moved subsequently to the date of the contract. He was working in the woods for some time after the date of the contract, but it does not appear whether the work he did was in any way connected with the logs in question.

It may be that the plaintiff is entitled to relief in another form of action, but I think he cannot succeed in this. His notice of appeal raises only the issue of his rights under said secs. 37 and 38, and I confine my consideration of the appeal to the grounds raised in the notice.

I think the appeal fails.

IRVING, J.A., agreed in the dismissal of the appeal. Irving, J.A

MARTIN, J.A.:—In the water at Turnbull Cove and Hauskin Lake the Pacific Slope Lumber Co. had one and a half million feet of logs which it agreed to sell to the Smith Shannon Lumber Co. and it only remained for the purchaser to pay for and take Martin, J.A.

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away the logs. Now if the matter rested here there could be no claim of any workman or labourer under sec. 38 because that section only relates to persons making "payment under such contract," which is the contract provided for in sec. 37, and that contract relates only to the future operation "of furnishing, supplying or obtaining logs or timber by which it is necessary to engage and employ workmen and labourers," and does not purport to include work already done.

At the same time, however, the contract may make it "requisite and necessary" that additional work and labour should be performed on logs or timber already obtained, such as that they should be boomed at a certain place, or brought to or delivered thereat, which would be, I think, included in the not very exact but wide expression "furnishing, supplying, or obtaining," because they could not be "obtained" by the purchaser unless under the contract; moreover "delivery" is mentioned in the latter part of the section as the time up to which the payroll should be made. Therefore under this contract the defendants might be liable for any additional work there might have been done in getting any shortage of logs from Hauskin Lake to Turnbull Cove necessary to make up the number contracted for, and also for booming them all in Turnbull Cove ready for towing. Unfortunately, however, neither in the plaint nor in the evidence is there any specific segregation of work upon this shortage or booming which would enable judgment to be entered therefor, owing apparently to a misconception on the part of counsel of the effect of the statute, so the plaintiff's claim becomes a matter of mere speculation.

The only thing to be done, therefore, is to dismiss the appeal.

Galliher, J.A.
GALLIHER, J.A.:—I agree with the Chief Justice.

McPhillips, J.A.
MCPHILLIPS, J.A., agreed in the dismissal of the appeal.

Appeal dismissed.

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THE KING v. THE "DESPATCH."
THE BORDER LINE TRANSPORTATION CO. v. McDOUGAL.

Exchequer Court of Canada (B.C. Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty, February 18, 1916.

1. COLLISION (§ I—3)—VESSELS IN CHANNELS—FIXING LIABILITY.

A vessel which fails to keep to the starboard side of the fairway or mid-channel, when entering a harbour, in violation of art. 25, and crosses at an excessive speed to the wrong side of the channel, without excuse, is liable for collision with a tug prudently proceeding out of the harbour, at a very low speed, with a heavy scow lashed to her starboard bow;

under such circumstances the latter cannot be blamed for her failure to reverse her engines to avoid the collision.

[*The Kaiser Wilhelm der Grosse*, [1907] P. 259; *Richelieu & Ont. Nav. Co.* v. *Cape Breton*, [1907] A.C. 112, 76 L.J.P.C. 14, referred to.]

2. EVIDENCE (§ XII H—961)—CANADIAN NAVAL CHARTS.

Canadian Naval charts, issued under the orders of the Minister of the Naval Service of Canada, are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

3. EVIDENCE (§ IV G—422)—DEPOSITIONS IN COLLISION INQUIRY—ADMISSIBILITY IN MAIN ACTION.

Depositions of the mate of a vessel in proceedings of a judicial nature before the Court of Formal Investigation, to inquire into a collision under secs. 782–801 of the Canada Shipping Act (R.S.C. 1906, ch. 113), cannot be received in evidence in the main action to determine the liability for the collision, the plaintiff having been a party to and represented by counsel at such proceedings.

ACTION for damages arising out of a collision of ships. Statement.

W. C. Moresby, for the Point Hope.

E. V. Bodwell, K.C., for the Despatch.

MARTIN, Loc. J. in Adm.:—This is an action brought by His Majesty the King, against the steamship Despatch (170 feet long; R. N. McKay, Master), and her owners, the Borden Line Transportation Co., for damage done to the Canadian Government tug Point Hope by collision in Victoria Harbour on October 25, 1913, at 4.25 a.m. There is also an action, tried at the same time, by the said Border Line Transportation Co. against W. D. McDougal, master of the Point Hope, for damages to the Despatch arising out of the said collision which is alleged to be due to the negligence of the said McDougal. Martin, Loc. J. in Adm.

At the time of the collision, the Point Hope was going out of the harbour with a scow (about 93 feet long), laden with about 250 tons of dredged-up mud and silt, lashed to and projecting ahead of her starboard bow, the intention being to dump the load in deep water beyond Brotchie Ledge. It is agreed that the weather was calm and clear; and the water at the end of an ebb tide, almost low water, with no appreciable current; and that the proper lights were shewn by both vessels.

The contention, in brief, of the Point Hope is that, while she was keeping on her proper side of the fairway or mid-channel in navigating this narrow channel (as this part of Victoria Harbour is admitted to be), off Shoal Point, she was negligently run into by the Despatch, which, it is alleged, in entering the harbour and rounding said Point at too high a rate of speed, had got over into the wrong or port side of the channel instead of keeping to her starboard side of it. The Point Hope invokes arts. 19 and 25, but

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in so far as the former is concerned, I think it may, in the circumstances of this case, be dismissed from further consideration, because it cannot be said that within the true meaning of that article these were "crossing vessels." Both were in the channel and what each was attempting, properly, to do in rounding Shoal Point, across which they could see one another, was to follow the winding reaches of a narrow channel in the manner directed by art. 25, and there was nothing to indicate that there was any other intention, either to cross the channel for any legitimate purpose (such as to call at a port there, or make for a pilot station, as in *The Perin*, cited in Marsden on Collisions, 6th ed., 1910, p. 444), or otherwise, so in the sense that the word is used in art. 21, there was no other "course" that either vessel could properly keep. There are, undoubtedly, cases where the crossing rule should be applied in narrow channels, but this is not one of them, *e.g.*, *The Ashton*, [1905] P. 21, at 28, and cases therein cited. Most of the cases on this subject are collected in Marsden, *supra*, at pp. 441, 443-6, and particularly at 26 Hals. 438-9, where I find, after examining many authorities, that the following deductions from the decisions are well stated at p. 439, and are directly applicable to this case:—

> First, it appears that the crossing rule can only apply when the lines of the courses to be expected with regard to the two vessels will in fact cross, and when there is risk of collision, that is to say, when both vessels will come to the point of crossing at or nearly at the same moment. Secondly, it appears that the two vessels will not come within the crossing rule, whatever their bearings from one another while rounding the bend may be, when there is no indication that either vessel is in fact crossing the river, and when they are keeping on opposite sides of the channel or one is keeping in mid-channel, so that the vessels, on the courses to be reasonably attributed to them, will pass clear of each other.

Since that was written, the leading case of *The Olympic and The Hawke* (1911-4), [1913] P. 214—C.A., 83 L.J.P. 113; [1915] A.C. 385; 84 L.J.P. 49, has come before the House of Lords and been affirmed, and the last word on the point now under consideration was spoken by Lord Atkinson, who, after referring to the judgment of the Privy Council in *The Pekin*, [1897] 66 L.J.P.C. 97; [1897] A.C. 532 (cited in particular by Lord Justice Kennedy below in connection with and as adopted by the Privy Council in *The Albano* v. *Allan Line SS. Co.*, [1907] A.C. 193, 76 L.J.P.C. 33, and quoting Sir Francis Jeune's observa-

tion that "vessels may no doubt be crossing vessels within art. 22 in a river: it depends on their presumable courses," goes on to say:—

But all that is meant by this last expression would appear to me to be this: Where two ships are navigating a narrow channel so winding in its course that the physical features necessitate, or the rules of good seamanship require, that either should relatively to the other take for a time a course which if continued would intersect the course of that other so as to involve risk of collision, and it can be reasonably assumed by the one that the other will change her course so as to avoid this risk as soon as those physical features will, consistently with the rules of good seamanship, permit, the article as to crossing ships does not apply: but the circumstances of each case must determine whether this necessity exists or this assumption can reasonably be made. This is, I think, clearly brought out in the judgment of Lord Justice James in *The Oceano* (1878), 3 P.D. 60, at 63, where, in commenting on the case of *The Velocity* (1869), L.R. 3 P.C. 44, 39 L.J. (Adm.) 20, he said, "What was decided really was, that in such a river the particular direction taken for a moment, or a few moments, in rounding a corner or avoiding an obstacle was not such an indication of the real course of the ship as to justify another ship in saying, 'I saw your course, I saw that if you continued in that course we should be crossing ships, and I left to you, therefore, the entire responsibility of getting out of my way under the rule.'"

It follows from this that, according to the collision rules and good seamanship, the submission of counsel for the Despatch that art. 19 (and consequent y art. 22) does not apply to the situation at bar, is sustained.

It remains then to consider art. 25, as follows:—

In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard of the vessel.

It was said by Lord Alverstone in *The Kaiser William der Grosse*, [1907] P. 259, at 265:—

I would point out that art. 25 is not merely a rule which is to be observed by one vessel as regards another vessel, but is a positive direction that a steam vessel shall be kept as far as practicable on the starboard side of the channel.

And Fletcher Moulton, L.J., said, p. 269:—

It is the imperative duty of ships to get to the right hand in passing in such a channel.

Kennedy, L.J., concurred, and said, p. 274:—

It is quite clear that the only possible excuse for disregarding the rule would be that there was something which rendered it neither safe nor practicable to follow that rule.

This "excuse" might, of course, arise "in special circumstances" under the "departure from the above rules necessary in order to avoid immediate danger," authorised by art. 27, but as to the caution and limit to be observed in his application, and the burden of proof, see *e.g.*, the observations in 26 Hals. 366 *et seq.*, and 468-

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71, and on the history of preceding statutes on the point see the remarks of Dr. Lushington in *The Sylph* (1854), 2 Ecc. & Ad. 75, at 79. The decision also of this Court in *The Charmer* v. *The Bermuda*, 15 B.C.R. 506, is in point.

Here, however, both vessels contend that they were on their proper, *i.e.*, starboard, "side of the fairway or mid-channel," and the Point Hope places the point of collision well up to the northern edge of the channel, while the Despatch places it well to the south of mid-channel. The expressions "fairway and mid-channel" and "fairway" *solus*, as used in various statutes and rules, have been considered in several cases, such as *The Panther* (1853), 1 Ecc. & Ad. 31; *The Sylph*, *supra;* and *Smith* v. *Voss* (1857), 2 H. & N. 97 (on "fairway and mid-channel" under former statutes); *The Blue Bell*, [1895] P. 242, at 246; (on the Thames By-law re "fairway"); *The Clutha Boat* 147, [1909] P. 36, at 40-1 (on the Medway by-law re "fairway"); and *The Glengariff*, [1905] P. 106; 10 Asp. M.L.C. 103, on "fairway and mid-channel" under the present article, wherein Bargrave Deane, J., says, p. 109:—

> What is a fairway? A fairway is practically defined by this article to be mid-channel. There is no rule which says that you must keep in the fairway, but the rule says that you must keep to the starboard side of the fairway or mid-channel in narrow channels.

This view of the fairway as being practically the same as mid-channel is in accord with the direction of Chief Baron Pollock to the jury in *Smith* v. *Voss*, *supra*, p. 99, which was upheld *in banc*. It is true that in the *Blue Bell* case, *supra*, the Divisional Court gave a wider scope to the term "fairway," but the word there was used alone, from the Thames by-law, and not in conjunction with "or mid-channel," so if anything should turn here on the exact construction I should feel obliged to follow the *Glengariff* decision, which is exactly in point. But in the present case it makes no difference, because if the Despatch had kept to the starboard side of the fairway, however viewed, or mid-channel, the collision would have been averted. I say this because after very careful examination of the evidence and the assistance of the assessors in laying out the various positions and courses on the chart and harbour plan before us, the only conclusion to reach is that the collision occurred at a point which, while not so far to the west or so near to the north edge of the channel as is claimed by the Point Hope,

is yet well to the north of mid-channel, and approximately on the line deposed to by Fletcher, master of the Petrel, viewed from his position at the stationary dredge Ajax (which he was alongside of), at the point indicated by A on the plan, to the point he marked at H, and which line he was in the best position to determine as regards direction though not the length of it, yet the weight of the whole evidence warrants the conclusion that the Point Hope was at the time of the collision well on her proper side of the channel. The result of this is that the Despatch must be taken to have got over to the wrong side of the channel in the water of the Point Hope without excuse, in which case, as their Lordships of the Privy Council said in *Richelieu & Ont. Nav. Co.* v. *Cape Breton*, [1907] A.C. 112, 76 L.J.P.C. 14, at 18:—

> the sole question left is whether anything was done or omitted to be done on board the (other ship) for which she ought to beheld responsible.

Here it is alleged that, in accordance with good seamanship under art. 29, the Point Hope should have stopped her engines before she did (about 2 seconds before the collision, her engineer says), and reversed them. These contentions have received very careful attention, with the result that I am advised by the assessors that in all the circumstances, bearing in mind that the Point Hope had always been going at a slow speed, not over three knots, with a heavy scow lashed to her starboard bow, and the proximity of shoal water to starboard in a narrow channel, and that signals for a starboard crossing had been given and answered, that she could not reasonably be expected to act otherwise than as she did in regard to stopping, and that, in continuing to port her helm as far as was prudent, more should not be required of her, seeing that she was justified in assuming that the Despatch could and would pass her port side to port side; and as to reversing, that it would have been inadvisable in the circumstances as tending, owing to the position of the heavy scow, rather to have aided than averted the collision by bringing the bow of the Point Hope to port. My independent view of the matter is in accordance with this advice which I adopt. The difficulty of handling a tug with scow attached in a narrow channel is well known to mariners and to this Court—*cf. The Charmer* v. *The Bermuda, supra*. The Point Hope was placed in a position of doubt and uncertainty by the action of the Despatch in apparently taking a course in the channel which did not correspond with her signal, and was entitled

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to expect almost up to the last that she would take such action as would avoid the collision, and which could have been done if the Despatch had ported her helm earlier or harder than she did. My view of the real cause of the accident is that the Despatch had got further out into the channel than she intended, owing to trying to round Shoal Point at too high a rate of speed. It is said in *The Tempus*, [1913] 12 Asp. 396, that:—

> It has been pointed out over and over again that one ought to be careful not to be too ready to cast blame upon a vessel which is placed in a difficulty by another vessel.

The circumstances in which this language was used and applied were much more in favour of a liability being imposed than they are here. It must be remembered that as Lord Justice Fletcher Moulton put it, in *The Kaiser Wilhelm Der Grosse* case, p. 272, the signals given by the Point Hope should "have recalled the other vessel to her duty. Not only was that possible, but it was what ought to have occurred." And other observations follow which are largely appropriate to this case; and also those of Lord Justice Kennedy on p. 275. Lord Alverstone says in the same case, pp. 266-7, "if art. 25 applies . . . . . then there is no article which gives any direction with regard to the course or speed of the 'Orinoco' " (which vessel was charged with the same errors in seamanship as are charged here against the Point Hope), and so "it must depend upon the provisions of art. 29," requiring good seamanship in all cases, and the advice given to the Court of Appeal by the assessors (p. 268) was the same as that which is given to me.

Upon the whole case, I can only reach the conclusion that the sole blame for the collision must be laid upon the Despatch and therefore, there will be judgment for the plaintiff in the main case, with a reference to the registrar, assisted by merchants, to assess damages. The cross action will be dismissed.

It is desirable to put upon record two rulings on evidence.

First. The practice of this Court respecting the admission in evidence of Canadian Naval charts issued under the orders of the Minister of the Naval Service of Canada was stated and confirmed, viz.: that such charts are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

Second. The depositions of the mate of the Despatch, Haskins, deceased since they were given in December, 1913, before

the Court of Formal Investigation, so styled, held to inquire into the collision now in question, under secs. 782-801 of the Canada Shipping Act, by the Commissioner of Wrecks, with assessors, with powers not only of "full investigation" (sec. 789), into the casualty, and of awarding costs (sec. 794), but of "charges of incompetency and misconduct on the part of masters, mates, pilots or engineers" (sec. 791), and of inflicting penalties by way of cancellation or suspension of their certificates (sec. 801), should not be received in evidence herein, in the main case, the plaintiff (the Crown), having been a party to and represented by counsel at such proceedings, which on the authorities which follow were held to be judicial in their nature: *Cole* v. *Hadley* (1840), 11 A. & E. 807; *Baron de Bode's* case (1845), 8 Q.B. 208; *Re Brunner*, 19 Q.B. D. 572; *The Queen* v. *London Co. Council* (1895), 11 T.L.R. 337; *Re The Grosvenor, etc., Hotel Co., Ltd.* (1897), 13 T.L.R. 309, 76 L.T. 337; 2 Roscoe's Nisi Prius Evidence (1907), 201; Taylor on Evidence (1906), 354 et seq; 545-6 (n. 6); 1268; Phipson (1911), 416-21; and Best (1911), 468. *Judgment for plaintiff.*

LANDRY v. KIRK.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. April 22, 1916.

1. APPEAL (§ VII M 8—657)—PARTNERSHIP ACTION—VERDICT AGAINST EVIDENCE—SETTING ASIDE.

A jury's findings against the right of a partner to compel another partner to repurchase his interest less his share of any loss upon his withdrawal from the business, in face of evidence establishing an agreement to that effect, will be set aside on appeal.

2. NEW TRIAL (§ III B—16)—VERDICT AGAINST EVIDENCE—APPELLATE JUDGMENT ON MERITS.

An Appellate Court will not, where the verdict appears against the evidence, remit the case for a new trial where no jury could properly find a verdict otherwise than in accordance with the inference of fact drawn by the Court of Appeal, but will direct a judgment on the merits as appearing by the evidence.

[*Suarez* v. *Eisenhauer*, 47 N.S.R. 418, followed.]

Statement.

MOTION to set aside a finding of the jury in favour of defendant in an action claiming a declaration that a partnership was dissolved and for an accounting.

H. Mellish, K.C., in support of application.

V. J. Paton, K.C., *contra*.

Ritchie, E.J.

RITCHIE, E.J.:—The question for consideration in this case is as to whether a finding of the jury should be set aside as against evidence. The finding is as follows: Q. Did they ever agree that if the occasion for Landry's retirement should arise, Kirk was to

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repurchase Landry's interest in the partnership assets and property for the sum of $4,304.18, subject to the deduction of any loss to be borne by Landry? A. No.

The plaintiff was the only witness. It is quite clear from his evidence that he was not willing to go into the business except upon the terms that if there was a loss after two or more years, the defendant was to purchase plaintiff's interest less his share of the loss. This was made clear from the inception of the negotiations. Was an agreement come to as to this term? I am of opinion that this question must be answered in the affirmative. The defendant wrote the term in question on a piece of paper in the form of a question. The plaintiff, referring to this paper, said in his evidence:—

> He held that paper in his hands for quite a while and I said "You have that business on my hands and I will not, or I do not want to put myself in such a position that you can force that business on me, or I will have to suffer a loss. I don't know if I will be able to run that business and I don't want to go into a thing that I cannot see my way out of." He said, "Never mind, I know I have the business on my hands." He considered it for five minutes and then said "Yes, I will." I said "All right. I will go into it on that lay."

Subsequently, when the dispute arose, the defendant said:—

> If I made an agreement of that kind I am a bigger fool than I thought I was.

If he had not made the agreement I think he would have met the contention in a different way.

I have no doubt that the agreement on this point was concluded. The fact that it was to be put in formal terms in writing does not invalidate it. This question of fact might be discussed at considerable length, but as it is only a question of fact there is no object in doing so. The finding must be set aside as against the evidence.

As to the price at which the defendant was to take over the business, it was subsequently fixed at $4,304.18, that being the amount which the plaintiff was to bring into the partnership.

The ordinary result of setting aside a finding is a new trial, but in this case there is nothing to try, because the Chief Justice in his judgment and the order taken out thereon has treated the question as one of construction for the Court and has disposed of the question of depreciation referred to at the argument by sending it to a referee. From this judgment and order there has been no

appeal and the question is finally disposed of. The plaintiff will have the costs of the application to set aside the findings.

RUSSELL, J., concurred.

HARRIS, J.:—The defendant and the plaintiff's father were contractors and had been in partnership in certain ventures. The defendant owned a mill and wood working business in Antigonish, and in February, 1912, he went to plaintiff and suggested that he should take an interest in this business, become his partner, and take the active management and operation of the mill and business. The defendant went to plaintiff's house and discussed the matter with the plaintiff and his father and they promised to think it over.

The plaintiff and defendant discussed the basis upon which the value of the business was in the first instance to be ascertained and that was agreed to and the last lines of G-1 refer to that matter. It was agreed that Mr. Christopher P. Chisholm, a solicitor, should incorporate their understanding in a written agreement.

The values of the plaintiff's and defendant's shares in the business were filled in in this agreement by Mr. Chisholm at $10,000 and $5,000 respectively, and when the plaintiff took it to the defendant, the latter struck out these figures and inserted the exact figures which the parties or the bookkeeper had arrived at after the first interview. In place of the $10,000 the defendant filled in $8,608.36 and in place of the $5,000 he filled in $4,304.18. After the defendant had examined the agreement he passed the agreement back to plaintiff saying "That is the way I understand it."

The agreement as prepared by Mr. C. P. Chisholm contained the following clause inserted to cover the understanding arrived at with regard to the repurchase of plaintiff's interest by defendant.

> And it is further mutually agreed that if the said business shall be found to result in a loss that the said William E. Landry shall be at liberty to retire from said partnership at any time after the expiration of two years from the making of this agreement, and that in the event of said William E. Landry so retiring the said D. Grant Kirk shall repurchase from said William E. Landry the one third part or interest of and in said partnership assets and property hereby vested in said William E. Landry or intended so to be at and for the price or sum of $ subject to the deduction of the proportion of the losses occurring in said business made chargeable to said William E. Landry by these presents.

It will be noticed that the price or sum is left blank in this clause. The written agreement never was executed by the parties, but the plaintiff went in and carried on the business for several

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years. In my opinion, there was a concluded agreement in the terms of the writing binding on both parties and in view of the evidence the blank in the clause last referred to should be read as if the sum of $4,304.18 appeared therein.

There is no dispute that the re-purchase in the contingency mentioned was the basis of the whole agreement, and it is, I think, impossible to read the evidence and arrive at any other conclusion than that the re-purchase was to be at the same price originally paid by plaintiff—less of course his share of the loss, if any.

After the partnership had been carried on over a year, the plaintiff had the written agreement copied with an additional clause added and submitted it to the defendant. As redrawn it did not alter or change the clause with regard to repurchase and he said he hoped to get defendant to agree to this additional clause. When plaintiff shewed this document to defendant, he said it was different so far as the repurchase clause was concerned from the agreement drawn up by Christopher Chisholm and plaintiff said it was the same and then the agreement which Chisholm had drawn, the one in which defendant had filled in the figures and which he said was all right was produced and defendant found that he was mistaken in supposing there was a difference between the agreements with regard to re-purchasing plaintiff's share. He said: "I was a d—— fool to agree to anything like that. Get the d—— thing fixed up." This was plaintiff's direct evidence but on cross examination defendant's counsel asked him this question: "Q. He said 'If I made an agreement of that kind I am a bigger fool than I thought I was.' Are those the words he used? A. Yes, he used those words."

It is of no importance which of these versions is correct. What they both clearly amount to is an admission that the agreement drawn up by Mr. Christopher P. Chisholm had been agreed to.

But I refer to it more for the purpose of saying that it is clear that this and other conferences about altering the agreement which took place more than a year after the agreement was made and had been in force, and which ended in nothing but talk, did not and could not affect the agreement previously made.

The action in which the evidence was taken was brought to compel defendant to take over plaintiff's interest in the business and pay plaintiff the $4,304.18 less the plaintiff's share or pro-

portion of the losses made chargeable in such an event to plaintiff under the agreement.

On the trial, in discussing the question as to whether the blank space in the clause for re-purchase should be read as if the figures $4,304.18 had been filled in therein, it appears that counsel on behalf of plaintiff claimed that it should be so read, but he also claimed that plaintiff was not accountable for any depreciation to the plant and machinery during the existence of the partnership, and defendant's counsel urged that the blank was not to be read as if the figures $4,304.18 were filled in, but a much less sum which was to be arrived at by first deducting the depreciation on plant and machinery.

Both these contentions were erroneous; and it was not suggested, and apparently did not occur to anyone, that the subsequent words of the clause "subject to the deduction of the proportion of the losses occurring in said business," covered the whole question of depreciation. It is obvious that when the parties came to compute the profits or losses of the partnership on a winding up or on a re-sale under the agreement that all depreciation on plant and machinery must come into the calculation.

But the trial Judge, misled by the arguments of counsel on both sides, which completely ignored this point, was induced to put to the jury two questions: 1. Did the parties ever agree upon all of the terms of the proposed partnership? 2. Did they agree that if the occasion for Landry's retirement should arise Kirk was to re-purchase Landry's interest in the partnership assets and property for the sum of $4,304.18 subject to the deduction of any loss to be borne by Landry?"

The jury answered the first question "Yes," and the second, "No."

The plaintiff has moved the Court to set aside the second finding as against evidence and for misdirection. There is absolutely no evidence to support this finding.

The trial Judge being misled by the wrong views presented by counsel on both sides told the jury with regard to this second question that the amount to be filled in in the blank was not necessarily the sum at which plaintiff acquired the interest, because there was the important question whether the property was still worth that amount. The deterioration might have to be considered. He also told them that it was unlikely that Kirk would

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agree to take back plaintiff's interest at the purchase price after it had been in use two years and when there had been two years' deterioration.

One cannot read the charge without the fullest conviction that the wrong theory as to the depreciation was the one and the only one put to the jury and it undoubtedly led to the wrong answer being given by the jury.

There really never was anything—at least so far as this second question was concerned—to leave to the jury. The plaintiff was the only witness examined on the trial and his evidence was clear and not being contradicted was conclusive and it is certain that the trial Judge would never have left this question to the jury had he not been misled by the fact that counsel on both sides contended that depreciation of plant and machinery was mixed up with the question.

The finding of the jury on the second question was clearly against evidence and the misdirection is patent and this finding must be set aside.

The remaining question is as to what disposition should be made of the case. Should there be a new trial or how otherwise should the case be disposed of?

It appears that when the order for judgment on the findings of the jury was moved that new counsel came into the case for plaintiff and pointed out the mistake which had been made on the trial and the trial Judge filed a written judgment adopting the contention that the depreciation was a matter which must be dealt with in ascertaining the loss which plaintiff had to pay under the agreement, and it was then apparent that there had never been any question to submit to the jury on this second branch of the case. He ordered the partnership accounts to be taken on this theory and they have been taken. This order was not appealed from.

On the argument before this Court it was said that if the second finding was set aside there must be a new trial.

It is apparent that there is nothing to be tried by a jury. There was no contradiction of the plaintiff's evidence and only one conclusion can properly be drawn from it. And as I have already said, the second question should not have been put to the jury, and if it were again submitted to a jury and a finding made

for the defendant, it would be immediately set aside as against evidence. There is no reason to think that any new light can be thrown on the matter by a new trial and I can see no reason why the Court should go through the farce of ordering one. It was said on the argument that under our rules a new trial must be ordered even if it was unnecessary and even if there was nothing to try. That, in my opinion, is not the law.

In England motions for a new trial were formerly made to a Divisional Court and the provisions of O. XL., r. 10, which are the same as our O. XXXVIII., r. 10, applied to such motions.

The provisions of O. LVIII., r. 4, which are the same as our O. LVII., r. 4, applied to appeals to the Court of Appeal. Now the Court of Appeal has original jurisdiction to hear practically all motions for a new trial and the jurisdiction of the Divisional Court in such cases has been abolished.

There had grown up a practice in the Divisional Courts with regard to new trials which was governed by the provisions of O. XL., r. 10, which in some respects was said to be different from the practice of the Court of Appeal under O. LVIII., r. 4, and it was said by more than one Judge that greater powers were given to the Court of Appeal under O. LVIII., r. 4, than were conferred upon the Divisional Court under O. XL., r. 10, because of the provision in the latter order which restricted the power of the Court to draw inferences of fact to such inferences as were not inconsistent with the findings of the jury.

The case of *Millar* v. *Toulmin*, 17 Q.B.D. 603; *Allcock* v. *Hall*, [1891] 1 Q.B. 444, and *Paquin* v. *Beauclerk*, [1906] A.C. 148 at 161, all dealt with the practice in, and the powers of, the Court of Appeal under O. LVIII., r. 4. In this last case in the House of Lords, Lord Loreburn, L.C., after referring to *Millar* v. *Toulmin* and *Allcock* v. *Hall*, *supra*, said the Court of Appeal:—

> Were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury, yet if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by a jury, is a fine distinction and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

The Court of Appeal has frequently refused to send cases back for a new trial where they thought there was nothing to submit

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to a jury or where no jury could properly find a verdict otherwise than in accordance with the inferences of fact drawn by the Court of Appeal.

The rule laid down under O. XL., r. 10 (Our O. XXXVIII., r. 10), is thus stated by Denman, J., in *Bobbett* v. *S. E. R. Co.*, 9 Q.B.D. 424, at 430:—

> This brings me to the question whether upon the undisputed facts proved at the trial and set forth above, I ought to give judgment for either party, under O.XL. r. 10. When that question arises I understand the proper test to apply is to consider whether there is evidence such as if left to the jury would warrant them in finding a verdict for the plaintiff which the Court would not be clearly bound to set aside as wholly unreasonable. If there be such evidence there ought to be a new trial; if not, in the absence of any ground for thinking that further light could be thrown upon the matter by a new trial judgment ought to be entered for the defendant.

A Divisional Court consisting of Jessel, M.R., and Lindley and Bowen, L.JJ. affirmed this decision. (See (1882), W.N. 92).

Since the change in the English rules whereby O. XL., r. 10 applies to the Court of Appeal on motions for a new trial there is one case reported, *Skeate* v. *Slaters, Ltd.*, [1914] 2 K.B. 429, where the question was discussed and *Millar* v. *Toulmin*, *Allcock* v. *Hall*, and *Paquin* v. *Beauclerk*, were approved, but in considering that case it must be remembered that it was not a motion for a new trial but an appeal from a decision of a Judge to enter judgment where the jury had disagreed and the trial Judge thought there was something to be left to the jury, but Phillimore, L.J., at p. 445, said:—

> Upon motion for new trial the Divisional Court when such motions come before it, having power under O.XL. r. 10, and the Court of Appeal having the same power, did in certain cases give judgment for the appellant instead of sending him back for a new trial, and this we know that the Appeal Court is the Court of first instance on motions for new trials and perhaps further assisted by O. LVIII. r. 4—can also do.

Again at p. 446, he said:—

> The result, I think, is that the cases lay down that when the Court, to which the motion for new trial is made, sees that the verdict was wrong, and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or *pro* itself set aside and so *totics quoties*, and at once give judgment.

In our own Court, I have found two reported cases where the matter was considered:—

In *Densmore* v. *Hill*, 45 N.S.R. 312, the verdict of the jury was

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set aside and Russell, J., quoted what Denman, J. had said in *Bobbett* v. *S.E.R. Co.*, 9 Q.B.D. 424, at 430, and thought it applied to the facts of that case and that the plaintiff's action should be dismissed. The other members of the Court thought there should be a new trial but did not discuss the authorities.

In *Suarez* v. *Eisenhauer*, 47 N.S.R. 418, the Court set aside the findings of the jury and refused to order a new trial. The judgment of the Court was delivered by Graham, E.J., now the Chief Justice of this Court, and at p. 423, speaking for the Court, he said:

> The practice is not to send a case back for a new trial when, if another verdict was given, it would be set aside as unsupported by evidence.

For the reasons already pointed out, I think there should not be a new trial in this case. The findings of the jury in answer to the second question will be set aside and the case should go back to the trial Judge to be dealt with under his order, dated October 6, 1915, and the report of the referee thereunder.

Longley, J.
Chisholm, J.

LONGLEY and CHISHOLM, JJ., concurred with RITCHIE, E.J.

Judgment accordingly.

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REX v. THERRIEN.

Quebec King's Bench, Cross, J., in Chambers. December 17, 1915.

1. HABEAS CORPUS (§ I B—8)—COMMON LAW WRIT—SUCCESSIVE APPLICATIONS.

The restriction imposed by 23 Vict., ch. 57, sec. 27 (C.S.L.C., ch. 95, sec. 28) in habeas corpus matters in Quebec, whereby an application once refused should not be renewed before another judge, except on new facts, but the applicant might apply to the court of Queen's Bench in appeal, applies to the statutory habeas corpus and not to the common law writ, consequently a writ of habeas corpus at common law to examine into the legality of detention under a conviction by an inferior court for a criminal offence may be issued by a judge of the King's Bench, after the refusal of an application upon the same grounds, made before a judge of the Quebec Superior Court.

[*R.* v. *Partington*, 13 M. & W. 679; *Cox* v. *Hakes*, 15 A.C. 506, 60 L.J. Q.B. 89 and *R.* v. *Davis*, 13 D.L.R. 612, 22 Can. Cr. Cas. 34, referred to.]

2. CRIMINAL LAW (§ II A—49)—ELECTING TRIAL WITHOUT JURY—SPEEDY TRIAL—STATUTORY INFORMATION—CR. CODE, SECS. 827, 1152.

On taking the prisoner's election to be tried before a judge, without a jury, under the "Speedy trials," part of the Criminal Code, it is essential under Cr. Code, sec. 827, that the prisoner should be informed that he may remain in gaol or under bail if the court should so decide, in the event of his electing a jury trial, but if the conviction returned to a writ of habeas corpus recites in conformity with Code form 60, that the prisoner, "on being brought before the judge and asked if he consented to be tried before such judge without the intervention of a jury, consented to be so tried," and the conviction further shows that the prisoner pleaded guilty of an offence, which was properly triable under Part XVIII (Speedy trials), it is not an objection to same on habeas corpus, that it did not further recite the giving of the statutory information; the effect of Code form 60 and of Cr. Code, sec. 1152, as to forms is to make the conviction sufficient in that respect to show jurisdiction, without reciting therein all of

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the requisites of jurisdiction under Code 827; the prisoner's remedy if he desired to show that the statutory information under Code sec. 827, was not given is to appeal by way of reserved or stated case under Cr. Code, sec. 1014, et seq.

[*R.* v. *Mali* (No. 1), 1 D.L.R. 256, 19 Can. Cr. Cas. 184, *R.* v. *Mali* (No. 2), 1 D.L.R. 484, 19 Can. Cr. Cas. 188, followed; *R.* v. *Howell*, 16 Can. Cr. Cas. 178, 19 Man. L.R. 317; *R.* v. *Crooks*, 19 Can. Cr. Cas. 150, 4 S.L.R. 335, approved.]

3. HABEAS CORPUS (§ I C—12)—SCOPE OF WRIT—IRREGULARITIES NOT GOING TO THE JURISDICTION.

If the court of record, making the conviction possesses the requisite jurisdiction no matter what errors or irregularities occur in the proceedings or judgment provided they are not of such a character as to render them void, its action cannot be reviewed or examined into on habeas corpus.

4. HABEAS CORPUS (§ I A—3)—EXISTENCE OF OTHER REMEDY.

Resort to the writ of habeas corpus should not be permitted where there is as complete a remedy by appeal under Cr. Code sec. 1014, et seq. from the conviction attacked.

[*R.* v. *Amyot*, 11 Can. Cr. Cas. 232, 15 Que. K.B. 22, applied.]

Statement.

MOTION for discharge on habeas corpus.

L. Houle for the accused.

D. A. Lafortune, K. C. for the Crown.

Cross, J.

CROSS, J.:—A writ of habeas corpus to bring the petitioner before me has been returned and counsel consent that the writ be tested as if the petitioner were here in person.

Counsel have also placed before me the conviction of the petitioner as indicating the authority for his detention by the respondent in the penitentiary.

The conviction purports to have been made in the Court of sessions of the Peace and it is recited in it that, Adolphe Bazin Esq., judge of the sessions of the Peace for the City of Montreal acting in and for the District of Montreal being present, the petitioner and one Bourgoin being persons in the gaol of the district, committed for trial on a charge of having broken and entered a store and stolen goods therein, and being brought before the judge above named, and asked "if they consented to be tried before me without the intervention of a jury, consented to be so tried."

The document continues: "and being then arraigned upon the said charge they pleaded guilty thereof: whereupon I sentenced the said both prisoners to be imprisoned and kept in the St. Vincent de Paul Penitentiary during—each four years."

The petitioner says that the judge of sessions did not acquire jurisdiction to try him on the charge above mentioned, because it does not appear from the conviction that he informed the petitioner that in case he elected to be tried by jury he might be

admitted to bail if the court should so decide. Section 827 of the Code, as is well known, requires that the judge shall state to the prisoner (*a*) that he is charged with the offence; (*b*) that he has the option to be forthwith tried before a judge without the intervention of a jury, or to remain in custody, or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

Before proceeding to decide this ground of petition it is opportune to consider an objection advanced by counsel for the respondent. That objection is in substance one of "res judicata." It appears that the petitioner has already had his "habeas corpus" issued out of the Superior Court, and that after the detainer had been challenged on the same ground as is now advanced, the former writ was quashed by His Lordship Mr. Justice Lafontaine. The petitioner answers that, after a first refusal of the writ, he could apply for another to the Court of King's Bench and that I have the same jurisdiction as the court. That contention seems to be a mistake so far as the last part of it is concerned, but it does not settle the point.

By 23 Vic. cap 57, s. 27, afterwards cap. 95, C. S. L. C., sec. 28, it was enacted by the Legislature of the Province of Canada in effect that if the writ had been refused by a judge it should not be lawful to renew the application before him unless on new facts or before any other judge, but application might nevertheless be made to the court of Queen's Bench sitting in appeal.

Though I speak with some diffidence on the point, I feel warranted in saying that the enactments which came to be embodied in chap. 95, C. S. L. C., have in practice been read as regulating the procedure of what is sometimes called the statutory "habeas corpus" which corresponded to the writ regulated by 31 Charles 2nd, but, at the same time as not touching or affecting the common law writ of habeas corpus which ran in England long before the time of Charles the Second.

I take it to have been characteristic of that common law writ that its refusal by one judge did not prevent the party from procuring its issue by another judge and that he might thus go from judge to judge and court to court as long as there remained one to whom application could be made. Short & Mellor Crown Prac. 2nd. Ed. p. 320, citing *R.* v. *Partington*, 13 M. & W. 679, *Cox* v. *Hakes* (1890) 15 App. Cas. 506, 60 L. J. Q. B. 89.

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In the circumstances, I am disposed to hold that the objection of "res judicata" is not well taken, and that, on the writ before me, I can examine into the legality or illegality of the cause of detainer. This view appears to have been taken by Mr. Justice Guerin recently in *Rex* v. *Davis*, 13 D.L.R. 612, 22 Can. Cr. Cas. 34.

I therefore come to consider the petitioner's contention that the judge of sessions, not having informed the petitioner of his chance of being admitted to bail, did not acquire jurisdiction to try the charge.

If the question raised by the petitioner were to be decided on an admitted state of facts and free from any question as to the form of procedure, the answer would be easy. A judge of sessions who would have assumed to try and decide a charge of breaking in and stealing by speedy trial, and who in making the statement required to be made to the prisoner by section 827, omitted to inform him that he might remain in gaol or under bail, if the court should so decide in the event of his making the second option, must be considered not to have complied with one of the requisites to his jurisdiction. I consider that I should so decide in view of the decisions in that sense in *R.* v. *Howell*, 16, Can. Cr. Cas. 178, at 182, 19 Man. L. R. 317, *R.* v. *Crooks*, 19 Can. Cr. Cas. 150, 4 S. L. R. 335, and of the reasons given in these and other decisions which have followed them.

But *R.* v. *Howell* was an appeal by stated case, and it clearly appeared from the stated case that the petitioner had not been informed of his chance of being admitted to bail. What I have before me is a "habeas corpus" and the conviction. Am I to infer that, because the conviction does not contain a recital showing that the prisoner was told that he might be admitted to bail if the court should so decide, the judge of sessions did not give him that information?

Counsel for petitioner says that nothing is to be inferred in favour of jurisdiction of a court of limited jurisdiction, but that on the contrary the jurisdiction must be made to appear by proper recitals in the conviction or proceedings. As a general proposition that is true, but it is, on the other hand, equally true that the question may be affected by statutory enactments, and I must look at what there is by way of statutory enactments touching the matter.

Accordingly, I observe that in section 582, it is declared amongst other things, that in the City of Montreal, a judge of the sessions of the peace has power to try an indictable offence of the kind above mentioned. Then, Part XVIII indicates how he must proceed to speedy trials.

For such trials he is a court of record (sec. 824). The accused person may with his own consent, be tried. An entry shall be made "of such consent at the time the same is given" (sec. 825). Then in sec. 827 we have the above quoted statement which the judge is to make to the prisoner, and it is said that "if the prisoner consents to be tried by the judge without a jury, an early day is to be fixed for the trial."

That is not all. In sec. 1152, it is declared that "the several forms in this Part, varied to suit the case or forms to the like effect, shall be deemed good, valid and sufficient in the cases thereby respectively provided for." Then we have form 60, headed "sec. 827" and wherein the recital is "and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried." There is nothing about information of the chance of being admitted to bail. In view of these provisions it is clear that Parliament did not contemplate that there should be any recital in the conviction of the fact that the prisoner had been given the information about the chance of bail (though of course it was the duty of the judge to give it), but that, on the contrary, it was intended that the recital above quoted would suffice to show the jurdisdiction.

On "habeas corpus" I am not to go behind that recital. I cannot hold to be void that which the law declares to be valid and sufficient. To have me go farther and decide the point raised in the *Howell* case, [*R.* v. *Howell*, 16 Can. Cr. Cas. 178] the petitioner would need to have had the question of fact set out in a stated case.

The conclusion thus arrived at is in accord with the decision of Prendergast, J., in *The King* v. *Mali* (No. 1), 1 D.L.R. 256, 19 Can. Cr. Cas. 184, and of Robson, J., in *The King* v. *Mali* (No. 2), 1 D.L.R. 484, 19 Can. Cr. Cas. 188.

I therefore consider that the petitioner has misconceived his remedy and that the writ must be quashed.

The argument has covered a wide field and on that account it may be opportune to add a few observations upon the scope of

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the remedy by "habeas corpus" in matters such as this. In the exercise of the superintending and reforming power conferred upon it by article 3085 R. S. Q., the Superior Court, as the King's court, may send out its common law writ of habeas corpus unfettered by the statutory provisions from time to time enacted in regulation of that writ; such statutory provisions were to amplify, not to restrict the scope of the common law writ. It is well that that power should be jealously guarded and freely exercised on all proper occasions but it should be exercised "in such manner as by law provided," and not in a way to supersede or displace remedies, such as those by way of appeal from summary conviction or appeal by stated case or reserved case, which have been provided by the competent legislative authority.

Where applicants are undergoing sentence in execution of convictions for criminal offences, the resort to the writ of habeas corpus to the Superior Court in many if not in most cases is misconceived. The idea given effect to in the Criminal Code is that mistakes may be corrected, and very wide powers are accordingly given to the appellate courts. Where that machinery exists there is good reason for not permitting resort to a form of remedy like habeas corpus when, if there has been a mistake, the result must often be, not correction of the mistake, but immunity for the applicant whether he be guilty or not. In this very case, I have listened to an elaborate argument to the effect that I cannot make, or at least ought not to make, an order for further detention of the petitioner under sec. 1120, if I find that the detainer is illegal.

In view of the conclusion at which I have arrived, it is unnecessary to pursue any enquiry into that, but the very fact that such a contention is advanced in a case like this serves to give added weight to the view that habeas corpus is being here resorted to in displacement of the appropriate kind of remedy provided by Parliament.

In *Amyot* v. *Bastien*, 15 Que., K. B. 22, [R. v., *Amyot* 11 Can. Cr. Cas. 232] this Court refused to sanction the use there sought to be made of the writ of prohibition in a case to which resort to appeal should have been had. The reasoning is applicable as against process of habeas corpus as sought to be utilized in this case.

The point of jurisdiction being once decided against the petitioner, I do not feel authorized to go further back and decide

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upon his objection that the magistrate before whom the petitioner was first brought after arrest could not divest himself of the case and alone had the right to decide it.

"If the Court possesses the requisite jurisdiction, no matter what errors or irregularities occur in the proceedings or judgment provided they are not of such a character as to render them void, its action cannot be reviewed or examined into." Am. and Eng, Ency. of Pleading & Practice "Habeas Corpus," pp. 1061 and 1062.

In the result I agree with the conclusion reached by Mr.. Justice Lafontaine, who sat on return of the former writ, that the petitioner is undergoing sentence under judgment of a court of record and that, upon the recitals of the conviction, that court is to be taken to have had jurisdiction.

The writ is quashed. *Discharge refused.*

NORTH-WEST THEATRE CO. v. MacKINNON.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 1, 1916.

1. ASSIGNMENTS FOR CREDITORS (§ III C—30)—LIABILITY OF ASSIGNEE—LEASE.

Per Fitzpatrick, C.J., and Anglin, J.

An assignee for the benefit of creditors under the Assignments Act (Alta. Statutes 1907, ch. 6, as amended by sec. 14 of Statutes 1909, ch. 4 and sec. 12 of Statutes 1913, 2nd. sess., ch. 2), becomes invested with "all the estate and effects of the (assignor) which might be seized or taken in execution," including possession of premises held by the assignor under a lease, and there being no statutory provision for disclaimer, he remains liable to the landlord, because of privity of estate with him, for the rent which accrues after the assignment, while such privity of estate continues.

Per Fitzpatrick, C.J. If this defendant had pleaded his quality as official assignee, I am disposed to think his liability might have been limited to the extent of the assets coming to his hands.

Per Idington, J. (dissentiente). The equitable distribution of the estate of the insolvent amongst his creditors is the scope and purpose of the Act, and an assignee does not necessarily remain liable to a landlord because a lease is included in the assets assigned.

Per Duff, J. The assignee took possession under the lease. After occupation for three months it was not open to him to say, "I have not accepted the lease." It is, therefore, unnecessary to consider the general rule governing the position of the assignee with reference to the lease when the assignment took place.

Per Brodeur, J. (dissentiente). The Act vests in the assignee whatever estate the insolvent has, for the benefit of creditors generally. The assignee agreed to pay the rent only so long as he would be in possession. When that ceased, liability ceased.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 24 D.L.R. 107, 8 A.L.R. 226, reversing the judgment of Ives, J., at the trial, 8 W.W.R. 237, and dismissing the plaintiff's action with costs. Reversed.

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NORTH-WEST THEATRE CO. v. MACKINNON

Fitzpatrick, C.J.

O. M. Biggar, K.C., for appellants.

J. S Scrimgeour, for respondent.

FITZPATRICK, C.J.:—This action is brought against the defendant as assignee of a lease to recover damages for alleged breach thereof. It is remarkable, therefore to find that neither the agreement for the lease nor the assignment thereof is before the Court.

I am of opinion that this appeal must be allowed. The respondent is the assignee of the lease. If this had been a profitable holding, he could have disposed of it for the benefit of the estate and I do not understand how, in the absence of statute, the rights of the lessors can be dependent on whether the lease is valuable in the hands of the official assignee or not. The fact that the English bankruptcy laws contain a provision enabling the trustee in bankruptcy to disclaim such a lease points, I apprehend to the fact that without it the lessor's rights could not be dependent on its being of value to the bankrupt's estate in which case it would be retained by the trustee, or unprofitable when it would be disclaimed and the loss fall upon the lessor. It is however, unnecessary to consider this, as the statute in the present case contains no such provision.

I am disposed to think that the appellant could have pleaded this quality as official assignee and that his liability would then have been limited to the extent of the assets coming to his hands. This however, he has not done, but has denied the assignment of the lease to him and this issue has been decided against him.

He must, I am afraid, abide by the consequences of a possibly mistaken defence and be held to his liability as assignee of the lease.

The appeal must be allowed with costs

Idington, J.

IDINGTON, J. (dissenting):—The question this appeal raises must, in the last analysis be whether or not an official assignee who is a public officer obliged by law to accept an assignment under the Alberta Assignments Act, is bound by the terms of that Act to accept an assignment vesting in him a leasehold of his assignor whereby he inevitably must in such case become personally bound to fulfil the obligations of his assignor the lessee, to pay rent and otherwise.

It is clear law as result of such a tenure that one accepting the assignment thereof is bound by the law governing privity of estate and privity of contract to pay the rent and observe all the covenants running with the land by which his assignor was bound.

It is no answer to the naked question as I put it to say that he is pre-supposed to indemnify himself out of the estate, for there may be no other estate than the term or at least no adequate estate out of which he can be so indemnified. Indeed, it may be impossible for him by careful examination to determine the question of fact relative to the existence of the means of indemnification until long after he has discharged his public duty as such official assignee by accepting the assignment.

The question must be resolved by the construction of the Act. And thus presented I think, the right interpretation and construction thereof must be that it never was within the scope and purpose of the Act which is the distribution equitably of the assignor's estate amongst the creditors, that such a consequence must follow the discharge of duty on the part of the officer as to involve him in undertaking such obligations.

From that must flow the right and often the duty owing to those whom the Act was designed to benefit and protect and give a remedy for obtaining their claims against the debtor who is the assignor or so much thereof as realizable, to inquire and determine whether or not it is to the advantage of those so concerned to accept the term.

It may be said, though, the law denies the right of any one to vest in another against his will any estate tendered him, he usually is supposed to have allowed the vesting to take place by assenting to the grant thereof and that is so signified the moment he accepts an assignment under the Act.

All he in fact signifies, is an acceptance of that which the statute contemplates should pass to him and which he is to receive in the way of real and personal estate belonging to the assignor out of which or by means of which the creditors may receive some benefit. The pre-supposition must be that he has vested in him and received only that which he reasonably can accept, no more and no less.

It is clearly the equitable distribution of the estate amongst the creditors, which is had in view, as the whole purpose of the Act.

It is surely not to be assumed that, as a result thereof, a lessor is to become entitled to receive at the expense of the other creditors full compensation for his claim as landlord and they go perhaps entirely bare.

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Such a result would be in conflict with not only the purpose of this Act, but also in conflict with the law governing what landlords may be entitled to receive in the case of executions against their lessees.

It must not be overlooked that this method of dealing with insolvent estate is, as it were, in substitution for the costly and wasteful sysem of recovery by executions, in all such cases as the debtor chose to signify his assent thereto.

I think this is one of the cases in which we must interpret and construe the statute by looking at the scope and purpose of the Act rather than at the letter of it which latter, if strictly observed, might frustrate the former.

Moreover, I think the case is covered by the authority of the cases of *Bourdillon* v. *Dalton*, 1 Peake N.P. 238; 1 Esp. 233, which, it is true, was only a *nisi prius* ruling of Lord Kenyon but followed in the cases of *Turner* v. *Richardson*, 7 East 335, and *Copeland* v. *Stephens*, 1 B. & Ald. 593, decided *en banc* with Lord Ellenborough as Chief Justice. The former of these cases was decided before the Bankruptcy Act was so amended as to provide expressly for disclaimer of a lease by the assignee. The latter was decided after that amendment.

It is to be observed that, in each, Lord Ellenborough did not pretend to make much of the language of the enactments or found any distinct on thereon.

The language he uses in the latter case, at pages 604 and 605, is singularly opposite to what we have in hand here.

His authority can never be lightly set aside and the principle upon which he proceeds would justify us in following his mode of treatment of what an assignment by the commissioners should be held to cover.

I agree with the inferences drawn and conclusions reached by the Court of Appeal upon the facts presented in evidence and need not repeat because concurring in same reasoning as adopted there.

I may add that the case of *Linton* v. *Imperial Hotel Co.*, 1 A.R. (Ont.) 337, relied upon in argument in no way conflicts with the conclusion I reach.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—It is difficult to state with precision the questions involved in this appeal without a rather full statement of the facts

and some reference to the course of the proceedings in the Alberta Courts. On August 31, 1914, one C. R. McLachlan was the lessee of certain premises in Edmonton where he carried on a jeweller's business under lease from the owner, the appellant company. On the date mentioned McLachlan made an assignment for the benefit of his creditors, under the Assignments Act of Alberta, to the respondent. On September 3, the respondent was informed by the solicitor for the appellant company that if he would undertake as assignee to assure payment of the landlord's rental distress for rent could be avoided. On the 5th the respondent answered, as assignee, saying: "I will guarantee your client's claim for rent as long as I continue to occupy the building." The respondent appears to have placed a man in possession who carried on the business for him until the beginning of December, towards the end of September an agreement having been entered into for a sale of the moveable assets *en bloc* to a firm of wholesale jewellers. About the same time the respondent had a conversation with Mr. Sherry, the president of the appellant company, in which Mr. Sherry was informed by the respondent that the rent would be paid as soon as the sale of the goods should be completed, Mr. Sherry, at the same time, informing the respondent that he intended to hold him as assignee of the lease for the rent during the residue of the term. In November, by arrangement between the respondent and the appellant company, the premises were rented at a rental of $110 a month to the purchaser of the goods, the understanding being that the rights of the appellant company were not to be prejudiced by the lease. On November 6, the respondent paid the rent for September, October and November and, on December 4, he notified the appellant that he would not be responsible for any further rent in connection with the McLachlan estate.

The appellant company's case at the trial was that the respondent, having gone into possession as assignee of the lease among other effects of McLachlan, was responsible for the rent as assignee of the lease so long as the lease should continue vested in him. The respondent met this by denying that he was the assignee of the lease or that he had entered into possession of the premises.

There is a suggestion in the statement of defence that the respondent's occupation of the premises consisted merely in put-

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ting a man in charge of the goods there belonging to the McLachlan estate and that he was there under some agreement with the appellant company. The evidence, however, seems to shew clearly enough that the object of the arrangement was limited to avoiding a distress; it amounted to nothing more than this, that the appellant company would not distrain on the goods on the undertaking of the respondent to pay the rent so long as he occupied the premises. The trial Judge found as a act that the respondent took possession of the estate and entered into possession of the premises on September 1. In appeal, it was held that the assignee was not bound until he had done some act signifying his acceptance of the debtor's interest, that the entry into possession was only for the purpose of taking care of the goods, that the payment for rent was under a special agreement made with the lessor and that, consequently, there was no liability.

The first question to determine is whether or not the trial Judge was right in finding that what was done by the assignee was a taking possession under the lease. With great respect for the opinion of the Court below, I am unable to feel any difficulty on that question. I think the position becomes clear when one looks at it from the point of view of the assignor, the original lessee. As between McLachlan and the respondent, would it be open to the respondent to aver that he had not taken possession of the premises under the lease? Nobody, of course, disputes the fact that the assignment was *prima facie* sufficient to pass the term. Assuming that the respondent was entitled to disclaim or that something must be done by him to signify his acceptance of the lease, what is the proper interpretation of the respondent's conduct having regard to (let us assume it to have been) the offer by McLachlan, through the assignment, of the lease as one of his assets?

Assuming it to be open to the assignee to treat the instrument under which he took possession of the goods as making an offer as regards the lease which he was at liberty to accept or reject, was it open to him to say, at the end of November, after an occupation of the premises for three months, after payment of the rental during that period, I have not been in occupation under the lease, I have not accepted the lease, your grant of the goods in itself gave me by implication a license to enter and to remain there until the goods were disposed of and the rental was only paid for

the purpose of protecting the goods from distress? I must say, with great respect, that it appears to me to be sufficient only to state the proposition. To my mind, at all events, it is very clear that if the assignee intended to occupy other than under the lease he should have so declared in explicit terms before taking possession.

The Appellate Division seems to have proceeded upon the ground that occupation is to be attributed not to the exercise by the assignee of his rights under an assignment of the lease, but to a special arrangement with the landlord. Here the fallacy, with great respect, appears to be this. The landlord could only deal with the right of occupation of the property after cancelling or after a surrender of the lease. There is not a suggestion that there was any cancellation or surrender. The assignee's possession or occupation was, therefore, either wrongful or was an occupation under rights derived from McLachlan. Being capable of an explanation which makes it a rightful possession the assignee could not be heard to say that the possession was intentionally wrongful and in fact wrongful.

But the truth is, as I have indicated above that nothing which happened between the landlord and the assignee justifies an inference to which effect could be given in a Court of law that the assignee's occupation was in fact an occupation having its origin in some special arrangement with the landlord. What may have passed in the mind of the assignee is quite immaterial. One may, if one choose, guess that the assignee had no sufficient knowledge of his position. The assignee's legal position must be determined by what he did and what he did was simply this. He took possession of McLachlan's estate under and by virtue of an instrument which gave him the right to enter upon the premises in question and to occupy them as assignee of a subsisting lease; he did enter and contented himself with making an arrangement with the landlord that the landlord should not distrain if he undertook to pay the rent as long as he occupied the premises. He contented himself with this without a suggestion on his part that he was entering into possession in any other character than that of assignee of the lease. I find nothing here upon which to erect an agreement between the landlord and the assignee amounting to a new tenancy involving either a wrongful possession or a surrender of the term.

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In this view, it is unnecessary to consider the general rule governing the position of the assignee with reference to the lease at the date when the assignment took effect. I may observe, however, that I am not by any means satisfied that the assignee was entitled to sever the assignment of the lease from the assignment of the stock of goods and treat the assignment of the stock of goods as giving him an implied right to enter upon the premises for the purpose of realizing upon them. It is not by any means to my mind an obvious proposition assuming that in general an assignee under the Alberta Assignments Act may elect whether or not he will accept leaseholds included in the estate. It is not by any means an obvious result from that, that where the trader who carries on business in premises occupied under a leasehold makes an assignment, the assignee can be allowed to say, when entering into possession for the purpose of realizing upon the goods, that he is entering under some other right than the right to which he is entitled by the express assignment of the lease. It is, however, not necessary to pass upon that point. I must add further that it is not entirely clear to me that the assignee under the Alberta Assignments Act is entitled to accept part of the property comprised in the assignment and to reject the remainder. It is not necessary to decide the point and I do not pass any opinion upon it, but there is one consideration which I think has, perhaps, been lost sight of. The Assignments Act of Alberta is substantially a reproduction of the Ontario statute, as is well known. On being attacked as infringing the exclusive Dominion jurisdiction respecting bankruptcy and insolvency that Act was construed as providing for assignments which are purely voluntary. I think it might be argued not without force that under an assignment by a debtor, which takes effect only as a voluntary assignment, and which is an assignment of the whole of the debtor's property, it is not open to the assignee to defeat the debtor's intention by accepting the property in part and rejecting it in part. It may further be observed that there are several respects in which the analogy of the bankruptcy law may be misleading where the system in operation is not a true bankruptcy system.

I think the appeal should be allowed.

Anglin, J.

ANGLIN, J.:—By his plea the defendant admits the lease to his assignor sued upon and an assignment to him by the lessee for the benefit of creditors, pursuant to the Alberta Assignments

Act 1907, ch. 6, as amended by 1909, ch. 4, and 1913 (2nd sess.), ch. 2 sec. 12, of "all the estate and effects,' in the words of the Act, "of the (assignor) which might be seized or taken in execution." Under secs 6 and 7 of the Assignments Act, such an assignment "vests the estate . . . thereby assigned in the assignees therein named," if he be, as he was in this instance, an official assignee (sec. 5). Under this legislation the vesting of the assigned property takes place without any act o. acceptance by the assignee. *Titterton* v. *Cooper*, 9 Q.B.D. 473, at pp. 483, 487, 490. He becomes and, in the absence of a provision for disclaimer such as is ound in the English Bankruptcy Act of 1869 and in the Bankrupt Law Consolidation Act of 1849, he remains liable to the landlord, because of privity of estate with him, for the rent which accrues after the assignment under a lease so vested in him. Of that liability he can relieve himself either by obtaining a release from the landlord, or, as to the future, by putting an end to the privity of estate. *White* v. *Hunt*, L.R. 6 Ex. 32; *Hopkinson* v. *Lovering*, 11 Q.B.D. 92.

In the present instance the defendant has made no attempt to assign the lease and, although the privity of estate was terminated, *pendente lite*, by the landlord's making a lease to one Logan, that lease was made for the purpose of minimizing any claim that the plaintiffs might have against the defendant, and upon a distinct understanding, assented to by the defendant, that his liability, if any, should not be thereby affected except to the extent of reducing it by crediting him with rent payable by Logan. The case must, therefore, be dealt with on the footing that whatever privity of estate had been established between the assignee and the landlord continued until the expiration of the term.

For the defendant, it is urged, however, that an arrangement was come to between him and the plaintiffs by which they took him as tenant under a new lease for such period as he should require to occupy the premises in order to dispose of the assets of his assignor, and that they thereby accepted a surrender of, and avoided the lease now sued upon, and released him from liability under it. The judgment in appeal, however, is based on the view that, because of his official position and his inability to refuse the assignment, the defendant had an option to accept or to decline to take the lease in question; and what took place between the parties has been examined by the Appellate Division, not with a

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view to ascertaining whether it amounted to the making of a new lease involving a surrender of the existing term, but whether it established an election by the defendant to accept the existing lease. The cases relied upon by the learned Judge who delivered the opinion of the Court appear to have been decided upon the Bankruptcy Law as it existed in England under the statute 13 Eliz., ch. 7, which gave the commissioners

power and authority to take by their discretions such order and direction with the property of the bankrupt, etc.

Bourdillon v. *Dalton*, 1 Peake N.P. 312; 1 Esp. 233; *Turner* v. *Richardson*, 7 East 335, and *Copeland* v. *Stephens*, 1 B. & Ald. 593, are perhaps the best examples of these authorities. As is pointed out in *Cartwright* v. *Glover*, 2 Giff. 620, at 626-7, under that legislation "nothing vested until the power was exercised," and cases decided upon it do not apply to an assignment made under a statute which explicitly enacts that such assignment shall vest the property assigned in the assignee, even though he should have no discretion to refuse the assignment. *Crofts* v. *Pick*, 1 Bing. 354; *Doe d. Palmer* v. *Andrews*, 4 Bing. 348, at 355; *Bishop* v. *Trustees of Bedford*, 1 El. & El. 714, at p. 716.

Although the question as to the surrender of the existing lease and the acceptance by the landlord of the defendant as a tenant under a new lease was not as fully dealt with at the trial as could be desired—probably because of the fact, as Mr. Biggar pointed out, that this defence is not explicitly pleaded—I think the proper conclusion from the whole evidence—especially from Mr. Sherry's explicit statement that every time he spoke to the defendant in connection with the rent, he told him that he intended to hold him for the full balance of the lease—is that no such surrender took place, but that the defendant entered and took and held possession under the existing lease. It follows that he became liable for the rent sued for.

The appeal should, therefore, be allowed with costs here and in the Appellate Division, and the judgment of the trial Judge should be restored.

Brodeur, J. (dissenting)

BRODEUR, J. (dissenting):—This is an action by a landlord against an official assignee for rent of premises leased to the insolvent.

The lease was made on November 12, 1913, and was for a term of two years. On August 31, 1914, the lessee assigned his estate

for the benefit of his creditors under the provisions of the Assignments Act of Alberta (ch. 6 (1907)).

The assignee (the respondent), took possession of the premises and on the representations of the lessee that they were going to distrain for rent due by McLachlan unless he undertook, as an assignee, to secure payment of that rent, he answered that he would guarantee to pay the rent so long as he continued to occupy the premises.

Later on, on December 2, 1914, he informed the lessor that he would no longer be responsible because he was leaving the premises.

If it was an assignment under the common law, the case would not offer serious difficulties, because it seems to be well settled that where the assignee enters into possession of the premises without clearly disclaiming the lease, he is supposed to accept the lease and to become bound by its covenant.

But it is a proceeding under the Assignments Act. By the provisions of that Act, the assignee is not a voluntary assignee, but insolvents are bound to make assignments to him of whatever estates they have. If these assignments could be made to anybody else, it may be that the provisions of the common law would still apply and that the assignee could be bound. But the acceptance of the assignment is not voluntary on his part. He has to receive the estate from the hands of the insolvents and everything is vested in him.

He must then proceed to the distribution of the estate according to the best interest of the creditors generally and the fact of claiming against him personally the rent seems to me contrary to the principles of that legislation.

Besides, in this case, the lessor knew very well that he took the property and agreed to pay the rent only so long as he would be in possession. This seems to have been accepted by the appellants, the lessors, because they did not carry out their intention of distraining. Then the liability ceased when the possession ceased.

For these reasons, I think that the appeal should be dismissed with costs. *Appeal allowed with cos's.*

[Editors' Note.—The foregoing action was decided on the particular points. Duff, J., who agreed with the majority in allowing the appeal, gave no opinion on the point of law on which Fitzpatrick, C.J., and Anglin, J., founded their opinions.]

REX v. COHEN.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. March 31, 1916.

1. SEDITION (§ 1—5)—SPEAKING SEDITIOUS WORDS—CR. CODE SEC. 134.

A charge of speaking seditious words with intent in contravention of Cr. Code sec. 134 may be supported by evidence of seditious words openly expressed in a public place to a mere acquaintance, although others were not in a position to overhear what was said; the jury is entitled to draw inferences both as to the probability of the conversation being repeated by the person addressed and as to the possible effect on such person's loyalty.

[*R.* v. *Felton*, 25 Can. Cr. Cas. 207, considered.]

Statement.

APPEAL following the refusal of Mr. Justice Simmons to reserve a case for the opinion of the Court on the application of the accused. The case was argued by consent as if a case had been reserved.

B. Ginsberg, for appellant.

J. Short, K.C., for the Crown.

Stuart, J.

STUART, J.:—The accused was tried before Mr. Justice Simmons and a jury on the charge "that he, the said George Cohen, at Calgary . . . on or about 28th day of April, 1915, did speak seditious words with intent to raise disaffection amongst His Majesty's subjects or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."

The accused had been living in Riverside, a suburb of Calgary, for some three or four years and had been in the second-hand furniture business. It was not clear from the evidence whether he had ever been naturalised as a British subject or not, but this is immaterial (*Rex* v. *Felton*, 25 Can. Cr. Cas. 207). He was, so he had stated to witnesses, a German and had been an officer in the German army.

The principal witness for the Crown was one Wiggins who had kept a grocery store across the street from the shop of the accused although at the time of the occurrence in question he was not thus engaged. Wiggins stated that on the 28th April, 1915, shortly after the battle of Langemark, he had gone into a pool room at Riverside to get some tobacco and had met the accused at the tobacco stand near the door. There were at the time only two other men in the pool room and these were engaged in playing pool. There does not seem to have been any salesman at the tobacco counter. The accused had been reading a newspaper and, so Wiggins stated, started to laugh and said, "There is good

news" and in answer to a question from Wiggins he began to talk about the Canadians getting badly beaten and said, "You are slaves, you have to do what King George and Kitchener say" and that it was good enough for us to get cut up; we had no business in it at all. Wiggins asked him if he thought they (meaning the Germans) were fighting an honourable fight with gas and the accused answered, "Anything at all, no matter how you get there." Wiggins questioned him as to why he did not leave this country and the accused said he wanted to but had been stopped. He also said that "there would be lots of fertilisers after that battle, that the Canadians would make good fertilisers."

There was no evidence that either of the two persons playing pool heard these remarks. Wiggins said, in answer to a question whether he thought they would hear, "No, not if they were interested in the game of pool they certainly could not, they might have heard him talk but would not pay attention."

One of the two men was called but stated that he had not heard anything, in fact that he had only come in after the conversation was over but had heard about it. The other was not called.

This is all the evidence that is really material to the case.

The question which counsel for the accused asked to have reserved is:

"Was there any evidence in law to support the said verdict?"

There is of course no doubt that there was evidence to go to the jury upon the fact whether certain words were used or not. The only question is whether there was any evidence to leave to the jury upon the matter of seditious intention.

The law in regard to the matter was pretty fully discussed in *Rex* v. *Felton*, ubi supra, and it was very properly explained to the jury in the learned Judge's charge to which no objection has been taken.

There is just this slight distinction between the facts of this case and those in *Rex* v. *Felton*, that in the latter case the words were spoken in the presence of and were heard by at least two persons in a public bar-room in a hotel, while in the present case the words were, so far as there was any evidence to shew, spoken only in the hearing of the one witness Wiggins, though the locus in quo was of practically the same character.

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It appears to me as I said upon the argument that this case lies at least upon the extreme limit of the law. Indeed one is inclined to wonder why the authorities saw fit to put the country to the expense of a criminal trial when it was apparently possible to intern the accused as an enemy alien during the war. It may be that he is naturalised because the evidence is not clear on that point, but one would have thought that if he had been the fact would have been brought out in evidence.

While, however, the case is near or indeed just on the line I think we must take into account, as stated in *Rex* v. *Felton*, and in the trial Judge's charge, the circumstances not only of the particular occasion but also of the times. These latter have a real bearing on the case and were entitled to be considered by the jury. In more peaceful times this element of the evidence would not be present. Therefore on the whole I think there was evidence presented to the jury from which they could, if they saw fit, infer that the words used were likely to cause disaffection among His Majesty's subjects and to stir up ill-will and hostility between different classes of His Majesty's subjects. The fact that such words were being used by him would undoubtedly be reported, as the jury could infer. They would possibly, or at least so the jury might infer, stir up feelings of ill-will against His Majesty's peaceable subjects of German origin and have a tendency to create dissension and even riots in such times as these. And though the one person addressed may have been extremely loyal that is a matter which the jury might consider not to have been so clear. In any case I do not think the accused ought to be given the benefit of the steadfast loyalty of the person addressed. The words, spoken to an average man were, so the jury were entitled to infer, likely to weaken the firmness of the person addressed in his adherence to his country's cause. This was not a case of a quiet conversation between close and intimate personal friends but an open declaration of opinion to a person, only an acquaintance, casually met in a public place.

I think therefore there was evidence to go to the jury, though no doubt very weak, and that the appeal should be dismissed.

Scott, J.

SCOTT, J., concurred.

Beck, J.

BECK, J., concurred, but with hesitation.

Appeal dismissed.

McKINNON v. SHANKS.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. May 29, 1916.

1. EXECUTORS AND ADMINISTRATORS (§ IV A 2—80)—PROOF OF CLAIMS AGAINST DECEDENT'S ESTATES—CORROBORATION.

A claim for money loaned and goods sold a deceased, based solely on the parol evidence of the claimant, and not evidenced by any writing or entry in any book or document, nor corroborated by facts *aliunde* or by the testimony of other persons, cannot be allowed. (Critical review of authorities.)

[See also *Scott* v. *Allen* (Ont.), 5 D.L.R. 767; *Adamson* v. *Vachon* (Sask.), 8 D.L.R. 240; *Cowley* v. *Simpson* (Ont.), 19 D.L.R. 463; *McGregor* v. *Curry* (Ont.), 20 D.L.R. 706, affirmed by Privy Council in 25 D.L.R. 771; *Ledingham* v. *Skinner* (B.C.), 21 D.L.R. 300; *Dandy* v. *National Trust Co.* (Alta.), 22 D.L.R. 153.]

2. LIMITATION OF ACTIONS (§ IV A—155)—INTERRUPTION OF STATUTE—WANT OF REPRESENTATIVE OF DECEDENT'S ESTATE.

The want of a personal representative to be sued will not interrupt the running of the Statute of Limitations for a debt due by the deceased.

APPEAL from the judgment of Mickle, J., in favour of plaintiff, in an action against an executor for a debt claimed due by the deceased. Statement.

C. L. St. John, for respondent, plaintiff.

H. V. Hudson, for appellant, defendant.

HOWELL, C.J.M.:—The County Court Judge gave a carefully considered written judgment in this matter, but to me it is of such importance that I think it well to review to some extent the law on the subject of proving claims against the estate of a deceased person where the contract or liability depends entirely upon parol evidence, and where the evidence of the deceased would be most important. Howell, C.J.M.

At the outset it is necessary to go back to the comparatively early English law on this subject.

Prior to the English Law of Evidence Amendment Act, 1851, a claimant could not have proved his case by his own testimony, because until then the parties to a suit could not give evidence. Soon after this Act came into effect the Courts of Equity gradually established a practice in proving claims against the estate of a deceased person.

In 1865, in the case of *Grant* v. *Grant*, 34 Beav. 623, in an action proving a claim against the estate of a deceased person, the Master of the Rolls, Sir John Romilly, at p. 627, uses the following language:—

In all these cases the difficulty is whether the evidence establishes the fact, that is the real question to be considered. In the first place, there is a rule

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constantly acted on in Chambers in Equity, that the unsupported testimony of any person, on his own behalf, cannot be safely acted on. If it were otherwise any stranger might come and swear that any testator owed him a sum of money; but that is not sufficient proof; the question would be asked—Is there any writing, or other proof of the debt? Without that, this Court does not listen to the declaration of the claimant, and is obliged in all cases to disregard it, and though, in many cases, it may prevent a person from receiving what he is justly entitled to, still the Court cannot act on the mere unsupported testimony of a claimant.

In the same year, in the case of *Down* v. *Ellis*, 35 Beav. 578, the same Master of the Rolls, at p. 581, used the following language:—

I think that the preponderance of the evidence is in favour of the plaintiff. I quite assent to the statement, that the Court cannot act on the unsupported testimony of a person in his own favour. Were it otherwise, in the course of the administration of a testator's estate in the Court, any person might come in and say the testator owed me £1,000, and substantiate it by his own unsupported oath. It never is my practice to allow a claim upon the unsupported testimony of the claimant, (*Grant* v. *Grant*, 34 Beav. 623), there must be some attendant circumstances, or some facts established *aliunde*, which corroborate the claim, and these may be rebutted by the other side.

In July, 1869, Sir William James, V.-C. (afterwards Lord James), in the case of *Rogers* v. *Powell*, 38 L.J.Eq. 648, in an action by a claimant against the estate of a deceased person, used the following language, at p. 649:—

Mankind would not be safe if this kind of evidence were admitted. The affidavits seem to be framed so as to fit in with reported decisions and the language of judgments, and the expenditure seems an afterthought. But I never will give a person anything on his own uncorroborated statement against another after that other's death.

After using that language he decided against the claimant.

In March, 1870, in the case of *Morley* v. *Finney*, 18 W.R. 490, the same Vice Chancellor, in adjudicating in a case against the estate of a deceased person, used the following language, at p. 491:—

In this case a bill of costs is made out against the estate of the deceased. The executors have set up the Statute of Limitations, which is a perfectly satisfactory defence, unless it can be got rid of. There is no evidence of the payments except the evidence of the claimant. The new law enabling persons to give evidence in their own favour does not relieve the Court from the duty of distinguishing between admissible evidence and satisfactory proof. I have more than once before stated that mankind would not be safe if the Court were to act on uncorroborated evidence of transactions with a deceased person; the temptation to lie is so strong, and the facility with which a lie may be concocted is so great.

In the 5th edition of Daniell's Chancery Practice, issued in 1871, after discussing the evidence to be given in support of a

claim against the estate of a deceased person, the author, at p. 1096, uses the following language:—

> In adjudicating on the claims the Court cannot proceed on the unsupported evidence of the claimant; there must be attendant circumstances or some facts established *aliunde* which corroborate the claim.

I have not been able to find any cases up to that date which would in any way impeach any of these authorities or principles. I think I can safely say, then, that the English law, or, at all events, the English equity practice, as to the proof of claims against the estate of a deceased person is properly set forth in that quotation from Daniell.

It is well to bear in mind, too, that claims against the estate of a deceased person up to that time were always disposed of in Courts of equity.

Ever since this province has had Courts of justice, the law which bound the Courts was the law of England as it existed on July 15, 1870. Sec. 10 of the present King's Bench Act continues this law, and sec. 11 provides that in

> all matters relative to testimony and legal proof in the investigations of fact and the forms thereof and the practice and procedure, the Court may and shall be regulated and governed by the rules of evidence and the modes of practice and procedure as they existed and stood in England on the day and year aforesaid.

By sec. 25 of that Act sub-sec. (*g*), matters in the Court of King's Bench are decided on the principles of equity as they existed before the Queen's Bench Act, 1895, and by sub-sec. (*s*) of sec. 26, it is declared that where there is any variance between the rules of equity and the rules of common law, the rules of equity shall prevail.

It seems to me clear, then, that on July 15, 1870, the law of Manitoba was that a claim of this kind must be proved by evidence complying with the above rule laid down in Daniell's Chancery Practice.

In 1882, in the case of *Re Whittaker*, 21 Ch.D. 657, Bacon, V.-C., at 665, in an action involving a claim against the estate of a dead man, used the following language:—

> Now, bearing in mind the leading principle that the unsupported testimony of a claimant against a dead man's estate cannot be held to be sufficient to establish the claim, where am I to find in the whole of this evidence anything like corroboration of the plaintiff's statement?

In 1883, in the case of *Re Finch*, 23 Ch.D. 267, heard in the Court of Appeal, Sir George Jessel, the Master of the Rolls, at p. 271, uses the following language:—

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In the first place, I cannot find that anybody ever laid down the law or the doctrine that the rule that a claim against a dead man's estate should be supported by something more than the uncorroborated testimony of the claimant is confined to gifts. It is the first time I have ever heard of such a doctrine as this. I have heard it decided over and over again in reference to the payment of a debt, and it is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant, with a view, no doubt, of preventing perjury, and with a view of protecting a dead man's estate from unfounded claims. It is not a rule of law, but it is a question to be decided by a jury, although the Judge must recommend the jury not to trust the uncorroborated evidence; but still if they did, I do not know that any one could interfere with their verdict. But where we are sitting here as a jury we apply that rule to ourselves. That is the first point.

Baggallay, L.J., at p. 276, uses the following language:—

If we were to dispense with corroborative evidence, and adopt the account given to us by this lady, we should be certainly departing from that which I have always considered to be the general rule with regard to cases of this kind.

And Lindley, L.J., at p. 277, uses the following language:—

I do not distrust the lady, but I distrust her affidavit; and, upon the ground that her evidence stands alone, and without any corroboration, I think that this appeal ought to be allowed and with costs.

In the same year, in the House of Lords, in the case of *Madison* v. *Alderson*, reported in 8 App. Cas. 467, Lord Blackburn, at p. 487, uses the following language:—

It is not merely that the sole witness is a person deeply interested giving testimony as to what took place between herself and a person deceased, and that no Judge sitting in equity and deciding both the law and the fact would have acted on such evidence without confirmation. . . . I do not think there is any rule of law which prevents such unconfirmed evidence from being admissible or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly pointed out to them how dangerous it would be to do so.

After these various decisions, we come upon a very pronounced change in judicial opinion.

In 1885, in the case of *Re Garnett*, 31 Ch.D. 1, the Master of the Rolls (Brett), without considering any of these cases above referred to, and apparently without any of them being cited, uses the following language, pp. 8 and 9:—

It was said that this release cannot be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that that was a doctrine of the Court of Chancery. I do not assent to this argument; there is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the Judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the Judge, in fact, believes to

be absolutely true, is, according to a doctrine of the Courts of equity, not to be believed by the Judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law. The law is that, when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if, in the end, the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in law or in equity.

After using the above language, he goes into the matter, and he finds the story corroborated, and I would think, sufficiently corroborated, according to the previous rules.

His judgment is followed by judgments of Cotton and Fry, L.JJ., neither of whom in any way confirms the above statement of the law, but dispose of the case as if the evidence had been corroborated.

In the same volume, at p. 177, is the case of *Re Hodgson, Beckett* v. *Ramsdale*. In that case, at p. 183, Sir J. Hannen uses the following language:—

Now, it is said on behalf of the defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon. But, as a matter of fact, it does appear to us that in the present case there is not an absence of corroboration—that there are corroborative circumstances about which there can be no dispute, since they are written documents.

The Judge then goes on and apparently does hold that the evidence was corroborated, and, in my humble judgment, sufficiently corroborated.

He is followed by the judgments of Bowen and Fry, L.JJ., and neither of these Judges repeat the principles quoted above. In that case *Re Finch* and *Re Whittaker* were both cited in the argument, but were not remarked upon by the Judge in his judgment.

After this peculiar change in judicial thought in England, the

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matter came up in Ireland in the case of *Re Harnett, Leahy* v. *O'Grady*, 17 L.R. Ir. 543, and it is necessary to make a long quotation from that judgment. The Vice-Chancellor, who gave the judgment, used the following language, at p. 547:—

With due respect to the Master of the Rolls, I do not concur with him. The other Lords Justices apparently did not concur, for they decided the case on the ground that there was sufficient corroboration, and the fact that they did so appears to be an additional ground for holding that the rule of the Court of Chancery still exists as stated. Neither *Hill* v. *Wilson* L.R. 8 Ch. 888, nor *Finch* v. *Finch*, 23 Ch.D. 267, was referred to. Sir James Hannen, in *Beckett* v. *Ramsdale*, 31 Ch.D. 177, expressed a similar opinion to that of Sir W. B. Brett, and in that case both *Hill* v. *Wilson* and *Finch* v. *Finch* were cited; but it was not necessary for the Court to decide the question, as the Lords Justices were all of opinion that there was sufficient corroboration, and none of them referred to the cases on the subject, nor did any of them, except Sir J. Hannen, express any opinion on the rule, except by expressing a general concurrence in his judgment.

The invariable practice of this Court has been for years, that claims against the estates of deceased persons cannot be sustained without corroborative evidence. It is not to be supposed for a moment that the evidence of the claimant is to be rejected as inadmissible. Every person can now give his evidence in a court of justice; but the rule was, as stated in *Finch* v. *Finch*, that as in an action tried by a jury it is the duty of the Judge to tell the jury that they ought not to act on the uncorroborated evidence of such a claimant; so the Court, acting as a jury, cannot take such uncorroborated evidence as sufficient to act upon.

It is, in my opinion, a most proper and salutary rule that there must be corroboration whether the person, as Mr. White put it, was an archbishop or a peer of the realm, as to whom there could be no suspicion. Look at the result of acting on such evidence alone. A claimant, who cannot by possibility be contradicted, and who may be too clever and unscrupulous to break down under cross-examination, could put forward a claim founded solely on his own oath, which the Judge can detect no reason for disregarding, and which in the absence of such a rule he would be bound to act upon, the only person who could contradict it being dead. It is not a rule which depends on the character of the witness, but on the manifest danger which requires the establishment of a general rule applicable to all alike from the great difficulty or impossibility of detecting falsehood. It was to defeat fraudulent and false claims by designing and unscrupulous persons that the rule was adopted. And is there anything unjust or unreasonable in this? Or is it any harder than the cases within the Statute of Frauds? If an archbishop or peer came forward and swore to the making of a contract which came within the statute it would be impossible to recover on it unless it were in writing, and no one considers this a hard or unjust law. I shall, therefore, act upon this rule, so long recognized in the Court of Chancery, and shall decline to vary it unless the House of Lords decide the other way.

I may add that the force and propriety of this decision appeal to me.

The matter came up again in England in 1887, in *Re Farman*

57 L.J.Ch. 637. That was a case where a bank deposit receipt, the property of the deceased, endorsed by him, was in the possession of the claimant. She swore that he took that receipt, endorsed his name on it in her presence, put it in an envelope and handed it to her. The address on the envelope and the signature on the back of the receipt were all in his handwriting. The claimant simply swore that he did this writing in her presence and that he handed it to her. She always had the custody of the documents, and the Judge, acting on that evidence, allowed her claim, and I should think properly. He, however, said that he would not decide it because there should be some corroboration, but simply because he believed her story and that as a matter of law corroboration was unnecessary. It seems to me in that case the judgment was proper because there was corroboration within the principles above set forth.

In 1898 the matter came up again in the case of *Rawlinson* v. *Scholes*, 15 T.L.R. 8. In that case again it seems to me there was clear corroboration, although the County Court Judge held that the evidence was not corroborated, and in a judgment at the end of the argument apparently the Chief Justice, Lord Russell of Killowen, verbaly remitted the case back to the County Court Judge, and used the following language:—

> The Judge ought to examine with care the evidence of the appellant and any other evidence offered, and if he should be dissatisfied with that evidence he ought to disallow the claim. But he ought not as a matter of law, if he believed the evidence of the appellant, to disregard it merely because it was not corroborated.

In the same year, in *Re Griffin*, 79 L.T. 442, [1899] 1 Ch. 408, the claimant appears with a deposit receipt endorsed by the deceased apparently properly in his possession, and Byrne, J., there used the following language:—

> There is no absolute rule in the case of a claim against the estate of a deceased person as to corroboration being necessary.

It does seem to me in that case that there was corroboration, and that under the old rule laid down in Daniell's Chancery Practice above quoted, the claim should have been allowed.

The next case in which this question was discussed is in this province in the case of *Doidge* v. *Mimms*, 13 Man. L.R. 48, Killam, C.J., after discussing the two cases in 31 Ch.D. above referred to, uses the following language:—

> It is evident, however, that both of these Judges were of opinion that the evidence of the survivor should be subjected to the most severe scrutiny

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and accepted only if it impressed the tribunal to an exceptional degree with its reliability (and he also stated): But in England there is no distinct law against it; the rule is one of prudence only.

The other Judges, in their judgments, also discuss the subject, but, as a new trial was granted, it cannot be said that the case was a direct authority upon this subject. I have not seen any cases upon this subject subsequent to those above referred to. To me this is a matter of very great importance.

In the case before us I can see no facts or circumstances or entries in books or the production of any documents that support the parol testimony. No doubt the County Court Judge did entirely believe the plaintiff's story, and if, under these circumstances and upon that evidence, the judgment is supported, then a claim against the estate of a deceased person can be established merely upon the unsupported testimony of the plaintiff without any other facts upon which inference could be drawn in his favour.

In this case the plaintiff apparently made no entry or charge in any book or account. There was no independent evidence that the grain was delivered to the deceased, and all the transactions took place years before the evidence was given.

Because of judicial decisions the evidence in this case is looked at and weighed differently from that in an ordinary case, and a review of the above decisions shews the various views of distinguished Judges and the difficulty of formulating any rule from them.

I think that the rule laid down by Daniell can still well be applied by holding that the parol evidence of the claimant must be supported by some attendant circumstances or some facts established *aliunde* which corroborate the claim.

I think there was not evidence in this case sufficient to support the plaintiff's claim.

Richards, J.A.

RICHARDS, J.A. (dissenting in part):—The facts are stated in the trial Judge's reasons for judgment.

As I understand it, he thought that certain dealings by the executors and evidence by the plaintiff's son corroborated the plaintiff's own evidence. But I further understand him to mean that, apart from such corroboration, he believed the plaintiff's case fully proved by the plaintiff's testimony.

It is argued that what he thought to be corroborative evidence was in fact no corroboration, and that, in its absence, he should not have found for the plaintiff.

It is, I think, unnecessary to consider whether there was, in fact, corroboration. There is no law that a claim against the estate of a deceased person must fail if the creditor's claim is supported only by his oath. In Ontario such corroboration is required by statute, and I am far from certain that such a statutory provision would not be safer, on the whole, than the law in force here. But we must deal with the law as it is.

The question was raised in two cases in L.R. 31 Ch.D. *Re Garnett*, at p. 1, and *Re Hodgson*, at p. 177. . . . . .

In *Doidge* v. *Mimms*, 13 Man. L.R. 48, the point was discussed and the above views approved.

I have carefully read over the evidence and considered the reasons given by the trial Judge. From the latter I am impressed with the belief that he viewed the case in the manner suggested in the language set out above. From the former I cannot say that he was not justified in holding as he did.

The evidence discloses a course of dealing in which the plaintiff was guilty of such carelessness that, if he were a business man, I should think it difficult to find conviction in his testimony. He seems to have acted towards the deceased with a trustfulness almost childish. Yet, considering that they were close friends, and (as I think the evidence shews) inexperienced in ordinary business matters, I cannot find ground for such suspicion as should cause me to overrule the Judge who heard the testimony.

Keeping in mind the nature of the parties and their intimacy, I find in the plaintiff's testimony itself no reason for so far suspecting its truthfulness. I am far from certain that, if I had heard the evidence and been as favourably impressed with the plaintiff's story as the trial Judge evidently was, I should have decided otherwise than as he did.

It is apparent, however, that the first item of the claim, $40, was due and payable more than 6 years before action brought; and the defendants have set up the defence of the Statute of Limitations. With much deference, I do not agree with the trial Judge's view, that there was a suspension of the statute during the period between the death of the deceased's executor and the appointment of the latter's executors. No cases were cited to support that opinion, and I can find none that do.

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The schedule prepared by the first executor only describes the plaintiff's demand as a "claim" against the estate. I can not consider that as any admission that it was a debt due by the deceased. So that, as I view it, there was no suspension of the statute and no acknowledgement of the debt that would give the statute a fresh start.

I would allow the appeal to the extent of $40 of the amount found due, and reduce the latter from $444.25 to $404.25.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff brings this action against the executors of the late James W. Shanks, who in his lifetime was the executor of James Shanks, deceased, to recover the value of goods supplied and the repayment of moneys advanced to James Shanks in his lifetime. The case was tried before Mickle, J., in the County Court of Rapid City, and judgment was entered for the plaintiff for $444.25.

The plaintiff and James Shanks (whom I shall call the deceased) were farmers living near each other, and were evidently on terms of close friendship. The deceased was an unmarried man and during the last year of his life usually resided at the plaintiff's house. The account sued upon is for seed grain furnished in the years 1909 and 1910 and for moneys loaned or disbursed for the deceased during the years 1910-1912. The deceased died on November 22, 1912. The action was commenced on August 7, 1915.

The first item in the particulars of claim is 100 bushels of seed oats at 40 cents a bushel, $40. This was supplied, according to the statement of claim, on April 5, 1909. There is nothing proved which would prevent the Statute of Limitations from running. The Judge took the view that there was a suspension of the statute between the death of James W. Shanks, the executor of the deceased, and the appointment of the executors of James W. Shanks. With great respect, this view cannot be supported. When the time began to run it continued to do so, even should subsequent events occur which rendered it an impossibility that an action should be brought. Darby & Bosanquet, 7th ed., 25. The time having begun to run under the statute during the life of the deceased, the want of a personal representative to be sued did not prevent the time from continuing to run: *Rhodes* v. *Smethurst*, 4 M. & W. 42, s.c. in Ex. Ch. 6 M. & W. 351; *Freake* v. *Cranefeldt*, 3 Myl. & C. 499.

As regards the whole of the plaintiff's claim, he did not furnish at the trial the slightest corroboration of his own verbal testimony. There was no writing, no entry in any book or document, either by the plaintiff or defendant, no verbal testimony by any other person, nothing in fact in the nature of evidence, to corroborate the plaintiff's statement as to the existence of the debt. The question of corroboration, where a claim is made against the estate of a deceased person, has been dealt with in several cases in this province. I would refer to *Rankin* v. *McKenzie*, 3 Man. L.R. 323, 326; *Doidge* v. *Mimms*, 13 Man. L.R. 48; *Re Montgomery*, 20 Man. L.R. 444. The last two of these cases follow *Re Garnett*, 31 Ch. D. 1, and *Re Hodgson*, 31 Ch.D. 177.

The proceedings in that case (*Re Garnett*, 31 Ch.D. 1) were instituted to set aside a release executed many years previously by two young women who claimed that they had been induced to execute it without advice, in error and against their rights. The other two Judges, Cotton and Fry, L.JJ., were of opinion that there was corroboration in the circumstances of the case, and expressed no view upon the question of corroboration.

In *Re Hodgson*, also a decision of the Court of Appeal, but in this case again the Judges were of opinion that there were corroborative circumstances.

In *Doidge* v. *Mimms*, 13 Man. L.R. 48, Killam, C.J., comments upon the above dicta as follows:—

> It is evident, however, that both of these Judges were of opinion that the evidence of the survivor should be subjected to the most severe scrutiny and accepted only if it impressed the tribunal to an exceptional degree with its reliability.

Later English cases have followed the dicta expressed in *Re Garnett* and *Re Hodgson*. See *Re Farman*, 57 L.J. Ch. 637 (1888); *Rawlinson* v. *Scholes*, 79 L.T. 350 (1899); *Re Griffin*, 79 L.T. 442, [1899] 1 Ch. 408. The result of these cases appears to be that, while there is in England no rule that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, it will be regarded with jealous suspicion.

In *Re Harnett*, 17 L.R. Ir. 543, Chatterton, V.-C., refused to follow *Re Garnett* and *Re Hodgson*, and in a very well-considered judgment in which a great number of cases are discussed, laid down the rule that a claim against the estate of a deceased person cannot be allowed on the uncorroborated evidence of the claimant.

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The same view was taken in a subsequent case, *Mahalm* v. *McCullagh*, 27 L.R. Ir. 431, which was affirmed by the Court of Appeal, 29 L.R. Ir. 496. The later cases in England regarded the question as one of practice rather than of law: 13 Hals., p. 604. Even if the requiring of some corroboration is a matter of practice and not a binding rule of law, it is a salutary practice and should not lightly be neglected.

The plaintiff was aware of the advisability of procuring some corroboration of his own testimony. He, therefore, called his son to give evidence as to the first three items relating to the sale to the deceased of seed oats and seed barley. The son could remember very little about the transaction. He stated that wheat was bought by deceased, but could not say whether oats were bought or not. He could not remember any sale of barley to the defendant. Now the plaintiff sues for oats and barley and makes no mention of wheat. The Judge thought that this evidence afforded some corroboration, but he appears to have been under the impression that the plaintiff's son used the word *grain* in the statement where he positively spoke of wheat and denied any recollection of a sale of oats or of barley.

When we come to the claims for money loaned, the suspicion with which such claims against the estate of a dead man must be approached, instead of being dispelled, is, it appears to me, greatly enhanced by an examination of the plaintiff's evidence and of the surrounding circumstances. The plaintiff is the owner of a half-section of land, which he bought ten years ago for $4,500 and on which he still owes $3,000. There is nothing to indicate that he was in such a financial position as to make considerable advances of money to the deceased without security and allow it to remain unpaid for several years. One item, as I have shown, has become barred by the Statute of Limitations.

The account plaintiff gives as to the loan of $175 in July, 1910, is that the hired man of the deceased desired to leave, that the deceased agreed to let him go, and that he required the money to pay the man. Plaintiff says he had sold some cattle and was going to pay a bill of his own, but he gave the money to the deceased. No receipt or acknowledgement was given by the borrower or requested at any time by the lender. The cattle dealer who, it is said, paid the money to the plaintiff was not

called as a witness. There is nothing but the plaintiff's own bare statement to support the claim.

Then we come to the next item of $125 money loaned to the deceased in the following year. Again the hired man of the deceased is leaving him in harvest time and the deceased is placidly consenting. Again he is in great anxiety to pay the man. He goes to the plaintiff, to whom he is already indebted to a considerable amount, and the plaintiff is so anxious to help him that he borrows the money from the bank on his own, the plaintiff's, promissory note and pays it to the deceased. The deceased was not even asked to sign or indorse the note. The note was not produced at the trial, nor was any officer of the bank called to prove that such loan was made to the plaintiff.

The last item is a sum of $40, being the amount of a hospital bill which the plaintiff says he paid for the deceased. This, plaintiff states, was paid by his own cheque given to the hospital. Neither the cheque nor the plaintiff's bank book was produced. No one was called as a witness either from the hospital or from the bank to corroborate the plaintiff's evidence as to such a payment having been made at the time. The bill from the hospital covering all its charges against the deceased for the years 1911-1912 was put in at the suggestion of the Judge, and apparently agreed to by both counsel. There is no item shewn for exactly $40, although the plaintiff states he gave a cheque for that amount some time in 1912. This alleged payment was made while the deceased was still alive, and on an occasion when he was leaving the hospital. At the foot of the bill there is a statement from the hospital authorities that all the payments were made by the late James Shanks, except $20.20 on the last account, which was paid by the executors.

It is shewn that the deceased, who was the owner of a half-section of land, on two occasions, as the plaintiff knew, borrowed sums of money from banks. It is also clearly established that in December, 1911, after the bulk of the alleged indebtedness had been incurred, the deceased received from a loan company a cheque for $885, that he was seen to cash the cheque at the bank, place the money in his pocket, and set out for the plaintiff's residence. Although the deceased was living with the plaintiff at that time, the latter denies any knowledge of the loan

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from the loan company, or of the receipt of the money, or the disposition made of it. It is shewn that on January 15, 1912, the plaintiff deposited $300 of the money of the deceased to the credit of the deceased in a bank. Considering the intimate relations between the two men these matters are scarcely consistent with the continued indebtedness of the deceased to the plaintiff and contradict the story of the plaintiff that the deceased never had the money to pay him.

I feel confidence in stating that there is no authority for allowing against the estate of a dead man a claim so surrounded, as is the plaintiff's in this case, with suspicious circumstances and without a shred of evidence to corroborate the statement of the claimant.

The Judge, after expressing his opinion that the absence of corroboration was not sufficient to defeat the claim, went on to say: "If the evidence of a plaintiff is strengthened by evidence which helps me to come to a conclusion that the material statements of the plaintiff are true, it would not be necessary that it should be proved by independent testimony." I take it that the Judge is referring to evidence which indirectly supports the claimant's statement, without going to the length of establishing the debt. Such evidence, if it exists, would be corroborative. The Judge then referred to certain parts of the evidence which he thought corroborated the plaintiff. One of these was the evidence of the plaintiff's son, which I have already dealt with. Another part to which reference is made is that Thomas Shanks, one of the executors of the deceased, who had received the plaintiff's claim, placed it amongst the claims against the estate "and considered it on the list of claims to be paid." This is not corroboration of the plaintiff's evidence as to the claim. It had nothing to do with the facts of the alleged indebtedness. The executor could not act otherwise than place upon the list of claims against the estate a claim lodged with him and verified by statutory declaration, as this appeared to have been. The other supposed corroboration was also an act of the executors. A proposal was made to sell the farm of the deceased to the sons of the plaintiff, and, as a part of the proposal, an offer was made to allow the claim of the plaintiff to be deducted from the purchase money in case the sons bought at a certain price. This was merely a matter of bargain and proposed compromise and

in no way supported the plaintiff's claim or affected the issues in the case. The proposal was not carried out. None of the matters referred to were evidence in corroboration of the plaintiff's statement, but I think the Judge received them as corroboration. He says:—

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I think that if there were any doubts in my mind as to the plaintiff being entitled, the evidence of the defendant Thomas Shanks as to his dealing with the claim when filed, the evidence of young McKinnon as to deceased's buying grain, etc., and, more particularly, as to proposed purchase of farm and the evidence of Snider as to defendant's treatment of plaintiff's claim would furnish the corroboration necessary to meet the defendant's objection.

These are the matters I have dealt with. With great respect, I think the Judge erred upon two vital points: First, he overlooked the suspicious circumstances surrounding the whole evidence of the plaintiff; second, he took as corroboration matters that in no way supported the plaintiff's evidence in regard to any part of the claim.

I would allow the appeal with costs and dismiss the action with costs.

Cameron, J.A.

CAMERON, J.A.:—My own view is that the governing rule as to evidence required in the case of claims against the estate of a deceased person is as stated by Sir J. Hannen in *Re Hodgson*, 31 Ch.D. 177 at 183, and by Lord Russell in *Rawlinson* v. *Scholes*, 15 T.L.R. 8, 79 L.T. 350, at 351. An interesting discussion on the subject and merits of the rule requiring corroboration, as laid down in the earlier cases, is to be found in Wigmore on Evidence, sec. 2065.

In this case, however, the County Court Judge nowhere in his judgment expresses the opinion that he was fully convinced of the truth of the plaintiff's story apart from the circumstances which he considers corroborative of it, but which, on examination, cannot be considered to be really such.

I agree with the judgment of Perdue, J., whose judgment I have read.

Haggart, J.A.

HAGGART, J.A. (dissenting in part):—The first item in the particulars of the plaintiff's claim is barred by the Statute of Limitations. The statute began to run on April 5, 1909, the day the seed oats were delivered by the plaintiff, and consequently more than six years had elapsed when this suit was begun on August 7, 1915. The fact that there was no representative of

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the estate during a portion of that period who could be sued did not prevent the statute from running.

Banning on Limitations of Actions, 3rd ed., at p. 7, in discussing this question, says:—

> A third rule of general and almost universal application is that time, once it has commenced to run, will not cease to run merely by reason of any subsequent event; and accordingly it is no answer to the statute to say, *e.g.*, that, after the cause of action accrued and after the statute had commenced to run, the debtor, within the 6 years, died and (by reason of litigation as to probate) no executor of his will was appointed until after the expiration of the 6 years, because generally when any of the statutes of limitation have begun to run no subsequent disability will stop their running.

And Darby & Bosanquet, on this same subject, say:—

> When time has once begun to run it will continue to do so even should subsequent events occur which render it an impossibility that an action should be brought. The rule holds good alike of all the statutes of limitation.

As authority for the above proposition, the text writers cite *Rhodes* v. *Smethurst*, 4 M. & W. 42, and on appeal 6 M. & W. 357, and *Doe d. Duroure* v. *Jones*, 4 T.R. 300.

The defendant urged that the County Court Judge erred in not holding that, as the plaintiff's claim was against the estate of a deceased person, that corroborative evidence was necessary. It is, no doubt, safer to have corroboration of the testimony of the plaintiff where the claim is against the estate of a deceased person, but this is not a rigid rule. Richards, J., in *Doidge* v. *Mimms*, 13 Man. L.R. 48 at 62, gives what I think to be a correct statement of the law in this respect when he says:—

> There is no statute requiring such corroboration, and, though its absence may be ground for suspicion, yet the County Court Judge would not have been debarred from finding in the wife's favour on her own testimony alone, if he thought it thoroughly clear and reliable.

The trial Judge believes the plaintiff's story, and I am not prepared to reverse his finding. In his reasons for his judgment he shews that this rule or practice of the necessity for corroboration was before him. See *Re Mackenzie and Rankin*, 3 Man. L.R. 323 at 327; *Re Montgomery*, 20 Man. L.R. 444; *Re Garnett*, 31 Ch.D. 1; *Re Hodgson*, 31 Ch.D. 177; *Rawlinson* v. *Scholes*, 79 L.T. 350, 351; *Macdonald* v. *Macdonald*, 33 Can. S.C.R. 145.

The plaintiff's judgment should be reduced by the sum of $40.

Appeal allowed.

DOME OIL CO. v. ALBERTA DRILLING CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 1, 1916.

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1. CORPORATIONS AND COMPANIES (§ IV D1—65)—POWERS—MINING AND "MINERALS"—RIGHT TO DRILL FOR OIL—AS CONTRACTOR.

Rock oil is a "mineral," and drilling for it is a mining operation within the contemplation of secs. 63 and 63*a* of the Alta. Companies Act (N.W.T. Ord. 1905, ch. 61, as amended by Acts 1911-12, ch. 4, sec. 5); a mining corporation empowered by virtue of sec. 63*a*(2) "to dig for minerals, whether belonging to the company or not," has a legal right to drill oil wells, and to carry on the work as a contractor on lands belonging to others.

[*Alberta Drilling Co.* v. *Dome Oil Co.*, 27 D.L.R. 118, 8 A.L.R. 340, affirmed. See also the *Companies Case*, 26 D.L.R. 293 with annotation.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 27 D.L.R. 118, 8 A.L.R. 340, affirming the judgment of Hyndman, J., at the trial, by which the plaintiff's action was maintained with costs.

Geo H. Ross, K.C., for appellants.

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

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that the judgment in this case which was unanimously approved by the Judges of the Alberta Appeal Court is right. I agree with Harvey, C.J., that there is ample evidence for thinking that the seizure was not honestly made.

The only question calling for remark is the defence that the contract was *ultra vires* of the respondents. The powers given to companies by sec. 63*a* of the Companies Ordinance include power

(2) to dig for . . . minerals . . . whether belonging to the company or not.

The words "to dig for" may not in the popular sense appear very apt to describe the process of boring an oil well of some thousands of feet deep, but the words as used must clearly receive a wide and special interpretation as they would be understood by those concerned with mining. Obviously you cannot obtain the mineral oil by digging with a spade, as the literal meaning might perhaps suggest, but the same is also true as regards all other minerals for mining which modern machinery is employed. It could hardly be suggested that under this power the company is not entitled to bore for oil on its own property. The words, I think, cover any process by which the earth is broken into for the extraction of the minerals.

Harvey, C.J., says that:—

one of the objects of the company is to bore for oil as a contractor.

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He concludes assuming that if the company is not one which comes within sec. 63 it is incorporated under sec. 16 and if the certificate of incorporation states that it is within sec. 63, it is in error to that extent, but no farther.

Fitzpatrick, C.J.

The object as stated by the Chief Justice does not appear in so many words in the memorandum of association which, however, does contain the same power as the above quoted par. (2) of sec. 63*a* of the Act. I am of opinion that the company is limited under sec. 63, but has power under sec. 63*a* to enter into the contract. The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J. (dissenting):—The respondent company entered into a contract with the appellant to drill two wells on the latter's holdings at such places as it might select to a total depth of 2,500 feet each or, upon its request, to drill 500 feet further; to furnish engine, boiler and fuel, camp, provisions, lumber, labour and all tools and supplies necessary to do the work subject to provisions thereinafter contained; upon the completion of each well to clean out and properly cap same; to extinguish any fire resulting through negligence of the respondent or its servants or agents; to use the best materials and labour available; to proceed continuously in a workmanlike manner; to have in charge of the work during continuance thereof competent drillers; in certain events specified, rendering work abortive, at respondent's expense to set the equipment over to a place to be selected by appellant, and drill, free of cost to it, a hole of same size and depth; to insure against accident each and every one of the men employed in said work, in a sum sufficient to cover any damages, and indemnify appellant; to remove from the well all casing therein not required by appellant to be left there; to procure the strata drilled and keep a log of drilling; and not to open same to inspection by any person other than appellants, or give information as to the work to any one else.

Such is a fair general outline of what the respondent undertook and for which it was to get $8.50 per foot, and beyond the specified 2,500 feet $10 per foot.

There are a number of other things agreed to on each side providing for varying and various contingencies in the course of executing the contract or stopping its further prosecution. The parties disagreed, and the appellant took possession of the respondent's plant and dismissed the respondent from the further prose-

cution of the work. The respondent sued the appellant therefor. The latter set up, amongst other defences, that the contract so entered into was *ultra vires* the respondent company.

The Courts below overruled this as well as other defences and entered judgment for respondent.

I incline to think, in all other regards than that relative to the question of *ultra vires*, that the Court of Appeal was right, but the opinion I have formed relative to this question renders it unnecessary I should form or express any definite opinion as to the other defences.

The opinion of Harvey, C.J., concurred in by the other members of the Court, contains the following:—

I am of opinion that it is not necessary to determine whether this company is one which comes within the terms of sec. 63 or not, for it is not by virtue of sec. 63 that it is incorporated. It is incorporated as any other company under the general provisions of the Ordinance. There is no doubt that its object comes within the legislative authority of the province and that, therefore, it may be duly incorporated under the Ordinance. If the certificate of incorporation which, as sec. 63 says, is issued under sec. 16 and not under sec. 63, states that the liability of the company is specially limited under that section when the company is in fact one that does not come within the terms of that section and whose liability, therefore, is not limited under that section, the certificate is in error to that extent, but not necessarily any farther. The company is incorporated because it has complied with the provisions of the Ordinance and obtained a certificate of incorporation and has the powers necessarily incident to a company with its object. One of the objects of the plaintiff is to bore for oil as a contractor.

Clearly, therefore, this contract is within its powers. Sec. 3 is for the express purpose of limiting the liability of the members. The question of liability does not arise here and it is, therefore, unnecessary to decide whether the company is within sec. 63 or not.

This extract contains, I think, a fair presentation of the point of view taken by the Court of Appeal in which I was at first inclined to agree as, possibly, the correct construction of a statute with which I was not familiar.

I find, however, on an examination of the provisions of the Alberta ordinance, known as the Companies Ordinance, under which the respondent became incorporated, if it ever so became, that I cannot agree either in the view so expressed or the reasoning upon which it proceeds. I assume the sec. 3 referred to in the extract is a clerical error for sec. 63.

The Companies Ordinance provides, by sec. 5, as follows:—

Any three or more persons associated for any lawful purpose to which the authority of the legislature extends, except for the purpose of the construction

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or operation of railways or of telegraph lines or the business of insurance, except hail-insurance, may by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration form an incorporated company with or without limited liability. 1911-12, ch. 4, sec. 4.

If this company had become incorporated under that provision alone and in the memorandum of association had named one of its objects to be that of carrying on the business of a driller or of a contractor for drilling wells or any such apt terms as covering the business involved in the contract in question herein, there could be no question herein of its powers.

It abandoned any such ground when it chose to become incorporated not by that provision alone, but by virtue of entirely different provisions containing a limitation of that general power and expressly restricting the possible objects of the company within the ambit of what secs. 63 and 63*a* provide.

Sec. 63, in the first part, is as follows:—

63. The memorandum of association of a company incorporated or reincorporated under this Ordinance, the objects whereof are restricted to acquiring, managing, developing, working and selling mines, mineral claims and mining properties and petroleum claims and lands and natural gas claims and lands and the winning, getting, treating, refining and marketing of mineral therefrom, may contain a provision that no liability beyond the amount actually paid upon shares and stocks in such company by the subscribers thereto or holders thereof shall attach to such subscriber or holder; and the certificate of incorporation issued under sec. 16 of this Ordinance shall state that the company is specially limited under this section. 1901, ch. 20, sec. 63; 1914, ch. 10, secs. 10, 11.

The memorandum of association certified by the registrar is in the case, but I do not find therein the certificate of incorporation.

The memorandum, by clause (*c*) thereof, states as follows:—

(*c*) The liability of the members is specially limited under sec. 63, C.O., 1901, ch. 20.

The resolutions contained in "Table A" are excluded. The name and description of the company at the head of the memorandum indicate it falls, and was intended to fall, under sec. 63.

The objects specified therein are copied from the twelve objects specified in sec. 63*a* with one or two omissions in way of clerical errors, I think, in copying No. 1 thereof; and, in addition to No. 3 of the words

especially to refine oil and the by-products of petroleum.

This addition cannot help here and the omitted words in No. 1 rather weaken, if anything, the company's position herein.

Then, these statutory objects are followed by five others which, in my opinion, in no way help, even if operative at all, the respondent in relation to what is involved herein. I shall presently set out these and deal with them in detail.

I am quite clear that the whole purpose of the incorporation was to conform with the provisions of secs. 63 and 63*a* in order to get the benefits thereof. The added objects must, therefore, be treated as null so far as, if at all, in conflict with the twelve objects specified in the sec. 63*a*.

If authority is needed for this proposition, see the somewhat analogous cases of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syn.*, [1899] 2 Ch. 80; *Payne* v. *The Cork Co.* (1900), 1 Ch. 308; where the articles of association were so attempted to be changed as thereby to conflict with or vary the statutory provisions protecting shareholders.

Can any one read the contract in question herein and realize what the respondent was trying to do thereby and compare it with the evident scope and purpose of the entire sec. 63*a* without feeling that the respondent in embarking upon the business of a contractor for drilling wells for others was attempting something never contemplated as within the objects defined in that section.

Let us read sec. 63*a* which prohibits the use of greater powers as follows:—

> 63*a*. Every company, the objects whereof are restricted as aforesaid, shall be deemed to have the following, but except as in this Ordinance otherwise expressed, no greater powers, that is to say . . .

Surely the language of these secs. 63 and 63*a* exclude the possibility of anything else except the twelve specified objects which follow being *intra vires* the respondent's corporate powers.

The expression "except as in this ordinance otherwise expressed" is not, perhaps, all that it might have been, but clearly was intended to reserve to the company only such other powers as consistent with the existence of a corporate creation with limited objects to be pursued, and liability for the shareholders. Certainly other objects of pursuit were not intended to be reserved by this exception.

Then, do these twelve specified objects cover the business of a contractor for hire, drilling upon the lands of others? The keynote of the whole series is found in the first, which reads as follows:—

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1. To obtain by purchase, lease, hire, discovery, location, or otherwise, and hold within the province, mines, mineral claims, mineral leases, prospects, mining lands and mining rights of every description, and to work, develop, operate and turn the same to account and to sell or otherwise dispose of the same or any of them, or any interest therein.

It is a proprietary company that is contemplated thereby.

True, when it comes to the business of smelting it may have to deal with the minerals of others and that is provided for. And, in relation to such like work or that done by its vessels, it can take compensation for work done.

From beginning to end of the section there is only the very inapt expression "to dig for" that can by any straining of the language be made to fit what this contract involves.

It is a mining company, as the Act elsewhere expresses it, that is had in view, not a drilling company or contracting company, that is intended to be given these special powers.

The following passage condensed from judicial opinions, and appearing on p. 9 of Buckley on Joint Stock Companies (9th ed.), in which I parenthetically incorporate his foot-note references, may be safely taken as our guide.

The memorandum of association of the company is its charter, and defines the limitation of its powers (*per* Cairns, L.C., *Ashbury Co.* v. *Riche*, L.R. 7 H.L. 668), and the destination of its capital (*Guinness* v. *Land Corp. of Ireland*, 22 Ch. D. 349). A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act. The memorandum of association is under this Act the fundamental and (except in certain specified particulars), the unalterable law of companies incorporated by virtue of it. (*Per* Lord Selborne, L.R. 7 H.L. 693).

But the doctrine that any act *ultra vires* the memorandum is void is to be applied reasonably. Anything fairly incidental to the company's objects as defined is not (unless expressly prohibited), to be held as *ultra vires* (*Atty.-Gen.* v. *Great Eastern R. Co.*, 11 Ch. D. 449, 480; 5 App. Cas. 473; *London and North Western R. Co.* v. *Price*, 11 Q.B.D. 485; *Foster* v. *London Chatham and Dover R. Co.*, [1895] 1 Q.B. 711; *Atty.-Gen.* v. *London County Council*, [1901] 1 Ch. 781; [1902] A.C. 165; *Atty.-Gen.* v. *North Eastern R. Co.*, [1906] 2 Ch. 675; *Atty.-Gen.* v. *Mersey R. Co.*, [1907] 1 Ch. 81; [1907] A.C. 415 . . .

A contract made by the directors upon a matter not included in the memorandum is *ultra vires* of the company and, therefore, of the directors. It is not binding on the company, and cannot be rendered binding even by the assent of every individual shareholder. (*Ashbury Co.* v. *Riche*, L.R. 7 H.L. 653); *Wenlock* v. *River Dee Co.*, 36 Ch. D. 675*n*.

The cases cited in support of these respective propositions amply bear them out.

The application of these authorities to the case in hand deserves some attentive care.

The Chief Justice of the Court of Appeal says: "one of the objects of the plaintiff is to bore for oil as a contractor."

I have read many times the objects as set forth in the memorandum of association to find what the Court rests that upon. There is nothing of that kind expressed therein in so many words, and I assume it is an inference drawn from what does appear that is relied on. With great respect I submit the inference is not well founded.

There is clearly contemplated in object No. 5 a conditional dealing, and in objects Nos. 8 and 9 a dealing with other companies. These, however, are far from being in the way of contracting to drill wells for others.

I can, however, conceive in the manifold complications which might arise out of or incidental to such dealings, a need of power to contract for the drilling of a well.

In the execution of such a purpose it might be fairly argued that it fell within the principle of what was involved in the cases of *The Atty.-Gen.* v. *The Great Eastern R. Co.*, 11 Ch. D. 449, at p. 480; 5 App. Cas. 473, or *London and North West. R. Co.* v. *Price & Son*, 11 Q.B.D. 485, or *Foster* v. *London, Chatham and Dover R. Co.*, [1895] 1 Q.B. 711, or *Atty.-Gen.* v. *The North Eastern R. Co.*, [1906] 2 Ch. 675, cited above.

But all these and analogous cases are very far from covering what is involved in this case and is broadly put as a right to bore for oil as a contractor.

All such incidental powers have to be interpreted reasonably. This case goes, in my opinion, far beyond what was held, for example, in the case of *London County Council* v. *The Atty.-Gen.*, [1901] 1 Ch. 781; [1902] A.C. 165, or the case of *The Atty.-Gen.* v. *Mersey R. Co.*, [1907] 1 Ch. 81; [1907] A.C. 415, cited above.

Numerous other cases are to be found drawing the distinction as to what is reasonably incidental. None I have been able to find reach as far as needed to support the respondent in this case.

One difficulty in finding authority directly bearing upon this case is the anomalous nature of the power given to create such a corporation as was, evidently, had in view in the amendment brought into the Companies Ordinance which is an Act founded upon and largely copied from the English Companies Act, but which has no provision exactly like this amendment.

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It evidently stands by itself and must be treated as an attempt to enable the creation of corporations with the objects specified in sec. 63(*a*) and not going beyond them.

The Court of Appeal suggests the company is incorporated by virtue of the Act and the limitations of sec. 63 only affect the liability of the shareholders. I submit every company that is incorporated by virtue of such Acts as this is only incorporated for the objects set out in its memorandum of association, and as above authorities shew, cannot do any act as a corporation which goes beyond the scope and purposes of the expressed objects for which it has been incorporated, or that fairly incidental thereto.

If there is any room for misapprehension in this regard, besides what I have already said, and am about to say, I would call attention to the language of sub-sec. (2) of sec. 63, which reads as follows:—

(2) This amendment (1914, ch. 10, sec. 10 (1)) shall apply to all companies heretofore incorporated under sec. 63 of the Companies Ordinance. 1914, ch. 10, sec. 10 (2).

That shews the legislature assumed, so late as 1914, that the incorporation took place under section 63, and to make that clear amended the Act by section 63(*a*).

The case of *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 674, and in appeal reported in the note thereto, pp. 675 *et seq.* (cited by Buckley for the support of his proposition lastly quoted above) furnishes something of value beyond the main point of *ultra vires* in its bearing upon the reliance put in the above extract from the judgment from the Court of Appeal for Alberta upon the certificate of incorporation. In that case the incorporation was by an Act of Parliament for a specific purpose empowering the borrowing upon mortgage of £25,000. It borrowed more; and the power given the Lands Improvement Co. (which lent the money) to advance was relied upon and especially by reason of a clause in one of its Acts making the certificate of the Inclosure Commissioners conclusive evidence of a valid charge under the Act.

It was held the certificate could not enlarge the powers of the defendant company and that the statutory validating certificate was of no avail.

It becomes us, therefore, I submit, not to rely upon the registrar's certificate of respondent's incorporation if it was that which he had no right in law to grant.

Assuming for the moment that he presumed to certify otherwise than specially provided for in sec. 16, generally to the incorporation of a company as if unrestricted in its objects, when the parties were plainly proceeding by the express terms in the memorandum of association for the incorporation of a company limited as to the liability of its members by sec. 63, then he clearly did that which he had no warrant in law for doing.

There is no provision made for the incorporation of a company having this limited liability had in view in sec. 63, with objects beyond those specified in sec. 63*a*, by the Companies Ordinance. And if that is to be taken as accomplished in this case, as the Court of Appeal has apparently taken it, then I have no hesitation in holding that there has been no incorporation of the respondent company and the appellant is entitled to succeed.

In such a case we ought to see that the law is not thus abused and to do so should give effect to the statement of defence in that regard and if not sufficiently explicit, leave to amend accordingly should be given as the Court below should have done if necessary. As the company sues and in suing asserts its due incorporation, and that is sufficiently denied, there should be no need for amendment.

I am not, however, for my part able to presume that any officer could venture upon giving any such unconditional certificate, but, on the contrary, presume that he gave a certificate in conformity with sec. 16 of the Act, which shewed the company to be limited in its character and powers by secs. 63 and 63*a*.

Lest it may be said, though not so argued before us, that the words (in the second and third lines of sec. 63) "the objects whereof are restricted to," etc., may render the foregoing reasoning inapplicable because there were five enumerated objects following the statutory twelve, and hence the objects not restricted, I will briefly examine same and indicate what I think the effect thereof:

They are as follows:—

(13) To obtain any provisional order or Act of Parliament for enabling the company to carry any of its objects into effect, or for effecting any modification of the company's constitution or for any purpose which may seem expedient, and to oppose any proceedings or applications which may seem calculated, directly or indirectly, to prejudice the company's interests.

(14) To procure the company to be registered or recognized in any foreign country or place.

(15) To sell, improve, manage, develop, exchange, lease, mortgage, dis-

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pose of, turn to account, or otherwise deal with all or any part of the property and rights of the company.

(16) To do all or any of the above things as principals, agents, contractors, trustees or otherwise, and by or through trustees, agents or otherwise and either alone or in conjunction with others.

(17) To do all such other things as are incidental or conducive to the attainment of the above objects.

These clearly add nothing to cover the business of a well borer and contractor. They also may be held if reasonably interpreted to add nothing but what might be implied in the foregoing statutory objects, Nos. 1 to 12 inclusive, as incidental thereto.

The first, however, is of the nature of what was held as to the articles of association in the cases cited on pp. 18 and 34 of Hamilton and Parker's Company Law, to be in conflict with the memorandum of association, and hence to be invalid. The same reasoning may render it futile here when the Act is looked at as a whole and its scope and purpose shewn.

If it refers to the Dominion Parliament it certainly seems out of place, and if to the Legislature of Alberta, still more so. The former should not interfere, but the latter can, and the subject matter does not seem to consist of what one would expect to find as the object of a corporation.

No. 14, the second of these, certainly is rather curious in light of the recent discussion so much agitated in the *Companies* case, 15 D.L.R. 332, 48 Can. S.C.R. 331 (affirmed 26 D.L.R. 293), and a curious commentary on, or display of ignorance of, all implied therein. Certainly it is otherwise of little use and possibly itself *ultra vires*.

The No. 15 seems also useless in light of the provisions of the statute.

Again, however, I submit, if effective to take the company out of the operation of sec. 63, the result is the company never was incorporated.

There is no place in this statute where the hybrid sort of thing having the combined objects of pursuit resting upon the other incorporating powers and also those in sec. 63 combined, is provided for.

These criticisms of what the supplementary objects may be worth are in my view of the statute in a sense beside the question.

Looked at comprehensively and endeavouring to give the statute a reasonable meaning in accord with its scope and pur-

pose, there is provided an incorporating power almost as extensive as the legislature had power to confer, and a procedure to accomplish such results as the power aims at.

Then there is within that a power to incorporate, but only for specific objects named in section 63*a* with unusual powers suitable to the pursuit of such objects, but which the legislature deemed it inexpedient to confer on companies for the pursuit of other objects. If those seeking incorporation desired a general incorporation and did not desire such unusual powers, they could pursue the same objects in the ordinary way and subject to the law governing such methods.

It is left for the parties concerned to declare in their memorandum of association when proceeding to procure incorporation which of those distinctly different kinds of incorporation they wish to obtain.

When they elect to obtain that proffered under sec. 63, they are limited to the objects named in sec. 63(*a*), and cannot add others.

If they specified others those others must be treated as null if in conflict with or expanding the objects so prescribed in sec. 63(*a*) of the statute.

If we will only apply reasoning analogous to that which Lord Cairns applied in the case of *Ashbury R. etc., Co.* v. *Riche*, L.R. 7 H.L. 653, at 670 *et seq.* when he demonstrated the ambit of the memorandum of association to be the dominant factor for consideration and the articles of association in conflict therewith null I submit substituting statute for memorandum of association we may see that the inevitable result is any departure from statute or memorandum of association must be treated as null.

It so happens in my view that the memorandum of association is but an expression of that which is required by the statute as I interpret and construe it, and is required by the statute to be so expressed.

That being so these supplementary objects so called are of no effect, should never have been permitted if at all in conflict with those which preceded it copying the statute. And I am inclined to think they should not have been permitted.

The result of my construction would be, if acted upon here, to deprive respondent of its present judgment, but, if I understand

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the facts aright, the appellant has taken possession of the respondent's property by virtue of the terms of an *ultra vires* contract.

That contract is, by reason thereof, void, but that fact does not deprive it of its property even if acquired for use in a purpose *ultra vires*. And certainly it did not warrant appellant taking it and despoiling respondent thereof either temporarily or permanently.

See the cases *Ayres* v. *South Australian Banking Co.*, L.R. 3 P.C. 548, at 559; and *National Telephone Co.* v. *Constables of St. Peter Port*, [1900] A.C. 317, at 321. *Cf. Great Eastern R. Co.* v. *Turner*, 8 Ch. App. 149.

I think, therefore, the appeal should be allowed, but under the circumstances without costs, and the judgment below be vacated and judgment rendered for recovery of respondent's property in same plight and condition as when taken, but if that is impossible then there should be a reference to find and report for further consideration bearing upon the question of the property and the damages, if any, done same.

The following cases may, besides those cited above, usefully be referred to:—

Bisgood v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743; *Atty.-Gen.* v. *Frimley and Farnborough Dis. Water Co.*, [1908] 1 Ch. 727; *Re Crown Bank*, 44 Ch. D. 634; *Pedlar* v. *Road Block Gold Mines of India*, [1905] 2 Ch. 427; *Mayor, etc., of Westminster* v. *London and North West. R. Co.*, [1905] A.C. 426; *Mann* v. *Edinburgh Northern Tramways Co.*, [1893] A.C. 69; *Simpson* v. *Westminster Palace Hotel Co.*, 8 H.L. Cas. 712.

Duff, J.

DUFF, J., (dissenting):—I have come to the conclusion that the general words of sec. 63*a* of the Companies Ordinance in force in Alberta on May 16, 1914 (when the appellant company was incorporated) must be restricted by the application of the principle *noscitur a sociis*. The enactment was borrowed from the statute of British Columbia passed in 1897 in circumstances that are well known and with reference to companies carrying on operations which have no relation to exploring for or developing oil wells. The tenor of the enactment as a whole sufficiently indicates this. And, if I were called upon to construe the British Columbia statute, I should not have the slightest hesitation in holding that the Act does not apply to a company carrying on a business

of the character which the appellant company appears to have been pursuing.

I am not aware, however, that the question of the scope of the enactment had been passed upon by the Courts of British Columbia before its adoption by the Alberta Legislature and the Alberta statute cannot, of course, be construed by reference to the circumstances in which, 15 years before, the parent enactment was passed. It is stated as a fact, and not disputed, that, at the time the enactment was passed, oil had not been found in Alberta in conditions making the development of oil fields commercially profitable, and that circumstance may be given its proper weight. The ground, however, upon which I rest my construction of the statute is this: The words "mining" and "mineral" are words of very elastic meaning and they are words whose scope has frequently been restricted by the application of the principle *noscitur a sociis*. There is no technical difficulty in the way of so restricting this meaning as to exclude mineral oil and boring for oil; as the general scope of the enactment appears to indicate, with sufficient clearness, that they are not within the contemplation of it. Looking at sec. 63*a* as a whole, any lawyer experienced in such matters would immediately recognize that the objects of companies coming within the section are stated in language which is simply that of the common objects' clause in the memorandum of association of a metalliferous mining company. It is not so much from any single phrase or single clause or group of words as from the section as a whole that one draws the inference that such operations as those carried on by the appellant company are outside the contemplation of the section. The restrictive intent, to use the phrase of Holmes, J., "breathes from the pores" of the enactment.

The question of substance is whether the judgment of the Court below can be sustained on the ground stated in the reasons given by the Chief Justice. With great respect, I cannot accept the view to which the Court below has given effect. The memorandum of association, by sec. 10 of the Companies Ordinance of Alberta (ch. 61, Consolidated Ordinances), is a contract between the signers and the company. The dominating clause of the memorandum before us is, very clearly to my mind, clause (*c*) which declares in effect that the objects of the company are restricted to those objects authorised by sec. 63*a*. Every word

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of the objects' clause in the memorandum must, therefore, be read subject to the qualification "providing such objects are authorised by the true construction of section 63(*a*)." The premise is negatived, therefore, upon which the Court below proceeds, namely, that the objects stated in the memorandum go beyond the field within which companies governed by sec. 63*a* are permitted to operate, because whatever might be the meaniug of the objects' clause taken by itself it cannot be given such a construction in view of the explicit declaration that the intent of the memorandum is that it shall not have that effect.

There are two reasons why I think this is the right way of reading the memorandum. In the first place there can be no doubt that what the parties at the time decided to do was to incorporate a company on the "non-personal liability" principle. The signers of the memorandum had their own protection to think of, they had the shareholders, with whom they intended to associate themselves, to think of. The design was to represent the company to the world as a company incorporated on that principle, and I think we must impute to the signers an intention to execute a memorandum having the meaning and effect necessary to bring it within the scope of sec. 63*a*.

Secondly. Any other view would make the statute a trap.

The amendment of 1914 admittedly cannot be invoked in this action.

The appeal should be allowed with costs.

Anglin, J.

ANGLIN, J.:—The appellant asks us to hold that, although it is incorporated under the name—"The Dome Oil Company"—it is nevertheless not within the scope of its powers to seek for and win oil from its property, and that it is likewise *ultra vires* of the respondent, "The Alberta Drilling Company," to undertake a contract to drill for oil on the appellant's lands. Counsel based this contention on the construction which he put on secs. 63 and 63*a* of the ordinance of the North-West Territories respecting companies, made applicable to these litigants. He argued that oil is not a mineral within the meaning of sec. 63 and cl. 1 and 2 of sec. 63*a*, and that drilling for oil is not a process authorised by the latter clauses. In my opinion the construction contended for is too narrow. Rock oil is admittedly a mineral within definitions of that word well established and generally accepted. It

was something well known as a mineral when the legislation under consideration was passed. There is nothing in the record to justify a finding, such as was made in the *Farquharson* case, 22 O.L.R. 319; 25 O.L.R. 93; 5 D.L.R. 297, [1912] A.C. 864, relied on by the appellant, that petroleum was not included in the sense in which the word "mineral" was used in the vernacular of the mining world and the commercial world at the date of the instrument under construction.

No sufficient reason has been advanced for excluding it from the purview of sections 63 and 63*a*. The word "minerals" in a statute bears its widest signification unless the context or the nature of the case requires it to be given a restricted meaning. *Lord Provost and Magistrates of Glasgow* v. *Farie*, 13 App. Cas. 657, at 690, 693; *Hext* v. *Gill*, 7 Ch. App. 699, at 712; *Earl of Jersey* v. *Guardians of the Poor of Neath Poor Law Union*, 22 Q.B.D. 555; *Ontario Natural Gas Co.* v. *Gosfield*, 19 O.R. 591; 18 A.R. (Ont.) 626. Here the use of the word "minerals" in juxtaposition with, but in contrast to, "metallic substances" affords a strong reason for giving to the former its widest meaning. Why should Parliament in enacting legislation dealing with mineral and mining matters be taken to have used the term "minerals" subject to a restriction which it has not expressed?

The word "drilling" is not found in the statute, but an authorised purpose of incorporation under cl. 1 of sec. 63*a* is the winning or getting of mineral from the earth, and under cl. 2 "digging for" and "raising" are means expressly authorised, and sufficiently comprehensive, I think, to include drilling, which is a method of digging for, with a view to raising oil.

It may be that the incorporation of a company subject to the provisions of sec. 63 upon a memorandum expressing wider purposes, but with the intent of confining its operations to the undertaking of drilling contracts upon properties not its own would be such a fraud on the statute as would justify the revocation of the incorporation. But fraud on the statute has not been suggested.

I think it would be very dangerous to hold, as appears to be suggested in the judgment of the Appellate Division, that merely because some of the purposes and powers of a company expressly incorporated subject to secs. 63 and 63*a* happen to exceed what

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those provisions contemplate, its shareholders are to be denied the protection which section 63 affords and that sec. and sec. 63*a* are to be deemed inapplicable to it. I rather think the effect of sec. 63*a* is to restrict the powers of such a company within the limits which it prescribes notwithstanding any wider language used in the memorandum of association.

Mr. Ross next contended that if the respondent company had power itself to seek for and obtain oil, it had not the power to undertake to do so for another person or company. That again, in my opinion, is too narrow a construction and ignores the provisions of cl. 2 of sec. 63(*a*) which extend to minerals, etc., "whether belonging to the company or not," of cl. 3, which authorise the carrying on of the business of mining, "in all or any of its branches," and of cl. 8, which provide for co-operation, etc.

I am unable to assent to the argument that the existence of a debt by the respondent company for a portion of the purchase price of machinery placed by them on the appellant's lands—a purely personal obligation—constituted a breach of their covenant to place their machinery, etc., on the appellant's premises "free of debt and of all and every lien and incumbrance." There was no lien or incumbrance charged upon the respondent's machinery; it was free of debt; a mere personal debt not creating a charge was, in my opinion, not within the scope of the covenent.

I have found no reason to differ from the conclusion of the provincial Courts that there had been no other default on the part of the respondent which would entitle the appellant company to seize under cl. 10 of the contract.

The plaintiff's recovery of $5,000 was, I think, warranted, under cl. 3 of the contract. The fact that the appellant had committed a wrongful breach of contract cannot, in the absence of an acceptance by the respondent of the breach as a termination of the contract, afford an answer to the appellant's absolute and unqualified undertaking that upon the respondents doing certain things (which they did) it would pay to them a fixed sum of money. The $250 allowed as damages for the wrongful seizure is not complained of.

I would, for these reasons, dismiss this appeal with costs.

Brodeur, J.

BRODEUR, J.:—The illegality of the seizure of the plant depended on questions of fact which have been found against the appellant company by the Courts below. That finding was

absolutely justified by the evidence and we must then decide that the seizure was illegal.

The appellants have to pay to the respondents damages for having stopped the work and for having, through the illegal seizure, prevented the respondents from carrying out their contract. The amount granted by the trial Judge is perhaps calculated on a wrong basis, but the evidence justifies the amount which has been awarded.

The appellant now contends that the contract in question was *ultra vires* the appellant and the respondent companies. Those two companies were incorporated under the provisions of ch. 20 of the Ordinances of the N.-W. T. of 1901 and of the amendments made thereto by the Legislature of Alberta.

It is not disputed that appellant and respondent companies could be legally formed under the provisions of that law for carrying out the oil operations for which they were respectively organised. But as their liability is limited by the mining sections of the Act, the appellants claim that the statute never contemplated including oil as a mineral substance. They rely mostly upon the judgment rendered by the Privy Council in the case of *Barnard-Argue-Roth-Stearns Oil and Gas Co.* v. *Farquharson*, 5 D.L.R. 297, [1912] A.C. 864.

In that case, the Privy Council, in construing a deed of 1867 which reserved to the grantor mines and minerals, decided that natural gas was not included in that reservation, because

at the date of the deed, natural gas had no commercial value and the parties thereto had no intention to except it as being a mine or mineral.

The sec. 63*a* we have to construe in this case was passed by the Legislature of Alberta at a time when the oil wells of that province were being exploited on a very large scale and it is to be presumed that the legislation was passed with a view of facilitating the development of that mining industry. In applying the principles laid down by the Privy Council in the above case, we must come to the conclusion that the legislature intended to include in the mining companies those dealing with rock oil.

Rock oil in its popular and scientific meaning is a mineral substance. Mineral bodies occur in three physical conditions, solid, liquid and gas; and although the term "mineral" is more frequently applied to substances containing metals, rock oil and petroleum are embraced in that term.

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United States v. *Buffalo Natural Fuel Co.*, 78 Fed. R. 110; *Ontario Natural Gas Co.* v. *Gosfield*, 18 A.R. (Ont.) 626, at pages 626-631.

I have come to the conclusion that the companies could properly enter into the contract sued on and that the obligations assumed by them can be enforced.

The appeal is dismissed with costs.

Appeal dismissed with costs.

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COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R. CO.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 24, 1916.

1. MUNICIPAL CORPORATIONS (§ I B—11)—ANNEXING COUNTY TO CITY—TOLL ROADS—REMEDIES.

The Ontario Railway and Municipal Board has jurisdiction to make an order annexing a portion of a county to a city, where the statutory notice (8 Edw. VII., ch. 48, sec. 1) to the adjacent township has been duly given, and it is not *ultra vires* to provide that "all former toll roads purchased by the said county in the annexed territory shall vest in the city;" the remedy of the county in such case is in compensation for the portion of the highway annexed, or possibly to relief under the provisions respecting arbitration contained in the Municipal Act (Ont.), but it cannot maintain an action for tolls on the portion of the highway annexed, unless the annexation itself is overturned.

[*County of Wentworth* v. *Hamilton*, 31 O.L.R. 659, reversed.]

Statement.

APPEAL by the defendant the Corporation of the City of Hamilton from the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 659. Reversed.

The question raised by this case is, whether the County of Wentworth is entitled to collect the mileage payments under its agreement with the Hamilton Radial Electric Railway Company. The defence raised by the City of Hamilton is, that, by reason of the annexation of territory including part of the road upon which the railway runs, the city became entitled to the payment for that portion, and not the county.

H. E. Rose, K.C., and *F. R. Waddell*, K.C., for appellant corporation.

G. Lynch-Staunton, K.C., and *J. L. Counsell*, for plaintiff corporation, respondent.

Garrow, J.A.

GARROW, J.A.:—As will be seen, the judgment rests upon the proposition that the Ontario Railway and Municipal Board had no authority to make an order transferring that portion of the county road in question which passes through the annexed territory from the county to the city. The order is intituled "In the matter of the

application for the annexation to the City of Hamilton of certain lands in the Township of Barton more particularly described in the resolution passed by the Municipal Council of the Corporation of the City of Hamilton on the 30th day of August, 1909." And it professes to have been made "upon the application of the said applicants made on the 27th day of September, 1909, and upon reading the petition of the said applicants and the resolution of the Council of the Corporation of the City of Hamilton passed on the 30th day of August, 1909, and upon hearing what was alleged by counsel on behalf of the said applicants and other ratepayers of the said township, the Corporation of the City of Hamilton, and the Corporation of the Township of Barton."

The order contains sixteen clauses and fills over five pages of closely printed matter, dealing with and determining a variety of subjects arising upon the separation. The portion objected to as *ultra vires* is contained in the last two lines of clause 5, the whole clause being as follows: "5. The City of Hamilton shall pay to the Township of Barton, on the 14th day of December, 1910, and thereafter annually during the currency of the good roads debentures issued by the County of Wentworth, the amount which would have been levied upon the said property to be annexed, in respect of such debentures, if the said lands had remained part of the Township of Barton, and were assessed each year at the amount said lands were assessed for the year 1909, and a rate were struck each year at the same rate as fixed by the Township Council of Barton for the year 1909, *and all former toll roads purchased by the said county in the annexed territory shall vest in the City of Hamilton.*"

The time fixed by the order as that at which it should come into effect was the 1st day of November, 1909, and it apparently has been acted upon ever since by the two municipalities of the City of Hamilton and the Township of Barton. So far as the mere words themselves in clause 5 are concerned, I agree with the contention of Mr. Rose, counsel for the city, that they are mere surplusage and add nothing to the general provision annexing the territory to the city, which *ipso facto* transferred the jurisdiction over the highway from the county to the city. That, however, does not go quite to the bottom of the objection made by the county, which is, that the county was entitled to notice

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and to an adjudication by the Board upon any claim it had in respect of the road. The only notice required to be given by the statute in force when the order was made was notice to the adjacent township: see 8 Edw. VII. ch. 48, sec. 1; and that notice was duly given. That has since been changed, and now, by R.S.O. 1914, ch. 192, sec. 21, notice to the county must also be given. The proceedings are purely statutory. Whatever may be the nature of the claims of the county or the consequences to it flowing from the order, it seems to me that, the statutory notice having been duly given, there is an end to any question going to the jurisdiction of the Board to make the order. It is not like the case of private rights or private litigation. The Board stands in many respects in such a matter in the place of the Legislature, and the consequences of the order are to be considered very much as if a statute had been passed making the annexation which the order authorised.

And, if the Board had jurisdiction to make the order, omitting the objectionable words, or rather the words objected to, I cannot see how the judgment can be supported. Jurisdiction over a highway locally situated in another municipality cannot be and is not claimed. All that can be or perhaps is claimed is, that the county was entitled to some compensation in respect of the portion of the highway in the annexed territory, especially in respect of the money payable under the agreement with the railway company, upon which the action is based. That agreement, however, is entirely based upon a mileage rate. The effect of the annexation is to shorten the mileage in the county upon which the railway company agrees to pay; and, unless the annexation itself, which transfers the road from the county to the city, is to be overturned, the plaintiff cannot, in my opinion, recover.

It is not, in my opinion, necessary to discuss at any length and especially not to pronounce any final opinion upon what claim, if any, the county really has. It loses the mileage rate, but it is also relieved from all charges for maintenance and repair. If the claim is based upon money expended to get rid of the tolls and acquire control of the road as a county road, that seems to be all in the past and to have been adjusted, and its share apportioned to the Township of Barton, and the proportion of the part of the township annexed carefully preserved and secured by the

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provisions of clause 5, before set out. But, whatever the nature of the claim may be, it must, I think, be asserted elsewhere, and cannot assist the plaintiff in maintaining this action. Relief may perhaps be found, as counsel for the appellant suggests, in the provisions respecting arbitration contained in the Municipal Act, which seems to have been carefully drawn to prevent injustice being done in the case of claims of this nature arising on the alteration of boundaries between municipalities. See sec. 58 of the Consolidated Municipal Act, 1903.

For these reasons, I would allow the appeal with costs, and dismiss the action with costs.

The money in Court should be paid out to the defendant the City of Hamilton.

MACLAREN, J.A.:—I agree.

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MAGEE, J.A.:—I agree.

Magee, J.A.

Appeal allowed; HODGINS, J.A., *dissenting*.

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Nova Scotia Supreme Court, Graham, C.J., Longley and Drysdale, JJ., Ritchie, E.J., and Harris, J. January 11, 1916.

1. PERJURY (§ II B—50)—STATING KNOWLEDGE OF FALSITY—WILFULNESS OF ACT.

When an indictment or a charge under the Speedy Trials clauses alleges perjury in that the accused had previously voted on an election day and with intent to vote again on that day had sworn that he had not already voted, there is implied in such allegation that he is charged with making the false oath "wilfully and corruptly" or "knowingly," and the form of the charge will be sufficient under such circumstances as the charge contains in substance a "statement that the accused has committed some indictable offence therein specified" (Cr. Code sec. 852), although it does not in terms state the offence as done "wilfully and corruptly" (Cr. Code sec. 172) or "with knowledge of the falsity of the assertion" (Cr. Code sec. 170).

[*R.* v. *Cohon* or *Cohn*, 6 Can. Cr. Cas. 386, 36 N.S.R. 240, and *R.* v. *Yee Mock*, 13 D.L.R. 220, 21 Can. Cr. Cas. 400, referred to.]

2. PERJURY (§ II D—77)—AUTHORITY TO ADMINISTER OATH—DE FACTO ELECTION OFFICER.

A charge of perjury in taking a false oath, at a municipal election held under the Towns Incorporation Act, R.S.N.S. ch. 71, that the deponent had not previously voted at the election, will not be quashed because it does not specifically set out the appointment by the municipality of the election officer which it names as the "presiding officer" for the polling sub-division before whom the alleged false oath was taken; Cr. Code sec. 862 makes it unnecessary to state the nature of the authority of the tribunal before which the oath was taken and the charge sufficiently indicated that the person described as "presiding officer" was acting as such under an appointment made in pursuance of the Towns Incorporation Act.

[See Annotation on "Authority to administer extra-judicial oaths" at end of this case.]

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Statement.

CROWN case reserved. The prisoner was tried before Duncan Finlayson, Esquire, Judge of the County Court for District No. 7, under the provisions of the Speedy Trials Act (Part XVIII. of the Criminal Code), for the crime of perjury, and was convicted and sentenced to two years' imprisonment in the penitentiary.

On the trial the objection was made on behalf of the prisoner that the accusation as read to the accused, which was the same as that upon which he consented to be tried, was bad in law and disclosed no offence. The objection was overruled by the learned Judge, but the question was reserved for the opinion of the Court as to whether the accusation disclosed and covered the offence of perjury.

The charge is set out in full in the opinion of GRAHAM, C.J.

R. H. Murray, for the prisoner.

S. Jenks, K.C., Deputy Attorney-General, for the Crown.

Graham, C.J.

GRAHAM, C.J.:—The defendant has been convicted of perjury in the County Court Judge's Criminal Court for District No. 7 under the provisions of the Code for speedy trial, and there is a reserved case on the question of the sufficiency of the charge.

It is as follows:—

"That he, the said Angus B. Morrison, on the 2nd day of March, A.D. 1915, at Glace Bay in the county of Cape Breton, did unlawfully commit perjury with intent to vote at the election of mayor for the town of Glace Bay aforesaid, by swearing at the election held for the town of Glace Bay aforesaid, on the 2nd day of March, A.D. 1915, at Section 'B,' Ward Four, before Adeline Chaisson, presiding officer, that he had not voted that day in any ward or polling division of the town of Glace Bay aforesaid, whereas in truth and in fact, he, the said Angus B. Morrison, had previously voted on the 2nd day of March, A.D. 1915, at Glace Bay aforesaid, in Ward Three, Section 'B_1' at the election of mayor for the said town of Glace Bay, at which section Harry McVicar was presiding officer."

Section 172 (*a*) of the Criminal Code on which it is founded is as follows: "Every one is guilty of perjury who, (*a*) having taken or made any oath, affirmation, solemn declaration or affidavit whereby any Act or law in force in Canada or any province of Canada, it is required or permitted that facts, matters or things be verified or otherwise assured or ascertained by or upon the oath, affirmation or declaration or affidavit of any person, wilfully

and corruptly upon such oath . . . . deposes, swears to or makes any false statement as to any such fact, matter or thing."

I say that, but I think sec. 175 covers the same thing, namely, false swearing in an extra-judicial oath. The sections possibly overlap. Section 172 is taken from older statutes of Canada, R.S.C. 1886, ch. 154, and, in these words, are not in the English Draft Code—hence such words as "wilfully" and "corruptly"—while sec. 175 of the Code is taken from the English Draft Code, sec. 122.

These two sections in the Canada Criminal Code probably mean the same thing. One has the words "wilfully and corruptly," the other by reference to sec. 170 has the words "such assertion being known to the witness to be false."

The oath in this case was authorized by the provincial statute, known as the Towns Incorporation Act, R.S.N.S. ch. 71, sec. 73, that part of it dealing with elections to the council:

"Every voter shall before voting, if so required, take the oath in the form D in the first schedule, which shall be administered by the presiding officer." Form D is in part as follows: "I, A.B., do solemnly swear that I have not voted this day in any other ward or polling division of this town at the present election."

The alleged defects are, first, that there is no allegation that the swearing was wilfully or that it was corruptly done; 2nd, there should have been an allegation that the presiding officer had competent authority to administer the oath.

The words "wilfully" and "corruptly" are both in sec. 172 of the Criminal Code, and the English cases shew that those words or their equivalent are essential to an indictment for perjury. But there are provisions and forms in the Criminal Code of Canada which make a difference. By sec. 852 it is provided as follows:—

"852. Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some indictable offence therein specified.

"(2) Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

"(3) Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an

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indictable offence or in any words sufficient to give the accused notice of the offence with which he is charged.

"(4) Form 64 affords examples of the manner of stating offences."

Turning to those examples we have two in respect to perjury, both, however, in respect to false swearing at trials. It has been held that these examples are not to be restricted to the offence stated in them, but that under sec. 1152 of the Code these forms may be varied to suit the case, and that forms to the like effect shall be sufficient: *The Queen* v. *Skelton*, 4 Can. Crim. Cas. 467, at 475, 3 Terr. L.R. 58.

Now, in those two forms of stating the offence of perjury, the words "wilfully" and "corruptly" are absent, and they begin as in this charge respectively as follows: "A. committed perjury with intent, etc." (on a trial), and also ,"The said A. committed perjury on the trial of B.," and in this case there is no allegation of intent at all. Also there is no statement such as "knowing the same to be false" or "knowingly."

I think that while this charge does not follow the words of the enactment creating the offence, it is made sufficient by sec. 852 of the Code. The form shews what is meant in sec. 852 (1) by the words, "containing in substance a statement that the accused has committed some indictable offence therein specified." Therefore we have in the form: "A. committed perjury, etc." If he committed perjury then the oath is not only false but knowingly false. This charge is in popular language, and it is sufficient to give the accused notice of the offence. But here we have help from the word unlawfully also and the intent is stated.

I think when it is alleged that a person who had previously voted on that election day for mayor, etc., and with intent to vote again on that day for mayor, etc., swore that he had not voted on that day there is implied in that allegation that he did so wilfully and corruptly or knowingly, when one may use popular language, and when one may omit anything not essential to be proved in the first instance. I mean if the allegations in this charge were proved there was nothing left essential to be proved.

Volume 4 of Words and Phrases Judicially Defined, 3687, has this: "Intent means that which is intended; purpose, aim, design, intention, and essentially implies premeditation." The author cites *Perry* v. *State*, 104 Wisconsin 230.

Webster defines intent to mean a design, a purpose; intention meaning drift, aim. Burril defines it to be the presence of will in the act which consummates a crime. It is the existence of intelligent will, the mind being fully aware of the nature and consequence of the act which is about to be done and with such knowledge and with full liberty of action willing and electing to do it. And he cites *Smith* v. *State*, 70 Tenn. 619. I have not access to these reports.

The statement of intent or design here implied deliberation, and there is involved in the charge a swearing to effect a wrongful design, viz., to acquire a benefit, i.e., voting twice, which might be aptly indicated, no doubt, by the word corruptly. I am of opinion that there is stated in popular language all the ingredients of perjury under this section and that it is sufficient notice.

Counsel for the defendant relied upon the dictum or something not necessary to the decision in *R.* v. *Cohon* or *Cohn*, 6 Can. Cr. Cas. 386, 36 N.S.R. 240. The alleged perjury in that case was a statement in an affidavit in an action, i.e., a judicial proceeding in Court. I have examined the appeal book 1903. Every one of the charges, including clause 2, is laid "falsely, wilfully and corruptly depose and swear," and "thereby did commit wilful and corrupt perjury" (see 36 N.S.R. at p. 241).

The section for perjury in an affidavit in an action in Court that is a judicial proceeding was sec. 145 of the Code, now 170. The first learned Judge, apparently in mistake, thought that the section applicable was 148, sub-sec. (*b*), now 174 (*b*). That sub-section does use the word "knowingly" as well as "wilfully" and "corruptly," although sub-sec. (*a*) does not; but neither one nor the other applied to an affidavit in an action, but only to cases of an affidavit authorized or required by statute—that is an extra-judicial proceeding. That learned Judge says:—

"There is no allegation in the charge that the prisoner, knowing that the defendant firm had received the money, so corruptly swore, etc., and surely one of the elements of the crime of perjury is that the accused knowing the fact swore to the contrary, swore to what he knew to be false. What constitutes perjury is defined in sec. 148 (now 172) of the Code, sub-sec. (*b*), *knowingly, wilfully and corruptly*, etc., subscribes any, etc., affidavit, etc." But the section (now 170) which did apply has not those words, but the

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words, "such assertion being known to such witness to be false"—I think, therefore, no crime or offence was charged in No. 2, and that the second conviction must be set aside" (36 N.S.R. 247).

The only other learned Judge who referred to this point at all says: "The charge numbered 2 in the stated case, assuming it to be sufficiently stated, was proved to be untrue. The money was received from Michael Miller and not from the plaintiff in the action. The charge was, however, not stated so as to constitute an accusation of perjury upon the affidavit in that it did not aver that the statement in the affidavit that he had not received the money from the plaintiff was *wilfully and corruptly false*": 36 N.S.R. 252.

That must be a mistake. I quoted from the report the words used, "did falsely, wilfully and corruptly depose and swear." One learned Judge's point is that the charge had not the word "knowingly," which really belonged to an inapplicable section, and the other learned Judge's point is that it did not have the words "wilfully and corruptly" when it had. There is no agreement between them, and the general concurrence of McDonald, C.J., does not indicate which he adopted. I was the only other Judge who heard the case, and I gave judgment upon the other ground without referring to this point at all. I would have thought that the words "wilfully and corruptly" would involve an allegation of "knowingly;" *Potter* v. *United States*, 155 U.S. 438; *Spurr* v. *United States*, 174 U.S. 728, at 836; and would be sufficient under the Criminal Code at any rate.

At p. 111 of Tremeear on Criminal Law (2nd ed.), the author says this: "But the decision of the *Cohon* case is in conflict with the Quebec decisions under the statute preceding the Code." He refers to *The Queen* v. *Bain* and *The Queen* v. *Bownes*, Ramsay's cases (Que.) 192. He speaks of it as the decision, but it is only an unnecessary portion of some opinions that got into the reporter's note, and is not concurred in by a majority of Judges, and is at variance with decisions of other Courts. I refer to *R.* v. *Yee Mock*, 13 D.L.R. 220 (Alberta); 21 Can. Cr. Cas. 400, *R.* v. *Legros*, 14 Can. Cr. Cas. 161, 17 Ont. L.R. 425 (Court of Appeal, Ontario); *R.* v. *Yaldon*, 13 Can. Cr. Cas. 489, 17 Ont. L.R. 179; *R.* v. *Lee Chu*, 14 Can. Cr. Cas. 322 (Drysdale and Russell, JJ.), and *R.* v. *Doyle*, 12 Can. Cr. Cas. 69; all at variance with it either directly or in principle.

Coming to the question of the authority to administer the oath, sec. 862 of the Code provides as follows:—

"No count charging perjury, the making of a false oath or of a false statement . . . . shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made."

Graham, C.J.

The provincial Act, sec. 73, which I have quoted, provides that the "oath shall be administered by the presiding officer."

The trial Court when it is trying a person for perjury committed in respect to it, finds there the authority of the presiding officer. The only thing that could be said is that it does not state the appointment. The same statute provides for his appointment by the town council, and the fact that he is acting as such presiding officer is sufficient proof of his appointment. I think the statement in the charge indicates that he was acting as such and is sufficient. I refer to *Regina* v. *Chamberlain*, 10 Man. L.R. 261, where the indictment is in the same form, and one may be satisfied that the point would have been taken if it was any good.

In my opinion the conviction should be affirmed.

Longley, J.
Ritchie, E.J.

LONGLEY, J., and RITCHIE, E.J., concurred.

Drysdale, J.

DRYSDALE, J.:—I would answer the question reserved in the affirmative and affirm the conviction. The crime of perjury is sufficiently stated to give the accused notice of the offence, follows form 64 mentioned in sec. 852 of the Code, and is, I think, a valid accusation under the provisions of said section.

Harris, J.

HARRIS, J.:—I agree that the question reserved should be answered in the affirmative. The accusation or charge is that the accused "did unlawfully commit perjury with intent, etc." The offence was one coming within the provisions of sec. 172 of the Criminal Code, and it is objected that the charge is insufficiently stated because the words "wilfully and corruptly" were not used.

Section 852 of the Code provides that:—

"*Every count* of an indictment shall contain and *shall be sufficient if it contains* in substance a statement that the accused has committed *some indictable offence therein specified.*

"(2) Such statement may be made in popular language without any technical averments or any allegations of matters not essential to be proved.

"(3) Such statement may be in the words of the enactment

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describing the offence or declaring the matter charged to be an indictable offence *or in any words sufficient to give the accused notice of the offence with which he is charged.*

"(4) Form 64 affords examples of the manner of stating offences."

Section 1152 says that the forms given in the Act or forms to the like effect shall be deemed good, valid and sufficient in the cases thereby respectively provided for.

Form 64 gives as examples of the manner of stating offences, among others, one relating to murder, one relating to theft, and two relating to perjury. A consideration of these sections and the forms makes it apparent that one object of Parliament was to do away with the necessity of stating in an indictment any of the common law or statutory ingredients of those crimes which are defined by the Code of which murder, stealing and perjury are examples.

In the case of murder, before the Code it was necessary to state that the act causing death was done "feloniously and of malice aforethought," and also that the accused "murdered" the deceased. Under the Code it is sufficient to say that "A. murdered B."

In larceny it was necessary before the Code to allege that the prisoner "feloniously did steal, take and carry away," now it is sufficient to say "A. stole." So in perjury it is not necessary to say that the prisoner "falsely, corruptly, knowingly, wilfully and maliciously swore, etc." It is now sufficient to say that he "committed perjury."

When it is alleged that the accused "committed perjury" that statement is to be understood as if the words "falsely, corruptly, knowingly, wilfully and maliciously" had been inserted.

In *Regina* v. *Skelton*, 4 Can. Cr. Cas. 467, 3 Terr. L.R. 58, the Supreme Court of the North West Territories held that the forms given in the Code were intended to illustrate the provisions of sec. 611 (now 852) of the Code, and that their effect was not confined to the offences stated in them.

As sec. 852 puts it, they are examples of the manner of stating offences.

In *George* v. *The King*, 8 Can. Cr. Cas. 401, 35 Can. S.C.R. 376, the charge was laid for "unlawfully stealing goods." There was

no allegation that the offence was committed "fraudulently and without colour of right," which are the words used in sec. 347 of the Code in defining the crime of theft or stealing. The words, "without colour of right," in the definition of theft, are apparently used in the same sense as the word "feloniously" in the common law definition of larceny. The Supreme Court of Canada held that the offence was sufficiently stated. See also *Rex* v. *Yee Mock*, 13 D.L.R. 220, 21 Can. Cr. Cas. 400; *Rex* v. *Yaldon*, 13 Can. Cr. Cas. 489, 17 O.L.R. 179.

I think we may safely conclude that this case would not have been reserved but for the opinion expressed by some of the learned Judges of this Court in the case of *Rex* v. *Cohon* or *Cohn*, 6 Can. Cr. Cas. 386, 36 N.S.R. 240. That opinion has been criticised by more than one author.

In the Canadian notes to 1 Russell Law of Crimes, 7th ed., p. 536*d*, I find it thus referred to: "In *R.* v. *Cohn* the Supreme Court of Nova Scotia held that a charge of perjury is defective as not disclosing a crime if it does not allege that the statement was sworn to knowing the same to be false or if such is not the necessary inference from what is alleged apart from the declaration in the charge that the accused thereby committed wilful and corrupt perjury. But the decision of the *Cohn* case is in conflict with the Quebec decisions under the statute preceding the Code. It has been held in the latter province that an indictment following the statutory form is sufficient if it charges that the accused "committed perjury" by swearing that (specifying the false oath) without including a specific statement that it was so done knowing the same to be false, *R.* v. *Bain* (1877), Ramsay's cases (Que.) 192, *R.* v. *Bownes*, Ramsay's cases (Que.) 192.

In a note to the report of the case of *The King* v. *Cohn*, in 6 Can. Cr. Cas., at p. 398, after referring to the Quebec cases, it is said: "These cases seem to be in direct conflict with the decision reported above as to headnote No. 3 thereof." Headnote No. 3 referred to sets out that portion of the decision under consideration. See also Tremeear (Criminal Code, 2nd ed.), p. 111.

With all deference, I think the *Cohn* case, in so far as it dealt with this point, was wrongly decided and must be held to have been overruled by the Supreme Court of Canada in *The King* v. *George*, 8 Can. Cr. Cas. 401, 35 Can. S.C.R. 376.

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The accusation or charge in my opinion contains all the necessary allegations and gives the accused notice of the offence with which he is charged, and is sufficient. I would answer the question reserved in the affirmative. *Conviction affirmed.*

Annotation—Perjury (§ II D—77)—Authority to administer extra-judicial oaths.

Perjury is now very largely a statutory rather than a common law offence in Canada. This is because of the large extensions made to the definition of the crime by the Criminal Code, so to include, *inter alia*, false statements made under oath wilfully and corruptly in extra-judicial proceedings.

It has always been an offence at common law for a witness upon oath in a judicial proceeding, before a Court of competent jurisdiction, to give evidence material to the issue, which he believes to be false. The common law, however, stopped there and took no notice of false statements, whether made upon oath or not, made under other conditions.

Under the Code, the giving of false evidence in a judicial proceeding constitutes perjury, whether such evidence is material or not, if the false assertion were known to such witness to be false, and intended by the witness to mislead the Court, jury or person holding the proceeding: Cr. Code sec. 170.

The inclusion of the words "whether material or not" makes inapplicable many of the English decisions; see *R* v. *Hewitt*, 9 Cr. App. R. 192.

The words, "judicial proceeding," in the sec. 171, were interpreted by the Supreme Court of Canada in *Drew* v. *The King*, 33 Can. S.C.R. 228, 6 Can. Cr. Cas. 424, in which a justice of the peace appointed for a group of counties sat in a case which, according to the provincial Act creating the offence, could be tried only by a justice residing in the county in which the offence was committed, whereas the justice who tried the case and administered the oath actually resided in another county of the group. It was admitted that he had no jurisdiction, and was not a tribunal *de jure*; but, because he was a tribunal *de facto*, and was exercising judicial functions, the Court held that it was a "judicial proceeding," and that the accused was rightly convicted of perjury.

Where a person acted *de facto* as a registrar under the Manhood Suffrage Act, 7 Edw. VII. (Ont.) ch. 5, without objection and under colour of right as having been appointed by the only statutory member of the Board of Registrars then officially acting, the administration of the qualification oath by the registrar so appointed to an applicant applying to be registered as a voter takes place in "judicial proceedings" within the meaning of sec. 171 of the Criminal Code, so as to found a charge of perjury in respect of wilfully false and misleading statements sworn to by the appli-

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cant, whether or not such *de facto* registrar had been regularly appointed: *R.* v. *Mitchell; R.* v. *West*, 10 D.L.R. 717, 21 Can. Cr. Cas. 193, 27 O. L. R. 615. [*Drew* v. *The King*, 6 Can. Cr. Cas. 424, 33 Can. S.C.R. 228, followed.]

Section 172 of the Criminal Code, 1906, taken from sec. 148 of the Criminal Code, 1892, enacts that:—

"Every one is guilty of perjury who,—

"(*a*) Having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or,

"(*b*) Knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part."

Section 175 (former sec. 147) of the Code enacts as follows:—

"Every one is guilty of an indictable offence and liable to seven years' imprisonment, who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding."

A false statement, made in a statutory declaration administered under the Canada Evidence Act, may be the subject of a charge akin to perjury under Code sec. 175, for the object of sec. 36 of the Evidence Act was to provide a means by which certain statements not authorized to be made on oath could be verified.

On a charge under sec. 175 of making a false statutory declaration, it was held not to be necessary to allege in the indictment that the false statement was made with intent to mislead: *R.* v. *Skelton* (1898), 4 Can. Cr. Cas. 467, 3 Terr. L.R. 58; but that decision has been questioned in the later case of *R.* v. *Sinclair*, 12 Can. Cr. Cas. 20, at 27; and see *R.* v. *Yaldon*, 13 Can. Cr. Cas. 489, 17 O.L.R. 179; *R.* v. *Legros*, 14 Can. Cr. Cas. 164, and *R.* v. *Farrell*, 15 Can. Cr. Cas. 288.

Code sec. 1002, which requires corroboration in certain cases, and which specially includes the offence of perjury under Code sec. 174, does not apply to the analogous offence under sec. 175 of

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making a false statutory declaration: *R.* v. *Phillips*, 14 Can. Cr. Cas. 239, 14 B.C.R. 194.

Section 176 makes further provision as to false statements and declarations in extra-judicial proceedings, and is held to apply to declarations other than those covered by sec. 175: *R.* v. *Skelton* (1898), 4 Can. Cr. Cas. 467, 3 Terr. L.R. 58.

In *R.* v. *Castiglione* (1912), 7 Cr. App. R. 233, it was held that corruptly swearing a false affidavit of service of writ in an action brought by the plaintiff in a fictitious name against a fictitious defendant constituted perjury within the Commissioners for Oaths Act, 1889 (Imp.), whether or no it was in a "judicial proceeding." The scheme disclosed there was the shipment of pictures to the address of the fictitious defendants in the civil actions and obtaining their seizure and sale under executions as being "part of the stock in trade of a picture-dealer." Avory, J., for the Court, said it was not necessary to decide that point, but that the facts "may be sufficient to shew that the proceedings were judicial so as to found proceedings for perjury;" and he referred to *R.* v. *Proud*, L.R. 1 C.C.R. 71, 36 L.J.M.C. 62.

In *R.* v. *Chamberlain*, 10 Man. L.R. 261, referred to in *R.* v. *Morrison*, *supra*, the prisoner was convicted on an indictment for perjury, in having sworn before the deputy returning officer at an election for member of the House of Commons for the City of Winnipeg, that he was the person whom he represented himself to be, named on the list of electors for the polling subdivision. He was not an elector, or entitled to vote in the constituency. At the trial, prisoner's counsel contended that there was no authority for the deputy returning officer, under sec. 45 of the Dominion Elections Act, R.S.C. ch. 8, to administer an oath to any person but an elector, and the Judge reserved a case for the opinion of the Court as to whether the prisoner had been properly convicted:—*Held*, that the statute must receive a reasonable construction, that authority was intended to be conferred upon the officer to administer the oath to any person presenting himself and claiming to be an elector entitled to vote, and that under sec. 148 of the Criminal Code, 1892, prisoner had been properly convicted of perjury. Tribunals of limited jurisdiction have implied authority to receive proof of the facts on which their right to exercise their jurisdiction depends: *Regina* v. *Chamberlain*, 10 Man. L.R. 261; following *Reg.* v. *Proud*, L.R. 1 C.C. 71, 10 Cox 455.

If a commissioner for taking affidavits in a specified Court takes an affidavit in a matter which is not within his commission or authority, it would seem that perjury cannot be assigned upon it: *R.* v. *McIntosh*, 1 Hanney (N.B.) 372.

Annotation (*continued*)—**Perjury** (§ II D—77)—**Authority to administer extra-judicial oaths.** N. S.

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But it is perjury under the Code to give false testimony before a justice of the peace holding a judicial proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offence took place: *Drew* v. *The King*, 6 Can. Cr. Cas. 424, 33 Can. S.C.R. 228, affirming *Drew* v. *The King*, 6 Can. Cr. Cas. 241.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. July 22, 1915. B. C.

C. A.

1. TRIAL (§ III E 5—261)—HOMICIDE—DIRECTION ON QUESTION OF MANSLAUGHTER ON INDICTMENT FOR MURDER.

On a trial for murder, if the circumstances are such that a jury might reasonably infer a case of manslaughter and not murder in the event of their negativing the defence raised, then a direction must be given to the jury as to manslaughter and its omission is a substantial wrong, under Cr. Code, sec. 1019, constituting ground for a new trial.

[*Eberts* v. *The King*, 7 D.L.R. 550, 20 Can. Cr. Cas. 273, 47 Can.S.C.R. 1, and *R.* v. *Wong On*, 8 Can. Cr. Cas. 423, 10 B.C.R. 555 considered; *R.* v. *Hopper*, [1915] 2 K.B. 431, 11 Cr. App. R. 136, referred to.]

CROWN case reserved by MURPHY, J., on a trial for murder, and a motion for a new trial pursuant to leave, granted by the trial Judge under Cr. Code, sec. 1021, on the ground that the verdict was against the weight of evidence. Statement.

G. E. McCrossan, for the accused, appellant.

A. H. MacNeill, K. C., for the Crown.

MACDONALD, C. J. A.:—I would answer the first question in the negative. The second question has been withdrawn, and, therefore, it is unnecessary to answer it. Macdonald, C.J.A.

With respect to the other case—the appeal on the leave given by the learned Judge for a new trial on the weight of evidence—it now becomes unnecessary to deal with that. I may say that the conclusion I came to was that we could not set aside the verdict on the ground that it was against the weight of evidence.

IRVING, J. A.:—I would answer the first question in the negative. In my opinion, there was put in evidence, facts and circumstances from which the jury might reasonably infer that this was a case of manslaughter and not murder; and therefore a direction as to manslaughter should have been given. This case is covered, I think, by what is said in *Eberts* v. *The King*, 7 D. L. R. 550, 20 Can. Cr. Cas. 273, 47 Can S. C. R. 1, in the Supreme Court of Canada, where it is practically laid down that Irving, J. A.

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when the evidence shows the jury may reasonably infer a case of manslaughter, then that there must be a direction on that point. But, as pointed out by Mr. Justice Idington, where there is no such evidence, then it would only add to the perplexity of the jury if the Judge brought in any reference to manslaughter. In my opinion, a Judge ought to be slow to arrive at the conclusion that there are no circumstances that would justify a verdict of manslaughter. I do not agree with the decision in the *Wong On* case, [*R.* v. *Wong On*, 8 Can. Cr. Cas. 423, 10 B. C. R. 555]. There the evidence was not such that an inference of manslaughter could possibly be drawn. On the second point I express no opinion.

Galliher, J.A.

GALLIHER, J.A.:—I agree. It struck me when the case first came before us, and I certainly am of that opinion now, that where there is an element of reasonable evidence upon which the jury might have come to a conclusion, then a wrong is done to the prisoner if that is taken away from the jury.

McPhillips, J.A.

MCPHILLIPS, J. A.:—The motion is to the Court of Appeal for a new trial, following leave given under s. 1021 of the Canadian Criminal Code by Murphy, J., before whom the appellant was tried and convicted of the murder of Ratan Singh. The verdict of the jury was accompanied by a recommendation for mercy, and a statement from the jury, that in view of the fact that several murders and violent acts having been committed by Hindus in Vancouver, presumably while under the influence of liquor, that the Hindus should be prohibited from obtaining a supply of intoxicating liquor. The defence was one of justifiable homicide, that is, that the appellant shot in self defence.

The learned trial Judge, in effect, told the jury that if they did not agree with the defence and the evidence adduced in support thereof, the only verdict capable of being returned would be a verdict of murder. Note this language occurring in the charge:

"Murder, in some instances may be reduced to manslaughter; but that set of facts again does not arise on the evidence here."

With great respect, in my opinion, this was not a proper direction to the jury as I submit will appear when the attendant facts and circumstances are considered and a verdict of manslaughter was a verdict which the jury might have found. In *R.* v. *Hopper* (1915), 11 Cr. App. R. 136, [1915] 2 K.B. 431

the Lord Chief Justice in considering an appeal against a verdict of murder said (11 Cr. App. R.):—

"Now the complaint made is, that the Judge, in directing the jury, told them that they must find a verdict of murder or acquit the appellant; in other words that, if the jury did not accept the theory and evidence of the defence that the killing was accidental, they had no alternative but to return a verdict of murder. The appeal has been very properly argued on the view that the true state of facts was, as found by the jury, that it was not an accident. The question left is whether it was open to the jury on the evidence and whether the Judge ought to have left to them the option, if satisfied that a verdict of manslaughter would be right, to return such a verdict."

It may be that in the present case we have not really before us any question of law arising out of the direction of the Judge (s. 1014 Canadian Criminal Code), that I assume may still be applied for and be reserved, but it is pertinent, it seems to me, when considering whether the verdict is against the evidence to consider what the jury really meant by their verdict and whether, possibly a verdict of manslaughter was not really meant when the recommendation of mercy accompanied it, also that if the verdict of murder is against the weight of evidence and a new trial directed, the jury ought to have had the option (adopting the language of the Lord Chief Justice) "if satisfied that a verdict of manslaughter would be right, to return such a verdict."

It appears, as the evidence discloses itself to me, stripped of inconsistencies in evidence and evidence not capable of being believed when considered with unimpeachable independent corroborative evidence, that on the evening of March 18, 1915, the appellant, who had a room over the store of Amur Chand was set upon by Ratan Singh, the deceased, who was in company with Bela Singh, and was thrown down upon the pavement some few feet in front of the store and whilst down and being throttled by Ratan Singh, the appellant drew a pistol and struck Ratan Singh with it upon the forehead. Still Ratan Singh persisted in his throttling of the appellant, being urged on by Bela Singh to kill the appellant and Ratan Singh said "I will kill him this time." When overpowered and unable apparently to successfully withstand the attack made upon him, and being underneath Ratan

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Singh, who was a much larger and physically more powerful man, the appellant fired two or three shots from the pistol. The evidence of the surgeon demonstrates very clearly that the wound on the forehead of Ratan Singh was from a blow given with the pistol in his hand as stated by the appellant and the wounds in the head of Ratan Singh caused by the pistol shots were undoubtedly wounds received when the pistol was held close to Ratan Singh's head. The evidence is, that immediately previous to the assault upon the appellant, Ratan Singh and Bela Singh were in the store of Amur Chand and were drinking brandy, Ratan Singh having brought the liquor. Amur Chand desired them to leave his store, but they would not but kept on drinking and arguing and using as Amur Chand states "bad language" to Jagat Singh, the appellant, who it would appear had come into view outside the store but had passed on.

It would appear that Ratan Singh, as well as Bela Singh, had been drinking before their arrival at Amur Chand's store. It is clear that Ratan Singh and Bela Singh were enemies of the appellant, their conduct and language demonstrated that, and it is not at all improbable, in fact reasonable, to believe the appellant's story that this enmity was the result of the appellant not committing the murders it was desired by them he should commit, and for which he had been given two pistols and a knife.

When the evidence of the two police officers is considered, also the evidence of Jones the druggist, it is clear that at most only three shots were fired, and when Jadda's evidence is looked at it is apparent that a great noise and quarrelling was going on. In view of all this testimony given by unimpeachable witnesses wholly independent and disinterested, can the evidence of Bela Singh and Balmurkand be believed or given any weight?

With respect to the actual assault, scuffle and shooting, it is plain that the only witnesses that can really speak to this are Amur Chand and the appellant; and the Crown, in my opinion, cannot rely upon any evidence given by Bela Singh and Balmurkand as that evidence is so inconsistent with that of Amur Chand who was best able to detail what took place, Amur Chand was a Crown witness not treated as being hostile, nor was it attempted to be shown that he was hostile and his evidence, even apart from the evidence of the appellant, shows that the shots were fired under such circumstances that the verdict as rendered by

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the jury cannot be said to be other than against the weight of evidence.

R. v. *Hopper, supra,* was a case where a fight took place, it not being capable of being determined who was the aggressor. Here that seems well proved. It followed as a matter of natural consequence that Ratan Singh would assault the appellant in view of his intoxicated condition and bearing in mind that notwithstanding when he arrived at Amur Chand's store he was already intoxicated he still further plyed himself with liquor and all the while spoke abusively of the appellant.

The Lord Chief Justice said in *R.* v. *Hopper, supra,* 11 Cr. App. R. 136, at p. 139:

"Then one struck the other, it is not certain which, and this resulted in a fight between the sergeant and Dudley and another man who helped him. The two got the appellant to the ground and as he expressed it, 'hammered' him. . . . During the struggle it is said by the appellant that Dudley threatened to stick a bayonet into him."

The shooting in the *Hopper* case did not occur at the time of the fight as it did here, and the more excusable it is. With respect to the actual shooting in the *Hopper* case the facts were that later Dudley was required by the sergeant to give up his arms but he would not. As stated by the Lord Chief Justice (11 Cr. App. R. at p. 140):

"The appellant was carrying a rifle of the old pattern with a very easy pull, the bayonet being fixed and the rifle loaded with live cartridge, which was quite proper in the circumstances. Then having again given the order for Dudley to be disarmed, he gave the order, 'Halt! Left turn.' The men thus faced the appellant, he being on the pavement about three inches higher than they. He tried to coax Dudley to give up his arms; Dudley refused and put his hand on his bayonet. Then in a moment, according to the view taken by the jury, the appellant levelled his rifle to his shoulder and fired, killing Dudley.

* * * * * * *

"The Judge took the view that on the facts as presented it was impossible for the jury to find manslaughter, and so he directed them either to acquit the appellant or to find him guilty of murder. After consideration of all the circumstances we have

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come to the conclusion that the question ought to have been left to the jury so as to enable them if they thought right, and if they rejected the view that it was murder, to return a verdict of manslaughter. The reason we have come to this conclusion is not from any new view of the law, but because there was sufficient evidence of facts and circumstances to justify the jury if they took a certain view of them in finding manslaughter. It is not for us to say whether or not they would have done so. One must bear in mind the provocation caused by the fight and by the two men holding the appellant down and hammering him within so short an interval of time before the fatal shot."

In the present case we have the extreme provocation and the reasonable fear of the appellant that unless he shot he would lose his life and at the moment of peril, Ratan Singh having him at death grip, the shooting takes place.

The Lord Chief Justice (11 Cr. App. R. at 141 and [1915] 2 K. B. at 435),* continuing, says:—

"Moreover, it must be borne in mind, although it is very little to be relied on, that the facts that there had been so much drinking and a fight as well as other grave insubordination, all tended to make the appellant lose control of himself at a critical moment. In these circumstances we think that the matter should have been left to the jury so that they might find murder or manslaughter, as they thought right."

It may be said that the defence raised in the present case was that of justifiable homicide or self-defence only. Even if this be the case, it does not prevent this Court giving consideration to the facts, as we see them before us and directing a new trial in a proper case where the verdict is against the weight of evidence. Upon this point the further language of the Chief Justice (11 Cr. App. R. at 141 and, [1915] 2 K. B. at 435), at p. 141 in the *Hopper* case is expressly in point:

"We wish to refer to the suggestion that as the defence raised

*The text of the report in [1915] 2 K.B. at 435, corresponding to this quotation is in the following terms: "Further it has also to be borne in mind, although upon this not much reliance can be placed, that there had been much drinking and the fact that there had been a fight, all tended to make the appellant lose control of himself at the critical moment when he fired the rifle. In those circumstances the question ought to have been left to the jury upon a proper direction to say, if they were so minded, that the crime was manslaughter and not murder."

was that of accident the Judge was justified in directing the jury as he did. It is not the fact in this case that the appellant's counsel relied only upon that defence; he indicated in plain terms that if that failed he should hope for a verdict of manslaughter; the Court does not take the view that the Judge need not give the jury the opportunity of finding that verdict. The Court is of opinion that whatever be the defence put forward by counsel it is for the Judge at the trial to put such questions to the jury as appear to him properly to arise on the evidence even if counsel has not suggested such questions. Here the difficulty of raising alternative defences accounts for counsel having said little on the subject of manslaughter. We wish further to say in answer to another argument put forward by the Crown, and based upon the statement by the appellant, that he was not angry when he did it, that we cannot agree that this statement necessarily negatives manslaughter. He was giving evidence and trying to shelter himself on the plea of accident; it was open to the jury to take the view that his statement that he was not angry was not true. In our opinion, the words must not be taken literally to the exclusion of any other possible view of the facts and circumstances. The Court, with the assistance of the jury, must arrive, not at the view presented, but at a true view of the facts; we think, therefore, that the verdict cannot stand."

Now, what is a true view of the facts in the present case? The appellant is set upon, thrown down, throttled, and when a severe blow on the forehead is ineffectual to compel his assailant to desist from what would appear to have been nothing less than a murderous attack, the appellant shoots. Could any jury upon such evidence rightly return a verdict of murder? In my opinion they could not. The verdict is unreasonable and cannot be supported, having regard to the evidence, and it is against the weight of evidence. To put it in another way. There was not sufficient evidence before a jury to justify them in bringing in a verdict of murder, and if there was not sufficient evidence it would be against natural justice that the verdict should be allowed to stand, and in so holding this must resolve itself into a determination that the verdict was against the weight of evidence as, being weighed in the scales, the evidence against any reasonable conclusion that murder was committed greatly outweighs any that can be called up to support such conclusion. See *R.* v. *Bradley*

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(1910),74 J. P. 247, and *R.* v. *Chainey*,[1914] 1 K. B. 137, 30 T.L.R. 51.

Reverting again to the question of manslaughter which was a possible verdict upon the evidence before us, although I do not for a moment say it is a verdict that should be found, I would refer to the judgment of Darling, J, in *R.* v. *Gross* (1913),77 J. P. at p. 352:

"The reason of its being possible that the killing of Jessie Mackintosh here might amount to something less than murder is, that if the husband had been killed owing to the provocation which it was said was given by blows I should have to tell the jury that if they believed that those blows were given and the provocation following upon them was such as to upset the ordinary balance of the prisoner's mind, the law has long allowed that such provocation as that reduces the crime from murder to manslaughter; and I should, therefore, say that the provocation operating upon the mind of the prisoner and reducing the killing to manslaughter, it would equally be manslaughter whether the person who gave the provocation was killed or some other person was killed. The reason of the distinction is that the ordinary balance of mind of the accused was upset. As is often said, the law in leniency and in mercy does not hold a person responsible for the full consequences of an action committed in such circumstances. Therefore, I shall tell the jury that if they believe this person's story as to the blows and find that they were given by Gross in such circumstances as would have reduced the crime to manslaughter if he had been killed the crime would equally be manslaughter not murder, though he was not killed and the woman who was accidentally hit died."

In the present case, there is no question of the assault upon the appellant and the fact that Ratan Singh had him down and was throttling him. It is the case that the Crown has established and under such circumstances when the shooting takes place a verdict of murder in the face of such evidence must be against the weight of evidence.

Lord Reading, C. J., in *R.* v. *Lesbini*, [1914] 3 K. B. 1116, 84 L. J. K. B. 1102, dealing with murder and provocation necessary to constitute manslaughter, said at p. 1120:

"We agree with the judgment of Darling, J., in *R.* v. *Alexander*

(9 Cr. App. Rep. 139), and with the principles enunciated in *Reg.* v. *Welsh* (11 Cox 338) where it is said that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man and so as to lead the jury to ascribe the act to the influence of that passion."

Also see *Eberts* v. *The King* (1913), 7 D.L.R. 550, 20 Can. Cr. Cas. 273, 47 S. C. R. 1.

It was stated by counsel for the appellant that the learned trial Judge, Murphy, J., when granting leave to the appellant to apply for a new trial, expressed himself as not being satisfied with the conviction. In *Rex* v. *Gaskell* (1912),77 J. P. 112, Avery, J., delivering the judgment of the Court said:

"It is obvious that where a case is properly left to the jury and the jury are properly directed by the learned Judge the mere opinion of the learned Judge who tries the case that he himself would have found the other way or that the verdict is unsatisfactory will not justify interference with that verdict by the Court of Criminal Appeal. But we have here to consider whether the learned Judge did give a proper and sufficient direction to the jury in the case."

And the court held that no proper and sufficient direction was given and the conviction was quashed.

In the present case, as I have already pointed out, the learned trial Judge erred in his direction to the jury, and, although no doubt exception thereto would be expected to be taken and a stated case applied for, yet it is a consideration perhaps explanatoryof the verdict as returned by the jury. Further, I am of the view that it is not a consideration this Court is disentitled from considering. When it is for us to decide, untrammelled by any limitations, whether the verdict as returned is against the weight of evidence (the English Act 7 Edw. VII (Imp.) ch. 23, s. 4, does not speak of the "weight of evidence" but "that it is unreasonable or cannot be supported having regard to the evidence"), that verdict must be against the weight of evidence which is not based upon sufficient evidence. See *R.* v. *Bennett* (1912), 8 Cr. App. R. 10 at p. 11.

In my opinion, the jury could not properly arrive at the verdict given by them. Viewing the whole of the evidence they could not reasonably find as they did. That is, the verdict was not the verdict of reasonable men and is against the weight of evidence.

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R. v. *Williamson* (1908), 24 T. L. R. 619, *R.* v. *Jenkins* (1908), 14 Can. Cr. Cas 221, 14 B. C. R. 61.

It follows that in my opinion the verdict is against the weight of evidence and the proper direction to make is that the appellant be granted a new trial. *New trial ordered.*

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. May 10, 1916.

1. JUDGMENT (§ IV B I—230)—OF SISTER PROVINCE—CONDITIONAL APPEARANCE—ATTORNMENT TO JURISDICTION.

A non-resident defendant, who appears conditionally and defends the action on the grounds of want of jurisdiction and on the merits, thereby voluntarily attorns to the jurisdiction of the Court, and a judgment recovered against him in such action is enforceable in the Courts of any other province; the question whether he has submitted to the foreign jurisdiction is primarily one of fact. (Elaborate judgment of Beck, J., dissenting).

[*Voinet* v. *Barrett*, 55 L.J.Q.B. 39, considered; *Richardson* v. *Allen* 24 D.L.R. 883, affirmed; see also *Churgin* v. *Guttman*, 27 D.L.R. 107.]

Statement.

APPEAL by the defendant from the judgment of Hyndman, J., 24 D.L.R. 883, in favour of plaintiff, in an action on a foreign judgment.

I. B. Howatt, for plaintiff, respondent.

James A. Ross, for defendant, appellant.

Stuart, J.

STUART, J.:—With very much that is said by BECK, J., in his very illuminating judgment, if I may be permitted without offence so to describe it, I entirely agree It is obvious from what he has said that great confusion of thought has crept into many of the cases upon this subject, and his judgment will at least serve to clarify the situation very greatly.

But it seems to me that after all the matter is reduced to the question of the proper answer to be given to the enquiry: Did the defendant voluntarily submit to the jurisdiction of the Ontario Court?

There is no doubt upon the facts that he was not subject to that jurisdiction under the rules of private international law. And there is also no doubt that, whether the recognition by the Courts of one jurisdiction of the judgments of another is based upon the principle of comity or upon the existence of a debt or legal obligation created by the foreign judgment (see Piggott, Foreign Judgments, ch 2), it is only on the ground of a voluntary submission to the Ontario jurisdiction that the defendant can be held bound in this Court by the judgment of the Ontario Court.

It seems to me that there is still one point of confusion which has nowhere, so far as I can discover, been sufficiently cleared up or indeed even adverted to. Is the question whether he has submitted to the jurisdiction of the foreign Court a question of law or a question of fact? In my opinion, it ought to be treated far more as a question of fact that it has hitherto been so treated. Of course, what inference is to be drawn from the defendant's acts upon the point of his willingness to submit to the foreign jurisdiction may be in a sense a question of law. But primarily it seems to me to be a question of fact.

Now there is no doubt that the defendant appeared in the Ontario Court and defended the action both on the ground of jurisdiction and on the merits. It is true that he disputed there the jurisdiction of that Court. But what does that mean? It can mean nothing less than that he came to the Court and said, not merely "I dispute your jurisdiction," for he is now doing that much in this Alberta Court, but also it meant "I ask you, the Ontario Court, to decide upon that question." No doubt if it meant nothing more than that, it could be said that all he meant was "I am disputing your statutory jurisdiction, and I submit to your decision, but merely upon that question." But the plea he entered against the jurisdiction was not upon that ground. He did not merely say "I deny that this was a case for service out of the jurisdiction under the Ontario rules," but he disputed the general jurisdiction of the Court evidently on the principles of private international law, claiming that he, being resident out of Alberta, was not subject to the jurisdiction of the Ontario Court. But by the entering of that very plea he asked the Court to decide it. Of course, that Court did not trouble about deciding, for, as far as it was concerned, it was enough for it to know that it possessed the statutory jurisdiction given by its own legislature. But the defendant went much further. He entered two pleas upon the merits. I am unable to see how the defendant can escape the conclusion that he thereby asked the Ontario Court to determine the truth and validity of those pleas. The only question therefore really is, did he do so voluntarily as a matter of fact or was there some compulsion upon him the nature of which was such that he is entitled to say "I did not do that voluntarily but was forced to do so."

Now, why was the defendant forced to do so? It is to be

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observed that the defendant pleads in the present action that he has no assets otherwise than in the Province of Alberta, and this he verifies by an affidavit which was by consent admitted in evidence at the trial. What form then did the duress or compulsion take? The most that can be said is that by the entry of a judgment against him in the Ontario Courts his freedom of acquiring property where he pleased, of acquiring property in Ontario in the future if he was so minded, was encroached upon. Are we to say then that he was therefore compelled involuntarily or even driven by great danger to his interests to endeavour to prevent a judgment going against him in Ontario? Much as I am in sympathy with human freedom, I am unable to say that these circumstances should be held to have made his plea to the merits an involuntary one or one entered under duress or compulsion. The world is wide and I think few persons would really feel that their freedom, not personal freedom, but freedom in the enjoyment of property, was being very greatly circumscribed because the Province of Ontario was being withdrawn from the scope of their operations. It is true that people in these days travel widely and the ramifications of business are wide; and the defendant if passing through Ontario might be subject to *capias*, or a debt due to him by a resident there might be garnisheed. But I think all this is extending the idea of duress beyond any reasonable limit. I quite agree that the distinction drawn by the English Court of Appeal in *Voinet* v. *Barrett*, 55 L.J.Q.B. 39, between the case where the defendant's property in the foreign jurisdiction is liable to attachment at once before judgment, and the case where it is merely liable to eventual execution under a possible judgment, is not based on any logical ground. But even if a defendant could properly raise the defence of want of jurisdiction in the latter case as well, I cannot see that he ought to be heard to say that his appearance and defence on the merits was involuntary when he admittedly has no property in the foreign jurisdiction at all. As I view the matter, it is all a question of fact, and I think that in this case the defendant did voluntarily appear in the Ontario Court and defend the action there upon the merits.

I also think that there is something to be said from another point of view. If the recognition of foreign judgments is based upon a principle of comity, which is the view of Piggott, *ubi supra*, then I think this Court should hesitate to place narrower limits

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upon that comity than we find is being done in other jurisdictions There is no doubt that, if the original judgment had been an Alberta one, and the same facts appeared, both the English Courts and the Ontario Courts would, under the latest cases decided in those Courts, have given effect to it. And while we are not bound by their decisions, I hardly think we should venture to be the first to restrict the scope of a principle which so far is apparently being recognised in the other Courts in the King's Dominions. See *Harris* v. *Taylor*, [1915] 2 K.B. 580.

I therefore, think the appeal should be dismissed with costs.

Scott, J.

McCarthy, J.

SCOTT and MCCARTHY, JJ., concurred.

Beck, J.

BECK, J. (dissenting):—The claim is for the amount of a judgment obtained in the Supreme Court of Ontario. The defence amongst other things alleges in substance that the defendant has resided for many years past in the Province of Alberta and at all times material had no assets elsewhere than in the Province of Alberta, nor was he domiciled or resident in or had he any place of business in the Province of Ontario, and that the Supreme Court of Ontario had no jurisdiction.

The plaintiff replied amongst other things that the defendant appeared and defended the action in which the judgment was obtained.

Then the defendant joined issue, and rejoined that he had only conditionally appeared for the purpose of objecting to the jurisdiction, and constantly objected thereto.

No oral evidence was taken at the trial. By way of admission, certificates, etc., the following facts appeared: The plaintiff recovered a judgment against the defendant in the Supreme Court of Ontario on April 4, 1914, for $4,978 and costs, which were taxed at $341.16.

The statement of claim in that action (February 21, 1913), put the claim on three promissory notes of the defendant (1) For $3,500 dated 27 December, 1910, payable to the order of the Collville Ranching Co., Ltd., at the Dominion Bank, Medicine Hat, Alberta, endorsed by the company to the plaintiff, on which there remained owing $2,550.50. (2) For $1,000 dated February 25, 1911, payable to the order of J. C. Crawford at the Dominion Bank, Toronto Junction, Ontario, and endorsed by Crawford to the plaintiff. (3) For $500 dated February 25, 1911, payable to

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the order of J. C. Crawford at the Dominion Bank, Toronto Junction, Ontario, and endorsed by Crawford to the plaintiff.

The statement of claim also alleged that attached to the first mentioned note as collateral security for the payment thereof were certificates for 300 shares of the capital stock of the Colville Ranching Co., Ltd., issued to the defendant and by him endorsed; and there is a prayer for an injunction restraining the defendant from dealing with these shares.

There is nothing indicating under what legislative authority the company was incorporated or where its head office is or whether it or its stock or the shareholders were, in any way, subject to the jurisdiction of the Ontario Court.

It is made to appear that the defendant was served in Alberta with the writ in the Ontario action; that he entered a conditional appearance thereto on March 18, 1913; that on April 16, 1913, he filed a statement of defence which was in substance as follows: (1) By order of March 17, 1913, it was ordered that the defendant should be at liberty to enter a conditional appearance disputing the jurisdiction of this Court to entertain or try this action, and that such conditional appearance might be entered without prejudice to the right of the defendant to object to the jurisdiction of the Court to entertain or try the action, and the defendant delivers this his defence pursuant to the leave aforesaid without prejudice to his rights. (2) The defendant resides in the Province of Alberta, out of the jurisdiction of this Court, and he has not in any way attorned to the jurisdiction thereof, and he disputes the jurisdiction of this Court to entertain or try this action.

Then follow some defences on the merits.

Then it appears that an order was made whereby the case was referred for trial to a referee; and later that the referee made his report on which judgment was entered. It does not appear whether or not the defendant was represented on the motion to refer or before the referee or on the motion for judgment.

The evidence at the trial of the present action—by consent it was by affidavit—was that at the time of the commencement of the action in Ontario he was resident in Alberta, and was served in Alberta with the writ in the Ontario action; and had been so resident in Alberta for fifteen years, that is long before any of the transactions referred to in the Ontario action took place, and for

fifteen years past had not resided in or had any property or business interests in Ontario.

It seems to have been assumed at the trial and before us that the statutes and rules of Court of Ontario could be referred to without proof. Probably they can be, anyway, by virtue of sec. 25 of the Alberta Evidence Act (ch. 3 of 1910, 2nd sess).

I shall have occasion to refer to some of these presently. For the purpose of considering the questions involved in the present case we may take the law as laid down by the Judicial Committee of the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670 at 683 *et seq.*:

The general rule is that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit (*actor sequitur forum rei*) which is rightly stated by Sir Robert Phillimore (International Law, vol. 4, sec. 891) to lie at the root of *all international*, and of most domestic, jurisprudence on this matter: All jurisdiction is properly *territorial*, and "*extra territorium jus dicenti, impune non paretur.*" Territorial jurisdiction attaches (with special exceptions), upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists as to land (the subject matter of the action) within the territory, and it may be exercised over movables (the subject matter of the action) within the territory; and in question of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but *no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates.*

In a *personal* action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by interational law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

All that is said in the foregoing quotation is, as is there indicated, applicable when the question is as to the jurisdiction of a Court of any one of the provinces of the Dominion with regard to a person not resident either permanently or temporarily in that province. Such a person is a "foreigner" with reference to the territory of that Court; and in international law a "country" is the territory over which the Court has territorial jurisdiction, for

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which Dicey suggests as an equivalent "law district": *Dakota Lumber Co.* v. *Rinderknecht*, 2 W.L.R. 275; 6 Terr. L.R. 210 at 219.

The action in the Ontario Court, which is now in question, was so far as appears a purely personal action. The Ontario Court was without any territorial jurisdiction over the defendant which, by international law, the Courts of any other country or law district ought to recognize; the local legislature of Ontario had conferred upon the Court jurisdiction in cases where the action is on the breach of a contract wherever made to be performed in Ontario (rule 25 E) and where an injunction is sought as to anything done or to be done within Ontario (rule 25 F); but this legislation—and the jurisdiction founded upon it—is effective only within the limits of the Province of Ontario.

So far as this Court is concerned we are to decide the question on the principles of international law.

The Ontario Court then have no jurisdiction which this Court ought to recognize unless the defendant in some way submitted himself to its jurisdiction. The whole question before us is, did he do so? If he had allowed judgment to go against him by default, or if he did not submit to the jurisdiction, it is not of the slightest consequence whether or not the Ontario Court had *statutory* jurisdiction. The only questions for a Court of another territorial jurisdiction are (1) Has the original Court territorial jurisdiction, or (2) Did the defendant submit to the jurisdiction. Here the defendant entered a "conditional appearance."

Ontario rule 48 says:—

> Where a defendant desires to contend that an order for service out of Ontario could not properly be made, a conditional appearance may be entered by leave.

Now this is a method provided for the testing of the question only of the local *statutory* jurisdiction; and it seems clear that the Ontario Court had statutory jurisdiction in respect of two of the three notes sued upon, and possibly with respect of the third note, because of the collateral security attached to it in respect of which an injunction was asked. No method is provided for testing the question of territorial jurisdiction or jurisdiction by submission, both of which may be classed together as international jurisdiction.

In addition to the conditional appearance the defendant also

filed a defence in which he not only objected that the Court had not statutory jurisdiction but also set forth the facts—which have been established as true before this Court—shewing that the Ontario Court had not territorial jurisdiction over him in respect of the matters in question in the action.

On the question whether the Ontario Court had *statutory* jurisdiction I think we must take it that the Court decided against the defendant, and that on that question its decision is not one for us to enquire into. The question of international jurisdiction, whether territorial or by submission, was one in which the Court was not interested except to disregard it as quite immaterial to that Court. What we have to decide is, as I have said, the one question, did the defendant submit to the jurisdiction of the Ontario Court?

By his statement of defence he protested and persisted in his protest against its jurisdiction; at the same time, however, he set up a defence to the merits; does this avoid his protest? Or, to put it as it has been put, could the defendant, while protesting against the jurisdiction of the Court, take his chances of a favourable decision, and yet not be bound by an adverse decision?

In my opinion the defendant could do so; the contrary opinion is based upon a sophism—an equivocation—namely, the using of the word "jurisdiction" in the two different senses of statutory jurisdiction and international jurisdiction; the distinction which I have already endeavoured to make clear.

All the English decisions bearing on the question of submission to the jurisdiction of the foreign Court are discussed in 2 Smith's Leading Cases 12th ed., in the notes to the *Duchess of Kingston's* case, pp. 824 *et seq.*; in Dicey's Conflict of Laws, 2nd ed., pp. 370 *et seq.* and Westlake's Private International Law, 5th ed., p. 326, and Piggott on Foreign Judgments, 3rd ed., Bk. iii. ch. 1 sec. iii, pp. 346 *et seq.* Effect of Appearance, and *Hilton* v. *Guyot*, 159 U.S. 113 at pp. 203, *et seq.*

In *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155 at 162, Lord Blackburn, speaking for himself, Mellor, Lush & Hannan, JJ., said:—

> We think it better . . . to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone*, 6 H. & M. 301; 30 L.J. Ex. 238, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound.

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Westlake, sec. 326, observes:—

If the point reserved were not decided in accordance with the obvious leaning of Lord Blackburn and his colleagues, the defendant would be bound to abandon his property abroad, as the price of saving his English property from the grasp of a Court having *ex hypothesi* no international jurisdiction in the case.

Piggott, p. 347, disputes—rightly I think—the assertion that *De Cosse Brissac* v. *Rathbone, supra*, is an authority for the proposition stated above. The case came up by way of demurrer. Piggott says:—

The plea overruled by that decision was that the defendants were "possessed of property in France which was, according to the law of France, liable to seizure in case they did not appear to the suit and in case judgment by default was signed against them, and that in order to prevent their property from being seized they authorized an agent to appear for them as defendants to the suit. *This plea did not raise any question of jurisdiction;* it did no more than allege that the Court having jurisdiction had exercised it by allowing the action to be brought, and that it would exercise it still further, should judgment go against the defendants, by allowing execution on their property. The jurisdiction not being challenged, it would obviously have been going against first principles to have allowed such a defence to prevail.

In *Voinet* v. *Barrett*, 54 L.J.Q.B. 521, at p. 525, Wills, J., as a trial Judge, discusses *General Steam Navigation Co.* v. *Guillou*, 11 M. & W. 877, and *De Cosse Brissac* v. *Rathbone, supra*, and holds that he is bound by the latter case, but he says:—

I cannot see why in principle there should be any difference between a case where the object is to protect property actually seized and a case where the object is to preserve property which may become subject to seizure. They seem to me to stand on the same footing.

On appeal *Voinet* v. *Barrett*, 55 L.J.Q.B. 39, the Court (Esher, M.R., Cotton, and Bowen, L.JJ.), held that an appearance entered only to protect property which might be seized under execution upon the judgment if obtained was a voluntary appearance, and that therefore the defendants were bound by the foreign judgment.

Westlake observes, p. 406:—

I cannot help thinking that, whenever the House of Lords may have to review the authorities, it will see no difference between property being in the hands of a foreign Court at the date of appearance (carefully considered reservation in *Schibsby* v. *Westenholz*), and property being at the same date in the foreign country and therefore within the grasp of its Court (*De Cosse Brissac* v. *Rathbone*), and that it will hold the defendant appearing not to be bound in either of these cases. But if a similar decision were made where the defendant appearing merely finds it convenient to protect his power of acquiring property in the foreign country in future (*Voinet* v. *Barrett*), it would be difficult to base any solid distinction on the nature of his business, and the principle that jurisdiction is given by voluntary appearance would be practically abandoned.

Dicey quotes this passage up to the citation of *De Cosse Brissac* v. *Rathbone, supra*, prefaced by the comment "The distinction

suggested rests on good authority, but is not entirely satisfactory."

Westlake goes on to say:—

That principle was maintained in *Boissière & Co.* v. *Brockner & Co.* (1889), 6 Times L.R. 85 (Cave, J.), where the defendant contested the foreign suit both on the question of jurisdiction and on the merits, and practically also in *Carrick* v. *Hancock* (1895), 12 Times L.R. 59 (Lord Russell of Killowen).

Dicey, p. 370, says:—

A defendant who appears only to protest against the jurisdiction of the Court certainly does not submit himself to its jurisdiction (and in a note adds):

This statement is not consistent with the language of Cave, J., in *Boissière* v. *Brockner*. His Lordship certainly lays down that a defendant who appears merely to protest against or to plead to the jurisdiction of a foreign Court submits himself to its jurisdiction; but note that (1) the decision in *Boissière* v. *Brockner* may be defended without having recourse to the doctrine laid down by Cave, J., since in that case the defendant really pleaded both the jurisdiction and to the merits; (2) the doctrine of Cave, J., is inconsistent with *Davies* v. *Price* (1864), 34 L.J.Q.B. 8; *Ringland* v. *Lowndes* (1864), 33 L.J.C.P. 337, which have always been held to be well decided.

These two cases hold that where a party to an arbitration appears and objects to the arbitration proceeding with an enquiry into certain matters as being beyond their authority, and the arbitration disregard the objection, the party objecting may, maintaining his protest, contest the matter without being estopped from insisting on his objection.

Since the cases above referred to there has come the case of *Harris* v. *Taylor*, [1915] 2 K.B. 580. It is a decision of the Court of Appeal consisting of Buckley, Pickford, and Bankes, L.JJ. It affirmed the decision of Bray, J.

The defendant appeared conditionally to set aside the writ, and an entry was made that the defendant was to move accordingly; he did so, and his motion was dismissed. He took no further part in the proceedings and judgment was ultimately entered against him. The Court held that the defendant had so acted that he must be taken to have submitted to the jurisdiction of the Court.

This case is open to much of the criticism made by the learned authors whom I have quoted upon earlier cases. The judgments discuss the practice in the foreign Court with reference to conditional appearance. The decision may be acceptable on the ground that a conditional appearance is a voluntary appearance—one deliberately entered for the purpose for which the practice is expressly provided, namely, the testing of the question of the

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statutory jurisdiction of the foreign Court, and that the defendant made no protest against the international jurisdiction of the Court, which he still might have done even at a later stage. The result of the authorities seems to be this:—

1. A person who appears unconditionally as defendant in a foreign Court having no jurisdiction over his person, but having jurisdiction over the class of case in question, appears voluntarily and thereby submits himself to the jurisdiction of the Court so that he cannot afterwards object that the Court had not both statutory and international jurisdiction over him.

2. A person who appears by way of a conditional appearance merely (without other objection to the jurisdiction of the Court), appears voluntarily and thereby submits himself to the jurisdiction of the Court both on the question of jurisdiction and (if that is decided against him), the question of the merits, whether he defends on the merits or not, so that he cannot afterwards object that the Court had not both statutory and international jurisdiction over him.

3. A person who appears by way of a conditional appearance (which in itself is a method of testing only the *statutory* jurisdiction of the Court), but also protests in any appropriate way against the international jurisdiction of the Court, but takes no other part in the case, does not appear voluntarily, and does not submit himself to the jurisdiction of the foreign Court, and the Court in which the judgment issued upon would hold the judgment to have been given without jurisdiction. (Dicey, p. 370, Case 3).

4. A person who appears and protests, as stated in the last paragraph, but, though maintaining his protest, contests the case on the merits, does not submit himself to the jurisdiction of the Court if his purpose is to protect property which has already been seized by the foreign Court; but so far as the decisions have gone up to the present time, no other purpose in making the protest, *e.g.*, to protect property which he has or may expect to acquire within the jurisdiction of the foreign Court from seizure under execution, will be effective to prevent the nullification of the protest.

Personally, I see no sense in making a protest before a foreign Court against its international jurisdiction when it has in fact statutory jurisdiction which it will of course exercise in spite of

any such protest and for the making of which protest no legislature or Court ever thinks of providing.

Again, agreeing apparently in this with Wills, J., and the distinguished authors on Private International Law quoted, I cannot see that any difference *in principle* is created by a difference in the reason for or the purpose of the protest against the international jurisdiction of the foreign Court. I look forward to seeing these distinctions discarded by the House of Lords in England and the Supreme Court of Canada supported by the Judicial Committee of the Privy Council, and, to use the words of Westlake, the principle, that jurisdiction is given by voluntary submission, practically abandoned. As will be seen by the text books, it is only within comparatively recent years that these questions have been seriously agitated. They are of far more frequent occurrence and of greater practical importance in the Dominions beyond the seas than in England, owing to people in the Dominions not only changing their residences from one province to another, but often making more than once such change, and also travelling for merely temporary purposes of business or pleasure through perhaps all the provinces of the Dominion.

Sitting here as I am, as a member of the highest appellate Court of the Province, and there being no decisions to the contrary by any Court whose decisions we are bound to follow, I should be prepared to hold that where a plaintiff sues a defendant in a foreign Court which has no territorial jurisdiction over him, but has statutory jurisdiction over him, the defendant—inasmuch as he has no power to prevent the plaintiff doing so, and inasmuch as the Court would naturally and quite properly refuse to pay any attention to a protest founded only on the want of international jurisdiction—is under no obligation to make any protest on that ground but may appear and contest the merits and the statutory jurisdiction in the hope of a favourable decision, no matter what his reason for so doing may be, and that the plaintiff, having chosen the forum, is bound, but the defendant, being there against his will, is not bound.

In the present case, however, the defendant did protest in the only way open to him, namely, by defence; for the conditional appearance is distinctly confined to the purpose of contesting the statutory jurisdiction only.

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Having made his protest he appears never to have withdrawn it, and under these circumstances, at all events, he ought, in my opinion, to be at liberty to contest the merits in the hope of success without being bound in the event of failure in accordance with the opinion of Dicey already quoted and the principle laid down in *Davies* v. *Price* and *Ringland* v. *Lowndes*, already cited.

In the present case, however, it does not appear that the defendant did contest the merits beyond merely alleging a defence on the merits along with his protest against the international jurisdiction of the Court, but it does not appear that he ever took any further part in the action. The burden of proving submission is on the plaintiff.

Under these circumstances I am of opinion that the judgment sued on in this action is not binding upon the defendant in this jurisdiction. I would, therefore, allow the appeal with costs and direct that the action be dismissed with costs.

Appeal dismissed.

SPIRES v. THE KING.

QUE.

K.B.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Trenholme, Cross, Carroll and Pelletier, JJ. April 24, 1915.

1. PERJURY (§ I A—10)—PROOF OF FALSE DEPOSITION BY PRODUCTION OF RECORD—CR. CODE, SEC. 1002.

Where the deposition containing the false statement charged as perjury forms part of the record of a superior court of record, and is certified and attested by the official stenographer, it is proved by the production of such record; the additional oral testimony of a witness that he had heard the accused make, under oath, the statements charged to be false, is not made necessary by Cr. Code, sec. 1002.

Statement.

CROWN case reserved.

On the 17th November, 1914, Spires was found guilty of perjury by the Court of Special Sessions of the Peace. According to the statement of facts submitted to the Court of Appeal by the Judge who presided at the trial, the only evidence of declarations made under oath by the accused and upon which he was convicted of perjury consisted in the production of the deposition taken in shorthand by an official stenographer, who declared that the deposition produced was that of the accused. This deposition formed part of the record of a case before the Superior Court and produced at the trial. There was not a single witness who declared that he had heard the accused make the declarations found in the deposition.

The accused offered no evidence. He claimed by his counsel

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that the proof made by the Crown, by means of the production of the record from the Superior Court, was illegal and did not conform with the provisions of Art. 1002 of the Criminal Code.

The Judge of the Court of Special Sessions of the Peace (Judge Bazin) in these circumstances reserved the three following questions for submission to the Court of Appeal:— Statement.

"1. Can the production of the original documents on the record of the Superior Court, or of the record itself, be legally made in a Court of criminal jurisdiction?

"2. Can this Court of criminal jurisdiction (Court of Special Sessions) take cognizance of the facts appearing in the different documents on this record?

"3. If this Court can take cognizance or is obliged to take cognizance of these facts, do the deposition filed and the attestation of the stenographer that this deposition is that of the accused constitute the corroboration spoken of in Art. 1002 of the Criminal Code?"

L. A. Rivet, for the appellant.

J. W. Jalbert, for the Crown.

THE COURT OF APPEAL affirmed the judgment of the Court of Special Sessions of the Peace and directed that an entry be made in the record to the effect that in the opinion of the Court of Appeal "no illegal proof was admitted and no reason assigned by and on behalf of the accused sufficient to set aside the conviction in this case." *Conviction affirmed.*

REX v. HEWA.

SASK.

D. C.

Saskatchewan, District Court of Moose Jaw. Ouseley, J. October 30, 1915.

1. APPEAL (§ III G—102)—SUMMARY CONVICTION—RECOGNIZANCE.
In order to perfect his appeal from a summary conviction, which ordered imprisonment in default of paying a fine, the appellant, who has given a recognizance under Cr. Code, sec. 750, before a justice, is under a duty to see that the justice promptly transmits the recognizance to the Court which is to hear the appeal, and if he has taken no steps to see that the recognizance is transmitted in time by the magistrate, the observance of which duty might be enforced by a mandamus against the latter, there is no jurisdiction to hear an appeal on a recognizance filed on the day of the opening of the Court when the appeal was to come on for hearing.
[*R.* v. *McKay*, 21 Can. Cr. Cas. 211, 10 D.L.R. 820, not followed; *Wills* v. *McSherry*, [1913] 1 K.B. 20, distinguished.]

APPEAL from a summary conviction under the Opium and Drug Act, 1-2 Geo. V. (Can.) ch. 17. Statement.

A. L. Geddes, for respondent.

J. L. Bryant, for appellant.

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JUDGE OUSELEY:—On April 1, 1915, a conviction was made by Christopher Sutton and James B. Rice, two justices of the peace, whereby the appellant was convicted of having in his possession at Outlook, in the Province of Saskatchewan, on March 28, 1915, without lawful excuse, a drug to wit, opium, for other than medicinal purposes and it was adjudged that the appellant for his said offence should pay a fine of $50 and $13.50 for costs, and in default of payment to be committed to jail for a period of 30 days.

The appellant endeavoured to appeal and served a notice which is not objected to and the appeal came on for hearing before me at Outlook. Mr. Bryant, for the appellant, tendered the conviction and the notice of appeal, both of which were received without objection, and then tendered a recognizance. Upon the recognizance being tendered Mr. Geddes, for the respondent, objected that the recognizance could not be received as it had not been filed in the office of the clerk of the court within the time limited for serving a notice of appeal herein. Mr. Bryant endeavoured to meet this objection by shewing that the recognizance had been filed the day of the opening of the Court when the appeal was to come on for hearing, but before the Court opened, and that was all that was required.

Mr. Bryant relies upon the case of *R.* v. *McKay*, 21 Can. Cr. Cas. 211; also the case of *R.* v. *Turnbull*, 15 Can. Cr. Cas. 1, 2 Sask. L.R. 186. In the *McKay* case, his Honour Judge McLorg, at p. 212, says:—

"It is objected, however, that I have no jurisdiction inasmuch as a recognizance that the applicant had entered into was not filed in the office of the clerk of the Court within ten days of the date of the conviction, and the judgment of Hannon, D.C.J., *Re McNeill and Saskatchewan Hotel Company*, 17 W.L.R. 7, is relied on. Certainly the learned Judge there has gone exhaustively into the authorities, which I have not had an opportunity of doing as fully as I could wish. Now, this conviction adjuges imprisonment. Consequently, if the defendant wished to appeal, one of two courses was open to him; either to remain in custody until the holding of the Court to which the appeal is given, or enter into a recognizance.

"What is there before me to shew which course this man elected? It is true that at the hearing a recognizance was produced, apparently, as was stated by counsel, fresh from the hands of the magis-

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trate before whom it was taken, but does it necessarily follow that it was by virtue of this recognizance that this appeal was taken? I do not think that it can so necessarily follow. In the first place, it was the magistrate's duty to return the recognizance to the files of the Court if he accepted it. In the second place, the recognizance must be entered into with two sufficient sureties, and the sufficiency of these sureties is entirely for the magistrate. Did he accept this recognizance as sufficient? There is nothing before me to shew that he did.

"There is another view of the case. The facts are that the recognizance must be handed to the magistrate. The appellant, when he has entered into it, has done all he can do. He has no control whatever over the magistrate. He cannot compel him to file it, and if the magistrate is indifferent, or for any reason biased or careless and neglects or refuses to do it, the logical conclusion is that the appellant's right of appeal is gone. Surely the appellant's right of appeal cannot depend upon circumstances over which he has no control. Such a conclusion seems to me most unjust and I cannot believe that it was ever intended."

Again he says:—

"I draw attention to what is laid down by the Court of Appeal in *Wills* v. *McSherry*, [1913] 1 K.B. 20, 82 L.J.K.B. 71. There it was held that where every effort had been made to serve the notice in writing of the appeal on the respondents, but the appellant was unable to do so, the Court still had jurisdiction to hear the appeal."

With all due respect to the learned District Court Judge, I cannot see the application of the case of *Wills & Son* v. *McSherry* to the question which is before us, being the same question the learned Judge was discussing, because in this case the appellant has not done everything in his power to get the recognizance before the Court within the time fixed by the statute. For all that appears before me, the appellant may not have made any application to the justice to return this conviction to the Court. It is dated April 16, 1915, and evidently remained in the hands of the convicting justices or one of them, from that date until the hearing of the appeal, which was in the month of May following.

There is no trace of impossibility of performance, such as there was in *Wills* v. *McSherry*. Let us see what *Wills* v. *McSherry* decides. It was a case stated by the justices for the opinion of the Court. It appeared that, at the Southampton County Borough

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petty sessions, claims were made by the respondents, 9 seamen, against the appellants, the owners of the ship, Hopper No. 66, under s. 164 of The Merchant Shipping Act, 1894, for extra wages alleged to have been verbally promised to the respondents by the master of the vessel during the time the vessel had been detained in certain ports. The justices gave judgment in favor of the respondents subject to this case. On the case being called on, counsel for the appellants informed the Court that notice in writing of the appeal and a copy of the case had not been served on the respondents as required by sec. 2 of The Summary Jurisdiction Act, 1857. An affidavit sworn by the appellants' solicitor was read, from which it appeared that all the respondents, save one, were foreigners, and that it had been impossible to serve them as none of their addresses could be ascertained. Notices of the appeal with copies of the case, had been sent to the last known addresses of the respondents in this country, and with one exception, they had been returned marked "gone away." Notice of the appeal and a copy of the case had also been served on a solicitor who had represented the respondents before the justices. He informed the appellants' solicitor that he was not instructed to act for the respondents on the appeal, but that they had given him addresses to which the money was to be sent in the event of the appeal being unsuccessful Some of these addresses were in foreign countries, and the remainder were the addresses of the Greek, Russian and Turkish consuls at Southampton. Enquiries had been made of these consuls, and also of the Board of Trade officials at Southampton and elsewhere, but in the result, no information could be obtained as to the whereabouts of the respondents, except that they were either abroad or at sea. Lord Alverstone, C.J., in his judgment at p. 21, said:—

"In my opinion the Court has power to hear this appeal. It is unfortunate that we did not give any reasons for our decision in *Anderson* v. *Reid*, 66 J.P. 564, but having regard to the reported argument of the Attorney-General, who was counsel for the appellant in that case, and to the authorities which he cited, I have not the least doubt that the reason why we decided to hear the case was that the appellant had done everything in his power to serve the respondent and it was shewn that it had been impossible for him to do so."

Channell, J., in giving judgment at p. 25, said:—

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"I am willing to concur in the view that, in this case, the appeal may be heard, but the question is one of great difficulty, for the matter seems to me to be one of principle, and I cannot help thinking that our decision may be quoted in support of propositions to which it was never intended to be applied. I am sorry that we have not had an opportunity of hearing the case argued on both sides, for one of the difficulties which usually occur in these cases is that the Court is only able to hear the argument of one side. The statute gives this Court jurisdiction to hear appeals from justices by way of case stated subject to certain conditions. The law applicable to the point is clearly stated in *Maxwell on the Interpretation of Statutes*, 5th ed. at 621: 'Enactments which impose duties on conditions are, when they are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that *lex non cogit ad impossibilia aut inutilia*. They are understood as dispensing with the performance of what is prescribed, when performance is idle or impossible. . . . In such cases the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown.' "

I think it clear that the fears which Channell, J., expressed, in his concurring judgment, were well grounded, and this is one of the "propositions." Instead of it being shewn here that the appellant has done all that he possibly could do to prove his appeal there is absolutely no evidence whatever to convince me that he ever made a move to request or compel the justices to return the recognizance into Court.

So far, therefore, as *R.* v. *McKay* and *Wills* v. *McSherry* are concerned, they do not support the contention urged by Mr. Bryant and neither of them are an authority in favor of the appellant. But I am, moreover, content to go further and say, concerning the return of the recognizance into Court by the magistrates within the 10 days limited by the statute, that this is not one of the matters which it is impossible for the appellant to comply with. If, upon a request of the magistrate to forward the recognizance into Court the magistrate or justice refuses or neglects to do so, all that is necessary for the appellant to do is to apply by way of mandamus

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to compel the magistrate to file the recognizance within the time limited by the statute.

I cannot usefully add anything to what his Honor Judge Hannon has said in *Re McNeill and Saskatchewan Hotel Company*, 17 W.L.R. 7, which I follow.

I might also refer to *Wyman* v. *Cronk*, a decision of his Honor Judge Wood. In that case that learned Judge says:—

"The conviction under the seal of the magistrate was put in without objection. The recognizance entered into by the appellant was then tendered. This recognizance was on record in the office of the clerk of the Court before the opening of the Court for the hearing of the appeal. Objection was taken to the recognizance upon the ground that it was not sufficient under the Act, there being no sureties which, upon examination, I found to be the case. A further objection was taken that, even if the recognizance was a proper recognizance, it was not sufficient in view of the conviction because of that portion of clause (*c*) of sec. 750 of *The Criminal Code* (as amended in 1909), which requires a deposit of the fine and costs and a further amount as security for costs of appeal with the magistrate within ten days, or within the time limited for filing and serving the notice of appeal. It was admitted that no such sum had been deposited, and I held that it was too late to make that deposit at that stage of the proceedings or in fact at any time after the time limited for serving the notice of appeal had expired."

These authorities seem to me to be decisive on the subject and I am content to follow them, and I can only adopt *R.* v. *McKay*, *R.* v. *Turnbull* and *Wills* v. *McSherry*, where it is shewn by affirmative evidence, that it is impossible to comply with conditions which are precedent to the appeal, or to use the words of Channell, J.:—

"when compliance is impossible in the nature of things," or "though not impossible in this sense impracticable without any default on the part of the person on whom the duty is thrown."

For instance, in the appeal before me, if it had been shewn that the request had been made to the justice to return the recognizance into Court and if he had refused or neglected to do so, and application had been made by way of mandamus to compel him to do so, and in the meantime the 10 days had expired, it would probably be the duty of the Court on appeal to hold that as the appellant

had done all that he could reasonably do under the circumstances, that the appeal was in order.

Nothing of this sort is shewn in the appeal before me and I will, therefore, hold that the appeal is not in order and must be dismissed.

As counsel for the respondent intimated in his argument to me that he would be content to take an order for the dismissal of the appeal, without costs, in the event of my finding the appeal was not in order, I will order accordingly, and the appeal is dismissed without costs. *Appeal dismissed without costs.*

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Ouseley, J.

Annotation—Appeal (§ III E—90)—Pre-requisites on appeals from summary convictions—Cr. Code sec. 750. Annotation.

The Notice of Appeal.—This notice must be in writing and must set forth the particulars of the conviction or order appealed against *R.* v. *Mah Yin* or *Ah Yin*, 6 Can. Cr. Cas. 63. It must further state to what Court the appeal is being made and should specify the appropriate sittings of that Court at which the appeal is made returnable under sub-sec. (*a*) of Code sec. 750.

For the Province of Nova Scotia, in which the counties are grouped into districts, a special provision is contained in sec. 750, so that where sittings are held at more than one place in the district, the appeal shall be to a sittings held in the county where the cause of the complaint arose. The appeal in Nova Scotia shall be made to the sittings next after the conviction if there is an interval of fourteen days and the second sittings after the conviction, if there is not an interval of fourteen days between the date of the conviction and the date of the first sittings, so that the appellant always has fourteen days within which to prepare his appeal and the respondent always has the same time to prepare his case.

In the Province of Quebec, the appeal is taken to the Court of King's Bench (Crown side), and there is a similar interval of fourteen days between the conviction and order appealed from and the sittings at which the appeal is to be made returnable.

In the Province of Ontario, the Court to be appealed to depends upon the nature of the adjudication appealed from. If the appeal is from the dismissal of the complaint, it is to be made to the appropriate Division Court. If the appeal is from a conviction which adjudges imprisonment only, then it is to be made to the General Sessions for the county or district. If the conviction is not one which adjudges imprisonment only, then the appeal is to be made to the appropriate Division Court. Each county and district is divided into several divisions for the purposes of the Division Courts Act, these Courts having civil jurisdiction in claims for small debts and minor claims for damages. The Code has imposed upon the Division Courts, which were established

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Annotation.

Annotation (*continued*)—**Pre-requisites on appeals from summary convictions —Cr. Code sec. 750.**

primarily as civil courts, the duty of hearing appeals in criminal matters disposed of by justices under Pt. XV. of the Criminal Code except when the appeal is from a conviction adjudging imprisonment only. Cr. Code, sec. 749 (*a*). Each Division Court is a Court of record: R.S.O. 1914, ch. 62, sec. 8; and a sittings of the Court is held in each division once in every two months or oftener in the discretion of the Judge and the Judge appoints and may alter from time to time the date of the sittings of the Courts and the places for holding same, but is to notify the clerk of the Court of the appointments and changes made by him: Division Court Act, R.S.O. 1914, ch. 62, sec. 10. The city of Toronto contains two entire divisions and part of a third, for the purpose of the Division Courts Act, and the boundaries of these divisions have to be considered in ascertaining in which "division" the cause of the complaint arose so as to ensure making the notice returnable before the proper Division Court, and filing the notice of appeal in the office of the clerk of the Division Court for that division.

In the Provinces of Alberta and Saskatchewan, the appeal is to the District Court which holds a sittings nearest to the place where the cause of complaint arose and at such sittings. A special direction is contained in Code, sec. 749 (3), that the Judge in Alberta or Saskatchewan shall sit without a jury at the place where the cause of the information or complaint arose, or at the nearest place thereto where a Court is appointed to be held.

In British Columbia, the appeal is to the County Court at the sittings held nearest to the place where the cause of complaint arose.

In Manitoba, the appeal is to the County Court of the district where the cause of complaint arose.

In New Brunswick, the appeal is likewise to the County Court of the district or county where the cause of complaint arose.

The notice of appeal need not recite that the appellant is a "person aggrieved" by the decision appealed from (see Code sec. 749) if given by the person convicted. *R.* v. *Hatt*, 27 D.L.R. 640, 25 Can. Cr. Cas. 263; and see annotation to that case on "Who may appeal as a party aggrieved"; *R.* v. *Jordan* (1902), 5 Can. Cr. Cas. 438, 9 B.C.R. 33.

An appeal not being a common law right, the conditions precedent imposed by the statute must be strictly complied with. *The Queen* v. *Joseph*, 6 Can. Cr. Cas. 144, 11 Que. K.B. 211.

Where a time is limited by statute for giving notice of appeal and notice is not given until after the time has elapsed, the objection is fatal, although the appeal had been called and adjourned at the request of counsel on both sides to suit their convenience. The failure to give the notice in due time excludes the jurisdiction

Annotation (*continued*)—**Pre-requisites on appeals from summary convictions —Cr. Code sec. 750.** SASK.

Annotation.

and could not be waived by the adjournment. *The Queen* v. *Justices of Middlesex* (1843), 12 L.J.M.C. 59; *The King* v. *Justices of Oxfordshire*, 1 Mau. & Selw. 446; *The King* v. *Justices of Yorkshire*, 5 B. & Ad. 667.

Although served with the notice of appeal, the justice is not subject to an order for costs against him, if he takes no part in the appeal. *R.* v. *Goodall*, L.R.: 9 Q.B. 557, 38 J.P. 616. The justice should not ordinarily take any part in the appeal, but leave the matter to be contested between the defendant and the informant or the Crown, if it is a Crown prosecution, but it would seem that the justice has a *locus standi* to appear, and there may be special circumstances, making it desirable that he should do so, even at the risk of costs. Stone's Justices' Manual, 39th ed. 87, 70 J.P. 63, 160, 163; Tremeear's Crim. Code, sec. 750.

Mandamus lies to require an inferior Court to enter continuances and to hear an appeal from a summary conviction which it had improperly refused to hear on the merits upon an erroneous ruling against the sufficiency of the notice of appeal. *Rex* v. *Trottier*, 22 Can. Cr. Cas. 102, 14 D.L.R. 355, 25 W.L.R. 663. And the recognizance given for the appeal will remain in force. Ibid.

Notice in writing.—Where an Act requires a written notice, no oral notice will suffice; but it seems that a printed form of notice signed by the appellant, after being properly filled up, would. Dickenson's Quarter Sessions 634, citing LeBlanc, J., in *Schneider* v. *Morris*, 2 M. and S. 286.

The Code, sec. 3, sub-sec. 42, says that the expression "writing" includes any mode in which, and any material on which, words or figures whether at length or abridged, are written, printed or otherwise expressed, or any map or plan is inscribed.

By the Interpretation Act, R.S.C. 1906, the expression "writing," "written," or any term of like import, includes words printed, painted, engraved, lithographed or otherwise traced or copied. Type-writing falls within both of these statutory definitions.

It has been held under the Employer's Liability Act, 1880 (English), that notice that injury has been sustained within six weeks must be in writing as the words of the statute are apt only to a written notice. *Moyle* v. *Jenkins*, 8 Q.B.D. 116. But the notice need not be signed; *per* Brett, L.J., in *Keen* v. *Milwall Dock Co.*, 8 Q.B.D. 482. See also *Reg.* v. *Shurmer*, 17 Q.B.D. 323.

Judge Carleton in *R.* v. *Bryson*, 10 Can. Cr. Cas. 398, said:—"Bearing in mind that there are statutes requiring a notice which need not be in writing, others requiring a notice in writing, and others a notice in writing signed by the party giving it, it does appear to me to be most reasonable that no signature should be necessary to the second class, provided that the person giving it

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Annotation (*continued*)—**Pre-requisites on appeals from summary convictions —Cr. Code sec. 750.**

father the act by delivery. Such a course certainly complies with the literal demands of sub-sec. (*b*)." He referred to *Reg.* v. *Nichol*, 40 U.C.Q.B. 46, in which the holding was as follows:—

"It is not essential that the notice of appeal under 33 Vict. ch. 27 (D.), from a summary conviction, should be signed by the party appealing. A notice, therefore, 'that we, the undersigned D.N. and C.N.,' of etc., following the form given by the Act in other respects, but not signed, was held sufficient."

The statute under which *The Queen* v. *The Justices of Essex*, [1892] 1 Q.B. 490, was decided (The Summary Jurisdiction Act, Imp., 1879), prescribes that "the appellant shall. . . . . give notice of appeal by serving on the other party and on the clerk of the. . . . . Court of summary jurisdiction notice in writing of the intention to appeal." The notice in that case was not only served on the clerk, but it was addressed to him. The contention was that it ought to have been addressed to the convicting justices. The Court held that it would put too narrow a construction on the statutory direction to so hold.

If, however, the statute had prescribed a form of notice and directed that notice in that form should be given, as did the Canadian Code of 1892, indicating an address, it would be essential, *Cragg* v. *Lamarsh*, 5 Can. Cr. Cas. 160.

The office of a notice of appeal is to inform the respondents that some particular conviction is to be appealed against, and care should be taken that they cannot be misled on this subject; therefore the names of the appellants, the intention to appeal, the sessions to which the appeal is to be made, as well as the nature of the conviction itself, should be contained in the notice. Notices, however, will not be critically construed, and if they substantially give the respondents the requisite information they will (apart from statutory provision), be held sufficient; all the statutory conditions must be accurately fulfilled. Paley, 7th ed., 291-2.

The Court can adjudicate only on the matter stated in the notice of appeal. *R.* v. *Mah Yin*, 6 Can. Cr. Cas. 63, 9 B.C.R. 319; *R.* v. *Boultbee*, 4 A. & E. 498. See also *Cragg* v. *Lamarsh* (1898), 4 Can. Cr. Cas. 246 and *Reg.* v. *Durham* (1891), 55 J.P. 277.

A notice of appeal from a summary conviction cannot be served substitutionally on the respondent by mailing it to his last known address or leaving it at his last known place of abode; *Olson* v. *Cameron* (1907), 12 Can. Cr. Cas. 193; unless it is practically impossible to serve him because of his having gone abroad. *Wills* v. *McSherry*, [1913] 1 K.B. 20.

A notice of appeal from a summary conviction is not necessarily invalid because of the want of signature. *R.* v. *Bryson* (1905), 10 Can. Cr. Cas. 398.

Annotation (*continued*)—**Pre-requisites on appeals from summary convictions —Cr. Code sec. 750.**

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Annotation.

A notice of appeal wholly typewritten is a "notice in writing" under Code., sec. 750 (*b*). *Ibid.*

A notice of appeal is invalid if it shews merely to what Judge and at what place the appeal is to be made, and does not state at what sittings nor otherwise define the time of hearing. *R.* v. *Brimacombe* (1905), 10 Can. Cr. Cas. 168 (Sask.), 2 W.L.R. 53.

"*More than fourteen days before a sittings,*" *etc.*—In *R.* v. *Johnston* (1908), 13 Can. Cr. Cas. 179, it was held by two of the four Judges in Nova Scotia who decided the case that in computing the time which must intervene between the conviction and the sittings of the Court hearing an appeal under Code, sec. 750, the term "*more* than 14 days *before* the sittings" means that 15 days at least must intervene between the date of conviction and the date fixed for the sittings. (Townshend, C.J., and Meagher, J.)

Russell, J., held that the term "more than 14 days before the sittings," means that 14 days only need intervene between the date of conviction and the date fixed for the sittings.

Where notice of appeal was given for a sittings commencing within the fourteen days specified by the statute instead of to the second sittings after the conviction, the appeal was not heard. *R.* v. *Caswell* (1873), 33 U.C.Q.B. 303.

The notice for the wrong sessions cannot be treated as a notice for the right sessions. *R.* v. *Salop Justices*, 4 E. & B. 257. But a mistake in stating the date of the sitting which was otherwise correctly designated as the next sitting of the Court to be held at a stated place was considered not to be fatal in the Territories case of *Ullrick* v. *Daun*, 2 N.W.T. Rep. 329, 1900 C.A.D. 141, 35 C.L.J. 46.

Who may appeal as a "party aggrieved."—See *R.* v. *Hatt*, 27 D.L.R. 640, 25 Can. Cr. Cas. 263, and Annotation at 27 D.L.R. 645.

Filing the Notice of Appeal within ten days.—The appellant is to file his notice of appeal in the office of the clerk of the Court appealed to within ten days after the conviction or order appealed from.

The date of the conviction is excluded in computing the ten days after conviction. *Scott* v. *Dickson*, 1 P.R. Ont. 666. Sundays are counted in computing the ten days. *Ex parte Simkin*, 2 E. & E. 392.

But if the last day of the ten days in which notice of appeal from a conviction may be given, as required by sec. 750 (*b*) of the Criminal Code, falls on Sunday, sec. 31 (*h*) of the Interpretation Act, R.S.C. 1906, ch. 1, applies to make the notice regular if given on the following day. *Rex* v. *Trottier*, 22 Can. Cr. Cas. 102, 14 D.L.R. 355, 25 W.L.R. 663.

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The notice of appeal is too late where mailed to the clerk of the Court in time for him to receive it on the tenth day at his post office, if by reason of his own office being officially closed on that day, he did not in fact receive it until the day following. *R.* v. *Green* (1914), 22 Can. Cr. Cas. 155 (B.C.).

The notice of appeal is to be filed within "ten days after the conviction." This, according to a dictum of Elwood, J., in *Rex* v. *Prokopate* (1914), 23 Can. Cr. Cas. 189, 18 D.L.R. 696, 7 S.L.R. 95, would leave it open to shew by extrinsic testimony what was the real date of the conviction so as to make it appear that the notice was in time; and the fact that the conviction itself bore a prior date when the case was not finally disposed of, would not bar an appeal being taken on notice filed and served within the statutory period after the actual pronouncement of the conviction. It is to be observed, however, that any right of appeal in *R.* v. *Prokopate, supra*, seems inconsistent with the statement that the conviction was for assault causing actual bodily harm under Cr. Code, sec. 295. Appeals under the procedure of Part XV. are available in respect of a "summary trial," under Part XVI. for those offences which are specified in sub-secs. (*a*) and (*f*), of sec. 773, and then only where two justices acted as a magistrate under sec. 773.

Serving Notice of Appeal.—The appellant is to serve his notice of appeal upon the respondent, that is to say, the person in whose favour the adjudication was made by the justice, and he must also serve the justice who tried the case with a copy of the notice of appeal. It is submitted that the ten-day period mentioned in sub-sec. (*b*) of Code, sec. 750, applies both to the filing of the notice of appeal and to the service of same upon the respondent, and the justice respectively as was assumed to be the law in *R.* v. *Prokopate*, 23 Can. Cr. Cas. 189, 18 D.L.R. 698, 7 S.L.R. 95, *supra*. See annotation on this question in 23 Can. Cr. Cas. 254 and 255. The contrary has, however, been held by Newlands, J., in the Saskatchewan case of *R.* v. *McDermott*, 23 Can. Cr. Cas. 252, 19 D.L.R. 321, where it was held that the period of ten days' limited by Code, sec. 750 (as amended 1909 and 1913), for filing a notice of appeal, does not apply to the service of notice on the respondent and the justices, and that it was sufficient that the service was made in sufficient time to perfect the appeal. Tremeear's Crim. Code, sec. 750.

The proper service of notice of appeal under Code, sec. 750, is a condition precedent to the hearing of an appeal from a summary conviction. *R.* v. *Edelston* (Sask.), 17 Can. Cr. Cas. 155.

Service on one who acted as solicitor or agent in regard to the matter in question and who, in fact, still continued to represent

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the party, is effective: *R.* v. *Trottier* (1913), 22 Can. Cr. Cas. 102, at 105, 14 D.L.R. 355, 25 W.L.R. 663; *Reg* v. *Somersetshire J.J.* 69 L.J.Q.B. 311; *The Queen* v. *Justices of Oxfordshire*, 62 L.J.M.C. 156; and it seems that where one has been served for another, the latter may ratify the service so as to make it good: *Ibid.*

In Godman v. *Crafton*, [1914] 3 K.B. 803, an order had been made on an appeal from a case stated by justices in the absence of any one representing the respondent, and the question was raised by the Master of the Crown Office as to whether the respondent had been duly served with notice. The Act authorizing the appeal provided that the appellant should give "notice of such appeal to the other party." The solicitors who acted for the respondent had accepted service of the notice, and it appeared by evidence that they had authority to give such acceptance. Lord Coleridge, Avery, and Atkin, JJ., held that the service on the solicitor was sufficient, as the Act did not expressly require that the service should be personal.

In the absence of an officer of the N. W. Mounted Police, on whom an Indian Agent consents to service of notice of an appeal from a conviction by him, the notice may properly be served on the person in charge in such officer's place. *R.* v. *Trottier*, 22 Can. Cr. Cas. 102, 14 D.L.R. 355, 25 W.L.R. 663.

It would seem that, if two justices made the conviction, each should be served with the notice of appeal. *Hosteller* v. *Thomas*, 5 Can. Cr. Cas. 10, 4 Terr. L.R. 224, *R.* v. *Edelston*, 17 Can. Cr. Cas. 155.

It is sufficient that the service of the notice of appeal should be proved by affidavit and not by calling a witness on the return of the appeal to prove the service. *R.* v. *Curran*, 22 Can. Cr. Cas. 388; 19 D.L.R. 120.

[*R.* v. *Gray*, 5 Can. Cr. Cas. 24; and *Pahkala* v. *Hannuksela*, 20 Can. Cr. Cas. 247, 8 D.L.R. 34, considered.]

The Recognizance.—If the conviction or order appealed from is one which "adjudges imprisonment," that is to say, if imprisonment in the first instance is the punishment imposed upon the appellant by the conviction appealed from, the appellant may give a recognizance (Code form 51), with two sufficient sureties for his appearance at the Court sittings when the appeal is to be tried and conditioned that the appellant will "abide the judgment of the Court" and pay such costs as may be awarded. The appellant may remain in custody until the appeal can be heard in case he is unable to find sureties to enter into a recognizance of that kind.

If the conviction appealed from imposes a fine and directs that, in default of payment of the fine the appellant shall be

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imprisoned (see Code, sec. 739), the appellant may take any one of three courses to preserve his appeal:—

(*a*). Remain in custody from a time within the limit of ten days provided for the notice of appeal until the holding of the Court to which the appeal is given.

(*b*). Enter into a recognizance with two sufficient sureties.

(*c*). Make a deposit with the justice whose decision is appealed from of an amount sufficient to cover the fine and costs and the costs of the appeal.

Sec. 750 specifies that the recognizance shall be entered into within the time limited for filing a notice of intention to appeal, but it does not expressly state when such recognizance must be returned to the Court to which the appeal is taken. Sec. 757 makes it obligatory upon the justice to transmit the conviction or order to the Court appealed to before the time when an appeal from such conviction or order may be heard. This would seem to allow at least up to the day preceding the opening day of the appeal sittings within which the transmitted conviction or order may be received by the clerk of the appeal Court. And see *Harwood* v. *Williamson*, *infra*. Sub-sec. 4 of the same sec. (757), implies that other papers will be transmitted by the justice along with the conviction, as it states that after the appeal, if it is to be enforced by a justice, the clerk of the court or other proper officer of the appeal Court shall remit the conviction "and all papers therewith sent to the Court of appeal excepting any notice of intention to appeal and recognizance" to such justice to be by him proceeded upon. From this, it would appear that the justice is to forward to the clerk of the Court appealed to the notice of the appeal served upon him under sec. 750 (*b*), and the recognizance if the latter was taken before the convicting justice. The recognizance is not necessarily given before the convicting justice for sub-sec. (*c*) of sec. 750 empowers a County Judge, clerk of the peace or justice of the peace for the county in which the conviction is made, to take the recognizance. But, whatever official happens to take the recognizance on being satisfied as to the sufficiency of the securities, such recognizance should properly be transmitted to the Court having jurisdiction on the appeal. It seems to have been assumed by Judge Ouseley, District Court Judge at Moose Jaw, Sask., in *R.* v. *Hewa*, that the recognizance would have to be returned into Court by the magistrate within the ten days from the date of the conviction, but this seems to be an assumption not warranted by the authorities or by the wording of the Code. The appellant has the whole of the period of ten days within which to give the recognizance and to file and serve his notice of appeal. He is required to find two sureties whose sufficiency will be approved by the justice or other

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official taking the recognizance, and it would be an unwarranted abridgement of his rights to make it necessary that the recognizance should reach the clerk of the appeal Court, frequently at a considerable distance from the place where the recognizance is given, within the same statutory limit as is provided for finding the sureties. The recognizance must be transmitted to the appeal Court as its production is the best evidence that it was given and such must be shewn in proof of jurisdiction to hear the appeal. The giving of the recognizance is a matter of record. It has been held that in the case of a cash deposit as security, there is a duty on the appellant to see that it is returned into the appeal Court. (*R.* v. *Gray*, 5 Can. Cr. Cas. 24, *supra*), and if that be so, the same reasoning would apply to require the appellant to apply for the transmission of the recognizance. And see *R.* v. *Hewa*, *supra*.

If the recognizance has been given in due time, the failure of the magistrate to transmit it may delay the hearing of the appeal, as the recognizance must be produced to prove a condition precedent to the appeal; but, it is submitted, the delay should not have the effect of nullifying the appeal.

On an appeal from a summary conviction imposing a fine and, in default of payment, imprisonment, the appellate Court is not deprived of jurisdiction to hear the appeal by a clerical error in the recognizance whereby the amount of appellant's personal obligation was omitted although filled in as to the sureties. *R.* v. *Koogo*, 19 Can. Cr. Cas. 56, 19 W.L.R. 246, distinguishing *R.* v. *Joseph*, 4 Can. Cr. Cas. 126, *Ex p. Sprague*, 8 Can. Cr. Cas. 109 and *R.* v. *Tucker*, 10 Can. Cr. Cas. 217.

On a joint appeal by several defendants from a summary conviction adjudging imprisonment, the recognizance must be that of two sureties besides the appellants, and the appeal will be quashed if the recognizance be given with only one surety. *R.* v. *Joseph*, 6 Can. Cr. Cas. 144.

The recognizance must be conditioned that the defendant should "personally appear," and the omission of the word "personally" makes the recognizance defective. But, notwithstanding a defect in the security, the Court has jurisdiction to award costs against the appellant on quashing the appeal for a defect in the recognizance. *Ex parte Sprague*, 8 Can. Cr. Cas. 109, 36 N.B.R. 213.

It was decided in *Re Myers & Wonnacott*, 23 U.C.Q.B. 611, that a failure to comply with statutory conditions will not be waived by the respondent asking for a postponement after the appellant has proved his notice of appeal on the first day of the Court.

After the Court is opened for the hearing of the appeal, it is

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then too late for the appellant to file his recognizance. *Bestwick* v. *Bell* (1889), 1 Terr. L.R. 193; *Kent* v. *Olds*, 7 U.C.L.J. 21. The objection is one going to the jurisdiction. *R.* v. *Crouch*, 35 U.C. Q.B. 433.

It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given. *Cragg* v. *Lamarsh* (1898), 4 Can. Cr. Cas. 246.

It has been held that on an appeal to a Court of general sessions in Ontario, a non-resident of the county for which such Court is established is not a competent surety. *R.* v. *Lyon*, 9 C.L.T. 6, per Jones, County Judge of Brant.

The failure of the magistrate to return into Court the conviction appealed from, after being duly required to do so, has been held not to prevent the hearing of the appeal. *Re Kwong Wo* (1893), 2 B.C.R. 336, per Sir M. Begbie, C.J.

The giving of a recognizance operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from. *Simington* v. *Colbourne* (1900), 4 Can. Cr. Cas. 367, 4 Terr. L.R. 372.

Paragraph (c) of sec. 750, as well as Code form 51, are explicit in including as the conditions of the bond not only that the appellant shall prosecute his appeal but that he shall "abide the judgment of the Court thereupon," and pay costs awarded. The form is a general one so as to be applicable to the various circumstances of a summary conviction, and where the latter inflicts a fine, and after the appeal the fine still remains by virtue of the affirmance of the conviction, in terms of the justice's award or by the substitution of a new adjudication in the appellate Court, the words of the condition that the appellant "abide the judgment of the Court thereupon" seem particularly applicable to the payment of that fine. If more were needed to shew that the amount of the fine and costs as ordered in the justice's Court is to be covered by the recognizance and considered by the justice when he fixes the penal sum left blank in the statutory form, it is to be found in the alternative provision for a cash deposit. Whether or not imprisonment in default is directed, the defendant has the option, under paragraph (c), to deposit with the justice "an amount sufficient to cover the sum so adjudged to be paid" (*i.e.*, the "penalty or sum of money adjudged to be paid" by the conviction or order appealed against), together with "such further amount as such justice deems sufficient to cover the costs of the appeal."

It has, however, been held to the contrary in Saskatchewan, that when a summary conviction directs payment of a fine and,

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in default of distress, imprisonment, the defendant's recognizance on an appeal therefrom under Cr. Code 750 need not cover the fine and costs, the imprisonment fixed in default of payment being sufficient security for that; and that the basis on which the amount of the recognizance should be fixed in such case is what the probable costs of the appeal would be.

R. v. *McDermott*, 23 Can. Cr. Cas. 252, 19 D.L.R. 321.

Defendant was convicted of a third offence against the N.S. Liquor License Act and was adjudged to be imprisoned for a period of thirty days. Notice of appeal to the County Court was given, and a sum of money was deposited in place of the bond required in such cases. It was held that imprisonment having been ordered by the conviction, a recognizance was essential to the Court's jurisdiction. *R.* v. *Fraser*, 42 N.S.R. 202. The appeal will be quashed if the recognizance fails to provide for the costs of the appeal. *R.* v. *Becker*, 20 Ont. R. 676.

Where the recognizance was entered into after the expiry of the statutory period under the English statute, it was held that it might, notwithstanding, be estreated for non-payment of the costs awarded to the respondent on dismissing the appeal for want of jurisdiction; the fact that the recognizance was taken out of time did not make it void; *R.* v. *Glamorganshire Justices*, 24 Q.B.D. 675.

Stay of Proceedings.—The language of sec. 756 is not in harmony with the view that the justice could issue his warrant without waiting to see how the appeal would be decided. It is only "if the appeal is decided, etc.," that is, after the appeal is determined, that sec. 756 authorizes issue of warrant. *Simington* v. *Colbourne* (1900), 4 Can. Cr. Cas. 367, 4 Terr. L.R. 372, per McGuire, J. Sec. 760 provides that an appeal may be abandoned, and in such case that "the costs of the appeal shall be added to the sum, if any, adjudged against the appellant . . . and the justice shall proceed on the conviction, etc., as if there had been no appeal."

Deposit of money as security on appeal.—The procedure provided by Code, sec. 750, does not admit of a deposit of cash being made as security on an appeal from a summary conviction which adjudges imprisonment in the first instance, but if the conviction imposes a fine and imprisonment upon default, the appellant may, instead of giving a recognizance in form 51, deposit with the justice of the peace an amount sufficient to cover the fine and costs and the prospective costs of the appeal, the justice fixing the amount for which security is given, and in doing so, taking care that the same is sufficient to cover the costs of the appeal. The appellant has a third alternative where imprisonment is direct in default of paying the fine, of remaining in custody until the appeal is tried and thus avoiding the necesssity of any recognizance or deposit.

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Where the conviction or order does not award imprisonment, either in the first instance or in default of paying a fine, the appellant is to deposit with the convicting justice an amount sufficient to cover the sum adjudged to be paid together with such further amount as such justice deems sufficient to cover the costs of the appeal. Sec. 750 (c) as amended by 8-9 Edw. VII., ch. 9 and 3-4 Geo. V., ch. 13.

It has been held that, on an appeal from a summary conviction, the appellant making a money deposit in lieu of recognizance, must see to it that such deposit is returned by the justice into the Court to which the appeal is taken, and in default the appeal cannot be heard. The fact that the appellant had made such a deposit is a matter of record and is not properly provable by affidavit. *R.* v. *Gray*, 5 Can. Cr. Cas. 24; s.c., *Gray* v. *Gillman*, 37 C.L.J. 506.

Default in prosecuting the appeal.—The appellant may give notice of his abandonment of his appeal under sec. 760. This statutory notice of abandonment enables the justice to proceed on the conviction or order as if there had been no appeal and to add the costs of the appeal, that is the respondent's costs so far incurred, to the amount awarded by the conviction or order. Presumably the justice is to fix the costs of an abandoned appeal under this section. The written notice of abandonment must be given six clear days before the sittings of the Court appealed to, in order to make sec. 760 effective.

If no such formal notice of abandonment has been given and consequently the appeal has not been abandoned "according to law," within the terms of sec. 755, the latter section enables the Court to which the appeal was taken to tax the respondent's costs, and order payment of same even in cases where the appeal was not perfected by being set down. The respondent must, in such case, give proof of the notice of appeal served upon him. The section applies whether the notice of appeal was properly given or not, that is, the award of costs against the appellant may be made when the appeal is not prosecuted, although the notice of appeal was irregular and the appeal must have been quashed on that ground, if it had been proceeded with. The decision in *Re Madden*, 31 U.C.R. 333, on this question is superseded by the present form of sec. 755. The irregularity of the notice may be such as to make it impossible for the appellate Court to hear the appeal, on objection being taken to the jurisdiction, but by virtue of sec. 755, the Court is given special jurisdiction to order costs against any appellant who fails to enter or prosecute the appeal.

Where the appeal is prosecuted but is quashed for defect in the notice, there is jurisdiction to award costs to the respondent. *R.* v. *Doliver Co.* (1906), 10 Can. Cr. Cas. 405.

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If the conviction is affirmed, the Court may order payment of the fine and costs and the costs of the appeal out of the deposit and repayment of the residue, if any, of the appellant, sec. 751 (2).

If the conviction is quashed on the appeal, the deposit is to be repaid to the appellant upon an order or that effect, which the appellate Court will be bound to make. Sec. 751 (2).

Where the defendant appealing from a summary conviction deposited with the justice the full amount fixed by the latter as security for the appeal and the latter transmitted it to the clerk of the appellate Court, who deducted therefrom his fee of 50 cents for receiving, and issued a receipt to the justice for the balance only, the appeal is not thereby rendered incompetent; the making of the deposit with the justice and his handing the money to the clerk of the appellate Court completed the requirements of law as to the regularity of the appeal, and the appellant was not concerned with the retention of the fee by the officer of the appellate Court. *R.* v. *Walsh and Crane* (1913), 22 Can. Cr. Cas. 144, 26 W.L.R. 394 (Sask.)

A cash deposit under Cr. Code, sec. 750, to answer the costs of an appeal from a summary conviction, is a security payable to the Crown, and where an appeal from a summary conviction awarding a money penalty was taken under Cr. Code, sec. 749, to the Court of King's Bench (Crown side), in the Province of Quebec, and that Court dismissed the appeal without making any order in respect of the cash deposit made by the appellant under Cr. Code, sec. 750, the Superior Court of Quebec on evocation from the Circuit Court has jurisdiction to decide a contestation respecting the ownership of the money deposited. *Groulx* v. *Sicotte* (1911), 19 Can. Cr. Cas. 101, 13 Que. P.R. 31.

Custody until holding of Court.—In *Simington* v. *Colbourne*, 4 Terr. L.R. 373, 4 Can. Cr. Cas. 367, at p. 374, Wetmore, J., said:—"Suppose that the sentence is for one month, and the Court to which the appeal is taken does not sit for two months. The provision (now contained in sec. 750 (*c*)) is, if he remains in custody, that he shall remain in custody "until the holding of the Court." There is no alternative provision whereby the imprisonment is determined at the expiration of the sentence, and the provision I have quoted is imperative. If the conviction is confirmed the Court shall order the party "to be punished according to the conviction." (Sec. 751). It seems to me that imprisonment after notice of appeal is by way of securing the presence of the appellant at the Court of Appeal in case he does not enter into a recognizance so that he may be dealt with in case the conviction is affirmed or an order made against him. It is somewhat akin to the case where a party being convicted of an offence in the higher Courts a case is

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stated, and the party convicted is committed to prison, pending the decision on the stated case. I do not wish to be understood as holding that if a person imprisoned by virtue of the conviction has served out a portion of his term of imprisonment before the notice of the appeal and the recognizance are given, the time so served shall not count if the conviction is affirmed and the appellant ordered to be punished according to the conviction."

Transmitting the Conviction to the Appeal Court.—The duty of transmitting the conviction to be kept among the records of the Court appealed to, is placed by sec. 757 upon the justice who made it. He will have had notice of the appeal served upon him under sec. 750 (*b*) and there is no express requirement in sec. 757 of any formal application on the part of the appellant as a pre-requisite of the statutory duty so imposed upon the justice.

It was held in *Harwood* v. *Williamson*, 14 Can. Cr. Cas. 76, 1 S.L.R. 58, that sec. 757 of the Code is directory only, and the transmission of the conviction to the Court in accordance with the provisions of that section before the time when the appeal may first be heard is not a condition precedent to the appeal; and that it is sufficient if the conviction or order be lodged in Court before the appeal is actually heard.

It is advisable that the appellant should see to it that the convictihg justice does not overlook the transmission of the conviction or order appealed from and the notice of appeal, information, depositions, recognizance or security deposit as the case may be, if he desires the appeal proceeded with, without an adjournment which would likely be ordered so as to procure these papers from the justice.

Entry of Appeal.—Code, sec. 755, speaks of the entry of appeal in dealing with the question of costs of appeals not prosecuted. The object of the section is to confer power on the Court of appeal to order costs against the appellant who fails to prosecute his appeal, although the appeal was neither formally abandoned or properly perfected, and although the notice of appeal may not have been properly given. The Court may, at the same sittings for which notice of appeal was given, award costs against the party giving the notice, though such appeal was not prosecuted *or entered* after the notice was given. This gives statutory sanction to the practice commonly followed of requiring every appeal to be set down, that is entered upon a list prepared by the clerk of the Court of matters awaiting a hearing before the Judge. It cannot, however, be assumed that any local requirement for setting down appeals, under the practice of the particular Court appealed to, can infringe upon the time which the law gives in express terms to the appellant for finding sureties to enter into the recognizance which

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is to save him from imprisonment during the period of delay incident to his appeal. It may be necessary to "enter" the appeal before the expiry of the time allowed, under sec. 757, to the justice for delivering the conviction into the custody of the clerk of the appeal Court, *i.e.*, "before the time when an appeal may be heard.

Sec. 752 refers to the appeal being "lodged in due form." The contingency which enables the Court of appeal to try both the facts and the law, is that the appeal has been "lodged in due form and in compliance with the requirements of this Part." This may imply that practice requirements of the local court should apply to these appeals in so far as they are not inconsistent with the details of practice provided for by the Code itself which must necessarily prevail.

Alternative appeal by stated case.—As to an appeal on a case stated by a justice upon points of law, see Code, sec. 761; such appeals are to "the Court," as defined by sec. 705, which, in some of the provinces, is a different tribunal to that empowered to try an appeal under secs. 749 and 750 on both facts and law.

McILWAIN v. McILWAIN.

Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Lennox, and Masten, JJ. February 4, 1916.

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1. DIVORCE AND SEPARATION (§ V A—45)—ALIMONY—CRUELTY—ASSAULT.
In the absence of cruelty amounting to a reasonable apprehension of danger to the life, limb, or health of the wife as rendering cohabitation unsafe and impossible, an assault and battery is not sufficient ground for awarding alimony under the provisions of sec. 34 of the Judicature Act, R.S.O. 1914, ch. 51.
[*Lovell* v. *Lovell*, 11 O.L.R. 547, 13 O.L.R. 569, referred to.]

2. COSTS (§ II—20)—UNSUCCESSFUL ALIMONY ACTION.
Rule 388 is imperative, and, while the Court cannot order the husband to pay the costs of the wife's unsuccessful action for alimony, it may require him to pay the wife the amount of the cash disbursements actually and properly made by her solicitors.

APPEAL by the defendant, the husband, from the judgment of BOYD, C., in an action for alimony. Reversed. Statement.

D. L. McCarthy, K.C., for appellant.

J. C. Elliott, for plaintiff, respondent.

MEREDITH, C.J.C.P.:—The findings of fact of the learned trial Judge are quite insufficient to support the judgment directed by him, at the trial, to be entered in favour of the plaintiff: a judgment, in effect, of divorce from bed and board, with alimony, and the custody of the children: that is, it adjudges the plaintiff's separation of herself from her husband, to be lawful, and compels him to pay for her separate maintenance, with the Meredith, C.J.C.P.

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certainty that the children, who both went with her, will remain with her.

The findings are that the husband was guilty of cruelty—assault and battery—on the 24th June, 1914; and that there was "some proof" of former acts of cruelty "several years, five, six, or seven," before. After dealing with the evidence and making these findings, the learned Judge proceeded to charge himself as to the law in these words: "Where there are any acts of violence the Court intervenes, the Court can act; and the whole question is whether there was an act of violence, on this 24th June, which led to the woman leaving the house."

The power to award alimony in this Province is conferred upon the Court in these words: "The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which could entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the Court:" The Judicature Act, R.S.O. 1897, ch. 51, sec. 34.

That the findings of fact are not sufficient to support the judgment is a statement hardly, if at all, questioned by any one. If an assault and battery alone gave a right of divorce of any character, divorce would be made very easy, and litigation such as this would be lamentably very frequent. Long ago the true foundation was stated in these words: "The causes must be grave and weighty and such as to shew an absolute impossibility that the duties of the married life can be discharged." What is lacking in the foundation of the judgment in question is any kind of finding that the cruelty proved was such as to cause reasonable apprehension of danger to the life, limb, or health of the wife.

If we can, upon the evidence adduced at the trial, add to the findings at the trial, or, more correctly put, if, upon the whole evidence, we can find facts sufficient to support the judgment, it is the plaintiff's right to have it supported in that way: but I am quite unable to do so, and am quite convinced that the trial Judge in his findings of fact put the case as much in the plaintiff's favour as fairly he could; and I adopt as expressing my own

conclusion, after more than one sympathetic examination of the evidence—which sympathy one can hardly avoid where personal violence has been resorted to by a man against a woman—the conclusion of the learned trial Judge expressed in these words: "I see myself no reason why they could not live together in the future."

The assault was not an aggravated one; the man is in no sense vicious: there is no kind of evidence upon which I can attempt to supply the additional facts necessary to support the judgment. Two medical men were examined, as witnesses at the trial, without a tittle of evidence being adduced from either of them to warrant carrying the findings any further—their evidence has indeed the opposite tendency. The plaintiff, of course, gave some testimony which, if there were nothing to the contrary, if we were bound to accept all her views upon the subject expressed hysterically or otherwise, unquestionably would warrant a judgment giving her the relief which she seeks; but, if we did that, if we made the wife the judge of her own case, there would be no need of coming here at all to have the question of right to alimony tried. Did any one ever know of any wife, who quarrelled with her husband, not expressing the opinion that he was killing her?

I would allow the appeal and dismiss the action. The plaintiff should have all the costs we can compel the defendant to pay her—"the amount of the cash disbursements actually and properly made by her solicitor" only (Rule 388): but not as a reward for her conduct, or encouragement to any wife to bring an action for alimony on anything like the same grounds, nor as a salve for her bruises, for they were hardly serious enough to require it: but rather as a prophylactic for the husband, a preventive of bad manners, which began, in the instance in question, in what he calls "tickling" his wife, and ended the next day in a small swelling on the back of her head, whatever may have caused it. The most effectual cure for any disposition to lay hands, with any degree of violence, on his wife, is the certainty of a counter-assault upon his pocket, and a wounding of his purse, following. For an assault of no bodily consequence the man has been criminally prosecuted in a summary manner and fined and bound over to keep the peace; and after that compelled to journey through the full length of the provincial civil Courts, and, although successful there, is obliged to pay something towards the costs of her who

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carried on the civil as well as the criminal prosecution; and all his own costs besides. I am sure he won't do it again: and I am sure too that his, and his wife's, interests, their children's interests, and the public interests, require, as the trial Judge so strongly advised, even using these words, "If she won't go back it will probably be the means of wrecking him," that the household should be united again as soon as possible. There has already been quite too much smoke for so small a family explosion as that upon which all this double litigation—criminal and civil—has been based.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of the Chancellor of the 8th June, 1915, in favour of the plaintiff in an action for alimony.

The parties are both about 40 years of age, were married in 1897 and have two children, one a girl of about 15 the other a boy of about 11—they are of the farming community and lived together till July, 1914.

As the Chancellor says, the case "is certainly a very puzzling one upon the evidence:" and it will be safe to take what he has found—and perhaps what he has not found—as the basis for judgment.

Until the occasion of June, 1914, there had been a condonation of occasional acts of physical violence which "might have been overlooked if nothing else had occurred, because it was several years ago, and there was a period of time, several years, five, six, or seven years, in which there seems to have been no special outbreak of trouble between them."

In June, 1914, the wife determined to leave the defendant's home.

On the 26th June, Friday, the plaintiff had found fault with her husband for not taking her and her daughter in to supper at a garden party—he was sulky over this, and, though they slept together that night, on the following day after dinner a squabble took place between them. The plaintiff says: "After we had finished our dinner, I had pulled my chair back from the table, and he got up from the table, and he looked quite angry-looking, and he come up by me and kept pushing me, and I told him to let me alone, that I was tired, and he kept on, and I told him again, and he started pounding me on the back of the head with his fist. I had turned my head around and went to get out of the

road, and he kept at it. The last I can remember of I could not see and I don't know what happened after that."

The defendant's story is, that there was some unpleasantness about their daughter on the previous day, and he adds: "One thing and another; I was not paying much attention to it. The next day we had a late dinner, about two o'clock, and after she had her dinner she was very cross, and I had to go round the table to go out the door, and she sat over here. I started to tickle her, just ran my hands up and down her ribs like this—she had no corsets on—and she rose up and she picked up a tea-cup and she was going to throw it and she set it down and she walked around the table to this side and she picked up two pieces of cake and she rolled them like that, fine enough for the chickens, and she walked around the kitchen and she grabbed the girl in her two hands by the hair, and I thought she was going to pull her head off."

"His Lordship: She grabbed her daughter by the hair? A. She grabbed her daughter by the hair, and I said, 'Here, here, now, that is going too far,' and I got them separated, and she went at her own head and I caught her and pulled her hands out of that, because I was afraid she would pull the head clean off herself, and I got her hands out of her hair, and she grabbed the tea-pot and she struck for the kitchen—I don't know whether it was to get hot water, or what it was, but she made for the stove anyway, and she threw the lid of the tea-pot at me, and I ran and grabbed the tea-kettle so she would not get the hot water, and she threw the kettle at the ceiling, so I seen she was some place where she shouldn't be, and I got hold of her and set her on the lounge."

The daughter, who gave her evidence very clearly so far as we can judge, says:—

"We were sitting after dinner, and he come around and he started pushing her roughly, and she told him to go away, that she was tired, but he didn't go, and she got up from the table, and he hit her.

"Q. Where did he hit her? A. It was in the corner.

"Q. Where did he strike her? A. On the head.

"Q. What part of the head? A. Right in the back.

"Q. The back part of the head? A. Yes.

"Q. What was the effect? What happened? A. Well, he knocked her down."

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The doctor, who arrived within half an hour, could not find any physical signs of injury, but the plaintiff was very much excited, complained of her head and kept repeating over and over again that she could not live with her husband: another doctor, who came in a few hours after, found a little swelling which might have been caused by pulling the hair, a trifling matter in itself in any case.

The Chancellor was, on that evidence, quite justified in finding that the defendant struck his wife on the back of the head with his fist: and I adopt the finding, pausing simply to say that the defendant cannot be congratulated on exhibiting much wisdom when—and if—he endeavoured to placate an angry and tired woman by tickling.

If then the fact of such an assault justifies the wife in leaving her husband and obliges the Court to grant her alimony, her case is perfect.

There is no doubt as to the law of alimony, and each case must depend upon its own facts.

From the institution of the Court of Chancery in Upper Canada in 1837, it exercised jurisdiction to decree alimony in a proper case: *Soules* v. *Soules* (1851), 2 Gr. 299; and very early laid down that, to obtain such a decree on the ground of cruelty, the *sævitia* must tend to bodily harm or to the injury of the health, and in that manner render cohabitation unsafe: *Severn* v. *Severn* (1852), 3 Gr. 431, at p. 435: so that the wife cannot "safely return to her husband:" *Jackson* v. *Jackson* (1860), 8 Gr. 499, at pp. 505, 506: and that was the reason of the rule, both here and in England, that an isolated act of personal violence gave the wife no right to leave her husband: *Rodman* v. *Rodman*, 20 Gr. 428. "The law . . . lays upon the wife the necessity of bearing some indignities, and even some personal violence:" *ib.*, pp. 430, 431. "The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread:" *ib.*, p. 431, quoting Lord Penzance in *Milford* v. *Milford* (1866), L.R. 1 P. & D. 295. There must be a reasonable apprehension or a probable danger of personal violence: *Bavin* v. *Bavin* (1896), 27 O.R. 571, at p. 578, citing *Bramwell* v. *Bramwell* (1831), 3 Hagg. Eccl. 618, at p. 635.

It is useless to multiply cases—the law is authoritatively laid

down in *Lovell* v. *Lovell* (1906), 11 O.L.R. 547: *S.C.* in appeal (1906), 13 O.L.R. 569. I adopt the criterion of Moss, C.J.O., p. 571—"a question on the facts whether the plaintiff has shewn that the defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated to permanently affect her bodily health and (or) endanger her reason, and that there is a reasonable apprehension that the same state of things would continue"—adding only the statement of Lord Stowell in *Evans* v. *Evans* (1790), 1 Hagg. Con. 35: "The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged" (p. 37.) This is substantially what is laid down in *Russell* v. *Russell*, [1897] A.C. 395.

I do not understand that there was any difference on the Bench in the *Lovell* case as to the law—but Mr. Justice Street in the Divisional Court and my Lord in the Court of Appeal differed from their brethren on the facts. We are not bound by any decision of any Court on the facts (except of course as *res judicata* or the like): we may, and, if we do our duty, must, exercise our own judgment upon the facts of the case before us— it will be seen later, however, that the facts are not identical in the two cases.

There were sporadic acts of violence years ago, and, though condoned, the recent act of violence revives their effect: *Rodman* v. *Rodman*, 20 Gr. 428; *Bavin* v. *Bavin*, 27 O.R. 571—there was no continued series of violent acts, much less anything indicating habitual loss of self-control by the husband, or cold, calculating malignity.

Notwithstanding all that has happened, the Chancellor finds: "I see no reason . . . why they could not live together in the future;" "if she is willing to forgive this and go back, they might still live together again." From an attentive reading of the evidence, I wholly agree in these conclusions—and this is what differentiates the *Lovell* case. There the Chancellor found as a fact that the plaintiff was almost a wreck, her constitution breaking down, ill-treatment would lead to a final break-down, and (11 O.L.R. at p. 561) "the husband was greatly to blame for the wife's unstrung condition, and that she had good and reasonable grounds to fear the worst if she continued to live under his

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influence . . . She had reasonable grounds to be apprehensive that both mind and body would give way in utter prostration . . . . her health was exposed to peril without any adequate fault of her own,"

None of these is found by the Chancellor in this case: and the proof falls far short of establishing an "absolute impossibility that the duties of married life can be discharged."

Reasons there are in abundance why the Court should require strict proof on the part of the plaintiff—these I do not enter into, contenting myself with agreeing in that respect with the dissenting judgment in *Lovell* v. *Lovell* in the Court of Appeal.

Although the findings may be defective, we might supplement them on the evidence if that necessitated such a course: but, as has been said, I entirely agree with the Chancellor's conclusion as to the safety of a return to the husband's home. That being so, it is not, as, with great respect, I think, "for her to say:" it is her duty to return, and, refusing to return, she cannot compel her husband to pay alimony.

Were we able to deal with the costs with a free hand, I should be inclined to think that the defendant should pay all the costs—his own folly or worse is responsible for some, at least, of the trouble—but Rule 388 is imperative.

I am of opinion that the appeal should be allowed and the action dismissed.

Lennox, J.

LENNOX, J.:—I reluctantly concur in allowing the appeal. I do not question the correctness of the conclusions of my learned brothers, but regret that the jurisdiction of the Supreme Court, and the decisions which have grown out of the limited jurisdiction, not only justify the judgment about to be given, but perhaps make it logically inevitable. Not to go back further—although it can be traced back, I think, to the organisation of the Court of Chancery in 1837—by the Judicature Act, R.S.O. 1897, ch. 51, sec. 34: "The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto . . . and alimony when granted shall continue until the further order of the Court."

So long as the right to obtain alimony is practically put upon

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the same plane as the right to annul the marriage or obtain a divorce, or until we have a plain explicit enactment to the effect that the Court may grant alimony in any case in which it is made to appear, by satisfactory evidence, that the wife had good cause for separating from her husband (and, except in very exceptional cases, assault and battery or intentional physical injury, even if only on one occasion, might well be regarded as good cause), the old argument that a husband is entitled to thrash his wife occasionally, and, if at fairly long intervals, yet not be liable for payment of alimony, and the overworked doctrine of condonation, will be iterated and reiterated in the Courts, with effect, and sometimes, though not frequently, with tragic consequences. I am not insensible to what has been so often, and so well, said as to the evil consequences likely to result, to the parties, to the family and to the State, if husband and wife are encouraged to live apart for trivial causes. It is all true, but there is another side to it, which I will not discuss now. I only desire to add, if I may say so with great respect, that it is disappointing to find that the very commendable effort of the learned Chancellor to bring about a reconciliation has been used as an argument that the trial Judge doubted the conclusiveness of the very facts upon which the judgment is based—an argument very emphatically repudiated in the *Lovell* case by Moss, C.J.O. (13 O.L.R. at p. 574); and my regret at feeling myself compelled, having regard to the terms in which our jurisdiction is conferred, and decided cases binding upon me, to concur in reversing a judgment otherwise so eminently just.

I think the appeal should be allowed and the action dismissed, and that the defendant should pay the cash disbursements actually and properly made by the plaintiff's solicitor: Rule 388.

Masten, J.

MASTEN, J.:—In considering this case I have re-read the authorities cited and some others, but no useful purpose would be served by any statement by me of relevant legal principles which have been so often and so clearly stated before.

Where, as here, the case resolves itself into a question on the facts, and where it has been tried by so experienced a Judge as the Chancellor, one enters upon a consideration of the case with a strong expectation that the judgment is to be supported.

The judgment decrees alimony. The inference is that there

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is danger to the plaintiff in life, limb, or health, bodily or mental, or a reasonable apprehension of if, but the judgment contains no finding of fact to that effect. If it had, that would, in my opinion, have settled the question, because it is peculiarly a case where the finding of fact by the trial Judge ought not lightly to be disturbed. On the contrary, the Chancellor says: "I see no reason myself why they could not live together in the future. For the sake of the son and the daughter, I think she ought to consider that."

Such a suggestion could not be made if there was, in his opinion, danger to life, limb, or health, bodily or mental, or a reasonable apprehension.

We thus derive two conflicting inferences from the judgment, without any positive finding, and are thrown back on the evidence without the aid of any finding.

Whether one forms an opinion on the evidence that the parties might advantageously try to resume domestic relations, or, on the contrary, that they might, with more benefit to themselves and their children, live apart by mutual agreement, is nothing to the point.

The wife has brought her action claiming alimony as her legal right; and whether or not she is entitled to judgment must depend, not on the Court's view of what is convenient or expedient in this particular case, but on whether the evidence in the case brings it within the fixed principles on which the Court acts in awarding alimony.

I have read and re-read the evidence with the view of discovering whatever would support the judgment.

Upon the best consideration that I can give the matter, I am of opinion that the evidence falls short of what is necessary to found successfully the plaintiff's claim.

So far as I can see, to grant relief in this case would be to extend rather than to apply the existing rules regarding alimony.

I think the appeal should be allowed and the action dismissed.

Appeal allowed.

[See also the following cases: Ney v. Ney, 11 D.L.R. 100, affirmed in 12 D.L.R. 248; Hogg v. Hogg, 20 D.L.R. 85, affirmed 21 D.L.R. 862.]

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New Brunswick Supreme Court (Appeal Division), McLeod, C.J., and White and Grimmer, JJ. September 24, 1915.

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1. LOGS AND LOGGING (§ I—10)—WOODMEN'S LIEN—ATTACHMENT—DEMAND —SPECIFIC AMOUNT.

Under sec. 9 of the Woodmen's Lien Act, C.S.N.B., 1903, ch. 148, the affidavit required must shew that the amount claimed is justly due and owing, and that payment thereof has been demanded and refused, but this does not mean that the claim should be dismissed unless the amount claimed and demanded is the exact amount subsequently found to be owing. It is the duty of the Judge under sec. 17 of the Act to determine what if anything is due and if anything is found to be due and owing to order that the amount be paid to the lien holder.

[*Murchie* v. *Fraser et al* (1903), 36 N.B.R. 161, considered and explained.]

Statement.

APPEAL from a judgment of McLatchy, Co. Ct. J.

J. P. Byrne, for appellant.

A. R. Slipp, K.C., for respondent.

The judgment of the Court was delivered by

McLeod, C.J.

McLEOD, C.J.:—This is an appeal from an order of the Judge of the County Court for the County of Gloucester dismissing the claims of Branson and Olsen for liens under The Woodmen's Lien Act (ch. 148 C.S. N.B. 1903), on logs owned by Goodwin.

It appears that on March 1, 1915, Branson filed a claim under the Woodmen's Lien Act against the defendant for $24.65. An attachment was subsequently issued by order of the Judge of the County Court, and logs owned by the defendant were attached. On March 11, the Judge, under sec. 15 of the Act, fixed March 30, at the Court House in Bathurst, as the time and place to take the necessary accounts and determine the amount due the plaintiff or any other holder of the liens. Olsen, also, on March 1, 1915, filed a claim against the defendant, claiming $49.49, and an attachment was subsequently issued on that claim, and on March 11, the Judge, under sec. 15 of the Act, appointed March 30, at the Court House at Bathurst, as the time and place for hearing that claim. At the hearing the Judge, under sec. 24 of the said Act, consolidated the cases, and heard them together. At the close of the evidence the Judge dismissed the lien in both cases on the ground that the parties had not demanded the specific amount due them, holding that the demand must be for the amount that was owing.

Referring first to the claim of Branson: He claimed $24.65, alleging that he was entitled to $1.00 a day wages, and that after

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giving due credit for any amounts he had received there remained $24.65 owing him. The Judge found that there was no agreement between the parties as to the wages Branson was to receive, and that $20 a month would be fair wages for him. Without finding how much was due him at the rate of $20 a month, or whether anything was due him at that rate, the Judge dismissed the claim on the ground that the amount he had demanded was not owing him.

Olsen claimed $49.49, alleging that his wages were to be $1 a day, and claiming that after he had given all credit for any amounts he had received there was that amount of $49.49 owing him. In this case the Judge found that the agreement was for $20 per month and without finding how much, if anything, was owing Olsen at the rate of $20 per month, dismissed the claim on the same ground as that on which Branson's claim was dismissed. The Judge cited in support of his decision *Murchie* v. *Fraser* (1903), 36 N.B.R. 161. I will refer to that case again.

I have carefully examined the evidence given in both cases. Branson by his evidence claims that he was entitled to $1 per day, and he alleges that after giving credit for what he had received the amount of $24.65 was owing him. He demanded his wages from the defendant, and the defendant offered him $13 and some cents. This he refused to take, claiming that more was owing him. Olsen claimed that he was working for $1 per day, and that after giving credit for amounts he had received the amount of $49.49 was owing him. He demanded his wages from Goodwin. Goodwin refused to pay him the amount, but offered him $8 which he refused to accept. These proceedings were then commenced.

It does not appear to be disputed by the defendant that the demand was made. With reference to Olsen, defendant claimed that he had only agreed to give him $20 per month. With reference to Branson I gather from defendant's evidence that he claimed that no amount of wages was fixed but that Branson was not worth more than $20 per month. The defendant does not say in his evidence how much would be due either of them at the rate of $20 per month.

On going over the evidence I think it is clear that at the rate of $20 per month there was something due each of the plaintiffs.

I cannot tell very well from the evidence how much was due Branson. In Olsen's case I think from the evidence there was between $20 and $30 owing him. The Judge, however, as I have said, does not find how much is owing either of them. He simply bases his judgment on the fact that each claimed his wages were $1.00 per day, and that neither of them was entitled to $1.00 per day, and the demand they made was at that rate, and therefore was for more than the amount due them. In other words, he holds that they must make a demand for the specific amount owing them. In that I think the Judge was wrong.

Before referring to *Murchie* v. *Fraser et al, supra*, I will refer to the Act itself. Sec. 3 of the Act provides for the lien on logs or timber by persons performing labour or service in connection with it. Sec. 4 provides that the lien in sec. 3 shall not attach or remain a charge on the logs or timber unless and until a statement thereof in writing, duly verified upon oath by the person claiming such lien, or someone duly authorised in his behalf, shall be filed in the office of the clerk of the County Court in which the labour or service or some part thereof has been performed. Sec. 5 provides that that statement shall set out fully the nature of the debt, demand or claim, the amount due the claimants, *as near as may be*, over and above all legal set-offs or counterclaims, etc. Sec. 6 provides that the statement of claim shall, in respect of work done in the woods, be filed within 30 days after the last day on which such labour or services were performed. These sections all appear to have been complied with.

Sec. 9 provides as follows:—

> Without issuing a writ of summons, the claimant may apply to a Judge of the County Court of the county in which the logs or timber may be, and upon the production to the Judge of an affidavit verifying his claim and shewing that the same has been filed as aforesaid, also stating the particulars of the claim, and shewing that the claimant has fully performed his contract, and that the amount is justly due and owing to him, and that payment thereof has been demanded and refused, the Judge may thereupon, if he thinks it in the interest of justice to do so, make an order under his hand, directing that a writ of attachment may issue to the sheriff of such county, etc., to attach the logs.

This section was also complied with by both the claimants. Their affidavits are alike; they state the amount that they claim was justly due and owing them, and they say that payment had been demanded and refused. Attachments were accordingly issued, and the logs seized by the sheriff under the writs. The

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logs were subsequently released by order of the Court, and a bond filed by the defendant as provided for in the Act.

Section 15 of the Act provides as follows:—

After the said writ of attachment has been returned the Judge shall, upon the application of the claimant, which application shall be made within ten days after such return, unless the time shall be extended by the Judge, issue an appointment naming a day upon which all persons claiming a lien on the logs or timber shall appear before the Judge in person, or by their solicitor or agent, for the adjustment of their claims and the settlement of accounts, etc.

Sec. 17 of the Act provides as follows:—

The Judge shall hear all parties and take all accounts necessary to determine the amount (if any) due to them, or any of them, or any other holders of liens who may be called by the Judge to prove their claim, and shall tax to them their costs, and determine by whom the same shall be payable and settle their priorities, and shall determine all such matters as may be necessary for the adjustment of the rights of the several parties.

By sec. 20 it is provided that if nothing is found due then the Judge shall order that the liens or lien be discharged and the logs or timber be released, or the security given therefor be delivered up and cancelled.

Under those provisions of the Act it seems to me that where the party claims a lien, and has made a demand, although the demand may be for more than the amount that is subsequently found to be owing, yet it is the duty of the Judge to determine, under sec. 17 of the Act, what, if anything, is owing, and if anything is owing to order that amount to be paid to the lien-holders. I do not think that it is the intention of the Act that the party must have a liquidated amount, that is, that he must make the demand for the exact amount owing him. It is sufficient if there is something owing him, and he demands payment, and, although on the settlement of account it may appear that the exact amount demanded is not coming to him, yet it does not destroy the lien. The object of the Act was to secure to the men working on the logs their wages, and it would manifestly fall far short of its object if it is held the lien would fall if the party honestly makes a claim for more than is in fact coming to him.

In this case I gather from the evidence that the real question between the parties was as to the amount owing. The defendant claimed that there was not so much owing the plaintiffs as they claimed. They claimed that they were entitled to a dollar a day. In Olsen's case the defendant claimed that the agreement was $20 a month, and in Branson's case he claimed that he was not worth more than $20 a month, and that the amount of wages

had never been fixed. So that in my opinion the Judge of the County Court is wrong. As I have said, he makes no findings on the facts as to how much is owing at the rate of $20 per month, but simply bases his judgment on the fact that the plaintiffs had not proved the specific amount they claimed to be owing.

Referring to *Murchie* v. *Fraser et al, supra*, the headnote in that case says as follows:—

Under section 9 of the Act there must be a demand of the specific amount due before the issue of the attachment.

I do not think that note is warranted by the judgment. The case went largely on the ground that the claim was a fraudulent one. The judgment of the Court was delivered by the late Chief Justice Tuck, and practically all of the judgment is a discussion of the facts in the case, for the purpose of pointing out that the case was a dishonest one. It is true that in the course of the argument of Mr. Crocket, the counsel for the claimants, respondents, the Chief Justice did say:—

What do you say on the point that there was no demand? A. I say first that there was clear evidence of the demand. The claimants stated defendant gave them their time bills, and they asked him for their wages, and he said he had no money. Tuck, C.J.: There must be a demand of the sum mentioned in the claims. The words in sec. 9 are "the amount thereof."

I take that to mean that parties claiming a lien must first demand the wages owing them, but I do not think that it means that if on the taking of the accounts the actual amount owing them is less than the amount they demanded that they thereby will lose their lien. If, however, I am wrong in this I do not think that a remark made by a Judge during the course of the argument is a part of the judgment of the Court. In the judgment the only remark as to the demand is at the close of the judgment where the Chief Justice says:—

Being of opinion that the claims as allowed are dishonest, and that no demand was made, this appeal must be allowed with costs.

I do not interpret that to mean that a demand for the specific amount must be made, but rather to mean that the parties before taking the proceedings must make a demand of their claim against the owner of the logs.

Of course if I felt the case did decide that there must be a demand of the specific amount owing, I would be bound by that judgment, but I do not think that it is open to that interpretation, and in my opinion it would be a wrong interpretation of the Act

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to say that the parties must fail if the amount they demand is more than the amount that is finally found to be owing them on the adjudication. I cannot give any interpretation to sec. 17 of the Act if it is said that the party must fail unless the specific amount actually owing is demanded, because by that section it was provided distinctly that the Judge shall take the accounts and himself determine what amount is owing, and in this case I think the County Court Judge should have taken the accounts and determined what was owing. Therefore in my opinion the appeal in both cases must be allowed with costs, and the cases referred back to the Judge of the County Court to take an account under sec. 17 of the Act, and to allow the parties a lien on the logs for any amount that may be found owing. If, however, it should appear that the amount so owing is less than any amount that may have been tendered, the Judge probably would not allow the claimants any costs. *Appeal allowed.*

REX v. RAFUSE, alias PENAUL.

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Nova Scotia Supreme Court, Graham, C.J., Longley, J., Ritchie, E.J., and Harris, J. December 20, 1915.

1. BIGAMY (§ I—7)—ABSENCE AS A STATUTORY EXCUSE—CR. CODE, SEC. 307.

The continuous absence referred to in Cr. Code sec. 307 (3) as an answer or excuse to a bigamy charge is absence from the person, and it is not essential to a defence under that heading that the absence of the spouse should have been either out of Canada or out of the province in which the first marriage took place and in which both parties were domiciled until their separation, ten years before the alleged bigamous marriage.

Statement.

CROWN case reserved under the provisions of s. 1014 of the Criminal Code, by F. G. Forbes, Esquire, Judge of the County Court Judge's Criminal Court for District No. 2.

The prisoner was brought before the learned Judge under the provisions of the Speedy Trials Act, and elected to be tried without the intervention of a jury, on the charge that she on or about the 5th day of July, 1905, at Chester Basin, in the county of Lunenburg, being already theretofore married to one Joshua Rafuse, did, contrary to the provisions of the Criminal Code in that behalf made and provided, marry and go through a form of marriage with another man, to wit: William Penaul of Gold River, in the county aforesaid, her first husband being still alive.

The evidence showed that, within three or four months after the first marriage, the prisoner and her husband separated, the

latter leaving the county of Lunenburg and going to Cornwallis in the county of Kings, in the province of Nova Scotia, where he resided until the date of the prisoner's marriage to Penaul.

Between 1895 and 1905 the evidence showed (and the learned Judge so found) Rafuse, the first husband, did not contribute to the support of his wife, and during these years she did not hear from him and did not know where he resided or whether he was alive.

The learned Judge acquitted the prisoner on the ground that she came within the exception mentioned in s. 307 of the Code, sub-sec. 3 (*b*), but reserved for the opinion of the Court the question whether he was right in holding that absence by the first husband in an adjoining county to that where both marriages were celebrated for a period of upwards of seven years came within the section and whether he was right in acquitting the defendant on that ground.

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

J. A. McLean, K.C., for the prisoner.

Longley, J.

LONGLEY, J.:—This case turns upon the interpretation of s. 307 of the Code. If the wife or her husband has been continually absent for seven years, and he or she is not proved to have known that the husband or wife was alive at any time during those seven years, etc. The point at issue is, do the words "continually absent for seven years" mean continually absent from the province of Nova Scotia, the Dominion of Canada or simply absent from the person. In this case the Dominion Act cannot be construed as applying to absence from Nova Scotia; in order to make it have that significance it should be stated especially. If the absence was to be from the Dominion of Canada, it would be preposterous in its character, because the size of Canada is so great that a person could live for seven years away from a person in various parts of Canada and never be heard of.

In England it is expressly provided that continual absence from the person is sufficient, even though he reside in England. In this case, the defendant most positively swears that she never knew of the existence of Joshua Rafuse, her first husband, and that he did not contribute to her support. He was located only seventy-five miles away from her. It seems that she is a person of no education, unable to read or write, and would be as much likely

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to be unaware of the existence of her husband at seventy five miles distance as she would be at the distance of seven hundred and fifty.

We are called upon to give an interpretation to this statute for the first time and I have no hesitation in giving the same interpretation as the Judge below that "continual absence for seven years" means continual absence from the person and does not refer to either Canada or Nova Scotia.

Harris, J.

HARRIS, J.:—His Honour Judge Forbes acquitted the defendant on a charge of bigamy.

Sec. 30 (3) of the Criminal Code, so far as it applies to this case, reads:—

"(*a*) No one commits bigamy by going through a form of marriage. . . . . .

"(*b*) If . . . her husband has been continually absent for seven years then last past and . . . she is not proved to have known that . . . her husband was alive at any time during those seven years."

The first husband of the accused had been living apart from her for more than seven years and she swore that she did not know that he was alive at any time during those seven years, and the trial Judge believed her statement and found this fact in her favour.

She lived in Lunenburg County and it appears that during the seven years in question her husband was living in King's County, in this province, about seventy-five miles distant.

The trial Judge decided that the words "continually absent" in s. 307 s.-s. 3 (*b*), of the Code, meant absence from his wife, but he reserved a case upon the question as to whether these words had been correctly interpreted by him.

The statute is a Federal one and it seems to me that the words "continually absent" must either mean absent from his wife or absent from Canada. It was suggested that they might mean absent from the province in which the accused resided. There would, in my opinion, be something to be said for this construction, if the statute had been one passed by the local legislature of the province, but there is nothing in the Code to indicate that the Parliament of Canada meant absence from the province in which the accused resided any more than there is to indicate that it meant absence from the particular county or municipality in which the accused resided.

There are, I think, only two possible interpretations open: We must say that it means "absence from such person" or "absence from Canada."

In the English statute the words "continually absent" are followed by the words "from such person."

Prior to 1867 the statute in force in Nova Scotia contained the words "continually absent from such person." Rev. Stats. N.S. (3rd series), c. 161, s. 2.

When the criminal law of Canada was consolidated after Confederation, the same words were used. See s. 58, c. 20, Act 1869.

The first Criminal Code of Canada, passed in 1892, came into force on July 1st, 1893. In the new Code [Cr. Code 1892, s. 275,] the section was redrafted and the words "from such person" were left out.

It is suggested that Parliament in changing the language intended to change the law. Due consideration must be given to the change, but the omission of the words is not conclusive.

The law is thus stated in Maxwell on Statutes, at p. 520:

"The presumption of a change of intention from a change of language (of no great weight in the construction of any documents) seems entitled to less weight in the construction of a statute than in any other case; for the variation is sometimes to be accounted for by a mere desire of improving the graces of style and of avoiding the repeated use of the same words, and often from the circumstance that the Act has been compiled from different sources; and further from the alterations and additions from various hands which Acts undergo in their progress through Parliament."

It is significant that Chief Justice Taschereau, in the 3rd edition of his work on the Criminal Law of Canada, published after the first Code was passed, does not refer to the change in the wording.

Crankshaw, in the 3rd edition of his work, comments on some other verbal differences between the English statute and sec. 307 of the Code, but does not refer to the omission of the words "from such person" from the Code. He says that the effect of the two sections, i.e., the English and our sec. 307, seems to be the same, but it is not clear that he had in mind the omission of the words referred to from sec. 307.

All the Canadian authors quote the decisions under the English section in this sub-section of s. 307, as if they were applicable.

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I am unable to bring myself to believe that Parliament meant "continually absent from Canada," and I have already indicated my reason for thinking that absence from the province in which the accused resided was not intended.

To adopt the construction "continually absent from Canada" would be to attribute to Parliament an intention to adopt a retrograde course inconsistent with the whole tendency of modern legislation on the subject of Criminal Law. And in this connection, we must not overlook the great extent of Canada and the distances from one part to other parts of the Dominion; I think that construction should be rejected. The words should be given their ordinary and natural meaning, and they are in my opinion to be used as meaning "continually absent from such person."

I would uphold the decision of the learned County Court Judge and answer both questions reserved in the affirmative.

Graham, C.J.
Ritchie, E.J.

GRAHAM, C.J., and RITCHIE, E.J., concurred.

Acquittal sustained.

BARTLETT v. WINNIPEG ELECTRIC R. CO. and CANADIAN NORTHERN R. CO.

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Manitoba King's Bench, Galt, J. March 4, 1916.

RAILWAYS (§ IV A—90)—*Crossings—Accidents at — Negligence—Reliance on rule or signal.*]—Action to recover damages for the death of the plaintiff's wife. The question as to which of the defendants was liable was the only one reserved for trial.

The facts of the case were as follows:—

A freight train coming north duly stopped about 300 yards south of the crossing at Portage Ave., in the City of Winnipeg. The engineer was then signalled to proceed and did so slowly. A brakeman was stationed on the front freight car. The semaphores were fixed to indicate safety for the freight train to proceed and to warn the Electric R. Co. and others on Portage Ave., against crossing the railway track. The electric car duly came to a stop, and under the company rules was bound to remain stationary until the conductor of the car gave the "go ahead" signal. This signal was never given. When the freight train was perhaps 75 feet from the crossing the motorman suddenly decided to cross the track and started forward. When the electric car was partly on the diamond the brakeman on the freight car saw the danger of collision and shouted to the motorman to go ahead, the motorman applied extra power and the car went ahead with a

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jerk, and 3 passengers including the deceased were either thrown off the car or in desperation jumped from it and alighted on the diamond where the deceased was run over.

R. D. Guy, for Winnipeg Electric.

O. H. Clark, K.C., for Canadian Northern.

GALT, J., in a written opinion, said that under the Railway Act and the rules and regulations applicable to these defendant companies the steam railway had the right of way across Portage Ave., and that even if it had been otherwise the action of the motorman in approaching the crossing and stopping, operated as an invitation to the engineer of the freight train to continue on his course. The accident was caused by the frantic haste of the motorman to get across before the freight train and his conduct was grossly negligent. The fact that the steam railway had failed to comply with certain statutory requirements such as blowing a whistle or ringing a bell had no application to the facts of the case, and that a man had no right to cross a railway track in front of an approaching train in full view and when he suffered to complain that a bell had not been sounded. Neither was the railway company negligent under the circumstances in not having its air brakes coupled nor in the fact that the engineer missed the first violent signal of the brakeman, as he had no reason to expect such a signal.

The learned Judge said that where the negligent conduct of a party places another in a perilous situation, the latter cannot be expected to instantaneously adopt the very best method which might be open to him of avoiding the accident and his failure to do so cannot be imputed to him as negligence. (Beven on Negligence, *The Bywell Castle*, 4 P.D. 219 at 223; *The Schwan*, [1892] P. 419, 434.)

As to the matter of costs. The plaintiff was amply justified in the first instance in bringing his action against both defendant companies. The proper form of order under the Judicature Act was to order the defendant, who is liable as between himself and his co-defendant, to pay them to the co-defendant (*Rudow* v. *Great Britain Mutual Life Ass. Soc.*, 17 Ch. D. 600; *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181; *The "Esrom"* v. *The Hopper*, "*Wills No.* 66," [1914] W.N. 81, referred to.) The Judge thought that this was the proper course to adopt in the case at bar. *Judgment accordingly.*

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CITY OF TORONTO v. MORSON.

Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. June 9, 1916.

TAXES (§ VI—220)—*Income tax—Federal officers—Recovery of municipal taxes.*]—Motion by the plaintiffs for judgment in an action in the County Court of the County of Ontario, and referred by the County Court Judge to a Divisional Court.

The action was to recover municipal taxes in respect of the income of one of the Junior Judges of the County Court of the County of York, and the question was whether Judges and other federal officers could legally be assessed in respect of their incomes. The defendant raised a preliminary objection that the case was not properly before the Court.

Irving S. Fairty, for plaintiffs.

R. A. Reid, for defendant.

RIDDELL, J., in a written opinion, referred to ch. 56, R.S.O. 1914, making applicable to County Courts *mutatis mutandis* the provisions of sec. 32, of the same Act, which are as follows:—

(2) It shall not be competent for any Judge of the High Court Division in any case before him to disregard or depart from a prior decision of any other Judge of co-ordinate authority, on any question of law or practice without his concurrence.

(3) If a Judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher Court, he may refer the case before him to a Divisional Court.

The County Judge of Ontario deemed the decision of the County Judge of Peel in a previous action between the same parties in respect of the taxes for another year to be wrong, and so referred the case to a Divisional Court.

It appeared, however, that the decision of the Peel Judge was given in a Divisional Court plaint and in the opinion of Riddell, J., this was not a "decision of any other Judge of co-ordinate authority" and the County Judge of Ontario should give his own decision upon the case in his Court.

The case was therefore not properly before the Court, and the motion should be dismissed.

LENNOX, J., agreed in the result, although with some doubt.

MASTEN, J., also agreed.

MEREDITH, C.J.C.P. (dissenting) said there was no irregularity; the County Court Judges were of co-ordinate authority.

Upon the merits of the case there were two questions involved

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(1) Has the Province power to tax the salaries of the Judges of its Courts? (2) If so has it authorised the taxation of them? Both questions should be answered in the affirmative and the plaintiffs should have judgment for the amount claimed without costs. *Motion dismissed.*

Re NEWCOMBE v. EVANS.

Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. June 9, 1916.

WILLS (§ I E—40)—*Probate—Foreign will—Value of property—Construction.*]—Appeal by the defendant from an order of Latchford, J., in an application under sec. 33 of the Surrogate Courts Act, R.S.O. 1914, ch. 62.

Latchford, J., May 3 (in dismissing the application), said that the *locus rei sitoe* applied to realty and that only personalty was affected by a foreign probate, that the total value of the personal property of the deceased both here and abroad was much less than the amount mentioned in sec. 33. He was inclined to regard the words "The property of the deceased" as meaning the property over which the Surrogate Court had jurisdiction, but whether this was right or not, the application failed on the ground that the case was not of sufficient importance to warrant the interference of the Court.

A. W. Langmuir, for appellant.

H. S. White, for respondent.

RIDDELL, J.A., June 9, in a written opinion, said: The Surrogate Courts Act provided that a case should not be removed "unless the property of the deceased exceeds $2,000 in value." Property which could not be affected by the will was not to be considered in determining the amount of the property of the deceased under the section. The affidavit before Latchford, J., was defective in not setting out definitely the result in Massachusetts of a grant in Ontario.

On the argument of the appeal the Court allowed a further affidavit to be put in and it was satisfactorily shewn that a grant of letters probate by the Court of the domicile of the decedent is accepted by the Massachusetts Court. The property in Massachusetts would, therefore, be affected by probate in Ontario, and should be considered in determining the value of the property

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of the deceased. The appeal should be allowed and the case removed into the Supreme Court of Ontario.

LENNOX and MASTEN, JJ., concurred.

MEREDITH, C.J.C.P., also agreed in the result.

Appeal allowed.

CADWELL AND FLEMING v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Clute, J. June 9, 1916.

DAMAGES (§ III—222)—*Gravel lands—Diversion of stream—Increase of flow—Consequential damages.*]—Action for damages, and an injunction in respect of injury to the plaintiffs' lands. The facts of the case are as follows: The plaintiffs acquired sand and gravel lands on the river Maitland, and they complained that the defendants constructed an embankment, narrowing the stream and causing the waters to flow with great force against the bank of the river, and wash out great quantities of sand and gravel to their serious loss and damage.

J. H. Rodd, for plaintiffs.

Angus MacMurchy, K.C., for defendant.

CLUTE, J., in a written opinion, found that the breakwater caused a great change in the flow of the water, throwing more to the north side and tending to make that the main channel, that this obstruction amounted to a continuing nuisance and that the plaintiffs were by the erosion and destruction of the gravel bank peculiarly injured thereby in a different way from that which affected the general public, that there was no occasion for blocking up the south channel and that the embankment was built entirely without the sanction of the Dominion Board of Railway Commissioners. (Reference to R.S.C. 1906, ch. 37, secs. 151 to 156.)

The learned Judge concluded that there had been laches in applying for the remedy now sought, that the railway was a great public utility, the damages were capable of being estimated in money and compensated for, and it would be oppressive to the defendants to grant the injunction asked for, that future damages should be granted instead of the injunction. The learned Judge estimated the damages at $3,500 but granted leave to either party, if dissatisfied, to have a reference to the Master, for the purpose of having them assessed. *Judgment accordingly.*

SHARKEY v. YORKSHIRE INSURANCE CO.

Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. June 9, 1916.

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INSURANCE (§ III—40)—*Application and policy—Tender—Acceptance—Contract—Time.*]—Appeal by defendants from a judgment of Latchford, J., in an action to recover on a policy of insurance on a stallion.

Latchford, J. (in the judgment appealed from) held, that having regard to secs. 154 and 158 of the Ontario Insurance Act (R.S.O. 1914, ch. 83), the application for insurance was not part of the contract, and that the rights of the parties must be determined by the policy itself. The term of insurance conformably to the application and the policy was three months commencing at noon June 7 and ending at noon September 7. The death was during the period between the time the policy was brought into operation as a contract by the payment of the premium and the delivery of the policy, and the date on which the policy was to expire and that therefore the company was liable.

Oscar H. King, for appellants.

Sir George Gibbons, K.C., for respondents.

RIDDELL, J., read a judgment in which he said that there was no need to consider anything except what appeared in black and white on the face of the documents.

What was insured was:—

> Any animal . . . (which) shall during that period die from any . . . disease . . . contracted after the commencement of the company's liability.

The application was a request to the defendants to offer a policy; the company may decline or accede to the request. If the company accede, they write a policy and tender it to the proposed assured as the contract they are willing to enter into. If the assured accept the policy tendered and pay the premium or make such other arrangements as are satisfactory to the company, then and then only is the contract complete and the company's liability commences.

In this case the animal contracted the fatal disease after the policy was signed but before delivery of it to the plaintiff and before payment of the premium, and therefore before the liability of the company commenced, and the plaintiff could not recover. Reference to *Provident Savings Life Ass. Co.* v. *Mowat*, 32 Can.

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S.C.R. 147; *Canning* v. *Farquhar* (1886), 16 Q.B.D. 727; May on Insurance, 4th Ed., par. 43H; *North American Life Ass. Co.* v. *Elson* (1903), 33 Can. S.C.R. 383.

MEREDITH, C.J.C.P., and LENNOX and MASTEN, JJ., agreed in the result.

Appeal allowed.

LLOYD v. ROBERTSON.

Ontario Supreme Court, Garrow, Maclaren, Magee and Hodgins, JJ.A. June 27, 1916.

WILLS (§ I D—38)—*Action to set aside after probate—Want of testamentary capacity — Undue influence—Onus.*]—Appeal by defendants from the judgment of Meredith, C.J.C.P., 27 D.L.R. 745.

J. J. Coughlin, for appellants.
Glyn Osler, for respondent.

The judgment of the Court was read by GARROW, J.A., who, after setting out the facts, said that there was no explicit finding that the testator was not of testamentary capacity. The finding was that the will had been procured by the defendant Albert Lloyd, and that he had not satisfied the onus resting upon him of shewing that the paper-writing propounded contained in truth the last will of the deceased. GARROW, J.A., was, with deference, unable to agree with the finding. The will could not be said to have been "procured" by the defendant Albert Lloyd at all. The burden of proof had, upon the undisputed evidence, been fully and amply discharged.

There was no good reason why the clause of the will which bequeathed the residue to Albert should not stand as part of the will.

The appeal should be allowed and the action dismissed.

The plaintiff's costs as between party and party up to and inclusive of the trial-judgment, and the defendants' costs to the same point as between solicitor and client, should be paid out of the estate; and the plaintiff should pay the defendants' costs of the appeal.

Appeal allowed.

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Re SUCCESSION DUTY ACT AND BOYD.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. June 2, 1916.

1. TAXES (§ V C—193)—SUCCESSION DUTY—PARTNER'S SHARE IN LAND OF NON-RESIDENT FIRM.

Under sec. 5 of the Succession Duty Act, R.S.B.C. 1911, ch. 217, succession duty is payable in respect of the share of a deceased partner in partnership lands situate within the province, though the head office of the partnership and the domicile of the deceased were situate elsewhere. [*The King* v. *Lovitt*, [1912] A.C. 212; *Re Estate of Scott McDonald*, 9 B.C.R. 174, followed.]

APPEAL from the judgment of Hunter, C.J.B.C., dismissing a petition for relief against succession duty. Statement.

A. P. Luxton, K.C., for appellants.

H. A. Maclean, K.C., for respondent.

MACDONALD, C.J.A., concurred with GALLIHER, J.A. Macdonald, C.J.A.

MARTIN, J.A.:—This case is, I think, indistinguishable in principle from *Rex* v. *Lovitt*, [1912] A.C. 212, 81 L.J.P.C. 140, and as I agree with the judgment of my brother McPhillips I shall only add that as the Privy Council in that case, because of a statute corresponding to ours, placed a limitation upon the principle expressed in the maxim "*mobilia sequuntur personam*," therefore I cannot say the Judge below took a wrong view of our statute in interpreting it analogously so as to limit the application of the partnership doctrine relied upon by the appellants. Martin, J.A.

GALLIHER, J.A. (dissenting):—The short question is—does this property come within sec. 5 (*a*), ch. 217, R.S.B.C. 1911? Galliher, J.A.

These lands were partnership lands, and the rule laid down by Sir James Hannen in *Re Ewing* (1881), 6 P.D. 19 at 23, is:

> The share of a deceased partner in a partnership asset is situate where the business is carried on.

This rule is referred to and approved in *Stamp Duties Commissioner* v. *Salting*, [1907] A.C. 449, Lord Macnaghten, at p. 453.

H. A. Maclean, K.C., for the Attorney-General, cited *Re Scott McDonald*, 9 B.C.R. 174; and *Rex* v. *Lovitt*, [1912] A.C. 212.

Both these cases decided that where money is deposited in a bank in one province, and the deceased resides without that province, duty is payable in the province where the money is deposited.

These were both cases of deposits by individuals—here the property is partnership property, and all that those claiming under the deceased would be entitled to would be a share in the surplus of assets over liabilities of the partnership, and under the above

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rule that share is situate in the Province of Ontario where the business was carried on.

The appeal should be allowed and the petitioners are entitled to the declaration prayed for.

MCPHILLIPS, J.A.:—The matter to be determined is whether the executors of the will of Mossom Martin Boyd, deceased, are liable to pay succession duty in respect of land in the petition mentioned, and is by way of appeal from the order of Hunter, C.J.B.C., of date December 20, 1915—the Chief Justice having held that succession duty is payable in respect of the lands notwithstanding that the said lands are assets of the partnership of Mossom Boyd Co. and claimed to be on the submission of the appellants (petitioners) personal estate—the partnership being carried on at Bobcaygeon, Province of Ontario—also the place where the partners were resident and domiciled. The lands are registered in the Land Registry Office in British Columbia in the names of the partners, *viz.*: Mossom Martin Boyd and William Thornton Cust Boyd—it was also alleged that "duty is claimed by the Government of the Province of Ontario in respect of the whole of the interest of the testator at the time of his death in the surplus assets of the partnership of the Mossom Boyd company, including the partnership property in British Columbia."

Probate of the will of the deceased was sealed on November 1, 1915, in British Columbia under the Probates Recognition Act (R.S.B.C. 1911, ch. 184)—(probate being first obtained in the Province of Ontario)—and is of the like force and effect and of the same operation in British Columbia as if granted by the Court of Probate of the Province of British Columbia (ch. 184, sec. 3).

Mr. Luxton, the counsel for the appellants, strongly contended that all that passed by the will was the partnership interest of the deceased—no interest in land in British Columbia passing by the will—and referred to Lindley on Partnership (8th ed. 1912); at pp. 406, 407; and the Partnership Act (R.S.B.C. 1911, ch. 175) sec. 25 (this section is the same as sec. 22 of the Partnership Act (Imperial) 1890). Section 25 reads as follows:—

25. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representative of a deceased partner)

and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

It will, however, be observed that the language is "shall . . . be treated as between the partners"—previous to the enactment the decisions were conflicting.

It was also pressed that the share of the deceased partner is situate and situate only where the business was carried on at the time of the death. *Commissioner of Stamp Duties* v. *Salting*, [1907] A.C. 449, at 455, was cited. Lindley on Partnership, at p. 404, says:—

> As regards real property and chattels real the legal estate in them is governed by the ordinary doctrines of real property law (and sec. 20 of the Imperial Act is referred to—being sec. 23 of ch. 175, R.S.B.C. 1911) and therefore if several partners are jointly seised or possessed of land for an estate in fee or for years on the death of any one the legal estate therein will devolve on the surviving partners.

The land in question was not held by the partners as joint tenants but as tenants in common. There could not be in the present case any title by survivorship and the presumptive half share or interest in the lands necessarily passes under the will of the deceased.

The case of *Re Succession Duty Act and Re The Estate of Scott McDonald* (1902), a decision of the Full Court reported in 9 B.C.R. 174, is instructive upon the question arising upon this appeal and was referred to by Mr. Maclean, the counsel for the Crown. It was there decided that succession duty was payable upon money on deposit in a bank in this province belonging to a person domiciled in a foreign country at the time of his death. The Succession Duty Act (R.S.B.C. 1911, ch. 217), well defines that all property situate within the province is subject to succession duty (sec. 5, sub-secs. (1) and (2)). The property in question in the present case being land the *lex situs* governs—that is, it must be held to be subject to the law of British Columbia. Without referring in greater detail to the principle and the leading cases—I refer to the judgment of Gregory, J. in *Barinds* v. *Green* (1911), 16 B.C.R. 433.

The decision which in my opinion determines the appeal is that of *Rex* v. *Lovitt*, [1912] A.C. 212—and the statute law there under review may be said to be for all practical purposes and an understanding of the case the same as the statute law of British Columbia. Lord Robson delivered the judgment of their Lordships of the Privy Council—and at p. 218 said:—

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The actual *situs* of the property is therefore the first question to be determined.

Can there be any question as to the *situs* of the property in question in the present case? It must be admitted that it is land within the Province of British Columbia. Lord Robson, even in dealing with "movables," was impelled to say in *Rex* v. *Lovitt*, *supra*, at p. 220,

> Executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is recoverable, and no legal fiction as to its "following the owner" so as to be theoretically situate elsewhere will avail them.

Mr. Luxton contended that it was not really necessary to get ancillary probate in British Columbia or have the probate sealed under the Probates Recognition Act—and whilst not at all deciding the point—as a matter of practice it has been insisted upon in the Land Registry Office, when registration of title to land is applied for, when land is passing by will, and would appear to me to be a very necessary requirement in real property law.

Lord Robson makes it clear that in determining the law—the statute law governing must be carefully looked at. The rule of law may be affected—at p. 221 we find him saying:—

> Its application may be excluded by the use of apt and clear words in a statute for the purpose. The question now to be determined is whether that has been done in the present case by a legislature having full authority in that behalf.

Lord Robson refers to the amending Act of Queensland—in reference to the decision of the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. 769, and in my opinion the British Columbia Succession Duty Act is equally forceful. And Lord Robson says, at pp. 221-222:—

> Lord Hobhouse in delivering the judgment of the Board said, that if this amendment were restrospective it would be conclusive in favour of the commissioners who were claiming the duty. This weighty opinion is precisely in point as regards the present case. Here the Legislature of New Brunswick has expressly enacted that all property *situate* in the Province shall be subject to a succession duty though the testator may have had his fixed place of abode outside the province.

The land in question is subject to succession duty. The statute law declaring that land, being partnership property, shall be treated as personalty is declaratory of the law as between the partners and can have no application to the Crown. The legislature has imposed the succession duty as a tax to be paid on the property—*i.e.*, the land *situate* in British Columbia—and

the *lex situs* must govern. Upon the death of Mossom Martin Boyd *the land passed by the will and not otherwise*, and, in the language of Lord Robson, "apt and clear words in a statute for the purpose" appear in the British Columbia statute. The statute reads as follows—sec. 5 (sub-sec. (1) (*a*)):—

All property of such deceased person situate within the province and any interest therein or income therefrom whether the deceased person owning or entitled thereto was domiciled in the province at the time of his death or was domiciled elsewhere passing either by will or intestacy.

McPhillips, J.A.

In my opinion the Chief Justice of British Columbia rightly determined that succession duty is payable in respect of the lands in the petition mentioned—and I would therefore dismiss the appeal.

IRVING, J.A., died before judgment was delivered.

Irving, J.A.

Appeal dismissed, Court divided.

Re GOODMAN.

Manitoba King's Bench, Galt, J. May 17, 1916.

1. EXTRADITION (§ I—4)—PROVING FOREIGN INDICTMENT.

A certified copy of the indictment against the accused in a United States Court is admissible under sec. 23 of the Canada Evidence Act, R.S.C. 1906, ch. 145, in support of extradition proceedings taken in Canada to have him sent back to answer the indictment.

[See Annotations on Extradition from Canada 5 Can. Cr. Cas. 251, 5 Can. Cr. Cas. 540, 6 Can. Cr. Cas. 80, 9 Can. Cr. Cas. 264-321.]

2. BANKRUPTCY (§ I—7)—EXTRADITION FOR BANKRUPTCY FRAUDS—FRAUDULENT CONCEALMENT.

Evidence of the concealment by the accused of certain other sums of money a few days before the concealment of a larger sum in respect of which the charge was laid that he had concealed part of his property with intent to defraud his creditors, is admissible as evidence of the intent to defraud and of guilty knowledge.

[*R.* v. *Shellaker*, [1914] 1 K.B. 414; *R.* v. *Ball*, [1911] A.C. 47; *R.* v. *Ollis*, [1900] 2 K.B. 758, applied.]

3. BANKRUPTCY (§ I—7)—FRAUDULENT CONCEALMENT OF ASSETS—CONTINUING CONCEALMENT.

Extradition proceedings against the bankrupt for concealment of property in fraud of a bankruptcy trustee are not defeated by the fact that the concealment took place two months prior to the trustee's appointment, as the failure to disclose the prior concealment is in itself a concealment at the later date when the trusteeship became operative.

[*Re Webber* (No. 1), 20 Can. Cr. Cas. 1, 5 D.L.R. 863 and *Re Webber* (No. 2), 20 Can. Cr. Cas. 6, 5 D.L.R. 866, specially referred to.]

4. EVIDENCE (§ VII H—632)—PROOF OF FOREIGN LAWS—EXTRADITION.

Where the expert evidence given on the part of the prosecution to prove the foreign law is contested by the accused in extradition proceedings, the extradition Commissioner may refer to the foreign text books and reports bearing upon the subject.

[*Bremer* v. *Freeman*, 10 Moore P.C. 306, applied.]

Statement.

APPLICATION for extradition of one Morris Goodman.

H. W. Whitla, K.C., for the State of Massachusetts.

M. J. Finkelstein, for Goodman.

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GALT, J.:—The information of Adolph Friedman, of Winnipeg, police constable, shows that he is informed and hath reason to believe that Morris Goodman, formerly of the City of Boston, in the State of Massachusetts, one of the United States of America, lately of the City of Winnipeg, in Canada, did unlawfully at the City of Worcester in the said State of Massachusetts, on or about September 3, 1913, with intent to defraud his creditors or some or all of them, make and cause to be made a gift, conveyance, transfer or delivery of certain of his property, consisting of money to the amount and value of $5,000 in the said City of Worcester.

And further, that the said Morris Goodman, on or about December 13, 1913, at the said City of Worcester, did unlawfully, with intent to defraud his creditors or some or all of them, conceal part of his property, to wit, money to the amount of and value $5,000.

And further that the said Morris Goodman, on or about December 13, 1913, did unlawfully, knowingly and fraudulently conceal, while bankrupt, from his trustee in bankruptcy, the sum of $5,000, being part of the property belonging to the estate in bankruptcy of the said Morris Goodman, contrary to the laws of the United States of America, etc.

The information as laid contained two other charges which were abandoned by Mr. Whitla, counsel for the applicant, during the application for extradition.

The accused was represented by Mr. Finkelstein. Several objections were taken by Mr. Finkelstein to portions of the evidence tendered and admitted by me. I think it would be more convenient to deal with the objections after setting forth the material which I admitted.

The evidence submitted by the applicants consisted of the certified copy of an indictment for the same charges as are set out in the information, found by the grand jurors of the District Court of the United States of America, for the District of Massachusetts, returned and filed into the said Court by the said grand jurors on October 6, 1914, and several depositions taken at Boston, Massachusetts, by persons cognizant of the facts, and who had already given their evidence verbally to the said grand jury, together with certain oral evidence taken before me.

The identity of the accused with the Morris Goodman who

had been indicted in the United States was proved, and is not now contested.

The law under which it was alleged Goodman would be tried in Massachusetts was shown by William C. Matthews in his depositions. He testified as follows:

"I am an attorney and counsellor at law within and for the Commonwealth of Massachusetts, and also of the District Court of the United States within and for said Commonwealth.

That I have taken communication of the indictment and capias together with the depositions filed in the case of the United States by indictment versus Morris Goodman for knowingly and fraudulently concealing assets from the trustee of his estate in bankruptcy, and the following laws of the United States, namely, section 29 (*b*) of the Acts of Congress of July 1, 1898, as amended, are applicable to this case, which section reads as follows:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offence of having knowingly and fraudulently,—(1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy or attorney or as agent, proxy or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

The main facts relating to the charge of concealing assets to the extent of $5,000 from the trustee in bankruptcy may be briefly stated as follows: Goodman had conducted the business of a boot and shoe jobber for several years prior to 1913. Towards the end of September, 1913, Goodman consummated an arrangement with one Max Greenberg which certainly might be regarded as a concealment of the sum of $5,000 from his creditors or from his trustee in bankruptcy, if any. The application for the appointment of a trustee in bankruptcy against Goodman was not made until October. On November 10, Goodman was adjudged

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a bankrupt and Frank B. Holmes was appointed trustee, subject to the giving of the usual security. The security was completed on December 12.

In addition to the proof of concealment by the accused of the said sum of $5,000, evidence was tendered and admitted by me of the concealment by the accused of certain other sums of money —$1,000 and $940—a few days before the date of the $5,000 transaction.

Counsel for the applicant relied strongly upon two cases decided in our own Courts in which it was necessary to establish the very same laws as are in question here. I refer to *the King* v. *Stone* (No. 2), 17 Can. Cr. Cas. 377, and *Re Webber* (No. 1), 5 D.L.R. 863, 20 Can. Cr. Cas. 1. (See also *Re Webber* (No. 2), 5 D.L.R. 866, 20 Can. Cr. Cas. 6.) In both of these cases it was shown and held that sec. 29 (*b*) of the Acts of Congress aforesaid was similar in its terms and constituted the same crime as sec. 417, sub-sec. (2), of the Canadian Criminal Code.

The first objection taken by Mr. Finkelstein related to the certified copy of indictment, which he argued was merely hearsay evidence and therefore inadmissible. The document was certified to be a true copy of the original indictment, and it is attested by the seal of the U.S. District Court for the District of Massachusetts. I think this attestation was quite sufficient under sec. 23 of the Canada Evidence Act.

The next objection taken by counsel for the accused relates to the evidence given by the expert William C. Matthews in his depositions. It is said that he does not sufficiently show his qualifications as an expert. He does say: "I am an attorney and counsellor at law within and for the Commonwealth of Massachusetts and also of the District Court of the Unites States within and for said Commonwealth."

The question of an expert's qualifications depends, I should say, to a considerable extent upon the matter which he is required to prove. Where the charge alleged in an information or indictment depends upon a simple and well-known statute, I think comparatively slight qualifications would be sufficient in the expert.

In the present case the only charge relied upon is "that the said Morris Goodman, on or about December 13, 1913, at the said City of Worcester, did unlawfully, knowingly and fraudulent-

ly conceal, while a bankrupt, from his trustee in bankruptcy, the sum of $5,000, being part of the property belonging to the estate in bankruptcy of the said Morris Goodman; contrary to the laws of the United States of America," etc.

I think that for the purposes of such a charge Mr. Matthews' qualifications are sufficiently shown.

It is next objected that when Mr. Matthews says that he has "taken communication of the indictment and capias, together with the depositions filed in the case of the United States by indictment versus Morris Goodman, and that sec. 29 (*b*) of the Acts of Congress of July 1, 1898, as amended (quoting the Act), are applicable to this case" he is merely acting upon hearsay evidence.

The respective functions of an expert witness and of the Judge or Commissioner before whom evidence as to foreign law is taken are dealt with very clearly in *United States of America* v. *McRae*, L.R. 3 Ch. 79 at 85, where Lord Chelmsford, L.C., says: "The plea in this case sets out the Acts of Congress under which the forfeiture is said to have been incurred. That being admitted, it is the same as if it were proved as a fact in the case. Having it thus brought before him, is the Judge competent to construe the Act for himself, or does he (as it has been argued) require the further aid of a person learned in American law to inform him whether the case of the defendant is brought within it?"

His Lordship then proceeds to deal with laws in a foreign language requiring translation, etc., and holds that it is for the Judge to construe the instrument in question.

It was next objected that it was inadmissible for me to look at or in any way base my judgment upon the two cases of *The King* v. *Stone* (No. 2), *supra* and *Re Webber* (No. 1), *supra*, already decided in our own Courts and upon the same point. Counsel in support of this objection relied upon *M'Cormick* v. *Garnett*, 5 DeG.M. & G. 278. There a question of Scotch law had already been decided in England in an unreported case, and when a similar case arose, no evidence as to Scotch law on the subject was tendered. The Court said that "A question of Scotch law, being one of fact, was not to be decided by authority but by evidence in each cause. But the report proceeds to tell us that: An opinion, verified by affidavit, was produced, and thereupon an order was made for payment to the assignee."

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The authorities relating to the proof of foreign law indicate that considerable latitude is allowable to the Judge or Commissioner who has to interpret it.

In *Bremer* v. *Freeman*, 10 Moore P.C. 306, the Law Lords considered that the evidence of the experts given at the trial was not satisfactory and the following rule was laid down in the judgment: "Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but where the evidence of the experts is unsatisfactory and conflicting, the appellate Court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign Courts and the text writers, in order to arrive at a satisfactory conclusion upon the question of foreign law.'

With regard to this question of proving foreign law as a fact when the same fact has already been proved in other cases in our Courts, one is led to consider whether a Judge would not be justified in dealing with such a question in the same way as he is at liberty to deal with proof of a custom. Where a custom has been proved and established in several cases in the Courts, Judges both in England and here are entitled to take judicial notice of such custom. See Phipson on Evidence, 4th ed. pp. 12 and 13. *Ex parte Turquand, Re Parkers*, 14 Q.B.D. 636.

The expert who is called to prove what the foreign law is, as applied to a criminal charge in extradition, or to an ordinary civil action, can only testify as to what may be the law in the foreign State. He cannot give his views on what may be the law applicable in England or Canada.

Under the Extradition Act, R.S.C. 1906, ch. 155, sec. 2, the term "extradition crime" is defined to mean: "any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act; and, in the application of this Act to the case of any extradition arrangement, the said expression means any crime described in such arrangement, whether comprised in the said schedule or not."

Among the list of crimes set forth in the first schedule is,—

"8. Crimes against bankruptcy or insolvency law."

Now, in such a case as the present, the applicant comes before the Extradition Judge (or Commissioner) and says: "I accuse the

prisoner of having concealed from his trustee in bankruptcy the sum of $5,000, contrary to the laws of the United States of America."

The applicant must show, by expert testimony, that there is a law of the United States of America which makes such concealment a criminal offence. It is for the Judge, then, to decide whether such concealment of assets would be a criminal offence in Canada. In arriving at his decision the Judge will take judicial notice of the law of Canada, and incidentally, is at liberty to consult not only the statutes but also any cases decided in Canada upon the subject. If, in doing this, he finds one or more cases which not only decide the law of Canada on the subject, but also the law of the foreign state, based upon expert testimony adduced in those cases, is he compelled to close his eyes to that feature of the reports? The Judge has to decide not only the question of law, as to the Canadian law, but the question of fact as to the United States law, and if the cases may be looked at and followed for the one purpose, how can they be excluded for the other?

So far as the practice in this country is concerned, I find in *the case of William A. Hall* (Extradition), 8 A.R. 31 (Ont.), that the Judges of the Court of Appeal in Ontario had no hesitation about consulting and basing their judgments upon several American and English decisions.

With regard to the objection that all evidence relating to the concealment of the sums of $1,000 and $940 respectively a few days before the date of the $5,000 concealment should have been excluded, as the former two concealments do not form any part of the present charge against Goodman, my recollection is that the evidence as to those other two concealments was mixed up with the evidence relating to the $5,000 charge. But, in any event, I considered the evidence admissible not in proof of the charge relating to the $5,000, but as evidence of Goodman's intent to defraud, and guilty knowledge. Where only a single transaction is in question a man's conduct may be consistent with either innocence or guilt.

The rule applicable to this objection is clearly shown in the recent case of *The King* v. *Shellaker*, [1914] 1 K.B. 414. There evidence had been admitted at the trial of previous acts and conduct of the accused which tended to prove that he had been

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guilty of similar criminal acts with a girl under the age of sixteen years more than six months before the commencement of the prosecution. Isaacs, C.J., delivering the judgment of the Divisional Court, says, at p. 417:

"It was contended that this evidence ought not to have been admitted because it would or might disclose some previous offence committed by the accused more than six months before he was charged, and that upon that ground he was entitled to have the evidence excluded. That contention was supported upon two grounds. First, it was put upon the broad principle that to admit this evidence would be admitting evidence to shew that the accused was a man of evil disposition and likely to commit the crime charged against him, and that therefore the evidence was not properly admissible to throw any light upon the offence with which the prisoner was charged. It was further said that the effect of this evidence would be to prove an offence committed more than six months before the date when the charge was made against the accused, and would be proving an offence with which he could not then be charged.

"We are of opinion that this evidence was admissible, apart altogether from the statutory restriction as to time. It was admissible upon the well-established general principle stated in the House of Lords in *Rex* v. *Ball*, [1911] A.C. 47, although indeed the facts of that case were of a very special character. The House of Lords did not lay down any new principle, but merely applied the established principle to the facts of that case. That case followed a long line of authorities, of which *Reg.* v. *Ollis*, [1900] 2 Q.B. 758 at 781, was one, in which it was held that such evidence was admissible. The rule was well stated by Channell, J., in the latter case, where he said: 'In such cases evidence of other transactions is admitted, not for the purpose of shewing that the prisoner committed other offences, but for the purposes of shewing that the transaction the subject of the indictment was done with the intent to defraud, or with guilty knowledge, as the case may be. Such evidence is admitted, not because it tends to shew that other offences have been committed, but notwithstanding that, in the particular case, it may happen to do do.''

The next objection is that the depositions in this case failed to shew any crime against the laws of the United States, inasmuch

as the evidence shewed that the $5,000 in question was (if at all) concealed by Goodman in September, 1913, whereas his trustee in bankruptcy was not appointed until November 10, and did not qualify until December 12. I consider that a concealment of the money effected in September would (unless disclosed), continue to be a concealment in December when the trustee qualified. If I am entitled to rely upon the *Webber* case (5 D.L.R. 863, 20 Can. Cr. Cas. 1), this very point was there so decided; and it was held that the essence of the offence of fraudulent concealment of assets by a bankrupt under the law of the United States is the continuance of the concealment after adjudication of bankruptcy, and the appointment of a trustee, whose title relates back to the date of the adjudication, and extradition will not be refused merely on the ground that the act of concealment is alleged to have taken place before the date of adjudication.

It was also urged on behalf of the accused that the principal witness against him in respect of the $5,000 charge was Max Greenberg, who clearly shewed himself to be an accomplice in the transaction, and that, in the absence of corroboration, Greenberg's evidence should be disregarded. Whatever weight might attach to this objection if the accused were now undergoing his trial, it is not an objection of any weight on the present application: See *Re Richard B. Caldwell*, 5 P.R. (Ont.) 217.

Mr. Finkelstein did not attempt to argue that the facts disclosed in the depositions would not justify a committal under our sec. 417 of the Criminal Code.

Where the evidence given by the expert Mr. Matthews has been challenged and disputed by counsel for the accused, I think the decision of the Privy Council in *Bremer* v. *Freeman*, [10 Moore P.C. 306] *supra*, warrants me in looking at American decisions and authorities bearing upon the point. I find it laid down in Collier on Bankruptcy, 9th ed. (1912), in reference to the law now in question, as follows, p. 340:

"Concealment being possible only if the person is a bankrupt, strictly a concealment accomplished before the bankruptcy is not within the penalty of the statute. This limitation has, however, led to the doctrine of 'continuing concealment', which is now generally recognized. Although the concealment must have been done while a bankrupt or after discharge, yet where a

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bankrupt has disposed of property prior to bankruptcy, but has possession or control of the proceeds subject to adjudication, which he fails to disclose, there is a continuing concealment, for which he is amenable to the law. The word 'concealed' is sufficiently elastic to include continuing concealments. Such a concealment once begun necessarily continues after the bankruptcy and is therefore from his trustee."

Under the above circumstances, sec. 18 (*b*) of the Extradition Act directs:

"In the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, justify his committal for trial if the crime had been committed in Canada, the Judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison there to remain until surrendered to the foreign state or discharged according to law."

In my opinion the evidence before me would certainly justify me in committing the accused for trial if the acts deposed to have been done by him in Massachusetts had been committed in Canada.

I therefore commit the accused Morris Goodman to the common gaol of the Eastern Judicial District, there to remain until surrendered to the foreign state or discharged according to law. *Committal for extradition.*

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Manitoba King's Bench, Mathers, C.J.K.B. February 1, 1916.

1. LIS PENDENS (§ I—4) — LAND HELD IN TRUST — RIGHTS OF BONA FIDE PURCHASER FROM REGISTERED OWNER—DISCHARGE.

Under secs. 79 and 99 of the Real Property Act (R.S.M. 1913, ch. 171) a *bona fide* purchaser has the right to deal with the registered owner without any inquiry as to how and under what circumstances the owner procured title; if at the time of the agreement the purchaser has no knowledge that the vendor held the land merely as trustee for another person, he is not bound by a *lis pendens* filed by a judgment creditor of the real owner in an effort to subject the land to satisfaction of the judgment, and the purchaser is entitled to hold the land free from such claim, and to have the registration of the *lis pendens* removed, as forming a cloud upon his title.

[*Cooper* v. *Anderson*, 5 D.L.R. 218, followed; *Blair* v. *Smith*, 1 Man. L.R. 5, referred to.]

2. EXECUTION (§ I—8)—EQUITABLE INTERESTS — VENDOR'S LIEN FOR UNPAID PURCHASE MONEY.

A vendor's lien for the balance of the unpaid purchase money is not an interest in the land which can be reached by an execution creditor.

[*Bank of Montreal* v. *Condon*, 11 Man. L.R. 366, followed.]

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APPLICATION to be declared the owner of land free from a *lis pendens* registered against it and to vacate certificate of same. Granted.

J. F. Kilgour, for plaintiff.

G. W. Bruce, for defendant.

MATHERS, C.J.K.B.:—This is an action for a declaration that the plaintiff is the owner of a certain house and lot in the City of Brandon free from any claim of the defendant, and to vacate the registration of a certificate of *lis pendens* registered by the defendant.

On January 20, 1915, and for some time prior thereto, the certificate of title under the Real Property Act for lot 25 in block 28, as shewn on plan 15 of record in the Brandon Land Titles Office, stood in the name of Margaret Maud Cassidy subject to a mortgage for $1,000, on which, however, there remained unpaid only the sum of $450.

On this lot there was a dwelling house occupied by Mrs. Cassidy and one J. G. Avery.

On the said January 20, the plaintiff entered into an agreement in writing to purchase the lands from Mrs. Cassidy for the price of $1,200, payable $500 on the execution of the agreement and the balance over the amount due on the mortgage at the rate of $100 every three months with interest at 7%, the first of such deferred payments to be made on April 21, 1915.

It was a term of the agreement that the plaintiff should take the property subject to the mortgage of $450, and that the said Avery should be permitted to occupy the house until April 1, 1915, as tenant at a rental of $15 per month.

The sale was negotiated by H. J. Digman, as agent for the vendor, and on January 21, 1915, the plaintiff paid to him by cheque the cash payment of $500. At the plaintiff's request Digman made a search in the Land Titles Office and reported the title clear in Mrs. Cassidy's name, subject to the mortgage named.

I find that the plaintiff entered into the agreement and paid the cash payment of $500 in good faith, believing that Mrs. Cassidy was the real owner of the property and without any notice or knowledge that any person else had any right thereto or interest therein.

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On March 29, 1915, the defendant, a judgment creditor of the said Avery, began an action in this Court to have it declared that the said land, although standing in the name of Mrs. Cassidy, was really the land of the said Avery, and that Mrs. Cassidy held only as trustee for Avery and subject to the claim of the plaintiff, and on the same day the defendant caused a certificate of *lis pendens* to be registered.

The plaintiff had not registered his agreement of sale, and at the time the defendant began the said action and registered the *lis pendens*, he had no knowledge of the said agreement.

On the day following, viz:—March 30, Avery and Digman came to the plaintiff and represented that Mrs. Cassidy, who they said was then in Winnipeg, wanted to go to the Pacific Coast, and asked the plaintiff to pay the balance due under the agreement and accept a transfer. The plaintiff says he saw no reason why he should do so unless he got a discount, and offered to pay $185. At that time there was $253.25, with accrued interest at 7% from January 20, unpaid, and as against that there was over two months' rent at $15 per month owing by Avery—leaving the net amount $223.25. Digman and Avery did not then accept the plaintiff's offer of $185 for a transfer, but returned the following day with a transfer executed by Mrs. Cassidy in plaintiff's favour and accepted the offer. The plaintiff then gave a cheque in Mrs. Cassidy's favour for $185, and received the transfer. He went the same day to register the transfer, and he then became aware for the first time of the *lis pendens* registered by the defendant on the 29th. The plaintiff registered his transfer and a certificate of title was issued to him, subject to the mortgage and *lis pendens* before mentioned. Subsequently, in July following, the plaintiff paid the balance payable under the mortgage and obtained a discharge of same, but has not registered such discharge.

This action was commenced on August 18 last after some correspondence had passed as to the right of the defendant to maintain said *lis pendens*.

By his defence the defendant denies the agreement to purchase alleged in the statement of claim, and alleges if such an agreement was made it was entered into by the plaintiff with a knowledge that Mrs. Cassidy, although the registered owner,

was not the real or beneficial owner, and that Avery was the real owner, and that the plaintiff made any payments made by him with the full knowledge that the payments were enuring to the benefit of the said Avery.

The defence further sets up the action commenced on March 29 against Cassidy and Avery, and it is alleged that in that action the defendant claimed, amongst other things, a declaration that the conveyance or transfer of the lands and premises mentioned in the 2nd par. of the statement of claim herein from the said J. G. Avery to the said Margaret Maud Cassidy is fraudulent, null and void, as against the plaintiff (defendant), and should be set aside or postponed to him.

And that the said Margaret Maud Cassidy holds the title to the said lands and premises only as trustee for the said Avery and subject to the claims of the plaintiff (defendant) and on the said March 29, 1915, the defendant caused to be registered a certificate of *lis pendens* in said action.

As there is no such conveyance or transfer referred to in the second or any other paragraph of the plaintiff's statement of claim, the first part of this allegation is unintelligible.

No defence was entered by either Cassidy or Avery to the defendant's said action, and on December 31 last interlocutory judgment was signed against both of them.

Before this action was tried, the defendant obtained final judgment declaring that Mrs. Cassidy was a trustee of the said lands for Avery, who was the real and beneficial owner, and that the same were liable to be sold to satisfy the defendant's claim.

At the trial of this action it was not disputed that the plaintiff was a purchaser in good faith without notice, and that he was protected as to the sum of $500 paid before the defendant's certificate of *lis pendens* was filed, but it was contended that (1) as to the $250 paid after that date he was not protected and must account to the defendant, and (2) that the defendant had a right to register the certificate of *lis pendens*, and as his action against Cassidy and Avery was still pending when this action was brought, there is no power to set the *lis pendens* aside.

Dealing in the first place with the defendant's contention that the payment of the balance of the purchase money unpaid at the time his action was registered as a *lis pendens* was intercepted thereby. By sec. 79 of the Real Property Act the certi-

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ficate of title standing in the name of Mrs. Cassidy was conclusive evidence, both at law and in equity, against all persons that she was the owner subject to the defendant's right to show that she had procured it by fraud. Sec. 99 of that Act is as follows:

> Except in the case of fraud on the part of such person, no person contracting or dealing with, or taking or proposing to take an instrument from, a registered owner shall be required or in any manner concerned to inquire into or ascertain the circumstances under, or the consideration for, which such owner or any previous owner is or was registered, or to see to the application of the purchase money or of any part thereof; nor shall any person be affected by notice, direct, implied or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

That means that the plaintiff had a right to deal with Mrs. Cassidy without any inquiry as to how or under what circumstances she procured title. It further means that he was under no obligation to see to the application of the purchase money or any part of it. The most the defendant contends for is that the plaintiff was by the registration of the certificate of *lis pendens* effected with notice of the claim put forward by the defendant in his action; viz., that Mrs. Cassidy held the land in trust for Avery. But the section says that the plaintiff was not

> affected by notice, direct, implied or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding.

The interest claimed by the defendant was an unregistered interest within the meaning of this section, and by its terms the plaintiff was not affected by notice that the defendant claimed such an interest, or of the fact that Mrs. Cassidy held in trust. Even if before the plaintiff entered into the agreement to purchase he was aware of the claim made by the defendant he would still have had the right to enter into the agreement and to pay over his purchase money to Mrs. Cassidy. It follows that, if that knowledge was not acquired until after the agreement had been entered into and part of the purchase money paid, he had a right to pay over the balance remaining unpaid and accept a transfer. This was the view of this section taken by Robson, J., in *Cooper* v. *Anderson*, 5 D.L.R. 218. I am far from saying that if the land had been placed in Mrs. Cassidy's name, in pursuance of a fraudulent scheme to defeat the defendant's claim, and the plaintiff had knowledge of such fraud before paying over the

balance of the purchase money, he could shield himself under this section. It seems to me his doing so would make him a party to the fraud. No such case, however, is made against the plaintiff. Even if as against Mrs. Cassidy fraud were established by the judgment recovered by the defendant against her and Avery, that judgment was *res inter alios acta* and is not proof of fraud as against the plaintiff: (*Natal Land Co.* v. *Good*, L.R. 2 P.C. 121), and there was no other evidence of fraud.

I do not wish to be understood as holding that the defendant was entirely helpless in default of being able to affect the plaintiff with fraud. It seems to me that the defendant might by timely and appropriate proceedings for the appointment of a receiver by way of equitable execution, have intercepted the payment of this money; but I have no doubt he has not succeeded in doing so by the action taken.

As to the right of the plaintiff to have the *lis pendens* removed. It must be admitted that where a plaintiff has registered a *lis pendens* in an action in which he had a right to do so it cannot be set aside, except under exceptional circumstances, while the action is still pending: *Jameson* v. *Laing*, 7 P.R. (Ont.) 404; *Sheppard* v. *Kennedy*, 10 P.R. (Ont.) 242; *Foster* v. *Moore*, 11 P.R. (Ont.) 447; except in the limited class of cases provided for in rule 671.

When the agreement to sell to the plaintiff was entered into, he at once became the beneficial owner of the land. Mrs. Cassidy, by that agreement, divested herself and her *cestui que trust* of all interest in the land, retaining only a lien for the balance of the unpaid purchase money. Neither she nor Avery thereafter had any interest which could be bound by the defendant's judgment or sold to satisfy it: *Bank of Montreal* v. *Condon*, 11 Man. L.R. 366.

Yet, in very analogous circumstances to this case, the Full Court of British Columbia held, in *Peck* v. *Sun Life Ass. Co.*, 1 W.L.R. 302, that a *lis pendens* was properly registered, and could not be set aside during the pendency of the action or before the relief granted had been worked out. In that case it was held that the defendants were entitled to some relief, and until that relief was worked out they had a right to maintain their *lis pendens* on the register.

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In the present case the plaintiff is the absolute owner of the property and the defendant is not entitled to any relief as against him. Under these circumstances the *lis pendens* forms a cloud upon the plaintiff's title: *Blair* v. *Smith*, 1 Man. L.R. 5. Its maintenance on the register will certainly embarrass the plaintiff in dealing with his property, while it can in no way assist the defendant. In my opinion the plaintiff is entitled to have it removed.

There will be judgment declaring that the plaintiff is the owner of the lands in question free from all claim of the defendant. The registration of the *lis pendens* will be vacated. The plaintiff is entitled to the costs of the action.

Judgment for plaintiff.

SASK.

S. C.

VILLAGE OF KRONAU v. RUTENEIER.

Saskatchewan Supreme Court, Newlands, Brown, Elwood and McKay, JJ. March 18, 1916.

1. JUDGMENT (§VII C—282)—SETTING ASIDE DEFAULT JUDGMENT—FAILURE TO PLEAD FRAUD OF SUBSEQUENT PURCHASE.

Under secs. 162 and 169 of the Land Titles Act, R.S.S. 1909, ch. 41, except in case of fraud, a person dealing with the registered owner is not affected by notice of a prior unregistered interest in the land.

[*Arnot* v. *Peterson*, 4 D.L.R. 861, 4 A.L.R. 324, applied.]

Statement.

APPEAL by the defendant from the judgment of Lamont, J., in an application to set aside a judgment by default. Reversed.

J. F. Frame, K.C., for defendant, appellant.

C. M. Johnston, for respondent.

Newlands, J.

NEWLANDS, J.:—Judgment was entered in default of appearance in this case and upon an application to the Master in Chambers on an affidavit by defendant Fahlman in which he swore to a defence on the merits the Master refused to set aside the judgment. Upon appeal to a Judge in Chambers the judgment was set aside and the defendant allowed to appear and defend, but his defence was limited to one question. From this decision the defendant appeals upon the grounds that he has other defences on the merits that he should be allowed to set up.

Upon an application to set aside a default judgment the defendant is required to make an affidavit that he has a good defence on the merits. If the default is set aside, it is for the purpose of allowing the defendant to try the case upon the merits.

To restrict him in such defence would be to defeat the object of the rule, because if the Judge can say that one meritorious de-

fence cannot be set up he could say that no such defence should be set up and the opening of the judgment would be of no advantage to him. It is, therefore, not in the discretion of the Judge to refuse the defendant leave to set up a defence on the merits. He may impose such terms as he may lawfully make: *International Harvester Co.* v. *Smith*, 20 D.L.R. 138, 7 S.L.R. 151, but this is not such a term.

He may also restrict him from setting up a defence that does not go to the merits of the case as in:

Straton v. *City of Saskatoon*, 1 S.L.R. 426, where in an action by a solicitor the defendants on being let in to defend were prevented from setting up the defence that the solicitor had not served the defendant with a bill of costs as this defence does not go to the merits of the case.

I think, therefore, the defendant should be allowed to set up any defence upon the merits which he may have and that the judgment should be varied accordingly.

The judgment should further be varied upon the question of the costs of appeal from the Master in Chambers, the defendant by this variation of the judgment having been completely successful upon his appeal.

The appellant further contended that the statement of claim did not set up a good cause of action against him in that it was an action for specific performance and there was no tender of the amount due nor of a transfer for execution to him before action brought, and that he has therefore the right to have the judgment set aside *ex debito justitiæ*. Upon the facts as they appear before us this may not be material as this defendant took the land from the Ruteneiers on the understanding that defendants had purchased two acres and he retained in his hands the purchase money for these two acres and, therefore, he has been paid for them and upon these facts it may be held that he is a trustee for defendants of these two acres. For these reasons I would not interfere with that part of the order that requires defendant to pay the costs of opening up the judgment. Appeal is allowed with costs.

Elwood, J.

ELWOOD, J.:—I agree with my brother Newlands that the defendant should be allowed to set up any defence on the merits which he may have. I am, however, of the opinion that the defendant is entitled to have the judgment set aside *ex debito justitiæ*.

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The statement of claim upon which the judgment was entered, so far as the defendant Fahlman is concerned, merely alleged that the defendant Fahlman is now the registered owner of the land which is included in the block letter D. in the said village of Kronau and the said defendant Fahlman obtained title for the said land purchased by the plaintiff from the other defendants with actual knowledge of the purchase thereof by the plaintiff. There is no allegation of fraud, and there are no facts, except the bare allegation of notice from which fraud could be imputed.

Sec. 162 of the Land Titles Act is as follows:—

No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall except in case of fraud by such person be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by notice direct, implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

(2) The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Sec. 169 of the same Act provides in part as follows:—

Every certificate of title and duplicate certificate granted under this Act shall except:

(a) In case of fraud wherein the owner has participated or colluded; . . . be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same for the estate or interest therein specified subject to the exceptions and reservations implied under the provisions of this Act.

The Act, therefore, provides that notice shall not in itself be imputed as fraud. The statement of claim does not allege the circumstances under which this defendant obtained the title whether it was by purchase or how, and if it was by purchase, when. And it seems to me, that many instances might be cited where title might be obtained with notice of the prior claim and still there be no fraud; for instance—if this defendant had entered into an agreement to purchase without notice of the plaintiff's claim and had paid for the property without such notice but had subsequently obtained title to the land and at the time of obtaining the title had notice of the plaintiff's claim, surely it could not be argued that by so obtaining title with notice fraud was to be imputed to the defendant. So far as the statement of claim goes that may be the fact here.

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In *Arnot* v. *Peterson*, 4 D.L.R. 861, at p. 864, 4 A.L.R. 324, Beck, J., is reported as follows:—

So that the section clearly contemplates that a person dealing with a registered owner is not affected by any outstanding interest of which he has no notice, nor of any interest of which he has notice, unless, with that knowledge he goes one step further, and does something which will constitute fraud.

And it was held in that case that mere notice did not constitute fraud.

Independent Lumber Company v. *Gardiner*, 13 W.L.R. 548, is clearly distinguishable from the case at bar. In that case there was something beyond mere notice from which fraud could be imputed. At p. 582 my brother Lamont says:—

In the view that I take of the present case, we are not called upon to determine the question as to whether or not the acquiring of a registered mortgage of lot 4 by the plaintiffs with knowledge simply of T. A. Gardiner's transfer, and that the registration of the mortgage would defeat his transfer, would amount to fraud.

And at p. 553:—

In my opinion, the conduct of the plaintiffs amounts to "acts by which an undue and unconscientious advantage is being taken of another." This constitutes fraud.

So far as I have been able to gather from a perusal of the cases, there has always been something beyond mere notice from which fraud may be imputed.

In the case at bar, the statement of claim having alleged nothing beyond mere notice, the plaintiff was not entitled to enter judgment against this defendant on such an allegation of facts. On the application before the Master, it was not urged that this defendant was entitled to have the judgment set aside *ex debito justitiæ*, and in my opinion, therefore, this defendant is not entitled to the costs of the application before the Master.

In my opinion, the judgment appealed against should be set aside *ex debito justitiæ*; there should be no costs of the application before the Master; but this defendant is entitled to his costs of the appeal to my brother Lamont and of this appeal.

BROWN and MCKAY, JJ., concurred. *Appeal allowed.*

Brown, J.

McKay, J.

ADANAC OIL CO. v. STOCKS.

Alberta Supreme Court, Harvey, C.J. February 24, 1916.

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1. EXECUTION (§ I—8)—EQUITABLE INTERESTS—INTEREST OF UNPAID VENDOR.

Under the Land Titles Act, Alta., an unpaid vendor of land has an interest which is subject to execution, and which can be sold or transferred thereunder.

[*Traunweiser* v. *Johnson*, 23 D.L.R. 70; *Merchants Bank* v. *Price*, 16 D.L.R. 104, 7 A.L.R. 344, *Bain* v. *Pilfield*, 28 D.L.R. 206, disapproved. Review of authorities.]

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2. LAND TITLES (§ V—50)—TRANSFERS—RIGHTS OF EXECUTION CREDITORS.
A transfer from an unpaid vendor in pursuance of an agreement for sale made prior to the registration of an execution, but deposited after such registration, can only be registered under the Land Titles Act subject to the right of the execution creditor.
[Secs. 77 and 79 of the Land Titles Act, Stat. Alta. 1906, ch. 24.]

Statement.

APPLICATION for a direction to register a transfer free from executions. Dismissed.

E. A. Dunbar, for applicants.

L. F. Maybood, for execution creditors.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff claims to be the assignee from the purchaser of an agreement of sale of certain lands of which William S. Herron is the registered owner.

The alleged agreement is dated May 22, 1914, and nine of the defendants are execution creditors of the said Herron whose executions were issued and filed in the Land Titles Office subsequent to that date.

This is an application by way of originating notice for a declaration that the executions are ineffective against the plaintiff, and for a direction to the registrar to register a transfer from the said Herron to the plaintiff free from the said executions.

The only evidence of service of the notice is the admissions of service of various solicitors who, I presume, are the solicitors who filed the executions in question, and no one has appeared on this appliction for any of the defendants except one, who, however, objects to the application being granted.

The plaintiff refers me to the case of *Traunweiser* v. *Johnson*, 23 D.L.R. 70, in which my brother Stuart, J., held that an execution filed in the Land Titles Office did not attach against lands registered in the name of the execution debtor where an agreement for sale had been made before the filing of the execution.

I have read very carefully his reasons as well as those of my brother Walsh in *Merchants Bank* v. *Price*, 16 D.L.R. 104, 7 A.L.R. 344, but I regret to say that I find myself unable to agree with them.

Under these circumstances I could refer the application to the Appellate Division were it not for the fact that it seems to me that, as I have a definite opinion in the case, it would be scarcely fair to the defendant that he should be deprived of the benefit of my decision.

My brother Stuart appears to be of opinion that the Land

Titles Act has little application to the case, whereas it appears to me that it is of much importance.

Whatever may be said of the rules, the Act at least is the work of the legislature, and it provides in sec. 77 that no land shall be bound by any writ of execution against lands until its receipt by the registrar, but that after such receipt

> no certificate of title shall be granted and no transfer, mortgage, encumbrance, lien or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor.

The expression "such land" appears to refer back to the first line which refers to an "execution or other writ affecting land."

The provision in the old Territories Real Property Act was that the writ upon delivery to the registrar operated as a caveat against the transfer by the owner of the land or of any interest therein and no transfer could be made except subject to such writ, but under that Act the only land affected was the land specified in a memorandum delivered with the writ. For more than 20 years this limitation has not existed, all land of the debtor being now affected.

It seems clear that the provision of the Act contemplates the execution affecting the interest of a registered owner and of no one else. The instruments mentioned in the above quoted portion are all instruments that are executed by a registered owner, and the reference is also to a certificate of title being granted subject to the rights of the execution creditor.

Then, when we come to the provisions relating to the execution creditor enforcing his rights, we find in sec. 79 that when the transfer by the sheriff is ready for registration the registrar is directed to "cancel the existing certificate of title . . . grant a certificate of title to the transferee and issue to him a duplicate certificate." This provision can of course apply only to the case of a sale by the sheriff of the interest of the registered owner, and it is the only provision there is for giving effect to a sale under the execution.

It seems to follow therefore necessarily that if the interest of a vendor in the land of which he is the registered owner is not affected by an execution, the interest of no one in that land can be affected, and consequently all land in respect of which an agreement for sale exists is entirely free from the common law process of execution. This would certainly seem anomalous.

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I have used the expression "interest of the vendor in the land," but some of the authorities form the conclusions that an execution against the lands of a debtor does not affect lands of which he is an unpaid vendor, and base that conclusion on the view that he has no interest in the land. Taylor, C.J., in *Bank of Montreal* v. *Condon* (1896), 11 Man. L.R. 366, at 369, says: "A vendor's lien is not an interest in land," and quotes definitions to support it.

Mathers, C.J., in a judgment delivered in the present month, *Bain* v. *Pitfield*, 28 D.L.R. 206, relying on the above case, says:

When the agreement to sell to the plaintiff was entered into he at once became the beneficial owner of the land. Mrs. Cassidy, by that agreement, divested herself and her *cestui que trust* of all interest in the land, retaining only a lien for the balance of the unpaid purchase money.

In the first case Taylor, C.J., relies on the opinion of Mowat, V.C., in *Parke* v. *Riley*. In this last mentioned case upon the trial before Mowat, V.C. (1865), 12 Gr. 69, it was held as stated in the headnote that

When a debtor had entered into a binding contract for the sale of his land . . his interest as vendor was not salable under execution.

It may be noted, however, that the judgment does not state that the debtor had no interest in the land, but that "the only beneficial interest in it was as being entitled to hold the property for the unpaid purchase money." One can readily see that a vendor's lien after a conveyance of the land and a lien coupled with the legal ownership of the land might give rise to quite different consequences. On appeal from the decision of Mowat, V.C., 3 Er. & App. 215, he maintained the view expressed by him before, and A. Wilson, J., expressed a doubt as to whether it might not be a correct view, but all the other members of a Court consisting of Draper, C.J., Richards, C.J., Hagarty, J., and Wilson, J., while dismissing the appeal on other grounds, expressly dissented from this view.

Draper, C.J., who delivered the judgment for them, stating at p. 228:—

the possible mischief of such a determination is in my humble judgment so apparent that I should, even under the pressure of the most direct authority, reluctantly adopt the conclusion. I have not, however, found any such authority.

This view, though, as far as I can find, not controverted by any appeal Court, is disregarded by Taylor, C.J., as merely an *obiter dictum*, and as being expressly dissented from by Mowat,

V.C. I find also that in *Re Lewis* and *Thorne*, 14 O.R. 133, at 135, Boyd, C., says:—

As to executions against lands coming in after the contract to sell, I do not think they can possibly affect the devolution of title as between vendor and purchaser (see per Mowat, V.C., in *Parke* v. *Riley*, 3 Er. & App. 215, at 237).

In this case the executions were against a person who was beneficially entitled only to a portion of the proceeds of the sale of the lands. But in *Re Trusts Corp. & Boehmer*, 26 O.R. 191, Street, J., held on the authority of the last mentioned case and *Parke* v. *Riley*, that an execution placed in the sheriff's hands after a contract between the vendors and purchasers had been entered into formed no charge or encumbrance upon the lands.

On this expression of the law in Ontario it appears to me probable that a Court of Appeal would, if a case came before it, adopt the view of the majority of the Court of Error and Appeal rather than that of the Judges who have disregarded it. But if it were not so our law under our Land Titles Act is such as, in my opinion, to make the view of Mowat, V.C., inapplicable.

Sec. 41 of our Act provides that "No instrument until registered shall be effectual to pass any estate or interest in any land or render such land liable as security for the payment of money." In *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, Rouleau, J. attempted to give effect to the corresponding provision of the then Act, and declared that the execution creditor could sell the whole estate registered in the name of the execution debtor, though he had sold the land and been paid in full. While that view appeared to be in accordance with the strict reading of the section, the Court *en banc* of the Territorial Court and the Supreme Court of Canada (26 Can. S.C.R. 282), held that the meaning should be restricted, and that the unregistered transferees and the purchaser under an agreement who had paid all his purchase money had acquired equitable interests and the execution debtor, though registered owner, had ceased to have any beneficial interest, and consequently anything to which the execution could attach. Strong, C.J., who delivered the judgment of the Supreme Court, at p. 290, says:—

According to the ordinary rules of Courts of Equity, the appellant could have made his execution a charge on, and have sold for the satisfaction of his judgment, just what beneficial interest the execution debtor had in these lands and nothing more.

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He is referring to the parties and facts of that case. The appellant was the execution creditor, and his execution was an execution delivered by the sheriff to the registrar just as in the present case, and under that execution the Court held that he could sell whatever beneficial interest the execution debtor had.

If then a vendor of land has an interest in the land while he remains registered owner until his purchase money is paid, as the quotation suggests, it appears to me that it follows that under an execution against his lands filed in the Land Titles Office the sheriff may sell that interest.

The nature of the respective interests of a vendor and purchaser upon an agreement of sale is declared by Jessel, M.R., in *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at 506, where he says:—

It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate."

In *Shaw* v. *Foster* (1872), L.R. 5 E. & I. App. 321, there had been a sale of a leasehold estate under a valid contract and the title had been accepted, and at p. 338 Lord Cairns said:—

Under the circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and

cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.

This was a case in which the interests of the purchaser were under consideration and in it as well as in the preceding one reference is made to the case of *Wall* v. *Bright*, 1 Jac. & W. 494, in which the interest of the vendor was directly concerned. Lord O'Hagan at p. 349 quotes the then Master of the Rolls (Sir Thomas Plumer), at p. 503, as saying:—

> The vendor is, therefore, not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old dominion over the estate.

In *Rose* v. *Watson* (1864), 10 H.L. Cas. 671, Lord Cransworth, at p. 682-3, says:—

> There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him.

It seems clear from the above authorities that the vendor, until the purchase-money is paid, while he retains the legal estate has also a beneficial interest in the property.

Subject to the rights of the purchaser this interest may be conveyed in the usual way.

In *Rose* v. *Watson*, *supra*, a mortgage on part of the property had been given subsequent to the agreement of sale, and it was held that it conveyed to the mortgagees only that which the vendor was entitled to under the contract. In *Ex parte Rabbidge; Re Pooley*, 8 Ch. D. 367, after an agreement of sale, the property had been assigned to a trustee in bankruptcy under an adjudication made after the making of the agreement. The purchaser paid the balance to the bankrupt without notice of the bankruptcy, but it was held unanimously by the Court of Appeal that this gave him no right to the conveyance of the property. Cotton, L.J., at p. 370, says:—

> The whole difficulty has arisen from considering the trustee in the bankruptcy as if he were an assignee of the purchase-money as a chose in action, and nothing else. He had vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase-money had not been paid. But he took the legal estate in the property, subject to the equity of the

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purchaser under the contract, which gave the purchaser a right to say, Convey me the estate on my paying the purchase-money. The purchaser has chosen voluntarily to pay the money to the bankrupt: the bankrupt could not have compelled him to pay it, because he was not in a position to say that he was ready and willing to convey the estate. The purchaser has paid the money to a person who has no title to the estate. How can the real owner be compelled to convey the estate without payment of the purchase-money? The whole difficulty has arisen from considering the trustee as the assignee of the purchase-money as distinct from the estate, which is not his real position.

And Thesiger, L.J., says:—

If the trustee were simply an assignee of a debt due to the bankrupt—if, for instance, the property had been conveyed to the purchaser before the adjudication, but the whole of the purchase-money had not been paid, there might possibly have been some ground for the argument that payment of the unpaid purchase-money to the bankrupt after the adjudication, but without notice of it, would have been good. As to that I express no opinion. But the position of the trustee in this case is very different from that of a mere assignee of the purchase-money. He is the actual legal owner of the estate, and he is only bound to convey it away on payment of the purchase-money, and would have, after conveyance, an equitable lien on the property for any unpaid purchase-money.

Re *Taylor; Ex parte Norvell*, [1910] 1 K.B. 562, was also a case of an agreement of sale made by a debtor who subsequently became bankrupt. In the Court of Appeal, Fletcher Moulton, L.J., at page 573, says:—

The purchaser of real estate by entering into the contract and paying a deposit obtains an equitable interest in the land itself, and has a right upon payment of the balance of the purchase-money to have the land conveyed to him. But the owner of the land is still the legal owner subject to this equitable interest, and he has the right to transfer it—the transferee of course taking it subject to the equitable interest above mentioned. The purchaser (i.e., the person who has entered into the contract of purchase and paid the deposit), can under ordinary circumstances by application to the Court enforce his rights to a conveyance of the land against the new owner of the legal title (that is to say, he can require that the land shall be transferred to him), on his payment to such owner of the balance of the purchase-money. But he has no further or other right."

There seems no difficulty therefore in transferring by sheriff's sale or otherwise the rights of the registered owner subject to the rights of the purchaser.

It is suggested, however, that it will be a great burden if the purchaser must search the title every time he is required to pay an instalment of the purchase-price. Even if this were something that could be considered, it is apparent from *Ex parte Rabbidge*, *supra*, that except in so far as he may be able to protect himself by a caveat he cannot safely make such payment without satisfying

himself that the vendor's title still remains good. I do not consider whether a caveat would protect against a voluntary disposition, but if it would it would probably furnish as good a protection against an involuntary disposition.

In the present case the material does not shew when the payments were made or when the agreement, which is in form an option, became a valid and binding agreement of sale, but it is clear that the payments are not all made at the present time, and therefore for the reasons stated I am of opinion that at the time of the filing of the executions, the execution debtor had an interest in the lands which the executions bound, and that therefore a transfer from him in pursuance of the agreement can be registered only subject to the rights of the execution creditors. The application is consequently dismissed with costs.

Application dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. February 1, 1916.

1. FRAUDULENT CONVEYANCES (§ VI—30)—CONVEYANCE TO WIFE IN TRUST FOR HUSBAND—FRAUD ON CREDITORS—HUSBAND'S RIGHT TO TITLE.

Where property has been conveyed from husband to wife with intent to evade execution, the wife verbally agreeing to reconvey the land when the judgment was satisfied, the husband, because of his fraudulent intent, cannot recover the property after the satisfaction of the debt, though the land was by statute exempt from execution.

Per Duff, J. It is impossible to say the creditor was not prejudiced—the onus of proving that was on the plaintiff.

Per Anglin, J. The conveyance of exempted lands could not prejudice creditors. The fraudulent intent was therefore not fraudulent as against them.

[*Muckleston* v. *Brown*, 6 Ves. 52, applied.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 21 D.L.R. 593, 8 A.L.R. 417, whereby, on an equal division of opinion among the Judges, the judgment of Scott, J., at the trial, 17 D.L.R. 638, 7 A.L.R. 380, stood affirmed.

Frank Ford, K.C., for the appellant.

O. M. Biggar, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I think the appeal should be allowed.

The trial Judge has found that the evidence does not establish a valid agreement between the parties for the reconveyance of the property to the respondent. The respondent in such a case as this can, of course, ask nothing from the Court but his strict rights. There seems to me nothing necessarily inconsistent

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between the idea of his making an absolute gift to his wife and the fact of his having given her the property to keep it from his creditors. The appellant says that the reason for the gift was "because he lose it any how." I think that, as between themselves, the presumption of law that the gift to the wife was an absolute one is not rebutted.

But if it were necessary to hold that there was a resulting trust, in favour of the respondent, I do not think he is in a position to ask the Court to enforce it. He can only make out his case by alleging his own unlawful intentions in making the conveyance to his wife.

In the case of *Muckleston* v. *Brown*, 6 Ves. 52, at 68, the Lord Chancellor said:—

Cottington v. *Fletcher*, 2 Atk. 155, does not affect this case. That case was upon the grant of an advowson contrary to the policy of the law, by a Roman Catholic in trust for himself. Afterwards he turns Protestant; and desires a discovery as to his own act. The defendant put in a plea of the Statute of Frauds; but by answer admitted the trust. Lord Hardwicke is made to say, that upon the admission he would act. I do not know whether he did act upon it; but it is questionable whether he should; for there is a great difference between the case of an heir coming to be relieved against the act of his ancestor, in fraud of the law, and of a man coming upon his own act under such circumstances.

It is there said it might be different if it had come on upon demurrer. The reason given is that, as this assignment was done in fraud of the law, and merely in order to evade the statutes, it was doubtful whether at the hearing the plaintiff could be relieved. Lord Hardwicke means to say that, if the defendant admits the trust, though against the policy of the law, he would relieve, but if he does not admit the trust, but demurs, he would do what does not apply in the least to this case. The plaintiff stating he had been guilty of a fraud upon the law to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the Court would not act; but would say, "Let the estate lie, where it falls." That is not this case.

It will be observed that the Lord Chancellor considered it questionable whether the plaintiff ought to have relief even in a case where the defendant admits the trust. In the present case the appellant has denied the trust.

I am prepared to hold that a plaintiff is not entitled to come into Court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in such purpose.

I think the maxim quoted by Lord Eldon applies in this case and that the Court should say "Let the estate lie, where it falls."

IDINGTON, J.:—The respondent, as plaintiff, alleges in his statement of claim that the defendant, now appellant, who is his wife, was the registered owner of lands described therein but held the same as trustee for him, the plaintiff.

He proceeds in said statement of claim to allege that she, in breach of her said trust, sold the lands and he seeks a declaration of the trust and judgment for the part of the purchase-money she got and other relief. The lands I will assume, as the trial Judge has found as a fact, were bought with respondent's money, but the conveyance taken to the appellant when his wife.

Under such a naked state of facts the presumption of law would be that she received same by way of advancement. In short she, in law, thereby became the owner unless proven by other facts she was a trustee.

There was no writing or other evidence of a legal trust upon which he could rely. Therefore, he was of necessity, in order to establish his claim that she was his trustee, driven to prove that he had procured the conveyance to be made to his wife lest a creditor or creditors should reach the land if in his name and that the like reason had obtained for the vesting in her of other property out of the proceeds of the sale of which the land in question was paid for or improved.

Many authorities have been cited which I have, in deference to the argument and divided opinions below, fully considered. But from none of them can I extract authority for the proposition of law that when a man has, out of the sheer necessity to prove anything upon which he can hope to rest the alleged claim of trust, to tell of an illegal purpose as the very basis of his claim, that he may yet be entitled to succeed. I find cases where the man has, accidentally as it were, or incidentally, to the relation of his story told that which he might if skilfully directed both in pleading and in giving evidence have avoided telling, yet has told enough to disclose that he was far from being always guided by the law or morality in his intentions, and still entitled to succeed because he had in fact established, by the untainted part of his story as it were, enough to entitle him to succeed without reliance upon that which was either illegal or immoral.

This is not respondent's case, but the other kind of case I have just referred to is.

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Idington, J.

Out of the many cases on the subject *Taylor* v. *Chester*, L.R. 4 Q.B. 309, furnishes the law applicable to this case, and the case of *Taylor* v. *Bowers*, 1 Q.B.D. 291, furnishes an apt illustration of the other kind of case.

In this latter all Taylor need have done was to prove that the goods in question were his and they were found in the possession of the defendant who had never bought them or acquired any honest title thereto.

The plaintiff there had never executed the intended assignment in fraud of creditors or any other and if the defendant had set up the facts he relied upon, his defence would have been held illegal. That much is got from an examination of the facts noted and judgments in the case and especially from those in appeal.

The more recent case of *Kearley* v. *Thomson*, 24 Q.B.D. 742, shews some things said by even eminent authority in the case I have just referred to may not be law.

Had the conveyance been made to a stranger, under such facts and circumstances as might have enabled the respondent to present and rely upon the naked fact of this purchase and payment of the price as producing a resulting trust which the law would imply, the respondent might thereby have escaped telling of his own illegal purpose and succeeded. Here he has to tell the facts disclosing the illegal purpose as his chief, and indeed only, motive for constituting the trust he claims to have existed, and rely thereon, and cannot, as I view the law, successfully do so.

The cases of *Sims* v. *Thomas*, 12 A. & E. 536, and *Symes* v. *Hughes*, L.R. 9 Eq. 475, certainly fall far short of covering this. The real question of law involved and decided in the former was the non-exigibility of the asset in question and the right to sue in such case upon the bond in question despite the provision of an insolvency Act not framed to reach it.

The latter case certainly is not to be extended and it needs extension to cover this case even if binding us, as it does not.

All that was argued and well presented as to the operation of the Exemptions Ordinance seems, from my view of the law, as applicable to the facts herein irrelevant. On the law and facts the property was hers and the exemption relative thereto hers also.

The appeal should be allowed with costs throughout, and the action dismissed with costs.

DUFF, J.:—In 1908, the respondent, who was the husba d of the appellant, purchased land in Edmonton for which he agreed to pay $700. Shortly afterwards he built a house at a cost of $600 and, from that time until 1912, the appellant and the respondent occupied the property as their home with their children. On the completion of the purchase, in 1907, the transfer was taken in the name of the appellant and, in 1912, during the respondent's absence in the United States, the appellant sold the property at the price of $3,500; $2,000 having been paid in cash and the respondent, on discovering the sale, brought the action out of which this appeal arises claiming the property was his and consequently the residue of the purchase price, $1,500 still in the vendee's hands.

The respondent puts his case in this way. He says that the purchase money was paid by him under the agreement of 1907; that the house was built partly by his own labour and partly by labour and materials provided by him; that the transfer was taken to his wife by arrangement between them, the effect of which was that she should hold the property as trustee for him.

On behalf of the appellant it is not disputed that she was to hold the property as trustee for the respondent; but it is said that the explicit arrangement was that the property was to be held by her until a certain debt for the payment of which the respondent was then being pressed had been discharged and that the intention of both parties in making the transfer to the wife instead of to the husband was to conceal the fact that the husband was the owner and in that way to protect the property from proceedings by a creditor who, at the time the transfer was taken, had recovered judgment.

The appellant denies that the property was paid for with the respondent's money, but on that point the finding is against the appellant and this appeal must, I think, be decided on the footing that the finding is right.

It is not, I think, seriously open to question that the respondent could only succeed by producing evidence shewing that in directing the transfer to be made to his wife an advancement to her was not intended and the evidence which establishes this is precisely the evidence which shews that the title vested in the wife was intended as a cloak to protect the property from the

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creditor mentioned. The respondent's case, therefore, rests upon a transaction which if it had in fact the effect contemplated, namely, of delaying or hindering the creditor, would undoubtedly be a transfer void under the Statute of Elizabeth at the instance of the creditor; and in that case the respondent must obviously fail on the principle that a plaintiff cannot recover who is obliged to make out his case through the medium and by the aid of an illegal transaction to which he was himself a party. *Taylor* v. *Chester*, L.R. 4 Q.B. 309, at p. 314.

The respondent, however, has succeeded, the Appellate Division of Alberta being equally divided on the ground that the rule has no application where nothing has been done in execution of the unlawful purpose beyond payment or delivery of the property itself and that in point of fact the creditor whose debt has since been paid was not defeated, hindered or delayed. By the law of Alberta a house and building occupied by an execution debtor and the lot or lots on which they are situate are exempt from execution to the extent of $1,500. The view which has prevailed is that the evidence appearing to shew the property to have been of no greater value than $1,500, at the time the transfer was taken, the transaction could not be a fraudulent one and impeachable as such under the Statute of Elizabeth because of the well settled rule that the statute only applies to dealings with property which creditors are entitled by law to have applied in the payment of their claims.

The judgment of Mellish, L.J., concurred in by Baggallay, L.J., in *Taylor* v. *Bowers*, 1 Q.B.D. 291, is relied upon as establishing the proposition that the general principle gives to persons making a payment or delivering goods for an illegal purpose a *locus pœnitentiæ* so long as no part of the illegal purpose has been carried out, and that so long as that has not happened the restitution of the property transferred under such an agreement as that disclosed by the evidence in this case can be enforced. *Taylor* v. *Bowers*, 1 Q.B.D. 291, was in point of fact not decided upon the principle invoked, James, L.J., proceeding upon the ground that it was the defendant in that case who was obliged to set up the illegal transaction in order to justify his possession of the goods. Two very eminent Judges, however, Mellish, L.J., and Baggallay, L.J., do seem to have put their judgment upon the ground that where goods are delivered under a fictitious assignment, the

object of which is to defraud creditors, the delivery and assignment of the goods are not to be regarded as execution in part of the illegal purpose so long as no creditor is in fact prejudiced. It has been seriously doubted whether the general principle stated by Mellish, L.J., in his judgment was correctly applied to the facts of that case; and the subsequent decisions of *Kearley* v. *Thomson*, 24 Q.B.D. 742, and *Herman* v. *Jeuchner*, 15 Q.B.D. 561, afford considerable justification for such doubts.

I do not find it necessary for the purpose of deciding this appeal to pass upon the question whether a proper application of the principle stated above to the facts of this case would be to hold that no part of the illegal purpose had been carried out notwithstanding the fact that the conveyance had been taken in the name of the wife. This case must, I think, be approached from a slightly different point of view. The object, as I have said, of taking the transfer in the name of the wife was that her *ex facie* title should protect the property from pursuit by the husband's creditor, the design being that so long as the debt remained unpaid she should hold the title. Whether or not they had in mind a possible advance in value the scheme necessarily involved the hindering of the creditor in the exercise of his rights in the event of the value of the property reaching a point at which the surplus would become properly exigible. We know that, in 1912, the property had acquired a value of $3,500. It is conceded apparently that some time before the trial the debt was paid; when, does not appear. If any part of the debt was still unpaid after the value of the property rose beyond $1,500 the presumption would be that the creditor was prejudiced. In these circumstances it is impossible to say that the creditor was not prejudiced. Indeed, having regard to the fact that the respondent must have known the precise date when the debt was paid and offered no information about it there is some presumption of fact the other way. The conclusion I have come to, however, is this: Accepting the rule in the form in which it is stated in *Symes* v. *Hughes*, L.R. 9 Eq. 475, and *Taylor* v. *Bowers*, 1 Q.B.D. 291, I think the onus in the circumstances of this case was on the respondent to shew that the creditor had not been delayed.

It is true that as the respondent in this case does not ask to recover back the property on the ground only that it was property transferred for an illegal purpose which has not been carried out

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his position is not entirely the same as the position of the plaintiffs referred to in the judgment of Scott, J. His case may be put in the alternative. First, the transfer was taken in the name of the appellant, the consideration having been paid, the presumption of advancement is rebutted by the evidence of the agreement between the husband and wife that the property was to be held for the husband for the purpose of protecting him against a creditor. In point of law he rests upon the position that the wife is trustee for him by reason of the fact that the purchase money was paid by him. But while that is his legal position he is obliged, in order to make out that case, to prove an agreement fraudulent in the purpose under which the transfer was taken, which agreement he does not shew that he repudiated before part of its purpose took effect in the delaying of his creditor.

Secondly. He may allege an express trust arising out of the oral agreement that the property was to be held for him with the object stated. The breach of this express trust, the failure on the part of the wife to carry out the agreement under which she acquired the property being treated in equity as a fraud, constitutes the wife trustee *ex maleficio*, a trustee, that is to say, who is not entitled to invoke the Statute of Frauds as a protection against her own fraud. *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196. The respondent does not (be it observed with reference to an argument of Mr. Ford) in this way of putting his case seek to enforce the express oral trust, although the result in this particular case might be the same in the event of success as if he had succeeded in enforcing the express trust. The respondent's right and remedy would have been precisely the same if the arrangement had been that the wife instead of holding the property in trust for him had bound herself to hold it in trust for a third person, orally; to any proceeding by such third person as *cestui que trust* for the enforcement of the express oral trust the 7th section of the Statute of Frauds would have been an effectual answer, but there is no answer to an action on the part of the respondent for *restitutio in integrum* on the ground that the wife's fraudulent refusal to effectuate the express trust under which she acquired the property constitutes her a trustee for the person from whom she received it. Put in this way, nevertheless, the respondent's case still necessarily rests upon an arrangement which when it is fully disclosed appears

to be a fraudulent arrangement, and that arrangement the respondent has not shewn to have failed in effectuating its purpose.

In the result the appeal should be allowed and the action dismissed.

ANGLIN, J. (dissenting):—The plaintiff sues to recover from his wife the proceeds of property admittedly placed in her name with the intent that it should be held by her in order to defeat the claim of one of his creditors. When placed in the name of the defendant the property was occupied by the husband and family and was not worth more than $1,500. It was, therefore, exempt from execution under sub-sec. 10 of sec. 2 of ch. 27 of the North-West Territories Consolidated Ordinances, 1898.

In answer to the plaintiff's claim the defendant sets up:—

(*a*) That the purchase money of the property in question was wholly or in great part hers;

(*b*) That the property subsequently ceased to be occupied by the plaintiff and became worth more than $1,500 and the surplus would then have been exigible.

(*c*) That the plaintiff's admitted fraudulent intent debars his recovery;

(*d*) That the plaintiff, in order to succeed, is obliged to establish an express trust which section 7 of the Statute of Frauds renders incapable of proof by parol evidence.

The trial Judge found explicitly that the purchase-money all belonged to the plaintiff. He saw the plaintiff in the witness box and believed his story as against that of the defendant whose evidence was taken on commission. This finding was not disturbed on appeal and we are not in a position to say that it is wrong and that the defendant should have been believed rather than the plaintiff.

It is the value and condition of the property at the date of the transfer which must determine its exigibility. To hold that a subsequent change in occupation or increase in value should be taken into account would introduce an element quite too speculative, would unsettle titles and would defeat the purpose of the statute. *Sims* v. *Thomas*, 12 A. & E. 536; *Willoughby* v. *Pope*, 50 So. Rep. 705.

The law condemns and penalizes the fraudulent act, not the fraudulent intent. The act must be one which at least may be in-

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jurious to persons whom the law protects against it. In *Mundell* v. *Tinkis et al*, 6 O.R. 625, the transfer dealt with was of this character. However wrongful the intent with which it is done, an act *in se* lawful subjects the person who commits it neither to criminal nor to civil responsibility. The transfer by a debtor of property exempt from seizure is lawful and cannot harm his creditor and, therefore, cannot be fraudulent against him. *Mathews* v. *Feaver*, 1 Cox 278; Story's Equity, sec. 367; *Rider* v. *Kidder*, 10 Ves. 360; *Nichols* v. *Eaton et al*, 91 U.S.R. 716, at p. 726. However evil the mind and intent of such a debtor may be, he is amenable only *in foro conscientiæ*. The plaintiff's intent was fraudulent; his act was not. *Day* v. *Day*, 17 A.R. (Ont.) 157, at pp. 167, 166, 172; *Symes* v. *Hughes*, L.R. 9 Eq. 475; *Taylor* v. *Bowers*, 1 Q.B.D. 291; *Cloud* v. *Meyers et al*, 136 Ill. App. 45; *Palmer* v. *Bray et al*, 98 N.W. Rep. 849; 20 Cyc., pages 381-4.

Were it not for the presumption of an intention to make a gift by way of an advancement, which ordinarily arises where property belonging to a husband is without consideration transferred to or placed in the name of a wife, proof of the absence of consideration would establish a resulting trust in favour of the plaintiff. The presumption of advancement is, however, readily rebuttable, the sole question being the intent with which the transaction took place (*Marshal* v. *Crutwell*, L.R. 20 Eq. 328); *Re Young*, 28 Ch. D. 705, and but for the objection to its admissibility, based on sec. 7 of the Statute of Frauds, the evidence of the understanding of both husband and wife that the latter should hold as trustee for the former would clearly establish such a trust. That objection cannot prevail, for equity deems it a fraud on the part of a trustee to attempt to withhold trust property from his *cestui que trust* for his own benefit, and will not permit the statute to be made the instrument for committing such a fraud. *McCormick* v. *Grogan*, L.R. 4 H.L. 82, at p. 97, *per* Lord Westbury; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Re Duke of Marlborough*; *Davis* v. *Whitehead*, [1894] 2 Ch. 133; *Haigh* v. *Kaye*, 7 Ch. App. 469; *Davies* v. *Otty*, 35 Beav. 208.

I am for these reasons of the opinion that the appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—The main point to be decided in this case is whether the property in question having been transferred to the

appellant for a fraudulent purpose, the respondent could recover that property. The plaintiff and the defendant are husband and wife. The husband was very heavily indebted. He owned a homestead for which he had agreed to pay a little over $1,000, and which according to the laws of Alberta was exempt from seizure to the extent of $1,500. In order to prevent his creditors from seizing that homestead and in order to defeat them the husband (the plaintiff respondent) had that property conveyed to his wife, the appellant. The husband seeks to recover the property and claims that the wife was holding it as trustee for him. In order to enable him to recover he had to give evidence of the fraudulent scheme; otherwise the wife would have been presumed to have received an advancement. They both admit that the transfer was made for the purpose of defeating creditors. So the presumption of advancement was successfully rebutted provided it involves no other illegality.

But the Statute of Frauds is pleaded by the wife who claims that the husband will have to adduce written evidence of the alleged trust. The Statute of Frauds was not made to cover fraud; it does not prevent the proof of a fraud. It is a fraud on the part of a person to whom land is conveyed as trustee to deny the trust and claim the land herself. It is competent to prove by parol evidence that the property was conveyed upon trust for the plaintiff and that the wife is denying the trust and relying upon the form of conveyance in order to keep the land herself. *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 206. The question then is whether the plaintiff can invoke his own fraudulent intent to recover the property from his wife.

The general principle is that fraud vitiates all contracts. The Courts never assist a person who has placed his property in the name of another to defraud his creditors, and some decisions go so far as to state that it is of no consequence whether any creditor has been actually defeated or delayed.

Mundell v. *Tinkis*, 6 O.R. 625; *Rosenburgher* v. *Thomas*, in 1852, 3 Gr. 635; *Kearley* v. *Thompson*, in 1890, 24 Q.B.D. 742.

In the case of a trust the same principle applies and the settlor is prevented from recovering the estate if the trust has been created for a fraudulent purpose. Lewin on Trusts (12 ed.), p. 120.

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But the trial Judge, relying on the case of *Symes* v. *Hughes*, L.R. 9 Eq. 475, says that, where the purpose is not carried into execution, the mere intention to effect an illegal object does not deprive the assignor from recovering the property from the assignee and he says also that it was not necessary, in the present case, for the husband to have the property conveyed to his wife at the time in order to protect the lands in question against his creditors because they were exempt from seizure.

By the exemption ordinance, which I have already mentioned, the homestead was exempt from seizure if it did not exceed in value $1,500. We have no positive evidence as to the value of the property at the time it was conveyed to the wife; but we have the evidence that, a short time after, the property was sold for a much larger price. The intent of the husband, then, was to defeat the creditors when the property would become of a value sufficient to become liable to seizure.

Cases of the same kind with regard to homesteads have been decided in the United States. I find a case of *Kettleschlager* v. *Ferrick*, 12 S.Dak. 455, where it was held that a transfer of the homestead from husband to wife without consideration to prevent creditors from subjecting such premises to the satisfaction of their claims *in case the debtor should remove therefrom is fraudulent as to creditors.*

Similar decisions have been rendered in Texas: *Taylor* v. *Ferguson*, 87 Tex. 1; *Baines* v. *Baker*, 60 Tex. 139.

We have also *Barker* v. *Dayton et al*, 28 Wis. 367, which was decided in the Wisconsin Courts.

The plaintiff in having the homestead conveyed to his wife never ceased to be the real owner of the property. If the property had remained in his hands it could have been seized by his creditors for the payment of his debts. During all the time his wife was in possession of that property, the creditors, if it was a homestead exceeding in value $1,500, could claim the payment of their debt upon the property.

The Courts should never help any person who has acted with a fraudulent intent, and the same rule should apply whether a transfer is made for the purpose of defeating subsequent creditors or when it is made with the purpose of defeating existing creditors who may exercise their right upon the increased value of the property.

For these reasons I am of opinion that the plaintiff cannot recover the property from his wife and that his action should have been dismissed. The appeal is allowed with costs.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. March 24, 1916.

1. LAND TITLES (§ V—50)—CERTIFICATE OF TITLE—PRIORITIES—EQUITABLE MORTGAGE AND SUBSEQUENT EXECUTION.

The creation of an equitable mortgage of land by the deposit of a certificate of title and the execution of a transfer, both by way of security, followed by the registration of a caveat, alleging the deposit of the certificate and the execution of the transfer, do not entitle the mortgagee to a certificate of title free from the encumbrance of executions registered subsequent to the date of transfer.

[*Royal Bank* v. *La Banque d'Hochelaga; Muller* v. *Schwalbe*, 19 D.L.R. 19, 8 A.L.R. 125; *Sawyer-Massey Co.* v. *Waddell*, 6 Terr. L.R. 45, referred to; *Traunweiser* v. *Johnson*, 23 D.L.R. 70, *Adanac Oil Co.* v. *Stocks*, 28 D.L.R. 215, distinguished.]

Statement.

APPEAL from the judgment of Walsh, J., ordering the issuance of a certificate of title free from all encumbrances subsequent to the date of transfer. Reversed.

A. A. McGillivray, for plaintiff, appellant.

E. A. Dunbar, for defendant, respondent.

Scott, J.

SCOTT, J., concurred with STUART, J.

Stuart, J.

STUART, J.:—It seems to me that in this appeal there is more contest about words and forms than about realities.

I have no doubt that Walsh, J., intended fully to protect whatever interests the execution creditors had in the lands of Church. If in the clause of the order which permitted them to file caveats he had gone on to add, as no doubt he thought would be the effect in any case, that the filing of the caveats should operate to preserve fully whatever rights the execution creditors might have acquired in the lands by reason of the filing of their executions, then it is difficult to see what harm would have been done by the order to the execution creditors, or indeed, what good it would have done the Royal Bank.

Apparently the Royal Bank wanted something to shew that it had rights superior to those of the execution creditors. That it did in fact have such superior rights was not denied by the latter. But by the mere registration of the transfer and the issue of a certificate subject to the executions it would have appeared, but only on the face of things, that the Royal Bank's

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claim was postponed to them. On the other hand the execution creditors think that by the order which was made removing their executions and merely permitting the filing of caveats their rights might in some respect possibly be prejudiced, inasmuch as the Royal Bank would have been free to deal with the land as registered owner without having to take foreclosure proceedings as in an ordinary mortgage, and inasmuch as other contingencies might arise in which their legal rights under the caveats might not be as extensive as under the executions.

In my opinion, owing to the mere possibility of prejudice to the rights of the execution creditors by the change from registered executions to registered caveats, the order should not have been made. The Royal Bank could very easily have registered their transfer, taken the certificate subject to the execution, and then applied by originating notice for an order declaring the rights of the parties, if they were not ready to proceed to enforce their claim by sale or foreclosure, in which case the declaration could have been obtained in the action.

It is not necessary here to define the rights of the execution creditors under their executions. It may be pointed out however that the execution debtor here was really *entitled* to the legal estate conditional upon payment of the mortgage moneys which was not the case either in *Traunweiser* v. *Johnson*, 23 D.L.R. 70, or in *Adanac Oil Co.* v. *Stocks*, 28 D.L.R. 215. The provisions of sec. 77 of the Land Titles Act as to transfers, &c., by the execution debtor being "subject to the rights of the execution creditor" does not decide what those rights are, if any, where the debtor has only a *right* to an equitable interest.

I think the appeal should be allowed with costs and that the Royal Bank may take an order in either of the forms suggested by Beck, J.

Beck, J.

BECK, J.:—The Royal Bank on October 28, 1915, gave a notice of motion in Chambers for an order directing the registrar to register a transfer dated November 18, 1913, from one Church, who was the registered owner of the land in question, to the Royal Bank, and to issue a certificate of title to the Royal Bank, clear of all encumbrances registered subsequently to the date of the transfer.

The Royal Bank based its motion on the following facts:

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On January 7, 1913, one Church was indebted to the bank to the amount of some $5,000. The bank demanded security, and Church in compliance with this demand deposited with the bank his certificate of title for the land in question by way of security. On November 18, 1913, the bank procured a transfer of the same land from Church, still only by way of security, but instead of registering it, registered a caveat November 20, 1913, alleging the deposit of the certificate of title, and the execution and delivery of the transfer.

The motion was opposed by the Quebec Bank, who were execution creditors under an execution filed on August 27, 1914. Other execution creditors seem to have ceased to take any interest in the application. The matter came before Walsh, J., who made an order that the registrar accept and register, subject to all proper objections as to form, the transfer from Church to the Royal Bank, and issue a certificate of title to the bank, clear of all encumbrances affecting the land subsequent to November 18, 1913, (the date of the transfer), and that the execution creditors of Church should be at liberty to register caveats upon their executions against the interest of Church, subject to the interest of the Royal Bank. This appeal is from that order.

I think such an order ought not to have been made.

The procedure adopted would seem to indicate that the application was not made under the Land Titles Act to compel the registrar to perform a duty imposed upon him by the Act. Had it been so, I think the application must have failed. It would have been an appeal from what I think would have been a proper exercise of a discretionary power under sec. 97. See *Royal Bank* v. *La Banque d'Hochelaga*, *Muller* v. *Schwalbe*, 19 D.L.R. 19 at 21, 8 A.L.R. 125.

The matter must, I think, be treated as one under rule 432 (*d*) for the purpose of declaring the real right of the parties, the Court in doing so exercising the ordinary jurisdiction of the Court.

There is no doubt that, assuming the indebtedness of Church to the Royal Bank, the deposit of the certificate of title created an equitable mortgage, and that the delivery of the transfer created a new equitable mortgage, and that the registration of the caveat effectively secured the priority of these mortgages over any encumbrances upon the land subsequently registered. The ca eat,

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however, was not necessary to protect the bank against execution creditors as distinguished from encumbrances by specific charge. *Sawyer-Massey Co.* v. *Waddell*, 6 Terr. L.R. 45.

On the other hand, the execution of the execution creditors properly appeared as charges against any lands standing in the name of Church, the execution debtor.

In my opinion there was no right to call upon the execution creditors to do anything actively. The bank might have registered their transfer; the certificate issued upon it would have had memoranda endorsed upon it shewing it to be subject to the executions; but taking the certificate so endorsed would not have prejudiced the bank's real rights, either before registering the transfer or afterwards, at the bank's option, it could ask for an order declaring its interest and settling the priorities between it and the execution creditors, but the burden of the costs of shewing that its rights are otherwise than by the register they appear to be and of the respondents to application investigating them to the point where they ought to be satisfied ought to fall upon the applicants.

The proper order to have made on the application was, I think, to this effect: a declaration that the Royal Bank was an equitable mortgagee of the lands by virtue of the deposit of the certificate of title on January 7, 1913, and, furthermore, by virtue of the execution and delivery of the transfer on November 18, 1913, and that in respect of such security the bank was entitled to priority over the several execution creditors; with the right to any execution creditors to have the amount secured by such equitable mortgage ascertained at any time by a reference to the clerk of the Court, the costs of any such reference to be in the discretion of a Judge and the costs of the motion to be paid by the bank. I think an option might have been given to the bank to register its transfer, and then the order would have been modified accordingly, to declare that the bank held the land as registered owner only by way of security, the rest of the order remaining in effect the same. I think that is the order which we should now make.

I therefore think the appeal should be allowed with costs.

Appeal allowed.

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Saskatchewan Supreme Court, Lamont, J. April 22, 1916.

1. DIVORCE AND SEPARATION (§ VIII A—80)—SEPARATION AGREEMENT—SUBSEQUENT ADULTERY OF HUSBAND—EFFECT.

An admission by the defendant on examination for discovery that he has been living in adultery is a new circumstance, not in contemplation of the parties at the time of entering into a separation agreement, sufficient to entitle the plaintiff to the custody of the infant children and to such increase in alimony as the Court may think proper under the circumstances.

[*Morrall* v. *Morrall*, 6 P.D.R. 98, *Gandy* v. *Gandy*, 30 Ch. D. 57, *Bishop* v. *Bishop* (1897), P.D.R. 138, *Howey* v. *Howey*, 27 Grant at 59; *Theobald* v. *Theobald*, 15 P.D. 26, *Aldrich* v. *Aldrich*, 21 O.R. 447, referred to.]

2. DIVORCE AND SEPARATION (§ VII—75)—SEPARATION AGREEMENT—SUBSEQUENT ADULTERY—CUSTODY OF CHILDREN.

The Court in making an order for the custody of infant children will first consider the welfare of the children rather than the punishment of the guilty parent, and where the father's common law right to their custody conflicts with this interest it will not prevail.

[*Judkins* v. *Judkins*, [1897] P. 165, referred to. See also *Tuxford* v. *Tuxford*, 12 D.L.R. 380.]

ACTION for custody of infant children and for alimony. Statement.

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

W. B. Willoughby, K.C., for defendant.

LAMONT, J.:—The plaintiff, who is the wife of the defendant, has brought this action to obtain the custody and control of her two sons and for alimony. The parties hereto were married in October, 1900, and have two children, the eldest, Canice, is 12 years old and the younger, Donovan, 11 years old. Unhappy differences having arisen between the plaintiff and the defendant, they in November, 1906, entered into an agreement in writing to live separate from each other. They mutually covenanted not to take proceedings against each other for restitution of conjugal rights or to obtain a divorce or judicial separation in respect of anything that had heretofore taken place. The defendant was to have the custody and control of the elder boy and the plaintiff the custody and control of the younger. The defendant was to pay the plaintiff the sum of £1 a week for the maintenance of herself and her son Donovan. In 1911 or 1912 the plaintiff brought an action to set aside the separation agreement, but it was held (12 D.L.R. 380) that as no circumstance had arisen which was not in the contemplation of the parties when the agreement was executed the plaintiff could not have it set aside. In the present action new circumstances are alleged and proven. Lamont, J.

The plaintiff alleges and the defendant in his examination for discovery admits that since the trial of the last action he

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has been living in adultery with one Mrs. Andrews, who was keeping house for him. He also admits that in 1914 Mrs. Andrews gave birth to a child, of which she claimed he was the father, and that she possibly is right in her contention. In October last Mrs. Andrews went to England and has been there ever since; but the defendant says that they are still attached to one another and that there is an understanding that she will return to him. The defendant sets up that the plaintiff is estopped by the judgment in the former action and by the provisions of the separation deed from prosecuting this action: further, it is contended on his behalf that the plaintiff has not made out a case for alimony.

As to the defence of estoppel all I need say is that the judgment in the former action does not in any way affect the present proceedings and that the cases of *Morrall* v. *Morrall*, 6 P.D.R. 98; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Bishop* v. *Bishop*, [1897] P. 138, make it clear that the provisions of the separation agreement do not constitute a bar to the plaintiff's claim. There is here no agreement that she will not sue for increased alimony should the circumstances warrant her in so doing, and her covenant not to take proceedings against the defendant is, as I have already pointed out, limited to matters which had theretofore taken place, or which had theretofore been alleged to have taken place on the part of either of them. Then, has she made out a case for alimony?

By sec. 23 of the Judicature Act the Supreme Court is given jurisdiction to grant alimony:—

1. To any wife who would be entitled to alimony by the law of England or

2. To any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto or

3. To any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

Under this statutory provision the Court has jurisdiction to grant alimony on a proper case being made out although under the English law it might be granted only as an incident to some other relief. The ground upon which the plaintiff seeks to establish her right is the admitted adultery of the husband. Is a wife by the law of England entitled to alimony by reason of the adultery of her husband? The remedy of a wife for adultery on the part of her husband is judicial separation unless that adultery

is incestuous or is coupled with cruelty or desertion, in which case she may obtain a dissolution of the marriage: 16 Halsbury, 469-470 and 500.

At the latter page the author says:—

A husband or wife may petition for a decree of judicial separation on the ground of adultery, of cruelty, or of desertion without cause for two years and upwards.

In *Howey* v. *Howey*, 27 Grant at page 59, although the point was not actually decided, Spragge, C., said:—

Under the Imperial Act, 20 & 21 Vict. ch. 85, adultery by the husband is a ground for judicial separation.

In England, however, a decree for judicial separation carries with it the right to alimony: *Theobald* v. *Theobald*, 15 P.D. 26; and in *Aldrich* v. *Aldrich*, 21 O.R. 447, at 449, Boyd, C., said:—

Had the case rested at this stage, I should not hesitate to award alimony. Indeed, the adultery alone is sufficient in my opinion, though that was left undetermined in *Howey* v. *Howey*.

I am, therefore, of opinion that adultery on the part of a husband being sufficient in England to entitle a wife to judicial separation and to alimony as an incident thereof is sufficient in this province to entitle her to alimony without a decree of judicial separation. The adulterous conduct of the defendant also entitles her as between herself and her husband to the custody of the infant children which is usually given to the innocent parent unless the interest of the infants demands some other course.

The right to the custody of the eldest boy which she did not have under the separation agreement, with the obligation it entails of maintaining and educating him, entitles the plaintiff not only to a sum sufficient for his maintenance and education but to such alimony as under the circumstances the Court may think she is entitled to.

In *Judkins* v. *Judkins*, [1897] P. 165, Lindley, L.J., said:—

The whole case as to alimony and maintenance is properly open as soon as the position of the parties provided for by the deed is altered by the order of the Court changing the custody of the children.

I am, therefore, of opinion that the plaintiff should be given a reasonable alimony. The provision in the separation agreement is totally inadequate. The defendant is well-to-do. Taking all the circumstances into consideration I think $70 per month a fair allowance with which to maintain herself and the children and provide for their education.

It was contended that as rule 776 expressly provided that

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the Court may make an order giving the custody of children under 12 to the mother, the reasonable inference was that where the child was over 12 such order should not be made. I do not agree with this contention. The principle upon which the Court should exercise its jurisdiction as to custody is laid down in 16 Halsbury, 522, as follows:

> The Court has power to make an order as to custody *inter partes*, but, apparently, not as against the child. If a child of sixteen is minded to leave his father's house, he cannot be reclaimed by habeas corpus or otherwise. The paramount consideration of the Court in exercising its discretion is not the punishment of a guilty spouse, but the children's welfare, against which a father's common law right to their custody, if it conflicts with the rules of equity, does not prevail.

As I have pointed out the conduct of the father is ample justification for depriving him of the custody of the children and he should be deprived of their custody so long as the interests of the children do not require otherwise. If the boys intend to become farmers, it is very probable their material interests would be furthered by living on the farm with their father rather than living in the town with the mother. The father is a farmer in a large way and in a position to provide his boys with farms. What course the boys would like to follow I do not know, but I think it not inadvisable to give them an opportunity of expressing an opinion. If when the eldest boy reaches the age of 13 years, which will be in the near future, he elects to remain with his father the order taken out herein giving his custody to the mother may be abrogated, provided the defendant is not living with Mrs. Andrews and his conduct otherwise does not make it desirable in the boy's interest to have him live separate from his father. In the event of the boy remaining with his father, the allowance to the plaintiff should be reduced $15 per month. The same will apply to the other boy when he reaches the age of 13 years. In making this provision I am endeavouring to further the interests of the boys, regardless of what may be the desires of the parents.

In his examination for discovery I observe that the defendant states that he offered to send both boys to college, to maintain them there. This, in my opinion, would be the proper course, and if the defendant is still willing to do this and a satisfactory arrangement is not arrived at with the plaintiff in respect thereto, an application may be made to me to vary the terms of this judgment so as to give effect to the defendant's offer. No matter what

differences may exist between the parents they both owe it to their children to see that they get a good education.

The defendant will have the same right of access to the boys as the separation agreement provided for in the case of the younger. The plaintiff is entitled to her costs of the action.

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BITULITHIC AND CONTRACTING CO. v. CANADIAN MINERAL RUBBER CO.

(Reported in 25 D.L.R. 827.)

ALTA.

APPLICATION for an injunction to restrain an alleged infringement of letters patent for a "new and useful improvement in street pavements." Hyndman, J., said in the judgment reported (p. 828):—

In England it appears that the plaintiffs must establish, at least, a primâ facie case of novelty, sufficiency and utility. In the United States the patent carries with it a presumption to this effect and the Canadian decisions appear to have followed in this respect and so I hold in this action "Copeland v. Lyman," 9 O.W.R. 908.

ANNOTATION

Patents—Primâ facie presumption of novelty and utility.

Annotation.

BY RUSSEL S. SMART, B.A., M.E.

In Canada it seems to be accepted that a *primâ facie* presumption of the novelty and utility of the invention, and that the patentee is the first and true inventor, arises from the grant of the letters patent (*Overend* v. *Burrow, Stewart & Milne Co.*, 19 O.L.R. 642; *Electric Fire Proofing Co.* v. *Electric Fire Proofing Co. of Canada* (1910), 43 Can. S.C.R. 182 (31 Que. S.C. 34); *Copeland-Chatterson Co.* v. *Lyman Bros. Co.*, 9 O.W.R. 908 at 912; *Blount* v. *Societe*, 53 Fed. 98, 3 C.C.A., 455; *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U.S. 486; *Lehnbeuter* v. *Holthaus*, 105 U.S. 94). Notwithstanding this presumption, the English law requiring other circumstances creating a presumption of validity, to warrant granting an interim injunction, has been followed in at least two cases. (*Bonathon* v. *Bowmanville Furniture Man. Co.*, 5 P.R. (Ont.) 195; *Ottawa and Hull Power and Man. Co.* v. *Murphy*, 15 Que. K.B. 230.) This is the practice in United States Courts, which requires something such as adjudication against others or acquiescence by the public to aid the presumption which the patent raises. *Adam* v. *Folger*, 120 Fed. 260, 56 C.C.A. 540; *Blount* v. *Societe*, 53 Fed. 98, 3 C.C.A. 455; *Electric* v. *Edison*, 61 Fed. 734, 10 C.C.A. 106; *McCoy* v. *Nelson*, 121 U.S. 484, 30 L. Ed. 1017; High on Injunctions, 4th ed. 961.

It is necessary that a patent specification should be drawn with the utmost good faith (*Sturtz* v. *De La Rue* (1828), 1 Web. P.C. 83), and if it contains more or less than is necessary for obtaining the end for which it purports to be made the patent is void under sec. 29, when such omission or addition is wilfully made for the purpose of misleading. By the English law any unnecessary ambiguity introduced into the specification renders the patent void. *Turner* v. *Winter* (1787), 1 Web. P.C. 77, 80; *Crompton* v. *Ibbotson* (1828) 1 W.P.C. 83.

It is only suppression of things material for the public to know which

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is fatal. If the patentee makes a full and fair disclosure so far as his knowledge at the time extends, he has done all that is required (per Baylet, J., in *Lewis* v. *Marling* (1829) 1 Web. P.C. 493, 496).

Sub-sec. 1 of sec. 29 of the Patent Act (ch. 69 R.S.C.), provides:—

> A patent shall be void, if any material allegation in the petition or declaration of the applicant hereinbefore mentioned in respect of such patent is untrue, or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, when such omission or addition is wilfully made for the purpose of misleading: Provided that if it appears to the court that such omission or addition was an involuntary error, and if it is proved that the patentee is entitled to the remainder of his patent *pro tanto*, the court shall render a judgment in accordance with the facts, and shall determine as to costs, and the patent shall be held valid for such part of the invention described as the patentee is so found entitled to.

Under the English law a patent is void if the patentee does not communicate all he knows. He must disclose the best form of his invention. If anything that gives an advantageous operation to the thing invented be concealed, the specification is void. In *Wood* v. *Zimmer* (1815), 1 Web. P.C. 44, 82, the patent was for a method of making verdigris. The method described in the specification was sufficient to make verdigris, but the inventor was accustomed, clandestinely, to use *aquafortis* with some advantage. It was said by Gibbs, L.J.,

> Now, though the specifications should enable a person to make verdigris substantially as good without the *aquafortis* as with it, still, inasmuch as it would be made with more labour by the omission of *aquafortis*, it is prejudicial concealment and a breach of the terms which the patentee makes with the public.

The patent was held void. (See also *Retley* v. *Easton* (1852), Mac. P.C. 48; *Unwin* v. *Heath* (1855), 5 H.L. Cas. 505; *British Dynamite Co.* v. *Krebs*, 13 R.P.C. 190 at p. 195; *Electric Boot & Shoe Finishing Co.* v. *Little*, 75 Fed. 276, 138 Fed. 732.)

It is open to argument that the present clause does not require full disclosure, and that the specifications and drawings contain all that is "necessary for obtaining the end for which they purport to be made" if they describe a useful invention.

The case just reported would lead to the opinion that a full description of the invention in the utmost good faith would be required.

In England it has also been the law that ambiguity or any unnecessary details introduced into the specifications for the purpose of misleading the public as to the nature and operation of the invention rendered the patent void. (*Turner* v. *Winter* (1787), 1 Web. P.C. 77, 80; *Crompton* v. *Ibbotson* (1828), 1 W.P.C. 83.)

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GRAY v. WABASH R. CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. February 4, 1916.

1. RAILWAYS (§ III B—50)—ACCIDENTS AT CROSSINGS—SIGNALS—FAILURE TO LOOK—SNOWSTORM.

Failure to ring the bell and blow the whistle while a train is approaching in a snowstorm within 550 feet of a highway, although there is no statutory duty to blow the whistle, may justify a jury's finding of negligence in an action for injuries to a vehicular traveller on the highway;

the jury's finding negativing contributory negligence, because of the plaintiff's failure to look, cannot be disregarded by the trial Judge, particularly when the vision was obstructed by the snowstorm.

2. TRIAL (§ V A—270)—FINDINGS OF JURY—STATEMENTS OF FOREMAN—EFFECT.

The oral statements of the foreman of a jury, explaining to the Court the cause of an accident as found by the jury, cannot override the deliberate written verdict of the whole jury, so as to warrant the action of the trial Judge in entering judgment against their verdict.

3. NEW TRIAL (§ II—5)—ERRORS OF COURT—APPELLATE JUDGMENT ON MERITS.

Where a trial Judge directs a judgment against the verdict of the jury, the Appellate Court in setting the judgment aside will not order a new trial, but will direct a judgment to be entered in accordance with the verdict.

[*Jones* v. *C.P.R. Co.*, 13 D.L.R. 900, 30 O.L.R. 331, referred to.]

Statement.

APPEAL from the judgment of Middleton, J., dismissing an action to recover damages for injuries sustained by the plaintiffs by being struck by a train of the Wabash Railroad Company, operated upon the line of the Grand Trunk Railway Company, while the plaintiffs were attempting to cross the line in a buggy.

J. H. Rodd, for appellants.

H. E. Rose, K.C., for defendants the Wabash Railroad Company, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The jury in writing found that the plaintiffs' injuries were caused by the negligence of the respondents, and that the plaintiffs were not guilty of contributory negligence; and the findings were expressed in this, taken in connection with the Judge's charge, sufficiently clear and ample manner:—

"Q. Was there negligence on the part of the defendants, or either of them, which caused the injury to the plaintiffs? If so, what? Answer fully.

"A. We find that the Wabash Railroad Company were negligent in so far as the evidence shews that the engine-bell was not sounding immediately prior to the arrival of the train at Tecumseh road crossing and in so far as a danger-whistle was not blown between the 550 foot range of vision immediately west of the place on the crossing at which the accident in question occurred."

But, after their verdict had been so rendered, a discussion of the subject was entered upon by the Judge with the foreman of the jury, which ended, so far as the foreman was concerned, in these words:—

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"The Foreman: Your Lordship, in the finding we thought that might have prevented the accident, even at that late date, had the bell been sounded or the alarm sounded within the last 550 feet, that that might have prevented the accident."

"His Lordship: Did you think it would have prevented the accident, or is it only a guess that it might have prevented the accident? Do you take the responsibility of saying that, in your opinion, it would have prevented the accident, or it would have?"

"The Foreman: I could not go further than saying it might have prevented it."

The trial Judge directed that judgment be entered for the respondents, notwithstanding the verdict: basing that direction upon the grounds: (1) that the statement of the foreman of the jury, which I have given in full, reversed the written verdict of the jury in favour of the plaintiffs; and (2) that the action failed, upon the whole evidence, because the plaintiffs were guilty of contributory negligence.

In my opinion, there was error in both respects.

I cannot think that the statement of the foreman, especially when given in the course of a conversation, in which there was no time to weigh his words, ought to be taken as overriding the deliberate written verdict of the whole jury. No Judge, notwithstanding much experience in expressing publicly his views, would like to be tied down to every statement he makes during the trial or argument of cases; and how much less should a juryman be so tied down—a juryman much less able to express his thoughts with precision, and possibly without any experience in expressing them in public? The jury-room, after a proper charge, is the place where verdicts should be agreed upon. Nor can I understand how the expression of his own views by one juror, whether foreman or not, could rightly be considered not only as a verdict of the jury but also as contradicting and reversing the verdict of all of them, given in writing; and the more so now that an unanimous verdict is not required by law in civil cases.

Deliberate findings are not to be reversed upon undeliberated words, spoken as the words of one only of the twelve whose verdict it is. If the learned Judge had called the attention of the other jurors to the discrepancy, or supposed discrepancy, between the verdict rendered and the foreman's statement, it might have been

explained; it might have been shewn that the foreman did not intend to convey, by the words he used, the meaning the Judge attributed to them; or that, though he did, the rest of the jurors, or at least ten of them, stood by their verdict.

Clearly, not enough was done to warrant a verbal reversal of the jury's written verdict—a verdict expressly accepted as clear and sufficient, until, almost casually, the quoted words of the foreman came out.

It would not have been at all difficult to have cleared up all doubt upon that subject; and, in any event, it would have been better to have made plain to the jury the meaning attributed to the foreman's statement by the Judge and how it seemed to him to conflict with their written verdict; and to have sent them back to consider the matter, and to alter their written verdict, if it were proper to do so.

This not having been done, their verdict, once duly rendered, ought to stand. The onus of shewing, and shewing clearly, that it was rightly reversed, rests upon the respondents; and all that they have shewn falls far short of any warrant for a reversal.

The plaintiffs were driving in a highway running nearly parallel to the railway tracks, and were approaching an abrupt turn in the highway where it crossed the tracks; they were in a buggy with the "top" or hood, or cover, up; and so in a most difficult position for taking care of themselves against a train coming on behind them. The train which caused their injury was running slowly, under twenty miles an hour. The jury found, as they might reasonably have done, that the driver of the engine was guilty of negligence in not sounding the whistle of the engine, when within 550 feet of the crossing, as well as not ringing the bell, in order to warn whoever might be in the buggy, or otherwise on that highway, going to cross the tracks, that there was danger behind.

The jury may not have found that the driver saw the buggy and appreciated the danger; it was not necessary that they should; if he ought to have done both and did not, he was guilty of negligence; whilst, if the falling snow, or anything else, prevented him from seeing, yet knowing the danger of the place, they might still have found him guilty of negligence for not whistling, for taking chances, especially as the bell was not ringing.

Because the railway enactments do not make it a duty to

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sound the whistle within the 550 feet is no reason why failure to do so may not be negligence; if it were a thing which, in the proper performance of their duties, competent drivers—it would be negligent to employ incompetent drivers—ordinarily would not omit, the omission of it was actionable negligence; and the jury were quite within their rights in finding that the appellants' injuries were caused by the neglect of the company to sound the whistle, in the peculiar circumstances of the case.

But besides that negligence the respondents were guilty, according to the jury's findings, of neglect of the statute-imposed duty to ring the bell; and that negligence caused the plaintiffs' injury.

So the question here is not whether doubt was thrown upon the verdict, or what course the trial Judge should have taken of his own motion, in the interests of justice: the question is, whether, assuming that the judgment is wrong on the other ground upon which it is based—contributory negligence—the respondents are entitled to a new trial.

It has been said that a new trial is something in the nature of a calamity; it is certainly an extreme hardship, especially upon persons such as the plaintiffs: it is enough to go once through the anxiety, wear and tear, and expense and inconvenience of a trial; a second trial, where one should be enough, cannot easily be excused; and ought never to be unless the rights of one of the parties, or the interests of justice, make it necessary: see *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325.

What rights have the respondents to a new trial? None that I can find.

The plaintiffs have a sufficient and unmistakable verdict in writing against them. Assuredly they cannot get rid of that by saying that the words of the foreman, speaking for himself, in the manner I have mentioned, throw doubt upon the written finding. As long as it stands, it binds them. The doubt should have been dispelled; as it might so easily have been dispelled, whether in their favour or against them, at their instance. If they desired to take advantage of it, they should have moved the Judge to reopen the question upon which doubt rested, and, with a further clear charge upon it, to direct the jury to reconsider it: or they might have asked to have the jury—not merely the foreman—

polled. But they did not, and I can imagine only that they did not deliberately, fearing that such a course would remove all doubt to their disadvantage. And can any one have any doubt that it would?

The respondents were guilty of negligence in two grave respects, one the breach of a statutory duty, and the other the breach of what most men might think a very obvious duty, especially if the other were neglected, though not a statutory duty; and the plaintiffs were not guilty of contributory negligence. Is it within the range of possibility, even, that, in these circumstances, that jury, or any other, would, notwithstanding such negligence on the one side and care on the other, be unable to say that the negligence found by them caused the accident?

The findings of negligence are well supported by the evidence, especially the second one.

The respondents have wholly failed to shew any legal right to a new trial; and, as I see it, justice does not require it; an injustice would be done in directing it.

In the case of *Jones* v. *C.P.R. Co.*, 13 D.L.R. 900, 30 O.L.R. 331, the Court of Appeal here was unable to discover any finding of the jury that the negligence proved was the cause of the accident, and so directed a new trial; but the Privy Council set that judgment aside and directed that judgment be entered for the plaintiff in accordance with the verdict: and that is only one instance of very many in which, accurately or not, the rule that a verdict once found ought to stand has been applied: and the great reluctance there is, very properly, in directing a new trial, except as a matter of right.

If granted, it could be granted, fairly, only as to the one question upon which doubt has been cast, the question whether—the respondents having been guilty of negligence in the two respects, and the plaintiffs not guilty of contributory negligence—the real cause of the accident was the negligence of the respondents in either respect: see the Judicature Act, sec. 29. As I have intimated, there can hardly be a possibility of the plaintiffs failing at such a trial; indeed I doubt whether the respondents would be willing to go to trial upon that issue only. Trials are costly: and generally have the like result in such cases as this: and who can say wisely that such a result in this case would be unjust?

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There should not be another trial.

The ground upon which the learned Judge thought he was justified in directing judgment to be entered for the respondents, notwithstanding the verdict for the plaintiffs, was that the plaintiffs were, he thought, plainly guilty of contributory negligence—that they should have looked both ways for trains before crossing, and, if they had so looked, must have seen the train which caused their injuries, and should have avoided it.

Both swore very positively that they did look and kept on looking until the accident happened, but saw no train. So the Judge must have discredited their testimony in this respect.

There are cases in which obviously it would be negligent to cross a railway track without first stopping and looking out for trains and making sure that the way was safe; on the other hand, there are cases in which it would not be negligent: for instance, in the open country, where even the blind or deaf would know unless dreaming; that is, it would be that which persons ordinarily would do under the same circumstances; and so the question must nearly always be one for the jury.

If the short logic, "If you failed to look you were negligent, and if you looked and failed to see you were negligent," were always applicable, who could recover in respect of any level crossing accident? The measure of a man's duty is not what the "prophets after the event," or logicians, may say; it is but that which ordinarily is done under the like circumstances. It is not of much use to look if one be nearly blind or his vision obstructed by snow-storm, train, building, or any obstruction; nor, in such a case, is it necessarily negligent not to see if one look. Circumstances alter cases; and many circumstances may warrant an inroad upon this short and sometimes captivating logic.

The appellants were driving, in a buggy, with the cover up; the train that caused their injury was almost directly behind them; and both were approaching the awkward crossing, where the accident happened, in a snow-storm. Those who have never driven a horse at all, and those who have never driven in a buggy with the cover up, or in a snow-storm, may perhaps, with much confidence, apply the Lord Justice's logic, which I have quoted from memory and so perhaps not with verbal accuracy; but there are few jurors who have not, and so they must be the better

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judges; and in any case the subject is one within their province, which, in my opinion, was plainly invaded in that respect, as well as in determining the question of the veracity of the plaintiffs, man and wife. No one, in my opinion, reasonably can say that the jury, in finding distinctly and clearly that the plaintiffs were not guilty of contributory negligence, did that which reasonable men could not conscientiously do.

I would allow the appeal with costs, and direct that judgment be entered up in the action for the plaintiffs, and $1,000 damages, with costs of the action.

I should add that I am sure my brother Riddell is under a misapprehension in thinking that the plaintiffs do not want a new trial if they cannot get more: all that was said was that both sides preferred to have the case finally dealt with by this Court if that could be done without a new trial.

LENNOX and MASTEN, JJ., concurred.

Lennox, J.
Masten, J.
Riddell, J.

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

FRASER v. PICTOU COUNTY ELECTRIC CO., LTD.

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Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Drysdale and Harris, JJ. March 14, 1916.

1. STREET RAILWAYS (§ III B—25)—PREMATURE STARTING OF CAR—DUTY AS TO ALIGHTING.

Starting a tram car before ascertaining that a passenger has safely alighted, even on the signal "alright" of a person on the rear vestibule, is negligence which will render the tram company liable for injuries sustained by the passenger falling off the car.

[See *Armishaw* v. *B.C. Electric R. Co.*, 14 D.L.R. 393, 18 B.C.R. 152; *Montreal Street R. Co.* v. *Chevandier* (Que.), 24 D.L.R. 349; *Black* v. *City of Calgary* (Alta.), 24 D.L.R. 55; *Dunham* v. *Cape Breton Electric Co.* (N.S.), 21 D.L.R. 38; *Blakely* v. *Montreal Tramways Co.* (Que.), 20 D.L.R. 643; *Winnipeg Electric R. Co.* v. *Schwartz* (Can.) 16 D.L.R. 681; *Schaffer* v. *The King*, 14 Can. Ex. 403.]

2. STREET RAILWAYS (§ III C—46)—CONTRIBUTORY NEGLIGENCE—PERSONS UNDER DISABILITY.

A passenger's failure to see, while alighting, that the car was in motion, is not necessarily contributory negligence, if the passenger is an old person with perceptive faculties less acute than those of youth.

3. NEW TRIAL (§ III B—15)—VERDICT AGAINST WEIGHT OF EVIDENCE—REASONABLENESS.

Where the verdict arrived at by the jury upon evidence properly submitted to them upon questions of fact is one that reasonable men might reach, the verdict will not be disturbed as being against the weight of evidence.

[*Commissioners of Railways* v. *Brown*, 13 A.C. 133; *Windsor Hotel Co.* v. *Odell*, 39 Can. S.C.R. 336, followed. See also *MacKenzie* v. *B.C. Electric R. Co.*, 21 B.C.R. 375; *McDonald* v. *Campbell* (N.S.), 22 D.L.R. 748; *Ball* v. *Wabash R. Co.* (Ont.), 26 D.L.R. 569; *Morgan* v. *McDonald* (Can.), 27 D.L.R. 125; *Canadian Pacific R. Co. v. Walsh*, 24 Que. K.B. 185; *Suarez* v. *Eisenhauer*, 47 N.S.R. 418; *Tobin* v. *Halifax* (N.S.), 16 D.L.R. 367; *Holt Timber Co.* v. *McCallum* (P.C.), 25 D.L.R. 445.]

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FRASER v. PICTOU COUNTY ELEC. CO., LTD.

Graham, C.J.

APPEAL from the judgment of Ritchie, E.J., upon a verdict by a jury in plaintiff's favour, in an action for personal injuries sustained while alighting from one of the defendant's tram cars in consequence of the negligence and careless operation of the car.

H. Mellish, K.C., for appellant.

R. H. Graham, K.C., and *V. J. Paton*, K.C., for respondent.

GRAHAM, C.J. (dissenting):—In my opinion the verdict is against the weight of evidence . . . Then the plaintiff's evidence is at variance with his pleading, as it originally stood. .

I think the plaintiff attempted to alight after the car had started, and he had been warned by a fellow passenger not to, and the injury was brought about by his own act. . .

One word about setting aside the verdict of a jury. If the plaintiff's argument is to prevail, that if there is any evidence for a jury their verdict must be sustained, it would result in this, that hereafter there is to be no new trial in any case of a verdict being against the weight of evidence; corporations will have a bad time. There has always been a formula for setting aside a verdict when it is against the weight of evidence. I think reasonable men ought not to have come to the conclusion that this jury did.

At any rate there is a discretion about granting at least one new trial, and in England it used to be granted almost as a matter of course when the trial Judge was not satisfied with it. There is in this case an exceptional incident, too. Both parties had closed their evidence the night before, and in the morning the plaintiff got leave to amend a paragraph of the statement of claim. As I have already mentioned, I cannot improve on the objection of Mr. Mellish for defendant to that course. It is printed in the case. I don't know what the amendment was. It was never taken out. An "amendment to meet the facts" at that stage would be almost incapable of being stated because no one could tell what the facts were. I have pointed out the difficulty of allowing a plaintiff to vary his case at this critical moment when he had formerly stated something different, namely, in his pleading. In the Admiralty practice, in collision cases, a party in his preliminary act states his case once for all. That practice does not exist in such a case as this but there is good sense at the bottom of that rule.

In my opinion the defendants should have a new trial with costs.

RUSSELL, J.:—An old man was travelling to his home on the tram of the defendant company. He had taken a seat at the rear end of the car, near the door leading into the vestibule, and as the car approached the corner at which he intended to alight he signalled to the conductor, who had intended to stop at that corner in any event because he assumed that the plaintiff would wish to alight at that place, as he had frequently done before to the knowledge of the conductor. The motorman would, it seems, on his own initiative, have stopped there as there were ladies waiting on the roadside to enter the car. The plaintiff got up and stepped into the vestibule, but not before the ladies had entered the car. He had to stand aside for them and before he could alight the car resumed its motion. He had got as far as the step before he was aware that it was in motion, and it was then impossible for him to return to the vestibule. He was holding on to the bar with his right hand, and in his left he held an umbrella and a parcel. He had a stiff knee, and was seventy-seven years of age. The consequence of the haste and negligence of the conductor in not ascertaining that his passenger had safely alighted before giving his signal to the motorman to go ahead was that the old man was violently thrown to the ground and sustained such serious injuries that he seems even to have been under the impression when he instructed this counsel that he must have been struck by the car. The fact that it is so stated in the plaintiff's statement of claim is now given as a reason why the jury should not believe the plain unvarnished tale that he has given of his sufferings and the cause of them. The jury has believed his statement, and their verdict is now attacked as one that no reasonable jury could have given.

So far from acquiescing in this view, I feel pretty confident that if I had been one of the jurors I should have felt bound to concur in their verdict. I should have had every inclination to accept the old man's statement that he had signalled to the conductor to stop the car, that he had immediately, without any delay, proceeded to alight, that he had been for a moment or two detained by the ladies in the vestibule, that he had descended the step without perceiving that the car was in motion, as I incline to believe that it was, and that he did not become aware of the motion of the car till he was on the step, when it was too late for him to return. I should have come to the conclusion without any hesitation that the conductor had been remiss in his duties in not

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ascertaining that the plaintiff had made a safe exit before signalling to the motorman to go ahead, and that the negligence and carelessness of the conductor had been the proximate cause of the accident. I should have considered plaintiff's recollection of the circumstances more likely to be correct and trustworthy than the conflicting accounts of the various witnesses who had no particular reason for either accurately observing or correctly remembering the circumstances.

True it is that there is one apparent inconsistency between the plaintiff's direct examination and the statement he made in answer to a question from the trial Judge. It would be inferred from his statement of the facts in his direct evidence that he signalled to the conductor before moving from his seat. In answer to the Judge, he said that the signal was given when he was on the platform of the car going out into the vestibule. It must be remembered in this connection that he was at the rear end of the car and remained there until he began to make his exit, that it is clearly to be inferred from his statement that he did not immediately catch the conductor's eye. I presume that he may have begun to move into the vestibule immediately on making his signal which would in that case have been given either in the body of the car or in the vestibule accordingly as one chose to consider it. I assume that he began to signal by displaying his transfer when about to go into the vestibule, and had reached the vestibule before he secured the conductor's recognition. The difference between the two positions, it must be remembered, would only be the width of a threshold. The suggestion I have made seems also to me to be sufficient to account for the myth of a second signal given by the plaintiff, of which I do not think there was any evidence that should have or can have satisfied the jury. That there was only the one signal seems clear from the evidence of the defendant's witness John A. McDonald, who says that the signal was given in the car and that he did not see plaintiff give any signal while in the vestibule. It is not quite clear from the report of the evidence of this witness that he did not mean to describe the plaintiff's signal as having been given while he was in the act of coming from the body of the car into the vestibule, though I think the fairer interpretation of his evidence would be that he meant to say only that when the car stopped the plaintiff was in the act of coming into the vestibule.

The conductor of the car was evidently under the impression at the trial that he started the car because he heard someone at the rear end say "all right." Nobody else seems to have heard those words. But assuming that he did hear them, I should think it would be a clear case of negligence on the part of a conductor to rely on such information instead of satisfying himself that everything was right before he signalled to put the car in motion. He admitted on cross-examination, in answer to a question whether his instructions were in writing, that he had instructions in a pamphlet to make sure that passengers were on or off before starting.

The witness John A. McDonald seems to me to substantially corroborate the plaintiff's account of the matter in most of its essential features. He saw the plaintiff signal, and describe the situation and the rapidly occurring events that succeeded the plaintiff's signal in such a way as to clearly demonstrate the plaintiff's right to the verdict of the jury, unless it can be considered contributory negligence on his part not to have been aware, as the witness himself was, that the car was in motion. I do not think that this was contributory negligence. The plaintiff was an old man with perceptive faculties necessarily less acute than those of a youth. Unless this Court is going to negative altogether the right of old persons to travel on the trams, I do not see how we can set aside the verdict for the plaintiff in the present case. I think we should hesitate to sanction any principle that would not afford a reasonable assurance of safety to old persons who must, even more than others, find it necessary to make use of the trams, the more so because, as the wise and witty essayist in the Book of Ecclesiastes observes, "some of us also are waxing old."

DRYSDALE, J.:—It is quite apparent here that counsel conducting the plaintiff's case shifted ground at the trial. By the statement of claim the case went down to trial on the allegation that the plaintiff was struck by the car and injured while in the act of alighting from the car or immediately thereafter. After the plaintiff's case was made under the evidence, but before counsel went to the jury, apparently, an amendment of the claim was asked for and allowed, and as noted in the minutes plaintiff was allowed to amend to meet the facts. No formal amendment was made on the record, and I cannot gather what was intended by the motion unless it can be understood from the trial Judge's charge. It seems,

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I think, from the charge that the plaintiff relied upon an allegation of negligence in that the car had been stopped for him to alight; that without waiting a reasonable time to enable him to alight in safety the car was negligently started while he was in the act of going out and not allowing plaintiff reasonable time to safely get off the car. That by reason of such improper starting of the car the plaintiff was thrown off and injured. This was the case made by plaintiff in his evidence at the trial, is the case now relied upon, and as nearly as I can gather from the report of the trial this is what was in substance submitted to the jury. If I am correct in this the point involved was eminently for the jury, and the jury's finding should not be interfered with. Under the evidence reasonable men might reach the conclusion disclosed by the answers to the questions submitted.

After hearing the argument of counsel and after a perusal of all the evidence in the case I am unable to say that reasonable men might not come to the conclusions arrived at by the jury. I think no matter how viewed the case comes to a question of fact on the evidence, and I cannot think we are called upon to interfere with the findings. I would dismiss the appeal.

Longley, J.

LONGLEY, J.:—I am inclined to believe that the verdict in this case must be upheld. The original pleadings do not allow or make provision for the plaintiff falling off the car, but this was amended early in the trial, and the trial proceeded on the assumption that the plaintiff had fallen off the car. There is no particular evidence against this theory at all, and as the jury has found that way, even though one may think it was unfair and erroneous, I do not see any reason for overturning the verdict of the jury on the plaintiff's own evidence.

Harris, J.

HARRIS, J.:—In the case of the *Commissioner for Railways* v. *Brown*, 13 App. Cas. 133, the Court below had set aside the verdict of the jury as being against the weight of evidence, and the Privy Council—there being evidence on both sides properly submitted to the jury—reversed the decision of the Court below and restored the judgment at the trial. Lord Fitzgerald, at p. 134, said:—

> Tindal, C.J., about 50 years since laid down a rule to this effect: that where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand and that the setting aside of such a verdict should be of rare and exceptional occurrence. Their Lordships are not aware that the rule thus laid down has been abandoned.

This quotation from the decision of the Privy Council formed the basis of the judgment in *Windsor Hotel Co.* v. *Odell*, 39 Can. S.C.R. 336.

The question for consideration in this case is whether the verdict of the jury should be set aside as being against the weight of evidence, and after giving careful consideration to the facts I have reached the conclusion that it should not.

It does seem to me that the case was one peculiarly for a jury. The trial Judge could not properly have withdrawn the case from the jury, and while I feel bound to say that had I been trying it without a jury I think I should probably have given the defendant company judgment, yet as there is evidence both ways, and no objection has been or can be taken to the charge of the trial Judge, I think I am bound by the decisions to uphold the verdict.

As Lord Atkinson, in *Toronto Railway* v. *King*, [1908] A.C. 260, said:—

> The jury are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as Judges sitting in Courts of Appeal might themselves have arrived at.

I find myself unable to say that reasonable men might not have found as this jury did find.

On the argument of the appeal, it was urged that the plaintiff's statement of claim gave a different version of the accident from that given by him on the trial and that he could not succeed without an amendment. That is true; but before granting the amendment the trial Judge must have satisfied himself that no injustice would be done to the defendant by granting it. I think he correctly decided that question, and the defendant has not appealed from that decision. This being so the only value to be attached to the circumstance is that it might, if unexplained, throw some doubt on the plaintiff's credibility. His solicitor, who was present on the argument, says that the plaintiff was confined to his house and he had no opportunity of consulting him before delivering his statement of claim, and that the difference between the two statements is to be accounted for in that way. Quite apart from this explanation, it was open to defendant's counsel to comment on the difference in addressing the jury and I have no doubt he did so. After that it was for the jury and, unfortunately for defen-

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dant, they apparently took the view that it did not affect the plaintiff's credibility.

I would dismiss the motion for a new trial with costs.

Appeal dismissed.

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S. C.

GUNNE v. CONSOLIDATED LAND AND MORTGAGE CO.

Saskatchewan Supreme Court, Lamont, J. January 25, 1916.

1. VENDOR AND PURCHASER (§ I C—10)—CONTRACT FOR SALE OF LAND—NO TITLE IN VENDOR—REPUDIATION BY PURCHASER.

If the vendor in a contract for the sale of land has no title in himself to the land sold and is not in a position to compel a conveyance of it from the registered owner, the purchaser may (as soon as he becomes aware of that fact) repudiate the contract, and he does not need to give the vendor time to secure title.

[*Bannerman* v. *Green*, 1 S.L.R. 394; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, applied.]

2. VENDOR AND PURCHASER (§ I C—10)—CONTRACT FOR SALE OF LAND—VENDOR HAVING RIGHT TO CALL FOR TITLE, REASONABLE TIME TO OBTAIN.

If the vendor in a contract for sale is in a position to compel a conveyance to himself and time is not of the essence of the contract the purchaser, on paying his last instalment of purchase-money, must give him a reasonable time to obtain the necessary conveyance.

[*Gregory* v. *Ferris*, 3 S.L.R. 191, *Batten* v. *Russell* (1888), 38 Ch.D. 334, *Brewer* v. *Broadwood* (1882), 22 Ch.D. 105, referred to.]

Statement.

ACTION for rescission of an agreement for sale of land.

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

Benyon, for defendants.

Lamont, J.

LAMONT, J.:—By an agreement in writing, dated September 14, 1913, the defendant company agreed to sell and the plaintiff agreed to buy lots 4 and 5 in block 8 in Baxter Place, Moose Jaw, for $750; payable: $112.50 cash; and the balance with interest in 18 monthly instalments. The agreement provided that the purchaser would pay those instalments and interest and all taxes and assessments which might be rated against the land after date of the agreement. It also provided that, upon payment of these instalments and interest, the defendants would "immediately execute and deliver to the purchaser a good and sufficient transfer under the Land Titles Act free and clear of all encumbrances." This transfer was to be prepared at the expense of the vendors. Time was expressly declared to be of the essence of the contract.

The final instalment became due in October, 1914, and on the 20th of that month the plaintiff, through his solicitor Fitzgerald, remitted to the defendants the balance due and asked

for a transfer of the lots. On October 27 the defendants replied as follows:

Dear Sir:—

Re lots 4, 5, block 8 "Baxter Place"—F. J. Gunne.

We beg to acknowledge receipt of your favour of the 20th inst., with cheque for $37.70 enclosed, being final payment on above property, for which please find enclosed our official receipt.

We regret that we are unable to furnish transfer at present as these lots must be released from the mortgage immediately this is done we will mail transfer in the name of F. J. Gunne, free and clear from all encumbrances. We would ask you to kindly bear with us until this can be effected.

Yours truly,

(Sgd.) John Cowan, *Secretary.*

On December 1, Fitzgerald wrote again, complaining of the delay and suggesting that if the defendants could not send the transfer they had better return to the plaintiff the money he had paid and interest thereon. On December 8, the defendants replied as follows:

We have your favor of the 1st inst. and note your request for immediate transfer to the above property, and might state that we are endeavouring to release the mortgage on the said property and if you will be kind enough to grant us a further extension of time we will mail transfer free of all encumbrances at an early date.

We have a provision on our agreement with the vendors of this property that on payment of the sum of $60 per lot that a clear transfer will be issued. The present crisis has put us in the unfortunate position at the present time of being unable to release these lots at once but as we are in the final stages of completing a bond issue for the company of $125,000 immediately this is subscribed which will be in the very near future we will have a clear title to all of this property thereby being in the position to give title to your client. Kindly bear with us for a little time longer as an action at this particular time would only delay matters considerably.

(Sgd.) John Cowan, *Secretary.*

On December 12, Fitzgerald wrote asking the defendants to return the money paid with interest, and on December 23, he again wrote, stating that unless the defendants forwarded by next mail either the transfer or the money paid with interest he was instructed to take legal proceedings. On January 13, 1915. Messrs Machray & Co., on behalf of the plaintiff, wrote to the defendants as follows:

Consolidated Land & Mortgage Co.,

607-8-9 Electric Railway Chambers, City.

Dear Sirs:—

We have been handed an agreement for sale dated April 14, 1913, made by your company to Mr. F. J. Gunne, covering lots 4 and 5, block 8, Baxter Place, Moose Jaw, with instructions to take immediate action against you for the recovery of the amount paid by Mr. Gunne on account of these lots

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Unless this is attended to by return we are instructed to start an action against your company for the return of the amount paid by our client. Please govern yourself accordingly.

Yours very truly,
Machray, Sharpe, Dennistoun, Locke & Crawley,
per F. J. Sharpe.

The following day, the defendants forwarded a transfer of the lots to the plaintiff, but on January 19, 1915, they again wrote stating that they had not yet obtained title, and asking the plaintiff to hold the transfer for a short time. On February 3, Machray & Co. returned the transfer to the defendants, stating that the transfer was of no use to the plaintiff as the defendants had not title to the lots, and also stating that they were commencing action for the return of the moneys paid. On February 8, 1915, a writ for the return of the moneys paid by the plaintiff was issued. The defendants obtained title on March 1.

These facts present two questions for consideration: 1st: Was the plaintiff entitled to repudiate the contract, and 2ndly, Did he in effect repudiate it?

On both points the rule seems to be fairly well settled. It is established law that if the vendor in a contract for the sale of land has no title in himself to the land sold, and is not in a position to compel a conveyance of it from the registered owner, the purchaser may—as soon as he becomes aware of that fact—repudiate the contract, and he does not need to give the vendor time to secure title. *Bannerman* v. *Green*, 1 S.L.R. 394, *Bellamy* v. *Debenham*, [1891] 1 Ch. 412. But, where the vendor is in a position to compel a conveyance to himself and time is not of the essence of the contract, the purchaser, on paying his last instalment of purchase-money, cannot repudiate because the vendor has not title in himself at that moment, but must give him a reasonable time to obtain the necessary conveyance. *Gregory* v. *Ferris*, 3 S.L.R. 191; *Hatten* v. *Russell*, (1888), 38 Ch. D. 334 at 346; *Brewer* v. *Broadwood* (1882), 22 Ch. D. 105 at 109.

What title the defendants had to the lots in question prior to March 3, 1915, or what right—if any—they had to compel title, does not appear. The agreement or arrangement which they had with the registered owners, if one existed, was not put in evidence. Assuming, however, that the defendants had an agreement with the registered owners for the transfer to

themselves of the land in question upon payment of mortgage referred to in the correspondence, and assuming also in their favour that time had ceased to be of the essence of the contract, what would be a reasonable time which they should have in which to procure title? In my opinion it would be such time as —in the ordinary course of business—would be required to enable the defendants to forward the purchase-money (together with their own money if such were necessary), to pay off the encumbrances against the land, and to obtain in return a transfer thereof. The length of time required would, in each case, depend upon the circumstances of the particular case; the place of residence of the registered owners, and the length of time necessary to communicate with them. In this case, the defendants' contract was, that upon payment of the purchase money they would deliver to the plaintiff a transfer of the land free of all encumbrances. This pre-supposes a present ability on their part to immediately pay off the encumbrances as soon as they had received the full purchase price according to the agreement. It does not pre-suppose that, after the plaintiff had paid his money, the defendants would have time to form a company and have a large quantity of stock subscribed in order to enable them to procure the funds necessary to pay off the encumbrances.

The inability of a vendor to raise the amount necessary to procure a clear title to land sold by him and of which he has contracted to give a clear title, is not merely a matter of conveyancing; it is a matter of title. If the defendants had an agreement with the registered owners—as set out in one of their letters—by which they could get title to the plaintiff's lots on making a payment of $60 each, all they had to do was to send $120 and get a transfer back; this would have taken a matter of days only, two or three weeks at most. To take over four months, when the registered owners were to hand, was unreasonable. The only conclusion to be drawn from the evidence is that the delay was occasioned not through conveyancing necessities, but because the defendants did not have the money necessary to free the land from the encumbrances thereon.

Inability to free the land from encumbrances at the time specified is simply inability to procure the title they had agreed to deliver. This entitled the plaintiff to repudiate the contract

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and to a return of his money. That he did repudiate before the defendants were able to make title, is shewn by the letter of Machray & Co. of January 15, and also by the issue of a writ for the return of the moneys paid, which, of itself, is a sufficient repudiation. *Krom* v. *Kaiser*, 21 D.L.R. 700.

Being entitled to repudiate and having repudiated, the contract between the plaintiff and the defendants was at an end. The subsequent acquiring of title by the defendants could not revive it. The defence set up as to non-payment of $1.40 taxes, cannot be supported.

There will, therefore, be judgment for the plaintiff for a return of the moneys paid, with interest.

Judgment for plaintiff.

MAN.

C. A.

DOMINION LUMBER AND FUEL CO. v. GELFAND.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. May 11, 1916.

1. MARSHALLING ASSETS (§ I—5)—INSURANCE FUNDS—MORTGAGEES—DIFFERENT DEBTORS—RIGHTS OF ASSIGNEE.

Where a first mortgagee has a claim against two mortgage funds upon the mortgaged premises, which funds belong respectively to different persons, and a second mortgagee has a claim against one only of the funds, the Court, at the suit of the second mortgagee, will not apply the equitable principle of marshalling assets to the prejudice of the dominant creditor, the debtors or their assigns, so as to compel the first mortgagee to satisfy his claim out of one of the funds only, but the claim of the first mortgagee will be charged rateably against both funds.

[*Re Mower's Trusts*, L.R. 8 Eq. 110, distinguished; *Ex parte Kendall*, 17 Ves. 514; *Gwilliam* v. *McCormack*, 4 S.W.R. 521, followed.]

Statement.

APPEAL from the judgment of Galt, J., in favour of plaintiff, a mortgagee, in an interpleader issue as to the proceeds of insurance policies garnished by a mortgagee of part of the insured property and claimed by an assignee.

Ward Hollands, for George Gelfand.

A. E. Hoskin, K.C., and *L. J. Earl*, for plaintiffs.

Perdue, J.A.

PERDUE, J.A.:—The judgment appealed from was pronounced on the trial of an interpleader issue by Galt, J. The facts are set out in the Judge's judgment and are admitted, but a summary of them is necessary for a clear discussion of the rights of the parties.

Three brothers, Louis, Joseph and Abraham Gelfand, carried on a dairy business under the name of Gelfand Bros. Abraham was the owner of three lots, 1, 2, and 3 in block 6; the rest of the description may be omitted. Louis and Joseph owned lots 4 and

5 in the same block, and they held lot 6 under an agreement of sale. The Gelfand Bros. had erected buildings on the above lots in connection with their dairy business. The main stable extended over lots 1, 2, 3 and 4. In September, 1912, a loan was obtained by the three brothers from Elizabeth Tobias which was secured by two mortgages, one made by Abraham on lots 1, 2 and 3, and the other by Louis and Joseph on lots 4 and 5. The mortgages were expressed to be collateral to each other.

In November, 1912, the Hudsons Bay Insurance Co. issued a policy of insurance for $9,100 in favour of Gelfand Bros. covering, in addition to chattels, five different buildings on lots 1, 2, 3, 4 and 5. Separate amounts were made applicable to the different buildings and the loss, if any, was made payable to Mrs. Tobias as her interest might appear. In October, 1913, Gelfand Bros. obtained further insurance of $5,000 from the Central Canada Insurance Co. upon the same buildings, with separate amounts applicable to each. The policy in this case also provided that the loss, if any, should be payable to Mrs. Tobias as her interest might appear.

On January 14, 1914, the three Gelfand brothers made a promissory note for $3,000 in favour of the plaintiffs, and Louis and Joseph Gelfand at the same time gave a mortgage to the plaintiffs for the same amount on lots 4 and 5. This mortgage was payable as follows: $1,800 in twelve equal, consecutive, quarterly payments of $150 each, the first payment to be made on March 15, 1914, and the balance $1,200 on March 15, 1917, with interest quarterly at 8% per annum. The mortgage contained an acceleration clause and also a declaration that the mortgage was collateral to a certain note bearing even date therewith payable 3 months after date, which the mortgagee covenanted to renew "for a length of time equivalent to the length of time required to pay off the within mortgage." The mortgage also contained a covenant that the mortgagors would insure the buildings on the mortgaged lands for the full insurable value thereof and would assign to the mortgagee the policies of insurance, also that all insurance moneys received might, at the option of the mortgagee, be applied in rebuilding or towards the payment of the mortgage instalments. The original promissory note referred to in the mortgage was not produced, but a renewal dated December 31, 1914, for $2,850 was put in. This is a joint note made by Louis,

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Abraham and Joseph Gelfand in favour of the plaintiffs, 3 months after date with interest at 8%.

On September 2, 1915, the whole property was destroyed by fire.

On September 7, 1915, the Gelfand Bros. executed assignments of the moneys payable under both of the insurance policies to George Gelfand, a relative of the members of Gelfand Bros. but not a partner in that firm. Notice of these assignments was given by George Gelfand to each of the insurance companies on September 7, 1915.

On September 20, 1915, notice of the plaintiff's claim under their mortgage was given to the insurance companies.

On September 18, 1915, an action was commenced by the plaintiffs against Louis and Joseph Gelfand upon the mortgage made by them on lots 4 and 5. The statement of claim sets out the covenants as to insurance contained in the mortgage, the loss by fire and that the defendants had neglected and refused to satisfy the amount owing to the plaintiffs. The plaintiffs then alleged that the amount owing to them by the defendants was $2,984.50, together with interest from September 15, 1914. The plaintiffs claimed payment of the last mentioned amount and interest. The plaintiffs issued garnishee orders in the suit attaching the moneys in the hands of the insurance companies payable to Louis and Joseph Gelfand. The garnishees then applied for an interpleader order. On January 14, 1916, an order was made by Macdonald, J., with the approval of all parties, that the insurance companies pay the insurance moneys into Court less their costs; that out of the moneys so paid into Court the claim of Elizabeth Tobias be paid; that an issue be directed to determine the rights and priorities of the various claimants, except Mrs. Tobias, one of such claimants being George Gelfand, the present appellant.

The issue was tried before Galt, J., who ordered that the full amount of the plaintiffs' claim should be paid out of the money in Court, and that George Gelfand was entitled to the remainder of the money.

It has been found by the trial Judge, and the finding is not disputed, that the insurance paid in respect of lots 1, 2 and 3 (Abraham Gelfand's lots) was $2,158.61, the insurance paid in respect of lots 4 and 5 (Louis and Joseph Gelfand's lots), $3,432.62,

and that in respect of lot 6, $340. There was in Court at the time of the trial, after payment of Mrs. Tobias' claim, the sum of $4,078.20.

The plaintiffs seem, in the argument to have rested their claims to the insurance moneys upon the equitable assignment given them under the terms of the mortgage from Louis and Joseph Gelfand. It is difficult to see how they could in a suit against two members of Gelfand Bros. garnish money payable to the three members of that firm. All parties, however, appear to have agreed to the order of January 14 directing that the rights and priorities of the claimants to the funds should be determined in the issue to be tried. It is further to be noted that Abraham Gelfand was not a party to the plaintiffs' suit and was not brought into the proceedings. The plaintiffs' claim must rest wholly upon the rights conferred by the mortgage from Louis and Joseph. There was no assignment of the insurance, either legal or equitable, from Abraham Gelfand to the plaintiffs. No proceeding was taken on the note made by Abraham jointly with his brothers. His liability on the note must be excluded from consideration in dealing with the rights conferred on the plaintiffs by the mortgage made by Louis and Joseph, covering lots 4 and 5, by a provision of which they agreed to assign the insurance on the buildings upon these lots.

The insurance moneys were, by the policies, apportioned to the several buildings and the trial Judge has found the amount payable in respect of lots 1, 2 and 3 and that payable in respect of lots 4 and 5. Although the insurance is payable to the three owners, we may take it that this is the manner in which the owners themselves would have apportioned the insurance between them if there had been no debts. The main point argued before the trial Judge, the point in fact upon which the decision turned, was whether the plaintiffs, having a security only upon lots 4 and 5, had a right to insist that the insurance moneys should be so marshalled as to throw Elizabeth Tobias' claim first upon lots 1, 2 and 3 in order that the plaintiffs might have the benefit of the fund in respect of lots 4 and 5.

The doctrine of marshalling is stated by Lord Eldon as follows:

> If A. has a right to go upon two funds, and B. upon one, *having both the same debtor*, A. shall take payment from that fund, to which he can resort exclusively; that by those means of distribution both may be paid. That

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course takes place, where both are creditors of the same person; and have demands against funds, the property of the same person . . . but it was never said, that, if I have a demand against A. and B., a creditor of A. shall compel me to go against A. without more; as, if B. himself could insist that A. ought to pay in the first instance; as in the ordinary case of drawer and acceptor, or principal and surety; to the intent that all obligations arising out of these complicated relations may be satisfied: *Ex parte Kendall*, 17 Ves. 514 at 520.

Now it is clearly laid down by the authorities as a principle, that marshalling will not be applied to the prejudice of third persons, even though they are volunteers: 13 Hals., p. 143; Smith's Eq. 4th ed. 601; Story's Eq. Jur. 13th ed., p. 640, note; *Barnes* v. *Racster*, 1 Y. & C.C.C. 401; *Dolphin* v. *Aylward*, L.R. 4 H.L. 486; *Gibson* v. *Seagrim*, 20 Beav. 614, 619; *Trumper* v. *Trumper*, L.R. 14 Eq. 295. Thus,

where two estates X. and Y. are mortgaged to A. and X. to B., and then Y. is mortgaged to C., B. cannot require A. to satisfy himself out of Y. and so exclude C.; but A. must satisfy himself rateably out of the two estates: 13 Hals. p. 144.

In *Gwilliam* v. *McCormack*, 4 S.W.R. 521, there is a most useful discussion by Lurton, J., of the equity to marshal securities. I feel justified in quoting the following lengthy passages from his judgment, p. 524;

It follows, therefore, from this view of the question, that the equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but, on the contrary, is one to be determined at the time the marshalling is invoked. The equity can only become a fixed right by taking proper steps to have it enforced, and, until this is done, it is subject to displacement and defeat by subsequently acquired liens upon the funds. The qualification upon the doctrine of marshalling, that marshalling will not be permitted to the prejudice of third persons, whether wholly or only partially dependent upon this principle, is one well settled, and operates to defeat the contention of appellant. Upon these two grounds the case of *Green* v. *Ramage*, 18 Ohio, 428, rests. That case was this: W. had a lien on lots 14 and 39, and G. on 14, and H. on 39, in this order of date; G. contending (just as does the third mortgagee in this case) that, as he had the right, before H. took his second mortgage on 39, as between himself and W., to throw W. on 39 first, therefore this right fastened itself into the situation so as to turn H.'s second mortgage on 39, when taken, into virtually a third mortgage. The Court, after conceding that if there was nobody to be considered but W. with two funds, and G. with only one of them, W. would have to exhaust his exclusive fund before touching the common fund, added: "In this case, however, there are three parties interested. If G. compel W. to exhaust lot 39 before he comes on lot 14, then G. will have the benefit of the fund arising from lot 39, although he took no security on it. But H., by this arrangement, will be deprived entirely of his security on 39, although he took a mortgage on it. We think the rule cannot be applied in a case of this kind. The principle is one established for the purpose of securing to parties the rights to

which, upon the principles of natural equity, they are entitled. To deprive H. in this manner of his security would be manifestly unjust."

So, in the case of *Leib* v. *Stribling*, 51 Md. 285, S. mortgaged to V. five lots. Afterwards four of these lots became incumbered with a mechanic's lien, and the fifth lot by a second mortgage to C. The contention was that S. should first exhaust the fifth lot upon which C. had his mortgage, so as to disincumber the four lots upon which the mechanic's lien was an incumbrance second to that of S. This was refused, upon the ground that the assets would not be marshalled to the prejudice of C., who had notice of the equity of the complainant.

In the case of *Marr* v. *Lewis*, 31 Ark. 203, the facts were that A. held a mortgage upon two tracts of land. B. also held a mortgage on one of them. In a proceeding to foreclose, B. sought to compel him to exhaust the tract not embraced in his mortgage first. The widow of the mortgagor, who was also a party, claimed a homestead in the latter tract. Held that, by reason of the widow's equity, the securities should not be marshalled. The rule, as laid down by the Court in that case, was this: "When one creditor has a security upon two funds, another having a security on one of them may, if necessary to the protection of his security, compel the other to resort to the fund not embraced in it, if it can be done without prejudice to the other creditor, or injustice to the common debtor or third persons having interest in the fund."

The Judge then cites an extract from White & Tudor's Leading Cases, 4th Am. Ed. vol. 2, p. 252, in which there is a discussion of the decisions in *Averall* v. *Wade* (1835), Ll. & G. *temp.* Sugden, 252; *Aldrich* v. *Cooper*, 8 Ves. 381; *Barnes* v. *Racster*, 1 Y. & C.C.C. 401, and *Lancy* v. *Duchess of Athol* (1742)., 2 Atk. 444. He then proceeds:

> These cases, and the sound equity upon which they are manifestly founded, sustain the proposition that marshalling is a pure equity, and does not at all rest upon contract, and will not be enforced to the prejudice of either the dominant creditor, or third persons, or even so as to do an injustice to the debtor. We are not disposed to extend the doctrine so as to affect the equities or legal rights of third persons.

The trial Judge in the present case based his decision upon *Re Mower's Trusts* (1869), L.R. 8 Eq. 110. In that case a mortgagor being entitled in reversion to funds A. and B. made three mortgages. Mortgage 1 included both funds; mortgage 2 included A. only; and mortgage 3 included both funds. Fund A. was absorbed in payment of mortgage 1. In the recital to mortgage 3 reference was made to the existence of mortgages 1 and 2, and it was made subject to them. It was held that, although fund B. was not included in mortgage 2, it must be applied in satisfaction of that mortgage in full, in priority to mortgage 3. The decision turned upon the fact that the holder of mortgage 3 took his security subject to mortgages 1 and 2. The distinction

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between *Re Mower's Trusts*, and the present case is obvious. No pretence is made that George Gelfand took the assignment of the insurance moneys subject to any claim of the plaintiffs, at all events so far as any claim of the plaintiffs against Abraham Gelfand's insurance money is concerned.

It appears to me that there is another serious obstacle in the plaintiffs' way. I shall not deal with it at length as the objection already set forth is sufficient to displace the plaintiffs' claim to have the securities marshalled in their favour. The obstacle I refer to is that, although there are two funds against which Mrs. Tobias might have recourse to pay her mortgage, these two funds do not belong to the same debtor. One belongs to Abraham and the other to Louis and Joseph. See *Re Kendall, supra*. Although the two mortgages made by these parties to Mrs. Tobias on the separate properties are made collateral to each other, it would be difficult to say that that alone makes them securities given by the same debtor.

With great respect to the trial Judge's opinion, I think it should be held that this is not a case for marshalling in the manner set out in his judgment. The claim of the first incumbrancer, Mrs. Tobias, must, under the authorities, be paid rateably out of the two funds. See *Barnes* v. *Racster, supra; Gibson* v. *Seagrim, supra*, 619.

According to the figures given by Galt, J., and as to which there is no dispute, the amount of insurance to be allotted to Abraham Gelfand upon his land is $2,158.61, and to Louis and Joseph Gelfand $3,432.62. The amount paid to Mrs. Tobias was $2,307.53, and this being charged rateably on the two funds, Abraham would be charged with $890.83 and Louis and Joseph with $1,416.70. Deducting the last mentioned amount from $3,432.62 leaves $2,015.92 as the amount to which the plaintiffs are entitled under their mortgage upon lots 4 and 5. This last amount should be paid to plaintiffs out of the moneys in Court, and the claimant George Gelfand is entitled to the balance of the moneys in Court after making such payment.

The appellant, George Gelfand, is entitled to the costs of the appeal. There should be no costs to either party in the Court of King's Bench.

Cameron, J.A.

CAMERON, J.A.:—The principles applicable to this case are fully and satisfactorily set forth in the judgment of the Supreme

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Court of Tennessee in *Gwilliam* v. *McCormack*, 4 S.W.R. 521. That judgment was delivered by Lurton, J., then a member of that Court, afterwards of the United States Circuit Court and now of the United States Supreme Court, and is therefore entitled to the greatest consideration.

The right of marshalling is not founded on contract nor is it in any sense a vested right or lien, but rests upon equitable principles only and the benevolence of the Court. Cyc. XXVI., 929.

Lurton, J., refers to it (the right of marshalling), as an "inchoate equity," as one "which is one to be determined at the time the marshalling is invoked" and holds that it "will not be permitted to the prejudice of third persons." Amongst the other cases cited by him is *Barnes* v. *Racster*, 1 Y. & C. 401, which was in point in the case before him as it is here. He concludes

marshalling is a pure equity, and does not at all rest upon contract, and will not be enforced to the prejudice of the dominant creditor, or third persons, or even so as to be an injustice to the debtor.

Hals. Laws of England, vol. 13, p. 144, says the same thing. Reference is made to *Barnes* v. *Racster*, *supra*; *Gibson* v. *Seagrim*, 20 Beav. 614, 619 (where *Barnes* v. *Racster* is approved) and other cases.

I have read the judgment of Perdue, J., and agree with his conclusions.

Howell, C.J.M.
Richards, J.A.
Haggart, J.A.

HOWELL, C.J.M., and RICHARDS and HAGGART, JJ.A., concurred in the result. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 1, 1916.

1. ESTOPPEL (§ III M—151)—TO DENY AGENT'S RECEIPT OF FREIGHT CHARGES.

Held on the particular facts of the case, that where the local agent of a railway company accepted the personal cheque of defendants' employee in payment of certain freight charges, and receipted the bills, and the employee attached the receipted bills to a draft on defendants, who paid it, the defendants were not liable for the unpaid freight charges, on the nonpayment of the cheque, on the ground that, having afforded means of inducing the defendants to pay the employee's draft, the plaintiffs were estopped from denying that they had received payment of the freight charges.

Per Fitzpatrick, C.J., Idington and Anglin, JJ. Duff and Brodeur, JJ. dissentiente.

[*Can. Pac. R. Co.* v. *Continental Oil Co.*, 21 D.L.R. 1 (Annotated), 8 A.L.R. 13, reversed. See also *Grand Trunk Pac. R. Co.* v. *Opperthauser* (Alta.), 26 D.L.R. 209.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 21 D.L.R. 1, 8 A.L.R. 363, affirming

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Fitzpatrick, C.J.

the judgment of McCarthy, J., at the trial, by which the plaintiffs' action was maintained with costs.

Wallace Nesbitt, K.C., for appellants.

O. M. Biggar, K.C., and *George A. Walker*, for respondents.

FITZPATRICK, C.J.:—I agree with the judgment of Harvey, J., in the Alberta Appellate Division and would allow this appeal.

I was myself at first somewhat prejudiced in favour of the respondents by the fact that the appellants suspected their agent's honesty, and did not communicate that fact to the respondents. There was, however, no occasion for the appellants to make any such communication. They did not hold their agent out to the respondents as a man to be trusted, and were not bound to advertise any doubts they might entertain of his honesty to everyone with whom he had to do business. The action of the respondents would have been improper whether the agent was an honest or dishonest man.

The appellants made very proper and business-like arrangements for the transaction of their affairs at their sales branch at Lethbridge. Not desiring to place a large sum of money at their agent's absolute disposal, they only placed in his hands, from time to time as required, a sum of $100 to meet petty disbursements and arranged that larger payments should be made at the local branch of the Molsons Bank whose drafts for such payments they would accept when forwarded with the receipted bill attached.

Subsequently, at the request of their agent, the appellants wrote the Imperial Bank at Lethbridge that they would honour their agent's drafts when receipted railway bills were attached. I do not think the arrangements with the two banks differed materially. The appellants may have concluded that their agent had arranged with the Imperial Bank to pay these bills or had paid them himself. It was only material as far as the appellants were concerned that they should have been actually paid and what better evidence could be had of this than the receipted bills?

I do not think it makes much difference whether the respondents gave the receipted bills for a mere personal post-dated cheque of the agent or on his assurance that he would pay the money subsequently. It was clearly not the correct thing to give receipts for the appellants' debts in exchange for a cheque which there was no reason to suppose he was authorised to give and which

the respondents knew was of doubtful value as several cheques, which he had previously given in similar manner, had been dishonoured. If any loss occurred through such irregularity the respondents must be prepared to accept the consequences of their own action.

The law governing the matter as it is to be gathered from decided cases is, I think, clear.

In the case of *Graves* v. *Key*, 3 B. & Ad. 313, at 318 *n*, Tenterden, L.C.J., said:—

> A receipt is an *admission* only, and the general rule is, that an admission, though *evidence* against the person who made it and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition; *Straton* v. *Rastal*, 2 T.R. 366; *Wyatt* v. *Marquis of Hertford*, 3 East 147; *Heane* v. *Rogers*, 9 B. & C. 577, at p. 586.

In the last mentioned case it was said:—

> There is no doubt but that the express admissions of a party to a suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person . . . and that transaction.

See also the case of *Irvine* v. *Watson*, 5 Q.B.D. 414, and *Davison* v. *Donaldson*, 9 Q.B.D. 623, at 626.

It is impossible to suggest that the appellants made payment to their agent otherwise than on the faith of the receipted bills. The appellants were indisputably induced by these to alter their condition and the respondents are, therefore, estopped from disputing them with respect to the appellants.

Harvey, C.J., refers to the case of *Wyatt* v. *The Marquis of Hertford*, 3 East 147, in which the plaintiff recovered and says that the facts of that case are not very dissimilar to those of the present. What he means, no doubt, is that they are similar with the difference which, if it had been present in the former case, Lord Ellenborough pointed out would have discharged the defendant. This difference is far more emphasized in the present case for Lord Ellenborough can only suggest

> that if it had appeared that the defendant had in the interval (*i.e.*, between the giving by the steward of his cheque and its dishonour) inspected the steward's accounts and had in any manner dealt differently with him on the supposition that his demand had been satisfied as the receipt imported no doubt the defendant would have been discharged.

In the present case it is unquestionable that the defendant paid

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the draft on them solely on the supposition that the railway bills had been discharged as the receipts imported.

The appeal must be allowed with costs.

IDINGTON, J.:—I so entirely agree herein with the opinion of Harvey, C.J., concurred in by Scott, J., in the Court of Appeal, that perhaps I should say no more than express my adoption thereof.

In deference to the argument here, I may, however, point out in addition to what has been so well said that when we are asked, for example, to hold the appellant company more to blame than the other, or that Willison was the agent of the appellant and it is responsible for his misconduct, I cannot find in the evidence anything to support such positions.

It seems to me when any one departs so far from ordinary rules of business and common sense as to give any one receipts which he could use as Willison did, the onus rests upon the party so acting to prove to the hilt, that he had some reasonable ground, known to and furnished by the other party sought to be blamed, for taking such a course.

I have sought in vain in the evidence to find any attempt made to shew anything of the kind, beyond the bare fact that Willison was "a salesman and collector" and that he is described in the statement of defence as "manager" at Lethbridge. What the term "manager" means is unexplained, except by the other phrase "salesman and collector" equally and perhaps still more indefinite.

When any one relies upon the acts of an agent as binding his principal he must shew either that the agent has been directly authorised by his principal, to do what is relied upon, or that he has been employed by such party in such capacity as necessarily implies the authority to do so, or held out by the principal in some way as having it. Strangers to the actual terms of an agent's engagement, knowing only what the principal may be reasonably presumed to have recognised, may become entitled to say the agent had been held out as having the ostensible authority of his principal for doing as he did. That is not this case.

We have before us the uncontradicted evidence on behalf of appellant as to what both the actual authority was and recognised course of conduct or dealing was so far as shewn; and nothing therein is shewn to justify respondent in acting as it did.

And when it comes to a description of this alleged agent's capacity, it is about as illuminating as if one tried to hold a municipality, for example, liable for the acts of the manager of the town pump if he presumed to act as tax collector. The term "manager" is applied as descriptive of so many things now, that we must ask in what sense it is used and then we are back to the recognised course of conduct which, so far as the evidence goes, fails herein to help.

I should be inclined to suspect that the agent, Willison, was merely a canvasser for customers to buy oil, and a collector to get in proceeds of such sales and deposit in the bank such proceeds. For his conduct in this latter regard the appellant relied on a fidelity insurance bond.

And as to the specific business out of which this action arises, he had been in fact so fenced in and guarded against, and his authority so limited that it was hard to conceive how, if respondent's agents acted with ordinary sense, he could have defrauded any one.

As to the method of carrying out this very limited authority, I should have desired to know a great deal more than we are told. For example, we have nothing to guide us as to the ordinary course of handling weekly freight bills. Was the railway agent accustomed to call on such customers to receive payment? Or was the shipper expected to call on the freight agent? Again; why was Willison's own personal cheque ever taken? And above all things why was it taken after it had been once protested, and more than once found no good, and no report made to his employers, especially in light of the terms of the latter granting a weekly credit which ended thus:—

> Wish to advise you that Mr. Ogden has granted your company a weekly credit account at this station.
>
> Our weeks close the 7th, 14th, 21st and last day of each month. It is absolutely necessary that payment of your account be made on these days, otherwise, credit will be immediately discontinued.
>
> Yours truly,
>
> S. E. MITCHELL, *Agent.*

This omission to act promptly should have been explained; especially in face of the positive evidence of Wilbert, the secretary-treasurer of appellant, who seems never to have heard of such remarkable conduct as had been carried on by Willison to the knowledge and detriment of respondent, without complaint.

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Then Wilbert says:—

Q. How were those to be treated?

A. Our arrangement was with the bills of large amount that the railway company take the freight bills to the bank and get their money and the bank in turn should draw on us. Willison would O.K. the bills, get a draft on us and we would honour the draft provided the freight bills were receipted and in order.

That implies the agent of respondent was to do what he did not apparently do and the matter rests there.

And the evidence from Long, the respondent's local freight agent, is as follows:—

Q. Have you any instructions from your company to accept personal cheques? A. I do not think that the company would have any objection so long as the cheque was O.K. Q. Have you any instructions that would allow you to accept a personal cheque and give receipted bills to a company for their freight? A. No, we have no instructions to that effect. Q. You had taken personal cheque from Mr. Willison before? A. Well, I cannot just say whether his cheque were made out similar to that. Q. Which were protested? A. Yes, we had several which were protested. Q. So that you knew his cheques were not liable to be good? A. Well, we figured the Continental Oil Co. were good enough when we granted them that weekly credit. Q. So that you could afford to take personal cheques and sign receipts and turn them over. A. Well, the receipts were just given in the ordinary way, the same as this cheque here. Q. But you had several cheques of Mr. Willison's turned down? A. Yes, several had been turned down. Q. Then when you received a cheque like that what did you do with it? A. Remitted it to Winnipeg.

Evidently he had no right to act as he did in taking these uncertified personal cheques which turned out so often worthless.

If it had been brought out in evidence that this course of dealing was known and recognised and tolerated by the appellant, there should then have been an end of the defence.

No attempt was made to do so. If the onus rested on appellant, it, of course, should have explained all these and many other things. But in my view the onus resting upon respondent has not been discharged.

How then can respondent seek to shift the onus resting upon it under such circumstances; or blame the other company instead of its own agents for trusting one so evidently untrustworthy?

I do not think this is a case wherein such authorities as *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, can be relied upon as at all applicable. They never were intended to protect people discarding the ordinary rules or precautions of business men, as the respondent did in handing over to such an untrustworthy instrument as the agents of the respondent knew Willison to be from their own experience of him.

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CONTINENTAL OIL CO. v. C.P.R. CO.

The authorities needed to be relied upon apart from all this appear in the opinion of Harvey, C.J.

I think the appeal should be allowed with costs throughout.

DUFF, J. (dissenting):—A word only as to the decisions relied upon. The truth of the matter is that this appeal involves no question of law. It is simply a question of an application of the principle of estoppel. The disputed questions are questions of fact.

Duff, J.

ANGLIN, J.:—I concur in the opinion of my Lord the Chief Justice and would only add that this case seems to me to fall within the language of Lord Cranworth in *Jorden* v. *Money*, 5 H.L. Cas. 185, at pages 210, 212, quoted by Lord Macnaghten in *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A.C. 396, at page 410.

Anglin, J.

BRODEUR, J., dissented. *Appeal allowed.*

Brodeur, J.

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REX v. MONSELL.
REX v. O'BRIEN.
REX v. KELLER.

Ontario Supreme Court, Appellate Division. Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. January 10, 1916.

1. FORTUNE-TELLING (§ I—5)—PRETENDED PALMISTRY—CR. CODE, SEC. 443.

An intent to deceive is essential to the offence of fortune telling under Cr. Code, sec. 443, but it is not necessary that the attempted deception should have been successful; a conviction may be supported, although the accused had taken from the persons whose fortunes were told a writing to the effect that they understood that what was being done was merely an examination of the lines of their hands and giving information in respect thereof in accordance with books on the subject of palmistry, if it be found that the taking of such writing was a mere sham and intended to evade the law.

[*R.* v. *Marcott*, 4 Can. Cr. Cas. 437, 2 O.L.R. 105, followed, *R.* v. *Chilcott*, 6 Can. Cr. Cas. 27, cited; and see Annotation at end of this case.]

Statement.

CASE stated by the Senior Judge of the County Court of the County of York for the opinion of the Appellate Division of the Supreme Court of Ontario, as follows:—

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"The accused was charged before me with having, in the month of August, 1915, undertaken to tell fortunes contrary to the Criminal Code. He elected to be tried before me without a jury, and was so tried on the 27th day of September, 1915, when I found him guilty of the offence as charged.

"Upon the application of counsel for the accused, I have reserved a case for the opinion of this honourable Court.

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"I have made the notes of the evidence taken at the trial part of this case, and reserved for the opinion of this honourable Court the question:—

"Was I right, in view of the facts described at the trial, in making a conviction, notwithstanding the contention of the accused that the Crown witnesses were not deceived?"

[Three other cases were stated in the same or similar terms —REX v. O'BRIEN (two cases) and REX v. KELLER.]

T. C. Robinette, K.C., for the defendants, relied on *Rex* v. *Marcott* (1901), 2 O.L.R. 105 (also in 4 Can. Crim. Cas. 437), citing the head-note in 2 O.L.R., which states that deception is an essential element of the offence of "undertaking to tell fortunes" under the section of the Code which is in question. Here the evidence shews that, as a matter of fact, no person was deceived. In the *O'Brien* cases, two girls went to the defendant with the express purpose of making evidence against the alleged fortune-teller. He also referred to *Rex* v. *Chilcott* (1902), 6 Can. Crim. Cas. 27, in which a document was signed by the complainant similar to one which was signed in the present case.

Edward Bayly, K.C., for the Crown, argued that the *Marcott* case did not cover the cases at bar, as here the Judge acted as a jury. The head-note in 2 O.L.R. does not accurately state the effect of the case. In these cases the trial Judge has found that the slip signed by some of the complainants was a mere subterfuge.

Robinette, in reply.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—These are cases stated by the Senior Judge of the County Court of the County of York.

The charges against the defendants are laid under sec. 443 of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found;" and the charges are, that the defendants had undertaken to tell fortunes.

The argument of the learned counsel for the defendants is

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that it is essential in order to bring the cases within the section that the persons whose fortunes the accused had undertaken to tell must have been deceived; that the evidence shews that they were not deceived; and that a document was signed by them which in effect stated that they understood that what was being done was merely an examination of their palms according to rules laid down in certain books on palmistry, etc.

In support of his contention, the learned counsel referred to the decision of the Court of Appeal in *Rex* v. *Marcott*, 4 Can. Cr. Cas. 437, 2 O.L.R. 105. That case does not, in our opinion, decide what it is cited for.

As pointed out by Mr. Bayly, the question there was, whether there was any evidence to go to the jury, and it was held that there was such evidence. In delivering judgment, Chief Justice Armour said (p. 109): "Section 396 of the Criminal Code is a transcript of the enactment contained in the section above quoted. The word 'undertakes,' as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes, and in doing so is asserting the possession of a power which he does not possess, and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete."

So that, so far from supporting Mr. Robinette's contention, it is against him. There must be an intent on the part of the person who is telling the fortune to delude and defraud, but it is not necessary that he should succeed in deceiving or defrauding.

But for that case I should have thought that the language of the section was plain and that it meant exactly what it says, that a man undertaking to tell fortunes—and that is what these defendants did—commits an offence within the meaning of the section. We are, however, bound by whatever was decided in that case.

Then as to the slip: it was found by the Judge that the use of it was a mere sham, and that it was not acted upon; but, if it had been a real thing, it would not, in the circumstances disclosed by the evidence, have helped the defendants.

Convictions affirmed.

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Annotation.

Annotation—Fortune-telling (§ I—5)—Pretended palmistry — Criminal Code. Sec. 443.

It was held in *R.* v. *Marcott* (1901), 4 Can. Cr. Cas. 437, 2 O.L.R. 105, that, to uphold a conviction under sec. 443 of the Code, there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent, in so asserting or representing, of deluding and defrauding others.

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others, the offence aimed at by the enactment is complete. Per Armour, C.J.O., in *R.* v. *Marcott* (1901), 4 Can. Cr. Cas. 437, 2 O.L.R. 105; *Penny* v. *Hanson* (1887), 18 Q.B.D. 478; *R.* v. *Entwistle*, [1899] 1 Q.B. 846; *Monck* v. *Hilton*, 2 Ex. D. 268.

The word "pretend" in itself implies that there was an intention to deceive and impose upon others. *R.* v. *Entwistle, ex parte Jones* (1899), 63 J.P. 423.

A conviction obtained upon the evidence of a person who was a decoy, but not a dupe or a victim, was affirmed. *R.* v. *Milford* (1890), 20 Ont. R. 306.

It was said in *R.* v. *Chilcott* (1902), 6 Can. Cr. Cas. 27, that any intention to deceive might be negatived by an express stipulation that there was to be only a delineation of the lines of the hand under rules laid down in published works on palmistry, but, as indicated by the *Monsell case*, the agreement to that effect must be the real contract and not a sham or mere form of writing designed to make the transaction appear to be within the law.

The Vagrancy Act 1824 (Imp.), 5 Geo. IV., ch. 83, sec. 4, made it a vagrancy offence to pretend or profess to tell fortunes, "or to use any subtle craft, means or device "by palmistry or otherwise," "to deceive or impose," etc.

Offering by advertisement in newspapers to cast nativities and answer astrological questions, and pretending by circular letter, in return for certain remuneration, to give a description of the person, liability to disease, occupation most suitable, marriage, etc., by the position of the planets at the nativity, was ample evidence that appellant had pretended to tell fortunes, without proof that he had actually told anybody anything. *Penny* v. *Hanson* 18 Q.B.D. 478, 56 L.J. 41.

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Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. May 10, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—"INJURY ARISING OUT OF EMPLOYMENT"—FROST BITE.

Where a trial Judge finds that frost bite to the feet of a workman incurred in the course of his employment upon a very cold day constitutes an "injury arising out of his employment," within the meaning of the Alta. Workmen's Compensation Act, 1908, ch. 12, sec. 3, the finding will not be reversed on appeal.

Per Scott, J. (dissentiente).—It must be shewn that the workman, by reason of his employment, was exposed to greater danger and risk of accident than that to which persons are ordinarily exposed. It was not shewn in this case.

Per Beck, J.—Because you can discover a class of workmen exposed to such a risk is no valid reason for saying that the injury did not arise out of the employment.

[*Warner* v. *Couchman*, [1912] A.C. 35, distinguished.]

Statement.

APPEAL by the respondent from the award of Noel, J., a District Court Judge, awarding the applicant compensation under the Workmen's Compensation Act (Alta.), 1908.

F. D. Byers, for plaintiff, applicant.

O. M. Biggar, K.C., for defendant, respondent.

Scott, J.

SCOTT, J. (dissenting):—The only question involved in this appeal is whether the injuries sustained by the applicant were caused by an accident arising out of his employment.

The material facts are that the injuries were caused by frost bite sustained by the applicant in his feet while he was in the course of his employment working on railway construction in the open air, from 7 a.m. until 5 or 6 p.m., without shelter, when the temperature was about 60 degrees below zero. He was using an axe cutting the roadway under the orders of respondent's foreman and was wearing two pairs of woolen socks and felt boots and rubbers, but the felt boots were not in good repair. His feet were in good condition that morning, but when he quit work at 6 p.m. and returned to camp it was found that they were badly frozen.

In *Kelly* v. *Kerry County Council* (1908), 42 Ir. L.T. 23, the applicant was a workman engaged on the road during a storm, his duty being to clean out the road to prevent the water flooding the road. While so engaged he was struck dead by lightning. The Court of Appeal of Ireland unanimously held that the accident was not one arising out of the employment of the deceased, there being no evidence that, in following his employment on the road during a thunderstorm, he ran any greater risk of being

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struck by lightning than any other person who was within the area of the storm.

In Andrews v. *Failsworth Industrial Society*, [1904] 2 K.B. 32, the applicant was a bricklayer and was killed by lightning while working on a scaffold about 23 feet from the ground. An electrician called as a witness testified that the position in which the applicant was working was an exposed one, that if the scaffold was wet the danger would be very much increased and that this would constitute a well-defined point at which a discharge would be more likely to occur. Collins, M.R., held that the accident arose out of the applicant's employment. He quotes with approval the following extract from the judgment of the trial Judge and states that he would be unable to frame a more accurate direction if he had to direct a jury in such a case.

> In this case therefore, if I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous and that, in consequence of the dangerous position, the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm. . . . . But if there is under peculiar circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk which ordinary people run and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed, is something arising out of his employment.

In *McNeice* v. *Singer*, [1911] S.C. 13, applicant who was a salesman and collector was kicked by a horse while riding upon his bicycle in a street. It was held by the Court of Session, Scotland, that the accident arose out of his employment.

In *Pierce* v. *Provident Clothing Co.*, [1911] 1 K.B. 997, the Court of Appeal in England held that if a canvasser and collector who, while riding a bicycle on a street in the course of his employment, was killed by a tramcar, was entitled to compensation, the accident being one which arose out of his employment.

In *Green* v. *Shaw* (1911), 46 Ir. L.T. 18, the applicant was a herder in charge of stock upon two farms a quarter of a mile apart. He usually rode on a bicycle from one farm to the other. While so riding in the course of his employment, his own dog got in the way and upset him. The Court of Appeal, Ireland, held that the accident did not arise out of his employment.

In *Davies* v. *Gillespie*, 105 L.T. 494, the applicant was a seaman

on duty on a blackened steel deck for some hours in a blazing sun, with no shade, at a temperature of 108 to 120 degrees Fahrenheit. He became suddenly faint and blindness resulted which incapacitated him from work. The trial Judge found that the employment involved special exposure to the risk of sunstrok and that the accident arose out of his employment. The Court of Appeal, England, held that there was sufficient evidence to support the finding.

In *Blakey* v. *Robson*, [1912] 49 Sc. L.R. 254, the applicant was a plumber and while at work on July 26, 1911, laying and jointing a pipe in a trench in a road in excessive summer heat, he was seized with heat apoplexy (sunstroke). The Court of Session, Scotland, held that the accident did not arise out of his employment. Lord Kinnear says

> I only say in a word that I do not think that this man was exposed by his employment to any special risk to which other people were not liable provided they happened to be working in the open air on July 26, 1911.

In *Rogers* v. *Paisley School Board*, [1912] S.C. 584, the applicant a school janitor was sent on a message on a hot day. He fainted on the street and in falling struck his head on the pavement and died from the effect of the injury. The Court of Session, Scotland, held that the accident did not arise out of his employment.

In *Karemaker* v. *Steamship Corsican* (1911), 4 B.W.C.C. 295, applicant, a seaman on a ship in Halifax, N.S., sustained frost bite in the course of his employment. The Court of Appeal, England, held that the accident did not arise out of his employment. Cozens-Hardy, M.R., says, at p. 297:—

> Halifax is a place where people do receive frost bite and therefore it is a proper place and, therefore, it is proper and necessary to take steps to guard against it. In that sense the liability to frost bite is one of the normal incidents to which everybody is subjected by reason of the severity of the climate.

In *Warner* v. *Couchman*, [1911] 1 K.B. 351, the applicant was a journeyman baker and while driving his employer's delivery cart, his right hand was frost bitten. It was on a very cold day with rain and sleet at intervals and he was obliged occasionally to remove his glove from that hand in order to make change. The County Court Judge found that there was nothing in the nature of his employment which exposed him to more than the ordinary risk of cold to which any person working in the open air was exposed on that day and he therefore refused compensation. The Court

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of Appeal dismissed the applicant's appeal from that judgment. Cozens-Hardy says at p. 353:—

It is not enough for the applicant to say, "the accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place." He must go further and must say, "the accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger." Can that be said in the present case. I am unable to see that there was any peculiar danger to which the applicant was exposed beyond that to which that large section of population who were drivers of vehicles, or who are otherwise engaged as out-of-door laborers are exposed.

Farewell, L.J., adapts to that case the language of Collins, L.J., in *Andrews* v. *Failsworth Industrial Society*, which I have quoted and says at p. 359.

"Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place" when driving in an open trap on a very cold day with rain and sleet at intervals? I can see none. The squire in his dog cart, the farmer in his gig, the butcher, the grocer, the traveller and the carter in their carts, were all in just the same position of exposure.

Fletcher Moulton, L.J., in his dissenting judgment, says at p. 357.

The severity of the cold which he (applicant) was thus compelled by his employment to expose himself is shewn by the nature of his injury, inasmuch as such injuries from cold are rare in this country, though common enough in northern or continental climates.

Upon appeal by the applicant to the House of Lords, [1912] A.C.35, Earl Loreburn, L.C., in his judgment dismissing the appeal, says at p. 37:—

These cases are difficult enough and we are apt sometimes to forget that which is decided in the County Court is much more often a question of fact than a question of law and, if it is a question of fact, then it is for the County Court Judge to decide it; . . . In substance, the County Court Judge seems to me to have found that, in this case, the man was not specially affected by the severity of the weather by reason of his employment. . . In substance I think that is what he decided. If so, I see nothing in the evidence which disentitles him to find that fact and, being so found as a fact, it is binding.

In *Riach* v. *G.T.P.R. Co.* (unreported), the applicant was a laborer working on railway construction. In December, 1911, while engaged in handling an iron bar and while wearing lined gloves his fingers were injured by frost bite. The District Court Judge held that he was entitled to compensation. The respondent company appealed to this Court, and its appeal was allowed apparently on the ground that the accident did not arise out of the applicant's employment.

The trial Judge found upon the facts I have stated that the

applicant's injury arose from an accident arising out of his employment, that the accident was one within the terms of the Act and that the applicant was, by reason of his employment, exposed to a greater risk of frost bite than any other person.

If the facts I have stated are sufficient to support the findings of the trial Judge they should not be disturbed and the appeal should be dismissed. I am of opinion, however, that they are insufficient to support the finding that the accident arose out of the applicant's employment.

The principle laid down in nearly all the cases I have referred to appears to be that the applicant in order to be held entitled to compensation, must shew that he was, by reason of his employment, exposed to greater danger and risk of accident than that to which persons are ordinarily exposed. It was by reason of their having shewn that they were exposed to this greater risk that the applicants in *Andrews* v. *Failsworth Industrial Society*; *Davies* v. *Gillespie; McNeice* v. *Singer;* and *Pierce* v. *Provident Clothing Co.*, were held to compensation. In the last two cases referred to the greater risk was shewn to have been incurred by reason of their having been forced by the nature of their employment to be on the street the greater portion of the day.

In the three cases referred to where the applicants' injuries were occasioned by frost bite (*Davies* v. *Gillespie; Warner* v. *Couchman* and *Riach* v. *G.T.P.R. Co.*), they were held not entitled to compensation and I cannot draw any material distinction between these cases and the present one. It is true, that, in this case, the temperature at the time of the accident is shewn to have been lower, but it is not shewn that it is unusual for men to be working in the open air at that temperature, or that the applicant incurred any greater risk than others who were working in that temperature on that day. In *Riach* v. *G.T.P.R. Co.*, the facts appear to have been more in favor of the applicant than those in the present case. It was there shewn that the applicant was engaged in handling iron bars and would thereby incur greater danger of frost bite in his hands.

I would therefore, allow the appeal with costs.

BECK, J.:—The applicant was employed as a labourer chopping with an axe under the orders of a foreman in cutting a roadway for teams working on the construction of a railway right-of-

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way, his hours being from 7 a.m. to 6 or 7 p.m., during which time he was not under shelter. On the day of the accident the temperature was about 60 below zero. On his return to camp after being exposed all day it was found that his feet were very badly frozen, notwithstanding that he was then wearing two pairs of woolen socks and a pair of felt boots and rubbers, though the boots were not in very good condition. This is the accident in respect of which compensation is claimed.

The District Court Judge made the following express findings in his award:—

I find on the facts that when the applicant met with the accident he was a workman within the meaning of the Workmen's Compensation Act. I also find that the injury did arise from an accident arising out of and in the course of his employment. I consider that the frost bite, as it happened in this case, is an accident within the terms of the Act, and I also find that the applicant was, by reason of his employment, exposed to a greater risk of frost bite than any other person.

It was contended by McArthur, the respondent to the claim and the present appellant, that the applicant cannot recover because the accident did not arise out of the employment and that the case, as concluded by *Warner* v. *Couchman*, 103 L.T. 676, [1912] A.C. 35, followed in this Court in *Riach* v. *G.T.P.R. Co.* (not reported). Both these cases were cases of frost bite under different conditions from those in question in the present case. I am not prepared even to criticize these decisions, and the question is: does the present case fall within or without the principles which they lay down?

In *Warner* v. *Couchman*, contrary to the present case, all the findings of fact were against the applicant. The County Court Judge held, (1) that he was not satisfied that the injury to the applicant was caused by an accident in the popular and ordinary sense of the word, but did not base his award on that ground; (2) that assuming there was an "accident," it was not such an accident arising out of the employment, and upon the second ground made an award in favour of the employer.

Giving judgment in the House of Lords, the Lord Chancellor (Earl Loreburn), said:—

These cases are difficult enough, and we are apt sometimes to forget that what is decided in the County Court is much more often a *question of fact* than a question of law; and if it is a question of fact, then it is for the County Court Judge to decide it. . . .

In the present case the only question decided in the Court of

Appeal was that they would not disturb the findings of the County Court Judge upon the question whether the injury by accident arose out of the employment. I think that Fletcher Moulton, who was the Judge in the minority in the Court of Appeal, stated the law fairly enough, or rather stated what was the point of view from which a Judge ought to approach cases of this kind. He said:—

> It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather, to which all persons in the locality, whether so employed or not, were equally liable. If it is the latter, it does not arise out of the employment, because the man is not specially affected by the severity of the weather by reason of his employment. . . .

In substance the County Court Judge seems to me to have found that in this case the man was not specially affected by the severity of the weather by reason of his employment. It is quite unnecessary to scan with minuteness every phrase which he used, but in substance I think that this is what he decided. If so, I see nothing in the evidence which disentitled him to find that fact, and being so found as a fact, it is binding.

Lord Atkinson and Lord Mersey both concur; and Lord Shaw, while concurring, says:—

> Both of these findings . . . are findings of fact. I do not think that it is the province of a Court of Appeal to disturb such findings.

Warner v. *Couchman*, *supra*, was applied in *Mitchinson* v. *Day Brothers*, [1913] 1 K.B. 603.

In the unreported case of *Riach* v. *G.T.P.R. Co.*, decided by this Court, the trial Judge made no express findings of fact, though by implication he decided all material questions in favour of the applicant. The only conclusion I can come to is that this Court in allowing the appeal decided that there was no evidence on which the trial Judge could make the necessary findings. That indeed was the only ground, it seems to me, on which they could reverse the Judge's findings.

In the present case not only is there, I think, ample evidence to support the Judges' findings of fact, but it is my opinion his findings were right on the evidence.

I would, therefore, dismiss the appeal with costs.

Stuart, J.

STUART, J.:—I have come to the conclusion that this appeal should be dismissed. Cases such as this are no doubt very diffi-

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cult. The most pertinent precedents have all been cited in the other judgments being delivered and I need not myself review them. I have, however, one criticism to make of some of the observations quoted. It seems to me to be a forgetting of the words of the statute "arising out of his employment" to say that all persons engaged in similar work were subject to the same risk. Admit that they were. If they suffered the same injury then it may be that their injury arose out of *their* employment. Men do, of course, in this country often work out of doors when it is 60 below zero. If they get their feet frozen from so doing, I think the injury arises out of their employment and from a special risk to which they were exposed. To say that the applicant was not exposed to any more special risk than ordinary persons engaged in out-door work simply means that the applicant might be one of a large class of persons who were exposed to a risk arising out of their employment. You might as well say that a man working in a factory who was struck by a falling board or bar should be disentitled to compensation because all persons working in factories are liable to have that happen to them. Simply because you can discover or describe a class of workmen who are generally exposed to such a risk and find the applicant to be one of that class seems to me to be no valid reason for refusing him compensation or for saying that his injury did not arise out of his employment. People who are not employed at all do not kick around in the snow when it is 60 below zero. People who are employed as waiters in a comfortable hotel are not exposed to frost bites. Neither are Judges, for example, nor lawyers, nor railway superintendents.

It was *because* he was so employed that the applicant was exposed to the risk and I see no reason for excluding his case from the words of the statute because you can discover other people whose employment similarly exposed them. Upon that principle no man could recover if you could shew that a group of other people were exposed in the course of their employment to similar risks. The man would have to be a *rara avis* indeed on such a doctrine before he could succeed.

It would be difficult to say that a man did not belong to some class or other the members of which were exposed to similar risks.

I think there was evidence to justify the finding of fact by the trial Judge, and I agree with the conclusions of my brother Beck. *Appeal dismissed.*

OWEN v. SAULTS & POLLARD.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. May 11, 1916.

1. MASTER AND SERVANT (§ II A4—60)—LIABILITY OF MASTER—BREACH OF STATUTORY DUTY—DEFECTIVE ELEVATOR DOORS.

An employer's failure to fulfil the statutory duty imposed upon him by sec. 33 of the Factories Act, R.S.M. 1913, ch. 70, to protect an elevator with "good and sufficient trap-doors," will render him liable for the death of an infant employee, occasioned by a fall into an elevator shaft, as the result of a defect in the doors which caused them to spring open when the employee struck them while playfully wrestling.

[*David* v. *Britannic*, [1909] 3 K.B. 146; *Jones* v. *C.P.R. Co.*, 13 D.L.R. 900, 30 O.L.R. 331; *Iles* v. *Abercarn Welsh Flannel Co.*, 2 T.L.R. 547, applied.]

Statement.

APPEAL from a judgment in favour of plaintiff in an action to recover for the death of a servant through negligence of the master.

C. P. Fullerton, K.C., for appellants, defendants.

T. J. Murray, for respondents, plaintiffs.

Howell, C.J.M.

HOWELL, C.J.M.:—The deceased, a boy sixteen years of age, who was in the employ of the defendants Saults & Pollard, Ltd., as a messenger boy, and another messenger boy, also in the employ of the defendants, were properly in a room on the premises of the defendants on one side of which was the door of an elevator used by the defendants in their business. These two boys commenced playing and wrestling and during this wrestling the deceased fell and struck the door which flew open and he fell down the shaft and was killed.

The jury gave a verdict for the plaintiffs against which this appeal is taken.

The Factories Act, R.S.M. 1913, ch. 70, sec. 33, sub-sec. (*c*), provides that:

> The opening of every hoist-way, hatch-way, elevator or well-hole shall be, at each floor, provided with and protected by good and sufficient trap-doors or self-closing hatches and safety catches, or by such other safeguards as the inspector directs; and such trap-doors shall be kept closed at all times, except when in actual use by persons authorised by the employer to use the same.

And this Act applies to the defendants.

It was therefore the duty of the defendants to protect the deceased from the dangers of the elevator shaft "by good and sufficient" doors, and he had a right to act and to live his life on the assumption that this duty had been performed. That this is the proper view of the law one has but to look at the language of Moulton, L.J., in *David* v. *Britannic*, [1909] 2 K.B. 146. At 157, he says:—

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Howell, C.J.M.

The risk of an employer failing to perform a statutory duty incumbent upon him seems to me to be clearly not a risk that can be considered one of those which the workman must be assumed to have accepted. On the contrary, he in his position as a member of the public has a right to assume that his employer will fulfil the duties which the statutes impose upon him.

This law is quoted with approval by Lord Atkinson in 1913 in the Privy Council in *Jones* v. *C.P.R. Co.*, which I have only been able to find reported in 30 O.L.R. 331. (See 13 D.L.R. 900.)

If there is a statutory duty imposed on the defendants it must be complied with and in case of a breach which caused an injury the action is not for negligence, but simply for breach of statutory duty. This seems clearly decided by Smith, L.J., and Rigby, L.J., in *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, and by Haldane, L.C., in *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693. In the last mentioned case the Lord Chancellor states that the obligation is absolute, and that no question of the defendants' negligence is relevant.

The deceased had a right to be in the room, a part of the wall of which was formed by these doors, and to live and act on the assumption that he was "protected" from the elevator shaft by doors which were then "good and sufficient." When that description of the kind of doors required is used, I assume it means that they must be good and sufficient for the protection of persons lawfully using the room in the ordinary ways, and acting as human beings, and if messenger boys were there, I should expect that there would be a certain amount of romping.

The two boys were struggling with one another in a playful mood, and the deceased slipped his hold on his fellow and he fell. The chief witness to describe the accident was the surviving boy, and this is the part of his evidence as to striking the door:

Q. Do you know which part of his body struck first? A. It seems to strike the floor first with his hip and then hit the door with his shoulders. I could not say whether he hit the door with his two shoulders or one. . . . Q. What part of the elevator door did the shoulders come in contact with? A. Right in the left-hand corner. Q. In the left-hand lower corner? A. Yes. Q. And how much of the elevator door opened? A. The whole thing opened. Q. That is the whole of the bottom? A. The whole of the bottom opened.

(In cross-examination to defendant's counsel, there is the following question and answer:)

Q. And it is quite possible that his shoulder struck before his hip struck, that is, he was in the act of falling when he struck? A. Well, his hip struck the floor before his shoulder struck the elevator.

The deceased weighed 125 lbs. and from this impact at one

of the lower corners the doors flew open, and the deceased fell down the shaft. The doors were of corrugated steel plate, apparently strongly built; they were hung upon chains, and were opened and shut automatically by the elevator cage in ascending and descending. They were kept in place by moving up and down in slots constructed on each side of the doors on the inside of the brick walls, which formed the shaft, and these slots held the edges of the doors by one half to one eighth of an inch on each side, and thus prevented them from swinging inwards. There was some evidence that one of these slots was loose to a certain extent at the place of the accident, and that it was warped.

It seems to me from the uncontradicted evidence that the doors were amply strong and that the only difficulty was in holding them in the slots to prevent them from swinging into the shaft. I cannot see why there was not a slot on each side with a hold of at least an inch.

From the impact above described the doors did fly open, and the plaintiffs claim they have thereby proved that the shaft was not protected by good and sufficient doors on the principle of *res ipsa loquitur*.

The force of the impact and the strength or condition of the slots supporting the doors are all arrived at by inferences of fact to be drawn from the circumstances and happenings detailed in the evidence and must be laid before the jury, and I cannot say that from these facts and inferences the jury ought not to find that the shaft was not guarded by good and sufficient doors to protect people in the ordinary actions of life.

It was strongly argued that the deceased was guilty of contributory negligence by wrestling in which he slipped and fell. If in his ordinary work while near this door he slipped and fell he could scarcely be held to be guilty of contributory negligence. It seems to me the shaft must be protected whether the plaintiff is wrestling or stumbling. In the case of *Iles* v. *Abercarn Welsh Flannel Co.*, 2 T.L.R. 547, a girl, an employee in a woolen mill, while going upstairs with a skein of woolen yarn on her arm, had her ankles touched by a boy, she turned and threw up her arm to strike him, the yarn caught on an unprotected moving shaft overhead and she was injured. She was held entitled to recover. The appeal is dismissed with costs.

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Perdue, J.A.

RICHARDS, CAMERON and HAGGART, JJ.A., concurred.

PERDUE, J.A.:—This is an action brought by a father and mother to recover damages for the death of their son, caused, as it is claimed, by reason of the insufficiency of a door guarding an elevator shaft. The action is against two defendants, the Saults & Pollard Co. Ltd., and the Manitoba Free Press Co. Ltd. The last mentioned company is the owner of the building, and had leased to the first named company an upper flat which was used and occupied by the Saults & Pollard Co. when the accident took place. The deceased, who was 16 years old at the time of his death, was in the employ of the Saults & Pollard Co. as a messenger boy and used to hand over his wages to his parents. The elevator shaft in question was used for freight purposes and had a large opening or doorway on each flat. One of these doorways opened upon a room occupied by the shipping clerk of the firm who had charge of the messenger boys. The boys were expected to stay in this room when not engaged in delivering parcels. The accident occurred about 6 o'clock in the evening. The deceased had finished his work for the day, but he waited for another messenger boy in the employ of the defendants who was about to receive a parcel for delivery. The boys as they waited commenced playing together and finally got into a wrestling match in front of the door leading to the elevator shaft. The deceased was thrown against the lower part of the door with such force that the door was sprung from the grooves holding it and he fell into the shaft and was killed. The other boy saved himself by clinging to the bell-knob at the side of the door.

At the trial the jury returned a verdict in favour of the Free Press Co., and a verdict for $1500 against the Saults & Pollard Co., $1,000 of which was awarded to the mother and $500 to the father.

The Saults & Pollard Co. appeal from the verdict upon several grounds, the principal being that they were not guilty of negligence; that assuming there was negligence the plaintiffs had failed to prove that it was the cause of the injury; that the plaintiffs in proving their case had shewn that the deceased had by his own negligence caused the accident.

The plaintiffs rely upon the provisions of sec. 33 (*c*) of the Manitoba Factories Act, R.S.M. 1913, ch. 70. The doors and mechanism provided for the shaft in question would appear, so

far as ordinary examination would disclose, to have satisfied all the requirements of the statute. The system adopted was approved and much used. At each opening the door was in two parts, the upper of which slid upwards and the lower downwards as the elevator arrived at the opening. As the elevator moved away the doors automatically closed again and became locked. The construction of the doors was a steel frame covered with corrugated iron. The doors were held in place by a tongue or projecting piece on each side fitting into a slot in which they could move up or down. The system of inspection on the part of the landlords was careful and complete. The night engineer employed on the building made an examination every evening of the elevators, machinery and doors. The doors and appliances in question had been inspected by the Assistant Building Inspector only 9 days before the accident and had been found satisfactory.

After the accident it was found that the slot in which the door in question moved, being the one which guarded the lower half of the opening, was very shallow, being at one place less than a quarter of an inch in depth. Some of the witnesses stated that the nut upon a bolt holding the rear face of the slot to the wall was not tight. There was also evidence that one of the sides or guides of the slot was warped, but it is not certain whether this was caused by the impact on the door at the time of the accident or was in that condition before. There was also some evidence that the door would bend or spring if force were applied to it.

The owners of the building appear to have taken great care in the selection of the kind of doors and the method of operating them. They also used care in adopting a system of inspecting the elevators and doors daily to detect any flaw that might develop in them after being in use. The deceased, although lawfully upon the premises at the time of the accident, was not injured while engaged in his master's business or while going to or returning from it. But the Factories Act in the section above quoted imposes a statutory liability upon an employer to make the doors protecting the elevator shaft "good and sufficient" for the purpose. As is pointed out in *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, there is an absolute statutory duty imposed by the Act and, if there has been a breach of the Act, it is not necessary to prove negligence in order to make the employer liable. See also *Butler*

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v. *Fife Coal Co.*, [1912] A.C. 149, at 159, 160, 174. The question whether the doors provided were good and sufficient for the purpose, is one for the jury to decide. There were facts brought out in the evidence and statements made by witnesses from which the jury might infer that the doors were not sufficient to fulfil the requirements of the statute. The very fact that the accident occurred in the way it did, and that the door was not sufficient to withstand the pressure applied when the boy fell against it, is in itself evidence which might assist the jury in finding against the sufficiency of the doors.

It was strongly urged by the appellant that the deceased had himself by his negligence caused the accident. It is argued that it was negligence upon the part of the deceased to engage in a wrestling bout with the other boy in close proximity to the door of the elevator shaft, that in so doing the deceased was not engaged in his master's business but was occupied with his own amusement, that it was in short the act of the deceased which brought about the accident. But the difficulty is in finding that the deceased was guilty of such an act of negligence, in acting as he did, as would disentitle the plaintiffs to recover. He and the other boy were doing nothing wrong. They were not, so far as the evidence shews, committing a breach of any rule or order of their employers. They were acting as boys may be expected to act. The intention of the statute was that the doors should be sufficient to prevent a person from falling down the shaft, if he walked or fell against them. If the boy had tripped and fallen against the doors while he was engaged in his master's business and had in that way suffered the accident, there could be no doubt that the master would be liable. If, therefore, at the close of his day's work and before he left the premises, the boy engaged in a playful struggle with another boy and fell against the door which gave way and the accident took place, is it not reasonable to say that the accident was caused by the employers' failure to fulfil the statutory duty imposed on them and to provide a door sufficient to sustain the pressure caused by a person accidentally falling against it?

I have come to the conclusion, but not without difficulty, that the judgment must stand and the appeal be dismissed.

Appeal dismissed.

REX. v. DAOUST.

QUE.

Montreal P.M.'s Court, Lanctot, J., November 20, 1915.

P. M. C.

1. COPYRIGHT (§ I—20)—CRIMINAL OFFENCES IN INFRINGEMENT—DRAMATIC WORK—SUPPRESSING NAME OF FOREIGN AUTHOR—BERNE CONVENTION—CRIMINAL CODE, SECS. 508A, 508B—5 GEO. V. (1915) CAN. CH. 12, SEC. 4.

The person who suppresses the name of the author of a theatrical play written by a foreigner but protected by the Imperial Statute (1886) 49-50 Vict., ch. 33 (Berne Convention), without the consent of the author, and who has it represented in a theatre in Canada, renders himself guilty of a criminal offense falling under sec. 508B of the Criminal Code.

Statement.

The information brought by Jules Helbronner charged the defendant with having made a suppression of the name of the author of a dramatic work protected in Canada, namely, a drama intituled "Mignon," written by Alphonse Robbe, in order to substitute his own, without the written consent of the author, and of having this play presented in Montreal on the 25th October, 1915, contrary to law.

The defendant pleaded guilty.

The Court condemned the defendant to a penalty of $5.00 and costs for the following reasons:

Whereas it had been proved that the play intituled "Mignon," by Alphonse Robbe, produced for the first time on the 23rd December, 1910, has been presented by the accused Julien Daoust, at the Théatre National Français during the week of 25th October, 1915, the name of the author being suppressed without the written consent of the latter or of his legal representative;

Whereas the name of Alphonse Robbe, author of the said play "Mignon," appears in the usual manner on his printed work, as is required by article XI. of the Berne Convention, the said author Alphonse Robbe is entitled to protection by the Canadian Courts;

Considering articles 508A and 508B of the Criminal Code [Amendment of 1915] which read as follows:

508A.—Any person who, without the written consent of the owner of the copyright or of his legal representative, knowingly performs or causes to be performed in public and for private profit the whole or any part of any dramatic or operatic work or musical composition in which copyright subsists shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding two hundred and fifty dollars, or, in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding two months, or to both.

QUE.

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508B.—Any person who makes or causes to be made any change in or suppression of the title, or the name of the author, of any dramatic or operatic work or musical composition in which copyright subsists, or who makes or causes to be made any change in such work or composition itself without the written consent of the author or of his legal representative, in order that the same may be performed in whole or in part in public for private profit, shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding five hundred dollars, or, in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding four months, or to both.

Considering that Great Britain as well for itself as for its colonies has adhered to the Berne Convention of 1886, and that the provisions of the said convention are applicable to Canada, as has been unanimously adjudged by the Court of Appeal of this province in the case of *Mary* v. *Hubert*, 15 Que. K.B. 381, on the 28th June 1906;

Considering that the authors belonging to one of the countries, parties to the said convention, are protected in Canada as long as their name is indicated on the work in the customary manner;

Seeing however that the accused has given explanations which militate in favour of a mitigation of the punishment; and as it is the first time that a case of this nature has come before this Court to serve as a precedent in the future:

Condemns the accused to pay a fine of $5.00 and costs and in default of his doing so to an imprisonment of a month, without prejudice to the author or to his legal representative to collect the royalties due; the Court gives warning at the same time that it will hereafter be severe to anyone committing a similar offence.

C. Rodier, K.C., for the complainant. *Defendant fined.*

N. B.

S. C.

BROWN v. THE BATHURST LUMBER CO., LTD.

New Brunswick Supreme Court (Appellate Division), McLeod, C.J., and White and Grimmer, JJ. November 26, 1915.

1. MECHANICS' LIENS (§ VIII—62)—PAYMENT OF WAGES—DECLARATION AS TO—TO WHAT CONTRACT APPLICABLE.

Sub-sec. 1 of sec. 30 of the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147, does not apply to a claim of lien that is made after the contract has been completed, the section only applies where a contractor is getting advances during the progress of the work, that is where he is getting payment on progress estimates.

[See *Dixon* v. *Ross*, 1 D.L.R. 17.]

Statement.

APPEAL from a judgment of McLatchy, Co. Ct. J., in a mechanics' lien action.

J. P. Byrne, for appellant.

George Gilbert, K.C., for respondent.

The judgment of the Court was delivered by

McLEOD, C.J.:—The defendant company is an incorporated company carrying on the business of manufacturing lumber at Bathurst in the county of Gloucester.

The plaintiff is a contractor and carpenter, and in January, 1915, he and a Mr. Mitchell and a Mr. Dixon entered into a contract with the defendant company, through Mr. McIntyre its manager, to build a house for the defendant company, situate in or near Bathurst. The contract was partly oral and partly written. I gather from the evidence that the parties who negotiated with McIntyre for the building of the house were really Mitchell and the plaintiff. I also gather from the evidence (t' ough it is not material in this case) that the defendant company was to furnish the lumber for the house. The price for building the house appears to have been agreed upon with McIntyre by the plaintiff, and it was $750. It appears from the evidence that these three men, that is Mitchell, Dixon, and the plaintiff, simply acted together, and each was to have $250, and they went to work at once building the house. A day or two after they commenced work McIntyre sent a letter to Mitchell, the material parts of which are as follows:—

> We herewith award you the contract for the completion of the house in Pine Grove, known as house No. 3. This house to be completed similar to the other houses on the hill, with the exception of fruit room in the basement, which is not included, and the linen closet and pantry, which are to be built with shelves and no doors, otherwise the house to be built the same.
>
> BATHURST LUMBER CO., LIMITED.

This letter was delivered to Mitchell, and by him shewn to the other parties. The three parties went on with the building of the house, and during the course of the contract and before it was finished the defendant company paid each of them $50. These payments were made separately to each of the parties. When the house was completed as claimed by the plaintiff, Mitchell, Dixon, and the plaintiff called at the company's office for payment of the balance owing, which they claim was $200 to each. McIntyre objected to paying, saying that the house was not finished, and desired them each to throw off $50. Mitchell and Dixon did each throw off $50, and accepted $150, being the balance of the $200 owing. Brown refused, claiming that he was entitled

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to the full amount. The defendant company refused to pay him, and this lien was registered in the office of the Registrar of Deeds for the county of Gloucester on April 3, 1915, and a duplicate duly verified by affidavit was filed with the Judge of the County Court of Gloucester county on April 5, 1915, and the Judge issued a certificate and an appointment returnable at the Court house at Bathurst on April 23, to determine whether the plaintiff was entitled to a lien in case his right to a lien was disputed. The defendant company disputed the plaintiff's right to a lien, and the grounds shortly stated are as follows:—

1. That the plaintiff, being a contractor, was not entitled to receive any payment on his contract because he had not produced or left with the defendant company a statutory declaration provided for by sub-sec. 1 of sec. 30, of the Lien Act.

2. That the plaintiff, being a contractor, was one of three joint contractors for the performance of the contract. The contract was not in his name, not made directly with him, but between defendant company and one Everett Mitchell, who, with the plaintiff and Dixon, undertook to carry out the work, and the defendant company settled with the plaintiff and Mitchell and the other person before the lien was filed as to the amount they would accept in full for the work done.

3. That there was nothing due the plaintiff.

4. That the plaintiff was not entitled to recover as the contract was not completed, and there was no provision for payment before the contract was completed.

5. That the lien was defective in that it did not state as required by the Act that the work was done on credit, and the period of credit agreed to had expired or would expire on a day named.

6. The lien was defective in that it did not correctly state the contract, and if all the work alleged in the lien were done it would not be a fulfilment of the contract, and the plaintiff would not be entitled to recover thereunder, as the contract requires the completion of the house in Pine Grove, known as No. 3.

7. There is nothing due by the Bathurst Lumber Co. Ltd., the owner, for the satisfaction of the plaintiff's claim.

The case was heard before the County Court Judge on the day named. The plaintiff and the defendant company were represented by counsel, and evidence was taken. At the close of the

case the Judge dismissed the lien on the first objection taken, that is that the plaintiff had not produced or left with the defendant company the affidavit required by sub-sec. 1, sec. 30 of the Mechanics' Lien Act.

In my opinion the Judge of the County Court was wrong. That section does not apply to a claim of lien that is made after the contract has been completed. The section applies where the contractor is getting advances during the progress of the work, that is where he is getting payment on progress estimates. In that case he files his declaration to shew that all the men employed by him have been paid up to a certain date. A reference to the section, I think, clearly shews that that is the object. Sec. 5 provides that the affidavit or statutory declaration shall not be necessary when the architect's estimate for the month (in case the contract provides for such estimate) does not exceed $100, or when the payment made in good faith in respect to the progress of the work for the month (in case the contract does not provide for estimates) does not exceed $100. Sec. 7 of the Act makes provision to protect the owner where the claim is made after completion of the contract. By sec. 7 it is provided that:—

> The owner shall, in the absence of a stipulation to the contrary, be entitled to retain for a period of 30 days after the completion of the contract 15 per cent. of the price to be paid to the contractor, when such price does not exceed $1,000.

And it is further provided that he may retain 12½ per cent. if the price to be paid is more than $1,000, but does not exceed $5,000, and in other cases he is entitled to retain 10 per cent. of the price to be paid to the contractor.

In this case the price did not exceed $1,000 and the defendant company would have been entitled to retain 15 per cent. of the contract for the period of 30 days after its completion.

I am, therefore, of opinion that the decision of the Judge of the County Court was wrong. No finding was made by the Judge on the other objection filed by the defendant company. I have, however, carefully examined the evidence given in the case, and it discloses this fact that McIntyre after the contract was made concluded that the price he had agreed to pay was too high, and shortly after the men commenced work he went to them and asked them if they would build the house by day's work, which they declined to do, and when they came to settle in the first in-

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stance he says that he told them he thought they had got too much. To use his own words, he said, "They got too much for that job, and kind of soaked us." It is true that he put forward that the house was not finished, but from all the evidence the objections he took that the house was not finished seem to me to be trivial. Mitchell, one of the parties to the contract, said that he would do all that McIntyre required to be done to it if Dixon and Brown would each give him $2. Mitchell and Dixon did each throw off $50 for a settlement. Dixon was anxious to get a settlement because he had a job as foreman with another employer, and wished to get away. Mitchell settled in the same way because he wished to continue in the employment of the defe dant company. The plaintiff refused to settle because he claimed that he was entitled to the full amount of his contract.

Bearing in mind that the Mechanics' Lien Act is passed to protect the workman or contractor in his wages it should receive a fair construction having that end in view. In this case it seems to me from the evidence of McIntyre himself that the real reason payment of the full amount of the contract was refused was because McIntyre thought the price he had agreed to pay was too much.

In my opinion the appeal should be allowed with costs, and the matter referred back to the Judge of the County Court of Gloucester to hear and determine the case on its merits.

Appeal allowed.

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S. C.

CHAMBERLAIN v. NORTH AMERICAN ACCIDENT INSURANCE CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Walsh and McCarthy, JJ. May 10, 1916.

1. INSURANCE (§ VIII—436)—EMPLOYER'S LIABILITY—"DAMAGES"—WORKMEN'S COMPENSATION—SETTLEMENTS.

The word "damages" has the universal meaning of recompense for wrong done; an insurance policy, purporting to indemnify an employer against "liability imposed by law for damages" on account of injuries to employees, covers not only claims for damages at common law, but also those under the workmen's compensation Acts, and contemplates the reasonable and prudent settlement of such claims by the assured.

[*St. Louis Dressed Beef and Provision Co.* v. *Maryland Casualty Co.*, 201 U.S. 173, followed.]

Statement.

APPEAL from the judgment of Ives, J., in favour of plaintiff, in an action on an insurance policy. Affirmed.

J. E. Wallbridge, K.C., for defendant, appellant.

Frank Ford, K.C., for plaintiff, respondent.

WALSH, J.:—The defendant by its policy which expired on July 29, 1914, agreed to indemnify the plaintiff

against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any employee or employees of the assured while at the places described in the schedule in and during the prosecution of the work described in the schedule,

subject to certain conditions therein set out. The schedule describes the work and the place as

all persons on the pay roll of the assured engaged in its business of drilling for natural gas, four and a half miles south-east of the city of Edmonton.

The plaintiff's case is that one Tovee, who was one of the class of employees covered by the policy was accidentally injured whilst engaged at the work and on the place described in it on July 27, 1914, that the defendant repudiated liability to the plaintiff for this accident, because, as it is incorrectly alleged, before it occurred he had transferred to a company the land upon which his operations were being carried on, which change of ownership under one of the conditions of the policy terminated it, and that thereafter he negotiated a settlement with Tovee at $1,000 which he paid to him. He sues to recover this sum under the policy and Ives, J., who tried the action gave him a judgment for it. From this judgment the defendant appeals.

It is argued that the plaintiff has failed to prove that he was legally liable to Tovee for this accident either under the Workmen's Compensation Act or at common law. I agree that there is nothing in the evidence given at the trial of this action upon which liability at common law could have been imposed upon him at the suit of Tovee for I can find nothing in it which is even remotely suggestive of negligence on his part resulting in the accident. I am satisfied, however, that enough is shewn to bring Tovee's claim within the Act. The evidence of the plaintiff is that Tovee "was working on a drilling rig" and that his employment was "any work in connection with the drilling rig." There is some corroboration of this in the evidence of the plaintiff's partner Campbell and there is no contradiction of it by anyone. The only helpful account of the accident is given by the witness Lewis, who says:—

They started the machinery and the drill went down very rapidly, and I was amazed to see it go down so fast, finally it began to work very slowly and there was one workman went over to it, he had a stillson wrench and took hold of this pipe; it appeared to me it went round just once and a half, he had the still-

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son on this pipe, and this pipe gave way and let this man plunge forward. He seemed to slip, I seen him as if he was trying to get his leg out of something; looked to me as if he was falling.

Reading this with the statement of the plaintiff and Campbell as to the work which Tovee was engaged to do, I think that no conclusion can be reached other than that his injuries arose out of and in the course of his employment and that being an employment which is within the Act the plaintiff was liable to him for compensation under it.

Then it is said that compensation under the Act is not covered by the policy at all, inasmuch as its indemnity to the plaintiff is against loss from liability for *damages* and that that word is not broad enough to cover what the Act calls compensation. If we are forced to give to the word "damages" as used in this policy the strict technical meaning first given to it generations ago and which undoubtedly still attached to it in comparatively modern times, this contention, unmoral and iniquitous though it may be, under the circumstances must prevail. The almost universal definition of the word given by text-writers is that it is a recompense for a wrong done. Stroud adopts the definition given in Coke on Littleton, 257 *a*,

> damna in the common law hath a special signification for the recompense that is given by the jury to the plaintiff or defendant for the wrong the defendant hath done unto him.

In vol. 10 Hals., at p. 308, it is said:—

> Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him.

For this definition the same reference to Coke is given as well as to Blackstone's Commentaries, 438. Mayne on Damages, p. 1, says, "damages are the pecuniary satisfaction which a plaintiff may obtain by success in an action." This definition, though, had its origin before the days of Workmen's Compensation Acts and at a time when a man's only liability to another in any form of action for the recovery of money except one arising *ex contractu* was for a wrong done to him by that other. Its meaning should, I think, be extended to keep pace with the development of our law which now gives to a workman something which it calls compensation for injuries sustained by him in his masters' employ, but which might just as well have been called damages. The two words are,

in many cases, used interchangeably by legislators and by Judges and by authors. For instance, ch. 48 of our C.O. is entitled, "An Ordinance Respecting *Compensation* to the Families of Persons Killed by Accidents," while sec. 2 of the Ordinance gives a right of action to "recover *damages* in respect thereof," following in both respects the language of its prototype, Lord Campbell's Act. In the Imperial Act, 27 and 28 Vict., ch. 95, amending Lord Campbell's Act, it is stated in sec. 2 by way of preamble that that Act provides for the giving of damages to persons injured by the death of another and then it proceeds to enact that the defendant may pay into Court one sum as a compensation to all persons entitled under the Act. In like manner the Employers Liability Act, 1880, gives what it calls compensation to workmen who sustain injuries through certain specified acts of negligence on the part of the employer. Such eminent Judges as Huddleston, B., in *Bortick* v. *Head*, 53 L.T. 909, Coleridge, J., in *Blake* v. *The Midland R. Co.*, 21 L.J.Q.B. 233, and Willes, J., in *Dalton* v. *South Eastern R. Co.*, 27 L.J.C.P. 227 (the only cases I have looked at for this purpose), use the two words indiscriminately to express the same thing. The same remark may be made of the authors of two of the standard text books on the subject of workmen's compensation, Mr. Ruegg and Mr. Dawbarn, *vide*, 6th ed. of Ruegg, p. 27 and 28, and 4th ed. of Dawbarn, p. 47. I think that in the evolution of the law the word damages has lost the narrow technical meaning first given to it apparently by Sir Edward Coke some 300 years ago and that it may now be properly used to describe the money payable to a person to recompense him for injuries suffered and indifferently as to whether it is so payable as the result of a wrong done by the defendant or under any other form of liability imposed by law. What a man gets under the Act is certainly by way of damages whether it is so called in the Act or not and so I should say that not only the present-day plain, ordinary and popular meaning of the word but its technical legal meaning is broad enough to cover a case under the Act. There are, I admit, difficulties in the way of this construction, both in the policy itself and in the Act, but they are not insurmountable. Condition F of the policy provides that no action shall lie under it except for money paid by the assured in satisfaction of a judgment recovered against him and there is no such thing as a judgment under the Act, the proceeding being by arbitration, and the lia-

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bility fixed by an award. R. 28 of the rules under the Act provides, however, that "such award shall be enforceable in the same manner as a judgment or order of the Court" so that in everything but name the award is a judgment. Then under sub-sec. 41 of sec. 3 and sec. 8 of the Act the distinction between damages and compensation seems to be preserved. This, however, is, I think, capable of explanation. Throughout the Act the word "compensation" is used to denote the liability of the employer under it so that one would expect to find it used for that purpose in these sections, but when the draughtsman speaks of a common law action he naturally drifts into the language familiar to every lawyer in that connection and speaks of an action to recover damages. I think, therefore, that the defendant's indemnity extended to such a liability as the plaintiff was under to Tovee under the Act.

I feel the less hesitancy in reaching this conclusion because of the fact, that that is obviously the view which the defendant took of its own liability, although I do not think that I am entitled to consider that at all in construing the policy. Its agent apparently attempted to negotiate a settlement with the plaintiff on the basis of there being a statutory liability. Under the statute in addition to that its letter of repudiation shews that though it had investigated the claim for some months in the course of which it must have satisfied itself that the only liability to Tovee was under the Act it did not repudiate upon that ground at all but upon an entirely different one. Furthermore, the language of the policy is that of the defendant and should therefore be construed most strongly against it. It is notorious that in this province since the passing of the Workman's Compensation Act, employers of labor very generally protect themselves against their liability under it by policies of indemnity in companies that write that form of insurance, and if all the facts were known I have not the slightest doubt but that it would be found that it was solely on that account that this policy was taken out and this to the knowledge of the defendant.

This disposes of the only doubt that I have had since the argument and since reading the Appeal Book as to the absolute correctness of the judgment under appeal. The objection that the insurance is in the name of the plaintiff alone while the drilling

operations were carried on by a partnership of which he was a member is met by the very clear evidence that was offered to shew that the defendant knew these facts when the application for the insurance was made and the policy was written and that it agreed to place the insurance as it did in the light of its knowledge of them.

In the face of the repudiation of its liability under the policy which it attempted to make before the plaintiff made his settlement with Tovee, I do not think that it can rely upon the conditions of the policy which it sets up as a defence to the action, and which otherwise would undoubtedly have been a good answer to the plaintiff's claim. These conditions are as follows:—

Condition D: If any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay the assured the indemnity provided for in condition "A" hereof;

Condition E: The assured shall not voluntarily assume any liability, nor shall the assured, without the written consent of the company previously given, incur any expense or settle any claim, except at his own cost, nor interfere in any negotiations for settlement, or in any legal proceeding.

Condition F: No action shall lie against the company to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after final judgment against the assured has been paid and satisfied. The company does not prejudice by this condition any defences against such action it may be entitled to make under this policy.

The facts are that Tovee, who lost a leg as the result of this accident, made claim against the plaintiff, that the defendant, both by letter and by the verbal statements of its manager, repudiated liability to the plaintiff because of his supposed transfer of the property to a company, that the plaintiff thereupon effected a settlement with Tovee at $1,000 and paid to or for him something slightly in excess of that amount.

If the defendant had not repudiated its liability as it did, conditions E and F would most certainly have afforded a complete defence to the action, for it is admitted that they were entirely disregarded by the plaintiff in the adjustment of the matter that he made with Tovee.

In the recent House of Lords case of *Jureidini* v. *National*

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British and Irish Millers' Ins. Co., Ltd., [1915] A.C. 499, Viscount Haldane, L.C., at p. 505, says:—

> Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

In that case the House held that, as the company had repudiated its liability under the policy on the ground of fraud and arson on the part of the plaintiff, it could not set up as a bar to the action a condition of the policy that the loss should first be determined by arbitration and that judgment is in my opinion conclusive of what is practically the same question here.

The trial Judge has found and properly so, in my opinion, that the settlement made with Tovee was a fair and reasonable one, and the decision of the Supreme Court of the United States cited to us by Mr. Ford, of *St. Louis Dressed Beef and Provision Co.* v. *Maryland Casualty Co.* 201 U.S. Supreme Court Reports 173, is one which I think we might safely and fairly follow. Personally, I think that the plaintiff would have been a fool not to settle as he did, even if, by so doing, he had absolutely forfeited his right to indemnity from the defendant. Tovee might, in an action brought by him for negligence, have convinced the Court, by his own and other evidence which was not available to the plaintiff in this action, that he was entitled to succeed in it and in that event his recovery would very largely have exceeded $1,000, to say nothing of the costs. Even under the Act his liability might have eventually been much larger and the company's liability is limited by the policy to $1,500 for injuries to one person. This plaintiff at that time was under the knowledge that he would get nothing from this company except at the end of a law suit and it is not to be assumed that under these circumstances he recklessly and improperly paid away his own good money.

If this company is in any manner under the supervision of the provincial authorities, I think that their attention should be drawn to this case so that they may ascertain as a fact whether or not the company is assuming to indemnify employers of labour against their liability under the Workmen's Compensation Act and issuing to them policies in the form of that here in question to give that indemnity. If my opinion to that effect is well founded, it is nothing short of fraud for it to attempt to argue itself out of its

liability by seeking to attach to the language which it employs to create it a meaning the very opposite of that which both it and the assured had in mind when the contract was entered into and some way should be found to put an end to its operations here. I may perhaps be doing this company an injustice in this respect, but its whole defence is so unpleasantly suggestive of business methods which are anything but fair and honourable that I have no apology to make for the suggestion which I offer. I would dismiss the appeal with costs.

Walsh, J.

SCOTT and STUART, JJ., concurred.

Scott, J.
Stuart, J.

MCCARTHY, J.:—In my opinion this appeal should be dismissed.

McCarthy, J.

The chief argument to my mind of the appellant is that there was no liability to Tovee, the workman, who was injured by the employer, Chamberlain, proved at the trial, for the reason that, as is argued, the policy covers only claims for damages at common law, and that it does not cover claims under the Workmen's Compensation Act.

Even assuming that the use of the words "liability imposed by law for damages" used in the policy must be restricted, as argued, to exclude anything other than damages technically so called, I am of opinion that the plaintiff, in view of the absolute repudiation of the policy upon an untenable ground, had a right when claim was made upon him by the workman to settle the claim. He has acted as a reasonable and prudent man would do under such circumstances and it is not necessary for him to shew that there was any negligence to justify a claim by the workman at common law.

I think the reasoning of the Supreme Court of the United States in *St. Louis Pressed Beef & Provision Co.* v. *Maryland Casualty Co.*, 201 U.S. 173, supports this view. See also *Jurcidini* v. *National British & Irish Millers Ins. Co., Ltd.*, [1915] A.C. 499, *Tustin* v. *Arnold & Sons*, 84 L.J.K.B. 2214. Fuller on Accident & Employers Liability Ins. Co., p. 488.

But even if this view is not correct, I have no doubt that the policy includes liability to pay compensation under the Workmen's Compensation Act.

Counsel for the company has on the appeal argued that the policy does not cover loss by reason of liability to pay compensation under the Workmen's Compensation Act, taking the view

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that the word "damages" must be taken in its strictest sense as including only liability for breach of duty. I cannot agree with this argument, particularly on the facts of the case. There is no doubt that when the policy was applied for and discussed with the agents of the company, what was in the contemplation of the parties was what is ordinarily termed employers' liability insurance, or what is in this province known as liability of employers to pay compensation to workmen. The evidence of Mr. Haversham, one of the agents of the company, clearly shews this. The agent of the company with whom the settlement was discussed, Mr. Thibedeau, also shews clearly that liability to pay compensation under the Workmen's Compensation Act was in the contemplation of the parties, and throughout the discussion he took the view that the company if liable to pay at all was liable under the Workmen's Compensation Act and not at common law. Indeed, the statement of defence used the word "compensation" in par. 6, and the clear evidence of both Mr. Chamberlain and Mr. Campbell as to the view taken by the agent of the company that there would be liability under the Workmen's Compensation Act if there was any liability at all, shews clearly what the company meant by its policy, and I cannot help thinking that the very unmeritorious argument raised by counsel for the insurance company is entirely an afterthought.

The company repudiated upon the ground, and upon the ground alone, that there has been a change of interest which had not been notified to the company. In my view this ground was not tenable even apart from the facts which shew that there never has been any change of interest from Chamberlain or the partnership to a joint stock company, for the reason as shewn by the evidence of Mr. Haversham and by the terms of the application itself, it was contemplated that a company would be incorporated to which the assets of the partnership would be transferred. It is unnecessary, however, to consider this as the facts shew that there has been no change of title or interest.

This being my view, I am further of the opinion that the settlement by the payment of $1,000 to the workman, even treating the case as a claim for compensation under the Workmen's Compensation Act, was a highly reasonable and prudent settlement to make. Up to the date of the discussion with Mr. Thibedeau a few months after the accident happened he then reckoned the

amount payable as of that time at $390. There being permanent partial disability arising by reason of the unfortunate loss of the workmen's leg by reason of the accident, it would naturally be expected that the weekly compensation payable to him under the Act for the future would amount to considerably more than the difference between this $390 and the $1,000 paid. The Act contemplates settlement as does the policy itself. If the claim is treated as one at common law the $1,000 is if anything more reasonable, or perhaps from the point of view of the workman, unreasonable in its smallness.

There is no doubt in my mind that the finding of the trial Judge is correct, that Tovee was acting in the course of his employment at the time of the injury and that he was a workman in the employment of the assured within the meaning of the policy. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. March 27, 1916.

1. CORPORATIONS AND COMPANIES (§ VII B—373)—VALIDITY OF ACTS OF UNLICENSED FOREIGN COMPANY—CONTRACTS—ACTIONS—INFRINGEMENT.

The effect of sec. 122 of the Companies Act, R.S.M. 1913, ch. 35, upon extra-provincial companies carrying on business in the province without a license, in addition to the penalty provided therein, is merely to suspend the remedy of the company to maintain actions upon contracts, until the license is obtained and the fees paid. It does not render void contracts made or acts done by such unlicensed corporations in the course of their business, nor does it disable them from bringing actions of tort.

[*Consolidated Investments* v. *Caswell*, 21 D.L.R. 525; *Randall* v. *British and American Shoe Co.*, [1902] 2 Ch. 354, followed; *North-Western Construction Co.* v. *Young*, 13 B.C.R. 297, distinguished.]

2. TRADE-MARK (§ IV—17)—"PASSING OFF"—SIMILAR NAME AND DESIGNS —SECONDARY MEANING.

The purchaser of the goodwill of a business has in general the right to continue to use the trade name, and the subsequent incorporation of a company by the assignor, under a similar name, which is clearly calculated to "pass off" his goods as the goods of the plaintiff, by the use of similar packages and designs, is an infringement which will be restrained by injunction. A trade-mark is only one badge of identification; it may be equally wrong to imitate a trade name or the get-up of goods, so as to "pass off" the goods as another's.

[*Reddaway* v. *Banham*, [1896] A.C. 204; *Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326; *Valentine* v. *Valentine*, 17 R.P.C. 673; *Kingston* v. *Kingston*, [1912] 1 Ch. 575; *Spalding* v. *Gamage*, 32 R.P.C. 273, applied.]

3. TRADE-MARK (§ IV—17)—"PASSING OFF"—HOW INFERRED—CONDUCT—QUESTION OF FACT.

The question whether the use of particular words or badges as a trade-mark is calculated to "pass off" goods or is merely honestly descriptive, is, in substance, one of fact; and it is not necessary to prove intent to deceive, but "passing off" may be inferred from conduct.

[For other litigation of case see 23 D.L.R. 451, and 15 Can. Ex. 275.]

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Cameron, J.A.

APPEAL from the judgment of Metcalfe, J., enjoining the imitation of a trademark.

A. E. Hoskin, K.C., for appellant, defendant.

E. Anderson, K.C., and *R. D. Guy*, for respondent, plaintiff.

The judgment of the Court was delivered by

CAMERON, J.A.:—The plaintiff the Mickelson-Shapiro Co. Ltd. is a corporation incorporated under the laws of the State of Minnesota, and the plaintiff Doerr is the receiver thereof, appointed by order of the District Court of the County of Hennepin in the said State, on November 15, 1913. The defendant the Mickelson Drug & Chemical Co. is a corporation organised under the laws of this province, and the individual defendant Anton Mickelson resides and carries on business in this city.

It is alleged in the statement of claim that prior to the year 1909, and until 1912, the Mickelson Chemical Co., a North Dakota corporation, manufactured in that State a gopher poison called "Mickelson's Kill-em-Quick Gopher Poison" which became well known under that name to the trade and the public, and that on May 25, 1909, the said Chemical Co. registered a specified trade-mark in the Department of Agriculture at Ottawa, consisting of an oval cut in which appeared four gophers with a cylindrical can upon the label on which were the words "Mickelson's Kill-em-Quick Gopher Poison," which, though not part of the trade-mark, designated the goods to the trade and the public.

It is alleged that in September, 1909, the defendant Anton Mickelson, as owner of the assets of the Chemical Co. and of the trade-mark aforesaid, sold the same to the plaintiff company and duly assigned the said trade-mark by an instrument in writing dated October 2, 1912, and duly registered.

It is further alleged that the defendant Anton Mickelson sold and transferred to the plaintiff company, of which he was a member and the president, the business, stock and goodwill of the Chemical Co., and it is claimed that the plaintiff company has the exclusive right to the use of the said trade-mark, and has used the same with the words aforesaid in its trade for the purpose of distinguishing and designating the gopher poison manufactured by it, and that such gopher poison has acquired a valuable reputation which the plaintiff company enhanced by advertising so that to the general public such gopher poison has been understood to be that manufactured by the plaintiff.

It is further alleged that the defendants have opened an office in Winnipeg and are wrongfully issuing to the trade and the public packages containing fraudulent imitations of the plaintiff's goods and have advertised and sold preparations under the name of "Mickelson's Kill-em-Quick Gopher Poison" in packages imitating those of the plaintiff company, with intent to deceive the public and to lead them to believe such preparations were those of the plaintiff company.

It is further stated that on March 16, 1914, the defendant company registered at Ottawa a trade-mark consisting of the words "Kill-em-Quick" accompanied by the fac-simile signature of Anton Mickelson, but this trade-mark was struck out of the register by a judgment of the Exchequer Court of Canada.

It is further alleged that the Mickelson Chemical Co., and Anton Mickelson, in September, 1909, for valuable consideration, transferred the formulæ, assets, trade name and goodwill of the Mickelson Chemical Co., to the plaintiff company, and the plaintiff company used and adopted the name of "Mickelson's Kill-em-Quick Gopher Poison" as the trade name of their goods, and have since then used the same in designating and advertising their goods, which, as a result, have obtained an extensive reputation, and that Anton Mickelson was the president of the said Mickelson Chemical Co., and of the plaintiff company until the month of November, 1913. It is further alleged that the defendant Anton Mickelson, in fraud of the plaintiff company, caused to be incorporated the defendant company, which company is using the name "Mickelson's Kill-em-Quick Gopher Poison" so as to deceive the public and that the defendants are passing off their goods as those of the plaintiffs in contravention of the plaintiffs' rights.

An injunction was asked to restrain the defendants from using the names 'Mickelson's Kill-em-Quick Gopher Poison" or "Kill-em-Quick," also an account of profits and damages.

The statement of defence denies specifically and at length the allegations of the plaintiffs' statement of claim, and alleges that the defendants did not, and could not, acquire any property in the words in question, that the words did not acquire any secondary meaning, and if they did so acquire any meaning it was at a time when the plaintiff company was carrying on business illegally in this province.

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At the trial of the action before Metcalfe, J., an injunction was granted perpetually restraining the defendants from advertising, selling, offering to sell or disposing of any preparation under the name of "Mickelson's Kill-em-Quick Gopher Poison," referring it to the Master to ascertain the damages sustained by the plaintiff since January 1, 1914, and reserving further directions. From this judgment the defendant appeals.

It appears that the plaintiff company obtained a license under sec. 118 of The Companies Act, ch. 35, R.S.M. on March 4, 1915. The action was commenced March 13. The defendant company was incorporated in January, 1914.

The ground is taken that even if the words in question are capable of acquiring a secondary meaning (which is not admitted), a foreign corporation carrying on business in Manitoba without a license is incapable of receiving the benefit of such acquisition. It is argued that such a foreign corporation is doing business illegally and can, therefore, hold or acquire no rights whatsoever. But it is an established rule of private international law that a corporation duly created according to the laws of one State may sue and be sued in its corporate name in the Courts of other States. By the comity of nations, corporations formed outside of one jurisdiction are permitted without question to carry on business in the domestic jurisdiction. No distinction appears to be drawn between the treatment of individuals and companies except such as arises from the differences between a natural person and an artificial creation with its defined and limited powers. It is of course open to the law-making power of the domestic jurisdiction to restrict and even wholly exclude foreign corporations.

The provisions for the enforcement of sec. 118 are to be found in sec. 122, which provides that failure to take out a license shall, in the event of the corporation carrying on business without a license, (1) subject the corporation to a penalty of $50 for every day of non-compliance, and (2) render it incapable of maintaining an action on any contract. There is no provision that contracts made or acts done by an unlicensed corporation shall be void. On the contrary, the mere taking out of a license enables an action on such a contract to proceed therewith, thus recognising the previous existence of the contract and that the right of action thereon is merely held in abeyance until the fees are paid and the

license obtained. There is nothing in the Act that I can see disabling an unlicensed foreign corporation from bringing an action of tort.

The only disabilities imposed by the Act on an unlicensed corporation are the liability to a civil action for the penalty prescribed and the incapacity to maintain an action on a contract. No other rights or capacities of the corporation are affected, and in view of the character of the Act, contravening as it does to some extent private international law, I would not extend its meaning further than its express words warrant.

As to contracts, the Courts will not readily construe them so as to bring them within the prohibition of a statute.

> The test to be applied is, as a rule, whether the statute was passed to enforce some object of public policy or conduct, or for some indirect object, such as facilitating the collection of revenue. Hals. XXVII., 194.

See also Craies' Hardcastle, 477. I can see no object of public policy in this Act, such as the prevention of frauds on the public or the prohibition of trade with alien enemies. A leading object of the legislation seems to me to be the raising and collection of revenue by compelling extra-provincial corporations to take out a license for the privilege of doing business in this Province, incidentally thus requiring them definitely to place themselves within this jurisdiction. To enforce that provision a civil action for a penalty for its violation at the instance, or with the consent of, the Attorney-General is provided, and its right to maintain an action on a contract is withheld until the license is duly obtained. Reading the various relevant sections of the Act together, it does appear to me, upon my best consideration, that the status of an unlicensed extra-provincial corporation is not affected otherwise than in the particulars thus expressed.

North Western Construction Co. v. *Young*, 13 B.C.R. 297, was decided on the wording of a statute differing in important particulars from our own. This statute and that decision were discussed in this Court in *Consolidated* v. *Caswell*, 21 D.L.R. 525, 25 Man. L.R. 213.

In *Randall* v. *British and American Shoe Co.*, [1902] 2 Ch. 354, it was held that a company may acquire a right to protection of its trade name used separately from its corporate name although such user is in direct contravention of the provisions of the Companies Act.

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The Companies Act, 1862, secs. 41, 42, imposes certain penalties on a company for non-compliance with its provisions, but the additional penalty of forfeiting its goodwill to any dishonest person who chooses to steal it is not imposed by the statute, per Swinfen Eady, J., at p. 358,

who referred to *Wright* v. *Horton*, 12 App. Cas. 371, and *Pearks* v. *Thompson*, 18 R.P.C. 185. In the last named case, where a company had not complied with sec. 41 of the Companies Act, Farwell, J., says:

The Act of Parliament imposes a penalty, and I am asked to add an additional penalty which the statute does not impose and say that it is competent to any dishonest person who chooses to steal the goodwill.

I do not think we are called upon here to impose on a foreign corporation, because it has failed to take out a license, a penalty not prescribed by the Act, which might involve its most valuable asset.

It is to be noted furthermore, that the plaintiff company carried on some of its business during the period in question by consigning its goods to wholesalers in this city, in a manner not at all in conflict with the statute, but in accordance with its provisions.

On the pleadings, and as the case is presented to us, this action is to be taken as in substance a "passing off" action.

It is an actionable wrong for the defendant to represent, for trading purposes, that his goods are those or that his business is that of the plaintiff, and it makes no difference whether the representation is effected by direct statements, or by using some of the badges by which the goods of the plaintiff are known to be his, or any badges colourably resembling these, in connection with goods of the same kind, not being the goods of the plaintiff, in such manner as to be calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff. But this rule does not extend to prevent the defendant honestly trading under his own name, or under the names of the members of his firm, or honestly describing his goods, and their place of origin, manner of manufacture, and other characteristics, in the ordinary terms current in his trade.

The question whether the use of particular words or badges is calculated to pass off the defendant's goods as those of the plaintiff, or is merely honestly descriptive, is often one of difficulty, but it is, in substance, a question of fact.

The principle of law may be very plainly stated, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures, does or does not come up to the proposition enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact, the legal consequence appears to follow: per Halsbury, L.C., in *Reddaway* v. *Banham*, [1896] A.C. 199 at 204; 13 R.P.C. 218 at p. 224. Kerly on Trade Marks, p. 529.

The trade-mark is important, particularly if registered, when

proof is greatly simplified. But a trade-mark is only one badge of identification; it may be equally a wrong to imitate a trade name, or the get-up of goods, so as to pass off the goods of one as another's. A party might fail to establish his title to a trade-mark for any one of various reasons. Yet by the imitation of that mark a person may have done the very thing that is calculated to pass off his goods as the goods of another.

In passing off actions, it is not necessary to prove intent to deceive. If the conduct of the defendant is such that it is calculated to pass off his goods as those of the plaintiff, that is sufficient.

A trader has much the same right in respect of his trade name, the get-up of his goods, and all the other distinctive badges and descriptions by which goods are known to be his, as he has in respect of his trade-marks. Kerly, p. 533.

In *Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326, Lord Davey said, at 343:—

The law is that a man shall not by misrepresentation pass off his own goods as those of his neighbour.

But a man "who takes upon himself to prove that words which are merely descriptive or expressive of the quality of the goods, have acquired the secondary sense to which I have referred (*i.e.*, have become significant of the plaintiff's goods as distinguished from those of other manufacturers), assumes a much greater burden." In this case it was finally held that the word "cellular" had not obtained any such secondary meaning.

In *Valentine* v. *Valentine*, 17 R.P.C. 673, it was held that the defendant company, using the name Valentine, the name of the promoter of that company, who had nothing whatever to do with the plaintiff company, had attempted to get the benefit of the reputation of the plaintiff's articles and that the defendant company had so put their goods on the market that they would be mistaken for those of the plaintiff. Lord Alverstone refers to the judgment of Lord Halsbury in *Reddaway* v. *Banham*, *supra*, and to that of Lord Herschell in the same case. With reference to the contention that the defendant company was using as its name that of the person who was carrying on the business complained of Lord Alverstone says: "In my opinion there is no difference in principle. You still have to apply the test which the Lord Chancellor laid down in the passage I have read, namely, whether or not the goods of the defendants have been represented

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as the goods of somebody else. Of course it is more difficult to deal with the case where the name is the name of the person *or the name of both persons* as distinguished from a fancy name which has been created for the purpose of the particular goods; but I can see no difference in principle between the two cases." "Dealing now with the case for the defendant C. R. Valentine, whether you treat him as an individual wishing to carry on a trade, or as an individual forming a company to carry on a trade—in my opinion it makes no difference for the purpose of the present case—I cannot regard his action as thoroughly straightforward and honest." And His Lordship reached the conclusion that the defendants were putting on the market goods which would be liable to be passed off as those of the plaintiffs.

In *Kingston* v. *Kingston*, [1912] 1 Ch. 575, the plaintiff was a catering company called "Thomas Kingston & Co., Ltd." The son of Mr. J. S. Kingston, one of its managing directors and incorporators, an assistant managing director, formed a new company "Thomas Kingston & Co., Ltd." to carry on the business of caterers. It was held by Warrington, J., that the use of the name "Kingston" was calculated to mislead, and an injunction against its use was granted.

In Hals. Laws of England, vol. XXVII, at p. 745, the cases are divided into those involving (1) the misuse of the trading name of a person or firm; (2) the misuse of the trading name of goods; and (3) the passing off of goods by means of get-up. But in all there is but one question, namely, whether the defendant has knowingly done that which would pass off other goods or another business as that of the plaintiff. It is not necessary to shew that confusion has actually occurred if the Court is of opinion there is a strong probability of it in the normal course of trade, p. 747.

The latest authoritative case on the subject is *Spalding* v. *Gamage*, in the House of Lords, 32 R.P.C. 273 at p. 284. Lord Parker holds that the right, the invasion of which gives rise to a passing-off action, is a right of property in the goodwill or business improperly used by the defendant. He goes on to say:—

> The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case

is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make a false representation.

The plaintiff company alleges that it has acquired the trade name of the goods both by purchase and assignment and by adoption and user, and that the defendants have passed off their goods as the goods of the plaintiff company, by use of the plaintiffs' trade name, by imitations of the plaintiffs' packages and otherwise.

The directors of the Mickelson Chemical Co., a North Dakota corporation, were authorized at a stockholders' meeting October 30, 1906, to purchase "the patents, rights, privileges and appurtenances for making gopher poison belonging to A. Mickelson" in consideration of stock of the company, and this was confirmed at a stockholders' meeting held the same day, as evidenced by the minutes of said meetings in the handwriting and over the signature of Anton Mickelson. This company, May 25, 1909, registered a specified trade-mark in the Department of Agriculture at Ottawa as already set forth.

The Mickelson Kill-em-Quick Co. was incorporated in Minnesota, September 4, 1909. See Journal, Ex. 31, p. 1, where the powers are set forth, and the power is given (p. 8) to complete the purchase from Anton Mickelson of the entire assets of the Mickelson Chemical Co., including the trade-marks, formulæ, stock . . . goodwill and, in fact, all assets of the said Mickelson Chemical Co. for stock in the Mickelson-Kill-em-Quick Chemical Co. The stock taken by A. Mickelson is shewn at p. 2. The accounts relating to formulæ and trade-mark and to good-will are shewn at p. 13. The transaction was apparently regarded by the parties as completed.

The Mickelson Kill-em-Quick Co. continued, with Anton Mickelson as president, until August 8, 1912, when its name was changed to that of The Mickelson-Shapiro Co., as shewn by the minutes over Mickelson's signature. On October 2, 1912, Anton Mickelson, as sole member and owner of the Mickelson Chemical

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Co., assigned to the Mickelson-Shapiro Co. all his right, title and interest in the registered trade-mark and all rights to use same. On January 7, 1913, at a directors' meeting a resolution was adopted instructing the secretary to see that the trade-marks of the company registered in the name of the Mickelson Chemical Co., and sold to the Mickelson Kill-em-Quick Co., were properly registered in the United States and Canada in the name of The Mickelson-Shapiro Co. This was approved in writing by Anton Mickelson.

The first business done in Manitoba by the Mickelson Kill-em-Quick Co. was in March, 1909, some months before the incorporation of the Mickelson Kill-em-Quick Co.

Considering the position occupied by the defendant Anton Mickelson throughout, he being at one stage the sole owner of the Chemical Co., and the president of its successors, the Mickelson Kill-em-Quick Co., and The Mickelson-Shapiro Co., it would seem to me reasonable to give a strong construction against him in dealing with the transfers of the trade-marks, assets and goodwill which are purported to be vested in the plaintiffs. He and those claiming under him cannot readily be allowed to impeach the validity of these transfers. Mickelson's answers to questions on these matters are far fron satisfactory.

The purchaser of the goodwill of a business has in general the right to continue to use the trade name: 27 Hals. 756.

The trade name had become of value and was, in my opinion, an asset transferred to the plaintiff company, in which the right to use it had been and is now vested.

The plaintiff also contends that it acquired a right to the use of the name by user and adoption. The advertisements and printed matter produced at the trial were referred to. We were shewn the plaintiff's advertisements in the Western Municipal News of January and March, 1913, when Mickelson was the advertising agent of the plaintiffs. Here is shewn (p. 20, ex. 17), a photograph of the defendant Mickelson. There was also produced a bundle of the plaintiffs' advertisements (ex. 18) all but two of which shew his photograph. In ex. 68, a copy of the Western Municipal News of September, 1914, we find an advertisement of the defendant company with the same photograph, containing the words on a pictured package "Mickelson's Kill-em-Quick Gopher Poison."

In ex. 75, a copy of the Northwest Farmer, an advertisement of the defendant company contains the words "You know all about Kill-em-Quick Gopher Poison," concluding with "Anton Mickelson, Manager (The originator of Mickelson's K-E-Q Gopher Poison)." These two advertisements would appear to shew the intention of the defendants to avail themselves of the knowledge already obtained by the farming community of the plaintiffs' preparations. So also with the defendants' advertisement in the Weekly Free Press of April 22, 1914. The form of the cut and the words are similar to those used by the plaintiff.

Ex. 26, containing a cut of the defendants, returned with coupons of the plaintiffs designed to promote circulation shews also the knowledge of the public as well as the confusion which arose between the two preparations.

The prospectus handed by the defendant Mickelson to Shapiro, ex. 24, makes interesting and instructive reading, particularly that part of it, p. 9, on "The Value of a Name." This appreciation is illustrated in the use of the words at the top of circular, ex. 28, and by the defendant Mickelson's letter of June 24, 1912, to Shapiro holding out inducements with respect to the possible Canadian trade. The plaintiffs' contention that it has acquired a right to the trade name by user and that that right and its value were recognized by the defendants seems to me to be borne out by the evidence.

It was argued for the plaintiff that in an action like this for "passing-off," where the trade name has been so long used by the plaintiff, it is not to the same extent necessary to establish a secondary meaning as in case of ordinary English words, such as "cellular." In this case it is the passing off of the goods of another as the plaintiffs' goods that is the ground of complaint. The grievance does not consist solely in the use of the name. That would be a matter of indifference if it were not for the sale of goods. The use of the trade name by the defendant is, or may be, an element of the deception, which can be considered apart from the secondary meaning it may have acquired. In support of this contention counsel cited a number of authorities: *Cellular Clothing Co.* v. *Maxton, supra; Valentine* v. *Valentine, supra;* Kerly, at pp. 529 *et seq.; Kingston* v. *Kingston, supra; Re Tecfani's Trade Mark*, 30 R.P.C. 76; *Du Cros* v. *Gold*, 30 R.P.C. 117; *Reddaway* v. *Banham, supra; Pinet* v. *Pinet*, [1898] 1 Ch. 179;

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and *Re Brinsmead & Sons*, [1897] 1 Ch. 45, and *Spalding* v. *Gamage*, to which I have referred.

From these decisions and numerous others that might be referred to, the conclusion seems to be, as stated, that the use of the trade name may be an element in the false representation, and that even if it has not acquired any secondary meaning it can or may be so used in connection with the goods to represent them as the goods of the plaintiff. That seems to me an entirely reasonable conclusion. It is impossible, as Lord Parker says, to enumerate or classify all the possible ways in which a man may make a false representation. And I entertain no doubt the name was so used by the defendants on their packages and in their advertisements.

But there is some evidence to shew that the words in question had acquired a secondary meaning, even if we bear in mind that the plaintiff had the entire field in Manitoba until the defendant company was organized on January 14, 1914, and began business in this province. Passages in the evidence of Mr. Mylius, Mr. Squires, Mr. Martin and Mr. Shapiro, indicate that such is the case. There is also evidence indicating confusion and the probability of confusion on the part of the public. A glance at the respective packages is sufficient to convince anyone of the possibility of confusion.

I find myself unable to avoid the conclusion that the defendants by the printing and colouring and the embellishment, size and structure of the packages in which their goods were offered for sale, intended, so far as they could, to seize the advantages which the plaintiffs, by the form, size, and get-up of their packages, had in course of time acquired. A comparison of the two, with their red type, the oval cut in the centre, the words "Mickelson's Kill-em-Quick Gopher Poison" distributed as they are, the similarity of the type used, the get-up of the packages, all invite the conviction that the defendants recognized the existence of certain valuable features in the plaintiffs' form of package and in the words, colouring, devices, etc., on the material enclosing the packages, and deliberately adopted them for the purpose of leading the public to believe that the goods offered the public were the goods of the plaintiff company. The defendants' advertisements are open to the same comment. To my mind they

evidence an intention to lead the public to believe that the goods of the defendants were those of the plaintiff company. Furthermore, I must say that the conduct and actions of the defendant Mickelson throughout the various transactions since he separated himself from the plaintiff company do not commend themselves as absolutely straightforward. His answers to questions on his examinations with reference to the transfers of assets by him, and the various companies, do not appear to be wholly candid.

Upon consideration of the documents, facts and circumstances brought out in the evidence, and of the authorities, I am of opinion that the judgment of Metcalfe, J., should be affirmed.

The appeal must be dismissed with costs. *Appeal dismissed.*

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Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. April 22, 1916.

1. INTOXICATING LIQUORS (§ III G—87)—PROHIBITED AREAS—EXCEPTIONS—VALIDITY OF SEIZURE—REPLEVIN.

It is not a violation of sec. 9 of the Nova Scotia Temperance Act, 1910, ch. 2, as amended by Acts 1911, ch. 33, to send intoxicating liquor from the City of Halifax into any part of the province in which the prohibitory part of that Act is in force, because sec. 9 is in that part of the Act which is expressly declared not to apply to the City of Halifax.

Statement.

SPECIAL agreed case to determine the validity of a conviction under the N.S. Temperance Act, 1910 (Acts 1910, ch. 2, as amended by Acts 1911, ch. 33). Judgment for plaintiff.

W. J. O'Hearn, K.C., for plaintiff.

Wm. McDonald, for defendant.

Graham, C.J.

GRAHAM, C.J. (dissenting):—The plaintiffs bring this action (with an order of replevin) against the defendant, a provincial constable, who, under a warrant of distress, after conviction for a penalty under the Nova Scotia Temperance Act, 1910, and amendments, had seized the plaintiffs' goods.

The conviction was made by a stipendiary magistrate in Stellarton, in the county of Pictou, who also issued the distress warrant, and the latter was indorsed here by a stipendiary magistrate for this city, in which the plaintiffs carry on business. These proceedings are not questioned except in respect to the matter I shall mention presently.

This is the special case agreed on by the solicitors. It was not contradicted that the goods sent to Margaux had not reached him in Stellarton in Pictou county, and were within Stellarton

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and caused to be sent there by the plaintiffs, and I shall deal with the case on that basis. That is what the case means.

Is plaintiff entitled to the return of the cash register referred to herein?

Certain provisions of an Act known as the N.S. Liquor License Act are in force in the City of Halifax, and by reason thereof licenses may be obtained for the sale of intoxicating liquor in that city.

Another Act, known as the Nova Scotia Temperance Act, 1910 (Acts 1910, ch. 2), is not in force there, but is generally in force throughout the province in those municipalities in which the Canada Temperance Act is not in force. This is the provision on the subject, Nova Scotia Temperance Act, 1910, ch. 2, sec. 3:—

> This part (*i.e.* Part 1, the prohibitory part) shall apply to every part of Nova Scotia in which the Canada Temperance Act is not in force (It is not in force in Pictou county) excepting the municipality of the County of Halifax, the County of Richmond and the city of Halifax, etc.

In this part sec. 9 is found, that is to say:—

> No person shall, by himself, his clerk, servant or agent send or cause to be sent, or bring or cause to be brought, from any place in the province liquor to any person in any municipality in which this part is in force other than to a vendor appointed under this part, etc. (For amendment see 1 Geo. V. 1911, ch. 33, sec. 6.)

For its infringement the penalties will be found in part 2, secs. 31 and 32.

Then there is sec. 4:—

> This part shall not affect any *bona fide* transactions in respect to liquor between a person in any portion of the province in which this part is in force and a person in another province or in a foreign country.

That section is inserted as a saving clause, the result of certain decisions of the Courts that it would be *ultra vires* for the provincial legislature to pass legislation to prevent those transactions mentioned in this fourth section from taking place, and you are not to attempt to make such an application of the Act or to place such a construction upon it.

It is ingeniously contended that to constitute an offence there must be both a sending and a receiving; both are essential elements and each must be prohibited: and that the sending from Halifax is not prohibited, the second or prohibition part not being in force there; therefore there is no offence; that the section will have scope if made to apply only to places in which both termini

are within prohibition areas. That is, it is only the introduction of liquor from one prohibition area to another prohibition area that is aimed at.

The underlying principle of the legislation in this country in relation to drink is what is known as local option.

If the inhabitants of a given area—it may be a province or municipality or other area—are opposed to the sale of drink in their midst, by some means or another they can secure that object; sometimes by special vote; sometimes by procuring direct legislation. This province, for instance, has in different areas three different legislative enactments respectively in force within their boundaries, largely obtained at the option of the inhabitants thereof. There may be licenses in one, in which intoxicating liquors may be kept for sale and sold, and another in which an Act of the Parliament of Canada prohibiting the same is in force, and a third in which a provincial statute is in force, and there a strict prohibition was intended against selling or keeping for sale, The idea seems to be that, if drunkenness in a certain area is to be put down, the sale or keeping for sale therein must be prevented, and even the introduction of intoxicating liquor into that area must be prevented. It must be stopped at the border. For, if it comes over into the prohibition area, it will be more difficult to prevent illegal sales and clandestine sales of it. So the legislature has passed sec. 9 to prevent the sending or bringing into any such prohibition area any intoxicating liquor. The offence is the introduction of intoxicating liquor into that area.

On the other hand, Halifax is not a prohibition area. There may be licenses granted there and intoxicating liquors may be sold and kept for sale. The prohibition part of the Nova Scotia Temperance Act does not apply. That is, it is not in force there. Halifax is expressly excepted from the provision putting it in force in nearly all of the other municipalities. But because an individual resides or does business in that excepted area where there is no prohibition, may he introduce intoxicating liquor into a municipality in which the prohibition provision is in force, by sending it or bringing it to any person in that municipality?

True, sec. 9 is not in force in Halifax, but it is in force in Pictou, which includes Stellarton, and no one, whether a citizen of Halifax

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or a licensee there or not, may send or bring liquor into Stellarton by selling it to any person carrying on business or residing in that municipality. He may sell intoxicating liquor at home under his own law, but he is not to sell it to the unlicensed vendor in Stellarton. If he does so, he is amenable to the law of Stellarton, if Stellarton can reach him with its process. That it can is not disputed here. I think there would be no question about it if sec. 9 did not contain the words "from any place in the province." That would be a plain provision that no person shall send or bring liquor to any person in any municipality in which this part is in force. That is, Pictou for one municipality.

The reason for the use of that expression, "any place in the province," is clear. I have already quoted the saving clause contained in sec. 4. The expression is used in order to make sec. 9 consistent with the exception contained in sec. 4, namely, transactions in liquors imported from another province of Canada or a foreign country.

Our attention was called to a provision passed in 1915, after the date of this offence, in which the legislature has taken it for granted that the view I am taking is the correct one and has passed a provision accordingly: Acts of 1915, ch. 30 sec. 52, providing for revocation of the license of a licensee in Halifax under secs. 30 and 31 of the Act of 1910.

Use cannot be made of such a provision passed subsequently except as a parliamentary exposition of the previous provisions. This is a forcible exposition at any rate.

But Acts of Parliament without having been passed for the express purpose of explaining previous Acts are sometimes spoken of as being legislative declarations or parliamentary expositions of the meaning of some earlier Act: Craies on Statute Law, p. 137.

I think there is a complete offence against the law in force in Stellarton, and the plaintiffs' Halifax citizenship and their licensed shop there will not avail them as a defence to such a prosecution.

There is a great abundance of provisions in the Act which absolutely forbids keeping for sale or selling liquor in the municipalities in which the prohibitive part is in force.

Therefore sec. 9 would have no office and be unnecessary if

it was held to apply only to the transportation from one prohibition area to another. In my opinion, an offence is disclosed under the conviction and warrant of distress mentioned in the special case, and I answer the questions accordingly. The defendant should have judgment on the special case, answering the findings in his favour, and the action be dismissed with costs.

RUSSELL, J.:—I do not see how we can say that an offence against the N.S. Temperance Act is charged by the information in this case, unless we choose to be wise above what is written and use our knowledge derived from the newspapers or the debates of the House of Assembly for the purpose of ascertaining the intention of the legislature. That method is not permissible in any case, but it is particularly objectionable in its application to a statute defining a crime. The offence created by sec. 9 of the Temperance Act is, I think, complete the moment a package of liquor has left the hands of the sender destined to any person (with certain exceptions) in any municipality in which part 1 of the N.S. Temperance Act is in force, whether it reaches its destination or is destroyed by lightning on the way, as said by Bayley, J., in *Fragano* v. *Long*, 4 B. & C. 219 at 221.

The offence charged in this information is unlawfully causing the liquor to be sent from the city of Halifax to a person in Stellarton. It is not stated that the liquor ever reached the person in Stellarton or ever left the city of Halifax. If the section does not apply to the city of Halifax, I do not understand the reasoning by which it can be contended that an offence has been committed, and the enactment in sec. 3 is explicit to the effect that the part in which this section is contained shall not apply to the city of Halifax until proclaimed to be in force there.

It is argued that the section can never have any operation, unless it is held to be in force in the city of Halifax. That sort of accident does sometimes happen in the enactment of statutory provisions, but I doubt if the circumstance has ever been successfully relied on to create a crime in direct contradiction to the terms of the statute. But I think the considerations referred to by Harris, J., make for the operation of the statute in this case without making it applicable to the city of Halifax, It is lawful under sec. 4 to import liquor into any part of the provinces from another province or a foreign country. Sec. 9 prevents the

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receiver of such liquor from sending it to any person in any municipality in which part 1 of the N.S. Temperance Act is in force, and there is, therefore, scope for the operation of the clause without doing violence to the words of the Act by making it applicable to the city. Of course, everybody knows that it was meant to apply to the city of Halifax, and that the main purpose of the legislature, in enacting the clause, was to make it so applicable, but our knowledge of this fact is not the kind of knowledge that we are permitted to use in the interpretation of an Act of Parliament, even if it were not an Act defining a crime punishable by fine and imprisonment.

Harris, J.

HARRIS, J.:—The plaintiff company carries on a liquor business in the city of Halifax, and was convicted, in November, 1914, for unlawfully causing intoxicating liquor to be sent from the city of Halifax to a person at Stellarton, in the county of Pictou, contrary to the provisions of part 1 of the N.S. Temperance Act, 1910, then in force in the county of Pictou.

Under a warrant of distress issued on this conviction, a cash register of the plaintiff's was levied upon. The plaintiff brought an action and re-took the property under an order of replevin, and by a special case two questions have been submitted to this Court for decision, viz.: (*a*) Do the information, conviction and warrant of distress referred to disclose an offence under the provisions of part 1 of the N.S. Temperance Act and Acts in amendment thereof? (*b*) If the preceding question is answered in the negative, is plaintiff entitled to the return of the cash register referred to herein?

Sec. 9 (which is in part 1) of the N.S. Temperance Act, as amended, reads:—

> No person shall by himself, his clerk, servant, or agent send or cause to be sent, or bring or cause to be brought from any place in the province liquor to or for delivery to any person in any municipality in which this part is in force other than to a vendor appointed under this part or a legally qualified physician, chemist or druggist.

Sec. 3 of the Act, as amended, provides that parts 1 and 2 of the Act shall "apply to every part of Nova Scotia . . . excepting . . . the city of Halifax."

This I take to be a plain legislative declaration that sec. 9, being in part 1 of the Act, is not in force in the city of Halifax, and nothing done in the city of Halifax can be considered an offence because it is forbidden by the first part of the Act.

The plaintiff corporation in the city of Halifax caused the liquor to be sent from the city of Halifax to Pictou County. Whatever it did was done in the city of Halifax. Sec. 9 makes it an essential part of the offence that the liquor should be sent from a place in Nova Scotia, and the charge is that the plaintiff caused the liquor to be sent from the city of Halifax to a person at Stellarton, in the county of Pictou, contrary to the provisions of part 1 of the Act. The sending or causing the liquor to be sent from Halifax is an essential part of the charge in this case, and as sec. 9 does not apply to the city of Halifax, I do not see how the conviction can be upheld.

It will not do to say that there was an offence in sending the liquor into Pictou from some point on the railway outside of the limits of the city of Halifax. That may be so, but it is not the offence charged, nor is it the offence for which the plaintiff was convicted. The charge and the conviction are for sending from the city of Halifax, and the question is not whether a good charge might have been laid under the circumstances. It is whether the charge laid and the conviction can be supported.

Under sec. 35 (2) it is provided that

Such prosecution may be brought before any magistrate having jurisdiction where the offence was committed.

This section has been amended by ch. 33, sec. 21, of the Acts 1911, and now it is provided that prosecutions for any offence under sec. 9 may be brought and carried on and a conviction had in the municipality from which any liquor is sent, shipped, brought or carried in violation of any of the provisions of the said sections or in the municipality to or into which such liquor is so sent, brought or carried.

But for this amendment, a prosecution for the offence charged against the plaintiffs would under sec. 35 (2), I think, of necessity have to be brought in the municipality from which the liquor was shipped, because that is where the offence was committed. That is why the amendment of 1911 was enacted.

But it was argued that no meaning can be given to sec. 9, unless it is held to apply to a case of this kind, and, therefore, we should hold it to cover the offence charged here.

That argument would have some force if the fact was as suggested, but we find that, under sec. 4 of the Act, it is provided that:—

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This Part (Part 1) shall not affect any *bona fide* transactions in respect to liquor between a person in any portion of the province in which this part is in force and a person in another province or in a foreign country.

There is no doubt that sec. 4 was enacted because it would be *ultra vires* for the legislature of Nova Scotia to prohibit the importation of liquor from another province, but that does not alter the meaning of the section. It means what it says—no matter what the reason was for its enactment—and if sec. 4 had not been enacted, the Court would have to say that importations of liquor from another province or from a foreign country were not prohibited by the Act.

Assume the Act to be in force in municipalities A. and B. in this province, and a person in municipality A. to import liquor from New Brunswick or from a foreign country, and then to ship it from municipality A. to municipality B. That would be a case within and prohibited by sec. 9. That being so, the argument that we should assume that the legislature intended to prohibit shipments from the city of Halifax to municipalities wherein the Act was in force, because, otherwise, the section would be meaningless, falls to the ground. If there had been any intention on the part of the legislature to prevent shipments from Halifax to municipalities wherein the Act was in force, it would, no doubt, have declared that sec. 9 was to apply to the city of Halifax. The legislature could have said that parts 1 and 2 of the Act (excepting sec. 9) should not apply to the city of Halifax, or it could have said that parts 1 and 2 should not apply to the city of Halifax, and have inserted sec. 9 in part 3 or some other part of the Act which did apply to the city of Halifax. But what was done was to expressly say that parts 1 and 2 "shall not apply to the city of Halifax."

Under the circumstances, I do not see how I can say—contrary to what the legislature has expressly said—that sec. 9 shall apply to the city of Halifax.

Another argument made by counsel for the defendant was that the legislature had shewn its intention that sec. 9 should apply to a case such as this because, by ch. 30 of the Acts of 1915, it is provided, that any licensee for the sale of liquors in the city of Halifax, who has been twice convicted for an offence against secs. 30 and 31 of the Act, should have his license can-

celled. Sec. 30 is in part 2 of the Act and prescribes the punishment for a violation of sec. 9.

We find, however, that the Act of 1915 was not passed until after the conviction in this case, and we must decide this case upon the law as it stood in November, 1914, when the alleged offence was committed.

It is also, under the authorities, clear that we cannot take what the legislature said in 1915 it then thought it meant to say when the Act of 1910 was passed. We must, according to all the rules of construction, ascertain the intention of the Act of 1910 by the words of the Act itself. It is the expressed intention which governs, and, so interpreting it, I am obliged to hold that sec. 9 does not apply to the offence charged.

I would, therefore, answer the first question in the negative and the second in the affirmative.

CHISHOLM, J., concurred with HARRIS, J.

LONGLEY, J., dissented.

Judgment for plaintiff.

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Quebec, Court of Sessions, City of Quebec, Langelier, J.S.P. April 29, 1916.

1. ABDUCTION (§ I—10)—INDUCEMENT OR PERSUASION—CR. CODE SEC. 315.

To constitute the crime of abduction of a girl under sixteen years (Cr. Code sec. 315), it is necessary to prove that the accused had taken an active part, through persuasion or otherwise, to induce the girl to leave. [*R.* v. *Jarvis*, 20 Cox C.C. 249, *R.* v. *Olifier*, 10 Cox C.C. 402, applied; see also *R.* v. *Blythe*, 1 Can. Cr. Cas. 263; *Re Johnson*, 8 Can. Cr. Cas. 243; *R.* v. *Holmes*, 16 Can. Cr. Cas. 7; *R.* v. *Yorkema*, 16 Can. Cr. Cas. 189.]

G. Chouinard, for Crown.

Alleyn Taschereau, for prisoner.

LANGELIER, J.:—The prisoner is accused of having illegally taken away against the will of her father Favrola Dinelle, aged less than sixteen years.

Langelier, J.

The facts sworn by the girl are as follows:—She has known the prisoner eight months; she quitted her domicile a Tuesday night in February last to go to the cartridge factory where she was employed. The same night after having left her work she met the accused on the street and asked him to take her with him to Montreal. He refused to take her, saying he would bring her the week after. Then she told him she was going to leave in spite of everything and when she was going to buy her ticket

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he paid for the same. When in Montreal they lived together and he tried to send her back home and she refused. The girl swore that the prisoner never induced her to run away with him, that she did it of her own accord.

Are these facts sufficient to constitute the offence of abduction?

The case of *The King* v. *Jarvis*, 20 Cox C.C. 249, is very similar to the present one. It was decided that to constitute the crime of abduction of a girl under sixteen years it was necessary to prove that the accused had taken an active part through persuasion or otherwise to induce the girl to leave her father's home; and the accused having taken only a passive part, having yielded to the suggestion of the girl, ought to be acquitted. In addressing the jury in that case, Mr. Justice Jelf said: "The question for you is whether the active part in the going away together was the act of the prisoner or of the girl; unless it was that of the prisoner, he is entitled to your verdict . . . for if she was determined to leave her home, and should the prisoner be convinced that that was her determination and insisted on leaving with him, and he yielded to her suggestion, taking no active part in the matter, you must acquit him."

In another case, *The Queen* v. *Olifier*, 10 Cox C.C. 402, Baron Bramwell expressed the same opinion:

"I am of opinion that if a young woman leaves her father's home without any persuasion, inducement or blandishment held out to her by a man, so that she got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of the Act, for the Act does not say he shall restore her, but only that he shall not take her away".

In the present case the prisoner never induced the girl to leave with him; on the contrary, she swore she was determined to leave in spite of everything. The prisoner is acquitted.

Charge dismissed.

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Ontario Supreme Court, Lennox, J. January 28, 1916.

1. CONSTITUTIONAL LAW (§ I D 3—95)—WINDING-UP ACT—DELEGATION OF COURT'S POWER TO REFEREE.

The Dominion Parliament, having power to legislate as to insolvency and the winding-up of insolvent companies, has power to determine upon the machinery by which they shall be wound up; sec. 110 of the Winding-Up Act (R.S.C. 1906, ch. 144), which empowers the Court, after

a winding-up order is made, to refer and delegate to any officer of the Court any of the powers conferred upon the Court by the Act, is no encroachment upon the constitutional appointive powers as to the judiciary (B.N.A. Act, sec. 96) and is not *ultra vires*.

[See also *Polson Iron Works* v. *Munns*, 24 D.L.R. 18 (Annotated); *Colonial Investment & Loan Co.* v. *Grady*, 24 D.L.R. 176, 8 A.L.R. 496.]

2. CORPORATIONS AND COMPANIES (§ VI A—315)—WINDING-UP ORDER—POWERS OF REFEREE—CONTRIBUTORIES—REVIEW.

A Judge, sitting in appeal from the findings of an official referee under the Winding-Up Act (R.S.C. 1906, ch. 144), respecting the liability of a contributory, has no jurisdiction to review the winding-up order made by a Judge of co-ordinate jurisdiction; unless it is discharged on appeal, under sec. 104 of the Act, it is binding on the creditors and contributories of the company and is authority for the referee to proceed, and except for error in the referee's report the Judge on appeal will not interfere.

[*Re Clarke and Union Fire Ins. Co.*, 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, followed.]

3. BANKS (§ V—128*a*)—DOUBLE LIABILITY OF SHAREHOLDERS—VALIDITY OF SUBSCRIPTIONS—PENAL PROVISIONS OF BANK ACT.

A shareholder of an incorporated bank cannot escape statutory double liability under sec. 125 of the Bank Act (R.S.C. 1906, ch. 29) by reason of any irregularity or illegality in the organization meeting, under sec. 13, or in relation to the certificate of the Treasury Board, under sec. 14.

Statement.

APPEAL by James R. Lindsay from the order of J. A. McAndrew, Esquire, an Official Referee, in a reference for the winding-up of the bank, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, confirming the placing of the appellant's name on the list of contributories. Affirmed.

W. Laidlaw, K.C., and *W. Nesbitt*, K.C., for appellant.

C. C. Robinson, for liquidator, respondent.

The Minister of Justice for Canada and the Attorney-General for Ontario were notified, but did not appear.

LENNOX, J.:—On the 25th January, 1911, an order of this Court was made for the winding-up of the bank "by the Court under the provisions of the said Winding-up Act and amendments thereto." By a subsequent order of the same date, after appointing a liquidator, it was "further ordered that it be referred to John A. McAndrew, Esquire, Official Referee, to take all such proceedings as may be necessary for the winding-up of the said the Farmers Bank of Canada."

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The order further provided and declared that "this Court doth hereby delegate to the said John A. McAndrew, for the purpose of winding-up the business of the said bank, all such powers as are conferred upon the Court by the Winding-up Act, and as may be necessary for the winding-up of the said bank."

The powers conferred upon the Court under the Winding-up Act may be exercised by a single Judge thereof (sec. 109).

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Both orders were subject to an appeal to the Appellate Division of our Supreme Court by "any person dissatisfied with the order or decision" (secs. 110, 101, and 102).

There was no appeal taken.

Pursuant to the order of reference, the Official Referee proceeded to settle the list of contributories, and placed the appellant, James R. Lindsay, upon the settled list as a contributory of the bank in respect of five paid-up shares of the capital stock, and $50 paid him in dividends which ought not to have been paid; and this has been reported to the Court.

The motion is by way of appeal from this report; but the argument, so far as it touches the order of reference, is, if I may say so, by way of appeal from the decision of the learned Judge who made the order.

Section 110 of the Winding-up Act provides that "after a winding-up order is made the Court may . . . by order of reference, refer and delegate . . . to any officer of the Court any of the powers conferred upon the Court by this Act."

Aside from the merits, the appellant argues: (a) that Parliament had no power to enact sec. 110; (b) and that, if sec. 110 is not *ultra vires*, the powers conferred by it were not properly exercised.

The first point is surely hardly debatable. It is pointed out in support of it that under the British North America Act Parliament appoints the Judges, pays their salaries, and they hold office during good behaviour; and it is assumed that, by reason of this, Parliament is compelled to leave all questions arising under its various statutes to the determination of these Judges, and this without assistance from the duly appointed officers of the Court. This opens a very broad field, and is clearly contrary to the hitherto unquestioned course pursued by Parliament since Confederation.

If called upon to decide the question, I feel no hesitation in holding that Parliament, having power to legislate as to insolvency and the winding-up of insolvent companies, has power to determine upon the machinery by which they shall be wound up, and can say that questions arising in connection with these companies or corporations shall either be wholly or partly ascertained, adjusted, or determined by the Court, or by an arbitration,

commission, board, or any other designated tribunal, and this either with or without reserving a right of appeal to the Courts.

It would be idle to dwell upon this. Cases in which this has been done and is being done, both by the Parliament of Canada and the Legislatures, are numerous, and it is enough to refer to the Dominion Railway Board, the Ontario Railway and Municipal Board, and, very recently in Ontario, the Workmen's Compensation Board; all of these bodies having jurisdiction over adjusting and determining questions formerly left to the determination of the Courts. It will hardly be seriously contended that in these and similar instances the legislation was not *intra vires*.

In support of the second objection, it is argued that, inasmuch as sec. 108 provides that "the proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the Court," there must be a practically rigid compliance with what is usually done in the trial or preparation of an action under the provisions of the Judicature Act, and I am referred to subsec. (1) of sec. 64 and to sec. 65 of the Judicature Act, R.S.O. 1914, ch. 56, and to secs. 2 and 48 of the Winding-up Act.

Section 48 says the list is to be settled by "the Court;" and, by sec. 2 (*e*), "the Court," in Ontario, means the "High Court of Justice." What the Court can do, as I have already pointed out, may be done by a single Judge (sec. 109).

As to sec. 48, the Court always settles, and upon this motion is now proceeding to settle, and will settle, the list of contributories; or take or direct the necessary proceeding to that end, subject of course to the right of appeal. "The action of the Master, which is always subject to appeal and revision, is the action of the Court:" judgment of Patterson, J., in *Shoolbred* v. *Clarke, Re Union Fire Insurance Co.* (1890), 17 S.C.R. 265, at p. 280. I can quite see that the proceedings should follow as nearly as may be the ordinary procedure of the Courts, but I am unable to see that this condition has been departed from. The *Union Fire Insurance Company* case, just quoted from, without more, is sufficient to answer the second objection, if indeed it should be dealt with upon this motion.

In that case, the order of the present Chancellor (see *Re Clarke and Union Fire Insurance Co.* (1887), 14 O.R. 618), after

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appointing a liquidator and directing that the security to be given by him be approved of by the Master in Ordinary, referred it to the Master in Ordinary to settle the list of contributories, take the accounts, make inquiries and reports, and do all necessary acts and give all necessary sanctions for the winding-up of the company's business. It was held that, in assigning to the Provincial Courts functions under the Winding-up Act, Parliament intended that they should be performed with the aid of its officers and by its ordinary machinery.

Speaking of the order there in question, Gwynne, J., 17 S.C.R. at pp. 268, 269, said: "I entertain no doubt that the order of the learned Chancellor of Ontario, which is the subject of this appeal, was a good and valid order under these Acts as the same are amended and consolidated in ch. 129 of the Revised Statutes of Canada . . . The objections taken to the form of the learned Judge's order appear to me of a purely technical character, affecting only matters of procedure, matters which are not, in my opinion, proper subjects of appeal to this Court. To speak of a reference to a Master of a matter which, according to the ordinary procedure of the Court, comes within his ordinary duty as a delegation by a Judge to a Master to do what it was the duty of the Judge himself to do, involves, in my judgment, a misuse of the term, a misconception of the intention of Parliament, and a misconception of the terms of the Act in which that intention is expressed."

Patterson, J., at pp. 278, 279, referring to what are now secs. 108 and 110, and to the latter as enacted to cover the objection as to so-called "delegation," says: "The ordinary procedure of the Court and the ordinary functions of its officers under the regular constitution and organisation of the Court, were not intended to be interfered with." And again: "The term 'delegation' is, to my apprehension, inaccurately used in this position."

I have not overlooked the fact that whether it could be left to the Master to settle the security to be given by the liquidator was the principal question raised in the Supreme Court, but the point here raised was very fully argued in the Court of Appeal (*In re Clarke and Union Fire Insurance Co.* (1889), 16 A.R. 161), and was presumably abandoned as hopeless.

The objections, assuming that they properly arise out of the motion, cannot be sustained. The order was clearly within the

powers conferred by the statute; and, if I may say so, with great respect, was providently made. But, even if I entertained a different opinion, the result would be the same. I have no jurisdiction to set aside the order or judgment of a Judge of co-ordinate jurisdiction.

In Halsbury's Laws of England, vol. 5, p. 394, it is said: "An abortive company which has not, in fact, been formed cannot be wound up as an unregistered company."

If, however, the Court does, without jurisdiction, make an order to wind up a company, the order cannot be treated as a nullity: and, unless and until it is discharged on appeal, it is binding on the creditors and contributories of the company, but not upon strangers. See also the judgment of Sir W. M. James, V.-C., in *In re London Marine Insurance Association* (1869), L.R. 8 Eq. 176, at p. 193.

The appeal is, as I have pointed out, to the Appellate Division, and the time for taking it is limited by sec. 104. While the order exists, it is authority for the Referee to proceed, and is binding upon me: *In re Arthur Average Association* (1876), 3 Ch. D. 522, at p. 529. All I can do—if the Referee has erred—is to give the judgment he ought to have given.

But I think the report of the learned Referee is right.

On the 18th day of July, 1904, by 4 Edw. VII. ch. 77 (D.), James Gallagher and four other petitioners and provisional directors "together with such others as *become shareholders*" were constituted *a corporation* by the name of "The Farmers Bank of Canada."

The Act of incorporation is in the form set out in schedule B to the Bank Act, and immediately upon incorporation these directors, with subsequent shareholders, became subject to the provisions of the Bank Act.

By sec. 5 of the Act of incorporation it is provided: "This Act shall, subject to the provisions of section 16 of the Bank Act, remain in force until the 1st day of July in the year one thousand nine hundred and eleven;" and sec. 16 of the Bank Act says: "If the bank does not obtain a certificate from the Treasury Board within one year from the time of the passing of its Act of incorporation, all the rights, powers and privileges conferred on the bank by its Act of incorporation shall thereupon cease and determine, and be of no force or effect whatever." By 4 & 5 Edw. VII.

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ch. 92 and 6 Edw. VII. ch. 94, the time for obtaining a certificate is extended until the 18th January, 1907.

The result at this point is that, by virtue of the special and general Acts, we have a banking corporation invested with certain rights, powers, and privileges which, without more, it will continue to enjoy until the 18th day of January, 1907, and which, even without the exercise of any of its powers, will continue to exist as a corporation until January, 1911. In other words, subject to the right of the Crown to take proceedings to revoke its charter, the power of Parliament to repeal its legislation, and the contingency of being wound up, the rights, powers, and privileges of the bank, on the one hand, and its corporate continuance, on the other, for the periods respectively mentioned, are absolutely fixed.

The 12th section of the Bank Act, R.S.C. 1906, ch. 29, says: "For the purpose of organising the bank, the provisional directors may, after giving public notice thereof, cause stock books to be opened, in which shall be recorded the subscriptions *of such persons as desire to become shareholders in the bank;*" and, in pursuance of this, stock books were opened on the 6th day of September, 1904.

On the 9th June, 1906, the appellant subscribed for five shares of the capital stock of the bank, and then or thereafter paid therefor, in full, $500. These shares were allotted to him on the 4th July, 1906; and all of this is regularly entered and appears in the said stock books. He had notice or knowledge of allotment, and received, and retains, his share certificate as the holder of five shares. See the appellant's evidence on the reference.

In his application he authorised the secretary to enter his name and sign the stock book for him. Down to this time no irregularity or illegality upon the part of the bank or its provisional directors is alleged; and upon the argument of the motion—and this is entirely in harmony with Lindsay's evidence—counsel for the appellant disclaimed reliance upon any contention that the subscriptions were unfairly obtained or that they were not *bonâ fide* subscriptions within the meaning of the Act. Subject to the preliminary objections as to sec. 110 being *ultra vires*, and the jurisdiction of the Referee, already dealt with, the sole contention is, that the appellant, although in fact a holder of shares under

a completed contract entered into in the terms of the bank's charter, and in strict conformity with sec. 12 of the Bank Act, is yet not "a shareholder," nor liable to be listed as a contributory, by reason of irregularities in connection with the organisation meeting of the 26th November, 1906, and the manner in which the certificate of the Treasury Board was obtained.

The meeting referred to was holden under the provisions of the 13th section of the Act, which states that so soon as a sum of not less than $500,000 of the stock has been *bonâ fide* subscribed, and not less than $250,000 "thereof" has been paid to the Minister of Finance, the meeting may be called. A sum of $250,000 was in fact paid to the Minister on the 23rd October, 1906.

Four weeks' notice of the meeting is to be given. The first publication of notice of the meeting appeared on the 24th October. It was called for the 26th November. Allowing for four weeks' publication, the first publication could as well have been on the 28th October.

Taking the figures given by counsel for the liquidator and not objected to, on the 22nd October there was $510,000 subscribed and $495,000 of stock allotted. By the 29th October, $560,900 had been subscribed for and allotted. The meeting being advertised according to the statute, and notice by post-card given to each subscriber, the appellant must be taken to have had notice, and, as against creditors, was bound by its action. He could easily have ascertained, if he did not know, all that is now alleged. He was a reader of the "Daily Globe," one of the newspapers containing the publication. The notice appeared in the "Globe" from day to day. He does not swear that he did not know of the meeting, that he did not attend it, or that he did not as a matter of fact know of the state of the accounts.

If the meeting of subscribers was duly called, what was done at it was the act of the corporation, of the appellant, and his associate subscribers. Allotment is not mentioned in the statute; and whether it is necessary or not depends upon the statute, or memorandum of association, if any, and the form of application: Burton, J.A., in *Re Standard Fire Insurance Co.* (1885), 12 A.R. 486, at p. 491; Lindley's Law of Companies, 5th ed., pp. 15, 760, 768; *Bird's Case* (1864), 4 De G. J. & S. 200; *Adams' Case* (1872), L.R. 13 Eq. 474; *Harward's Case* (1871), L.R. 13 Eq. 30. I do not

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think that the appellant can escape liability upon the ground of irregularities in this connection, if any there were.

Now as to the manner of obtaining the certificate. The sum of $250,000 was paid to the Minister before the 29th October; the appellant's contention does not turn upon this, but on the circumstance that all of it was not directly obtained in money from subscribers. Subscriptions amounting, it is said, to $189,400, were paid in cash, $25,915 by transfer of securities, and $291,310 by subscribers' promissory notes payable to the provisional directors.

Upon the pledge of these securities and the promissory notes or some of them, or upon notes alone, $100,000 was borrowed by W. R. Travers, who subsequently, on the 26th November, became managing director. The notes were endorsed by the payees, without recourse, and the bank did not purport to be, and was not, liable upon them. Out of the proceeds of this loan the difference between $189,400 and $250,000, or $60,600, was made up. To be exact, the whole $100,000 borrowed was paid to the Minister, as shewn by the cheques, and $150,000 taken out of the cash subscriptions; but the substantial fact is that the cash subscriptions were at the time more than $60,000 short. It is obvious that by the use of the word "thereof" in sec. 13 (as above) it was expected, and perhaps intended, that $250,000 would be collected from subscribers before the certificate of the Treasury Board would be obtained or applied for under sec. 15.

By sec. 14 of the Bank Act: "The bank shall not issue notes or commence the business of banking until it has obtained from the Treasury Board a certificate permitting it to do so.

"2. No application for such certificate shall be made until directors have been elected *by the subscribers to the stock* in the manner hereinbefore provided.

"15. No certificate shall be given by the Treasury Board until it has been shewn to the satisfaction of the Board, by affidavit or otherwise, that all the requirements of this Act and of the special Act of incorporation of the bank, as to the payment required to be made to the Minister, the election of directors, deposit for security for note issue, or other preliminaries, have been complied with, and that the sum so paid is held by the Minister."

The facts to be shewn to the Treasury Board were stated in a statutory declaration made by Travers and a letter written to the Minister on the 30th November, 1906. The statements in the declaration and letter may possibly be verbally true, but it is beyond doubt that the Minister did not understand the actual conditions at the time he granted the certificate. Whether he would or would not have issued the certificate if he had known how the money was obtained, I do not know. It is possible that, if the conditions had been candidly stated to him, including the substantial character of the subscribers generally, and that the shortage was not very large and was made up independently of the bank, he might have considered that the Bank Act had been substantially complied with. This point can only be a matter of conjecture. It is perhaps reasonable to infer that, if he had known the character of Mr. Travers as subsequently disclosed in the light of subsequent transactions, he would not have finally decided without further investigation.

For these causes the appellant contends that he was not a shareholder when the order for winding-up was made, or liable as a contributory under sec. 125 of the Bank Act. There is more to be said, and it is not favourable to the appellant; but, without more, I am clearly of opinion that the appellant was, and, in the sense of sec. 125 of the Bank Act, is, "a shareholder," and is properly placed upon the list of contributories.

It is said that there is no definition of "a shareholder" in the Bank Act. Why should there be? Upon a concluded agreement to sell and purchase shares, as here, I am unable to grasp the distinction attempted to be made between a holder of shares and "a shareholder."

It is argued that the certificate was fraudulently and illegally obtained. I am not able to go quite so far as that. It was certainly not honestly obtained. The provisional directors consulted a reputable firm of solicitors, and were advised that promissory notes could be legally accepted from subscribers in lieu of cash, in settlement for subscriptions. Under the circumstances, it could hardly be said that the provisional directors were intentional wrongdoers. It was open to them to apply for a certificate whenever they thought they were in a position to satisfy the Board that they had complied with the statutory conditions entitling

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them to have it. They were compelled to furnish such evidence of compliance as the Board might dictate. The Board was invested with judicial and discretionary functions, and it was for the Board, and not for the applicants, to say what evidence and what class of evidence of compliance should be furnished, and whether the statute had been complied with or not. The evidence was not all one way. The Board did not act without notice.

On the 8th October, 1906, some weeks before the organisation, Mr. Leighton McCarthy, K.C., a member of the House of Commons, wrote the Minister: "I have been consulted on behalf of a number of subscribers to the shares of the Farmers Bank, and from the instructions I have received a number of the subscribers will dispute the *bonâ fide* character of the subscriptions. I will therefore ask you to be good enough to stay any action which might be taken until I have an opportunity of discussing this with you," etc.

There were intervening telegrams and correspondence; and on the 19th October Mr. McCarthy again wrote: "I have received information that the alleged subscribers for shares paid a large sum of money in cash, and have signed notes for other large sums of money, and that the persons professing to act in the name of the bank have transferred notes and received the proceeds, and a deposit either has been or will be made of the cash received and the proceeds of these notes, or a sufficient amount to make up $250,000."

Mr. McCarthy subsequently wrote that the claims of his clients had been adjusted, but without qualifying the statement he had made as to methods generally being pursued by the agents of the bank. Information to the same effect was given to the Minister by Sir Edmund Osler and Mr. David Henderson, both members of the House.

On the other hand, the statutory declaration of W. R. Travers, subsequently filed with the Treasury Board, was submitted to the Department of Justice, and the Deputy Minister wrote the Minister: "In reply I beg to state that the statements in the statutory declaration of Mr. Walter R. Travers are sufficient, *if they are accepted*, to shew compliance with the statutory provisions, and that the evidence thus afforded is such as the Treasury Board may lawfully accept under the Act, and thereupon issue to the bank a certificate under section 14 of the Act."

But what had been represented to Mr. Fielding (the Minister of Finance) perhaps caused him to hesitate still. That he acted in the utmost good faith, and, as it appeared then, in the public interest, I have no doubt at all; but, as it turns out, I fear he acted injudiciously in accepting the verbally accurate but evasive and misleading letter of Mr. Travers as sufficient evidence to supplement his statutory declaration and turn the scale; and, as a consequence, to quote from the official record: "It having been shewn to the satisfaction of the Board that all the requirements of section 15 of the said Act have been complied with, the Board authorise the issue of the certificate applied for."

Accordingly a certificate was issued "permitting the Farmers Bank of Canada to issue notes and commence the business of banking," on the 30th November, 1906. It is only fair to remember that this was during a session of the House, when the calls upon the Minister's time are insistent and incessant, and the strain from overwork very great.

Well, supposing there was error, and that the certificate ought not to have been issued? The business has been carried on by the appellant and his associated subscribers, and the certificate has never been attacked or set aside. Can I say now that the action of the designated tribunal was null and void, and that the bank, although already incorporated, never became a legal entity *for the transaction of business?* What is happening in the Courts all the time, and what Court is invested with the quasi-statutory and plenary authority of the Treasury Board? All the evidence may not have been adduced, or it may have been misleading or perjured, or the Judge may have erred in fact or in law; but the parties must abide by the judgment or get rid of it. If the appellant's contention is well-founded, the logical result would be, not that he ceased to be a shareholder on the 30th November, 1906, but that no debts were subsequently incurred, and the so-called creditors are not entitled to rank even upon the visible assets of the bank.

It was not discussed by counsel, and it has not become necessary for me to consider, whether, a sum of $500,000 and upwards having been subscribed, and promissory notes converted into money, without liability upon the part of the bank, it can, or cannot, be said that a sum of not less than $250,000 "*thereof*" was

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paid to the Minister in literal compliance with the terms of the Act. If this question can be answered affirmatively—and I am very far from concluding that it may not be—there is not much to criticise in the statutory declaration filed.

The same cannot be said of the letter to the Minister. The solicitor's advice would in no way justify a reply which was deliberately intended to mislead as to a question of fact.

This question is not settled by *Cass* v. *Ottawa Agricultural Insurance Co.* (1875), 22 Gr. 512. In that case "the company received the notes as payment, and had reckoned them as cash in estimating the amount of capital stock paid-up," raised money on them by pledging the liability of the company, and was compelled to take up and still held several of them. Proudfoot, V.-C., is careful to refrain from committing himself to an opinion upon such conditions as we have here, and says, at p. 517: "Whether it be competent for the company to accept notes as cash or not, I take it to be quite clear that borrowing money on the credit of the company to pay the 10 per cent. is beyond the powers of the company; and that is not a compliance with the requirement of the statute that 10 per cent. be paid; and that under such circumstances the company had no right or authority to assume to commence business—that it is a fraud upon the Act."

In that case the company commenced business without having in hand the prescribed statutory capital; in this case it did not.

It is hardly relevant, but I cannot refrain from interjecting that it was not the acceptance of these notes, but the subsequent diversion of the bank's funds to speculative schemes, coupled with mismanagement and extravagance, which caused the failure of the bank.

The argument is pressed further, and it is predicated upon the proposition that where a statute contains specific provisions or conditions, coupled with penalties for their infraction, if these provisions or conditions are violated, all that is founded upon them is *ipso facto* null and void; and, applying this, I am referred to secs. 132 and 157 of the Bank Act as penal provisions violated in applying for the certificate. The argument was not directly challenged. I need not pause to consider whether, as the enunciation of a principle of law, this argument is well-founded to all intents; it can better be disposed of as a question of fact.

Section 157 imposes a fine or imprisonment, or both, for "offences against the Act;" and sec. 132 enacts that the person who does certain things "is guilty of an offence against this Act;" but sec. 132 does not touch the manner of obtaining a certificate to issue notes or carry on a banking business, but provides only that "every director or provisional director of any bank and every other person, who, *before the obtaining* of the certificate . . . issues or authorises the issue of any note of such bank, or transacts or authorises the transaction of any business in connection with such bank, except such as is by this Act authorised to be transacted before the obtaining of such certificate, is guilty of an offence against this Act"—something which is not alleged to have been done here; and it seems to me that the appellant, retreating to this fortification, is occupying a veritable house of cards.

It does not follow that the appellant, as "a shareholder," upon proceedings taken while the bank was a going concern, was without remedy, *against the bank or its directors*, if the certificate was improperly obtained or its business was being carried on illegally or contrary to the charter or the Bank Act. The cases referred to on the argument and many other shew this; but not to the prejudice of the accrued rights of creditors, and not after the winding-up order is made.

Until he repudiates and takes action the appellant is one of the incorporated wrongdoers, and the remedy is *inter se*. If he sleeps on, as the appellant did, and, with some knowledge, as he admits, of irregularities and of litigation initiated long before the certificate issued, retains his share certificates, knows of the opposition at Ottawa, and does nothing (see his evidence), attends a shareholders' meeting as late as February, 1908, and concurs in its action, as a shareholder draws dividends which were never earned, and pointedly refuses, through his counsel, to refund them, he is perhaps too late to obtain any remedy after the order for winding-up, and certainly to have redress to the prejudice of creditors whose losses he and his business associates have been instrumental in bringing about. See cases collected in Halsbury's Laws of England, vol. 5, p. 131, para. 211; also *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325, followed in *Morrisburgh and Ottawa Electric R.Co.* v. *O'Connor* 23 D.L.R. 748, 34 O.L.R. 161. Condi-

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tions change after a winding-up order: *Re Faulkner Limited, City of Ottawa's Claim* (1915), 25 D.L.R. 780, 34 O.L.R. 536.

To exonerate the shareholder would be in effect to annul the contract between the bank and its creditors. A transaction with a company, impeachable on the ground of being *ultra vires*, can only be set aside (or ignored) when both parties can be restored to their original positions: *In re Irish Provident Assurance Co.*, [1913] 1 I.R. 352.

The decision in *Re Standard Fire Insurance Co.*, 12 A.R. 486, was, that as to Kelly, Barber, and Copp there was no completed contract; they never became shareholders, and could not be made contributories; but there was a completed contract with Caston, and it was held that he was properly upon the list of contributories.

This does not help the appellant.

Page v. *Austin* (1884), 10 S.C.R. 132, 170, *Cass* v. *Ottawa Agricultural Insurance Co.*, 22 Gr. 512, *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada* (1892), 21 S.C.R. 72, and *In re Ontario Express and Transportation Co.* (1894-5), 21 A.R. 646, 24 S.C.R. 716, are wholly irrelevant to the issues here, and are cases in which intervening rights of creditors do not arise.

In *Page* v. *Austin*, the action of the company in purporting to issue new stock before the original stock was paid for in full, was as clearly *ultra vires* as it would be for an ordinary partnership firm to issue so-called stock in the firm name. What was called "new stock" never had a legal existence. The *Ontario Express Company* case is the same. In *Sinclair* v. *Brougham*, [1914] A.C. 398, the Birkbeck Company assumed to establish a collateral deposit and banking business. It was not covered by or incidental to the business it was authorised to engage in. Moneys were taken in on deposit, and losses resulted. It was held that the shareholders in the authorised company were not liable.

The *Cass* case indicates what I said above, that the Courts will, at the suit of a shareholder, restrain a company, before or after it has obtained a certificate, from carrying on its business in violation of its charter or Acts of Parliament affecting it, and it does nothing more, unless it be to establish that a company's violation of its chartered rights or powers, and misrepresentation

in obtaining its certificate, does not change the status of its shareholders; they are shareholders just the same; and it was because Mr. Cass, notwithstanding what had been done, was still a shareholder, that the Court held that he could individually maintain the action.

The *Dominion Salvage and Wrecking Company* case is again an action in restraint, to *prevent* the company from acting *ultra vires*, and taken while matters were *in fieri;* and establishes, as well, that the Crown alone can proceed to annul the incorporation or certificate; and on the other hand that it was open to the Crown, as in this case, to take proceedings if it appeared that the certificate was improvidently issued, or for any other sufficient cause. See also *Bank of Hindustan* v. *Alison* (1871), L.R. 6 C.P. 222; *Peel's Case* (1867), L.R. 2 Ch. 674; *In re Nassau Phosphate Co.* (1876), 2 Ch. D. 610. *Appeal dismissed.*

QUAST v. GRAND TRUNK PACIFIC R. CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, McCarthy and Hyndman, JJ. May 10, 1916.

1. RAILWAYS (§ II D 6—71)—INJURY TO ANIMALS AT LARGE—UNFENCED TRACK—NEGLIGENCE OF OWNER.

The word "negligence" in sec. 294 (4) of the Railway Act (R.S.C., 1906, as amended by 9-10 Edw. VII, ch. 50, sec. 8), is not used in the sense generally attributed to it in common law. An owner is not necessarily negligent because he leaves a large number of cattle near a railway in charge of one man. In considering the alleged negligence of the owner, the absence of a fence which the railway company was legally liable to erect should not be taken into account.

[See also *Waite* v. *G.T.P. R. Co.*, 27 D.L.R. 549.]

Statement.

APPEAL from a judgment in favour of plaintiff in action under the Railway Act (R.S.C. 1906, ch. 37, sec. 294 (4), as amended by 9-10 Edw. VII, ch. 50, sec. 8), for injury to animals running at large.

C. H. Grant, for plaintiff, respondent.

N. D. Maclean, for defendant, appellant.

Stuart, J.

STUART, J.:—I think there was ample evidence in this case to justify the inference that the defendant's railway was under operation at the point where the animals were found dead, and that they were killed by a passing train, even though no train was shewn to have recently passed. Also there is no evidence at all that the railway was merely under construction.

It is to be remembered that sec. 294, sub-sec. 4, places liability upon the railway company even if it has the best possible fence unless it establishes negligence. And it would be improper in

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my opinion in judging of the degree of care to be demanded of the owner, to take into consideration the absence of a fence, because I do not think that the railway company have a right to demand that its own breach of its statutory duty should be taken into consideration by the owner.

It is also a matter for observation, it seems to me, that the word "negligence" in sec. 294 is apparently not used in the full sense generally attributed to it in the common law. Negligence is generally defined as a breach of duty to take reasonable care with reference to the rights of another party giving rise to a right to sue for damages in that other party. Here the owner's negligence, even if existing, does not give a right of action to the railway company. The negligence of the owner referred to in the section is rather a negligence of his own interests, a failure to take reasonable care of his own property.

I am, therefore, unable upon the evidence adduced to say that the plaintiff was negligent in looking after his horses. I should hesitate to say that in this new country where large herds of cattle and horses are constantly being handled that an owner is not using reasonable care of his animals when he leaves 47 of them in charge of one man. I am much mistaken if it is not frequently done by stockmen and by men considered to be reasonably careful. At any rate, as Hyndman, J., points out, there is no evidence in the case to shew how many men would be reasonably required to look after such a number of animals properly. That being so I think the defendant failed to establish negligence.

But I cannot refrain from commenting upon the danger and unfairness liable to arise from the statute in casting the burden of proof upon the company, a danger and unfairness especially exemplified in this case. The statute leaves it open to an owner who knows all the facts, to conceal them, to refrain from producing witnesses whose identity and whereabouts are known to him alone, and simply to wait for the company to prove if it can something which is not within its knowledge, and the witnesses necessary to prove which may be to it both unknown and unavailable. It is a case where it would in my opinion be eminently desirable if the Court could exercise a power, not merely to umpire the game in the old way, but to investigate the real truth of the matter, and force the production of the necessarily existing evidence.

Nevertheless for the reasons given I think the appeal must be

dismissed with costs. With regard to the cross-appeal I think this also should be dismissed. I think the trial Judge was quite right in accepting practically the value placed upon the stallion by the plaintiff before the action was brought.

SCOTT and MCCARTHY, JJ., concurred.

HYNDMAN, J.:—It is clear that the railway company did not fence its right of way as required by the Railway Act, and this is one of the cases in which a railway company is liable for damage to the owner of cattle or horses killed on the track, unless such animals get at large, "through the negligence or wilful act or omission of the owner or his agent or the custodian of the animal or his agent."

It would seem to me to be, to say the least, a most careless thing to allow one man (Hanson), to take these horses, 47 in number, to the point mentioned, namely, a pasture or open space close to the unfenced railway track six miles away from the town, through a new, rough, wooded, and in places, boggy country, especially as the horses were strange, and one of them a blood stallion worth, as the plaintiff contended at the trial, $1,500. I would think that at least two men would be necessary to herd so large a number properly and safely, and it may have been due to this lack of ability of Hanson, or any one man, for that matter, to properly guard them, that accounts for their getting on the track and the consequent death of the four in question.

Still, there is no evidence that such an act would constitute negligence, or that it was a foolish or careless thing to allow. It would seem to me under all the circumstances that it should be considered so. However, the defendant might have produced expert witnesses to this effect and they have not done so, and the Court can be guided only by the evidence on such a question.

The Railway Act imposes the duty in such a case on the railway company to prove that the animals were at large through the negligence or wilful act or omission of the owner. This onus they have not discharged.

These remarks are of course made on the assumption that the railway company, though guilty of a breach of the statutory duty to fence, can take advantage of sec. 294, sub-sec. 4 of the Railway Act. If, however, they are liable under sec. 427 in any event, then the case for the plaintiff is all the stronger. It is doubtless a very harsh provision on the railway companies, as generally all

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knowledge of the matter is in the hands of the plaintiff or his agents or servants.

I understood counsel for the defence to say that he did not seriously contend that it was questionable whether the animals were in fact killed by a train. I think the conclusion is irresistible that such was the case. I would therefore dismiss the appeal with costs here and in the Court below.

I would dismiss the plaintiff's cross-appeal to increase the amount of damage, without costs. *Appeal dismissed.*

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COOK v. KOLDOFFSKY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. February 7, 1916.

1. MECHANICS' LIENS (§ III—13)—PRIORITY OVER MORTGAGE—INCREASED VALUE.

Sec. 8 (3) of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, gives a lien priority over mortgages upon the increase in selling value of land by reason of work or service done thereon or materials supplied. Sec. 14 gives priority to a lien which has been registered or of which written notice has been given to the mortgagee upon the land itself, including the buildings and erections thereon, over all subsequent advances under a mortgage.

The priority of an unpaid vendor is not forfeited by the substitution of a mortgage for the unpaid amount.

Actual notice not in writing is not sufficient to give a lien the priority over mortgages provided under sec. 14

[*Kennedy* v. *Haddow*, 19 O.R. 240; *Cook* v. *Belshaw*, 23 O.R. 545; *Locke* v. *Locke*, 32 C.L.J. 332, referred to; see also *Champion* v. *The World* (B.C.), 27 D.L.R. 506; *Cut-Rate Plate Glass Co.* v. *Solodinski* (Ont.), 25 D.L.R. 533; *Colling* v. *Stimson & Co.* (Alta.) 10 D.L.R. 597; *Anderson* v. *Kootenay*, 18 B.C.R. 643; *Rat Portage Co.* v. *Hewitt* (Man.), 6 D.L.R. 871.]

Statement. APPEAL by the defendants, mortgagees, from the judgment of an Official Referee, in an action to enforce a mechanic's lien, finding the liens of the plaintiff and other claimants established, and giving them priority over the appellants upon the increased selling value of the land. Reversed.

G. T. Walsh, for appellants.

W. A. McMaster, for the plaintiff and other lien-holders, respondents.

S. H. Bradford, K.C., and *J. H. Campbell*, for other lien-holders, respondents.

A. Cohen, for other lien-holders, respondents.

NOTE.—Sections 8 and 14 of the Act are as follows:—

8.-(1) The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

(2) Where the estate or interest upon which the lien attaches is leasehold the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the

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The judgment of the Court was delivered by

HODGINS, J.A.:—The Official Referee finds the liens established and has given them priority upon the increased selling value of the land, which increase he puts at the exact amount of the liens. The mortgagees object to the priority given, while a counter-attack is made on their position as to some of the mortgage-moneys.

One of the mortgagees, E. J. Kaake, owned the lands, and had agreed to sell them to Joseph Rosenfeld. Whether or not he conveyed them to him before payment of the amount due is not clearly shewn; but on the 20th May, 1914, Rosenfeld granted them in fee to Koldoffsky, and the latter makes all the mortgages in question as owner. He admits, however, that he is only a chargee, and that the real owner is Rosenfeld. This the mortgagees were aware of, through their solicitor, before any money was advanced on these mortgages, and the evidence is sufficient to satisfy me that they had actual notice of the liens when the four mortgages were registered and the moneys advanced thereunder.

The mortgages are five in number. One, described as a temporary one, is dated the 17th July, 1914, registered the 18th July, 1914, for $1,050, to James Kaake; and the other four, for $1,125 each, are upon the several houses on the land, two being held by James Kaake and two by E. J. Kaake. They are all dated the 1st September, 1914, and registered the 4th September,

owner upon the claim of lien at the time of the registering thereof, verified by affidavit.

(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

14.-(1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.

(2) Where there is an agreement for the purchase of land, and the purchase-money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) Except where it is otherwise provided by this Act no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lien-holders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro ratâ* according to their several classes and rights.

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1914. Prior to their registry, and subsequent to the registration of the $1,050 mortgage, Brown Bros. registered a lien for $182.55. All the other liens and the certificates of lis pendens were registered subsequently. In this action all lien-holders have proved their claims, and no question of parties nor other technical objection has been raised.

The financial transactions regarding these mortgages are as follows. On the $1,050 mortgage James Kaake advanced $886.37 on the 20th July, 1914, by his solicitor's cheque. This is produced, and is payable to J. & S. Rosenfeld or bearer. The solicitor swears that J. Rosenfeld got the cheque. There is no endorsement nor any proof as to who actually got the money, but it is presumed that J. Rosenfeld obtained it. Koldoffsky apparently raises no objection, and it may have been spent in paying for work or material on the building. Then $101.08 was paid by the solicitor to George Kaake on the 23rd July, 1914. The balance, $62.55, was retained, it is sworn, for interest from the 17th July, 1914, to the 1st September, 1914, when the mortgage was paid off. There is no rate of interest specified in the mortgage.

As to the four mortgages of the 1st September, 1914, two of these were on the west pair of houses, in favour of E. J. Kaake. He retained out of the moneys secured by these two mortgages the sum of $1,618.13 for principal and interest due himself on the agreement of the 28th April, 1913, whereby he had sold the whole of the land to Rosenfeld. He, or rather George Kaake for him, gave a cheque for the balance, $631.87, to his solicitor, who thereupon paid George Kaake the sum of $803.20. This more than absorbed the $631.87. George Kaake said that this amount was due to him for moneys due by Rosenfeld, some details of which he gives. Out of the mortgages on the two east houses James Kaake retained the amount of the $1,050 mortgage, and handed over $1,200 to his solicitor, who had to draw from it, towards the $803.20 paid to George Kaake, the sum of $171.33, leaving $1,028.67. Of this, amounts totalling $943.67 were paid for work on the four buildings, leaving $85, which the solicitor retained for money due him by Rosenfeld and for his fee in "placing" these mortgages.

None of these items were objected to before us, except: (1) $1,618.13; (2) $1,050; (3) $803.20.

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As to (1) and (2) the point made was that they were in fact prior charges or mortgages under sec. 8, and as to (3) that it was not a proper advance as against the lien-holders, because the mortgagees and the payee were aware that there were liens existing, although, except that of Brown, not registered.

As to (1), it was not a "payment or advance" under the mortgages, but its inclusion therein meant that the mortgagee took another security for its payment. When the work began, it formed a prior charge; and the right of the lien-holders in this action to have it so treated could not be modified by the action of the mortgagee, who released his vendor's lien as against the owner of the land; nor could its satisfaction by the taking of the subsequent mortgages prevent it from being, as to lien-holders, a prior charge within sec. 8: see *Locke* v. *Locke* (1896), 32 C.L.J. 332, *per* Ferguson, J.

The judgment in appeal has allowed as against the mortgagees the whole amount of the liens as a prior charge on the increased selling value, which is equivalent to a finding that the selling value was increased to that extent. No claim in this respect is made in any lien or by any statement of claim, but the mortgagees were parties to the proceedings, and the appeal was argued as if it had been properly before the Referee. If there were any evidence at all directed to this issue, the judgment might be supported; but, under the circumstances, the matter must be referred back to allow the evidence to be given if the parties desire.

It may, therefore, be proper to deal with the question of priority on increased selling value, so that, when it is resumed before the Referee, it may be properly dealt with.

The provisions of sec. 8 (3) and those of sec. 14 are not necessarily in conflict. Section 8, sub-sec. (3), deals with the land itself, or with an estate or interest in it which may be possessed by persons to whom the description of "owner" is applied under sec. 2 (*c*); and prior mortgages or charges, under the decisions, mean those mortgages or charges which existed upon the land or those interests before the work began, because by sec. 6 the lien attaches then, and it may then be at once registered (sec. 22): *Kennedy* v. *Haddow* (1890), 19 O.R. 240; *Cook* v. *Belshaw*, 23 O.R. 545. The lien given as against the prior mortgagee or chargee

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is not, however, given upon the land, but upon the value which has been produced by way of increase, over that which the land itself previously had, by the subsequent doing of the work or the placing of the materials; and this value is not that which represents the actual value or cost of the work, etc., in itself, but the amount which it adds to the selling value.

Under sec. 14, the lien has priority over mortgage advances made after the lien-holder has notified the mortgagee in writing of his lien or has registered it, and in the latter case the lien-holder is deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, the application of which is, however, limited (sec. 21).

Under sec. 14, the priority gained is on the estate of the owner or mortgagee in the land itself, and is positive, and is irrespective of any increased value given to the selling value by the work done, and so is not within the provisions of sec. 8, although the mortgage has priority by virtue of the Registry Act: *McVean* v. *Tiffin* (1885), 13 A.R. 1.

"Prior," in sec. 8, means before the work, etc., commences, because the land dealt with is described as incumbered land, and the nature of the incumbrance as a prior mortgage or charge. The reason why the increased value is not an element under sec. 14 is well explained by the Chancellor in *Cook* v. *Belshaw* (*ante*). It is paid for by the mortgagee by the periodical payments which are supposed to reach the lien-holders until they, by the registration of their lien, give notice that they are unpaid. It would be impossible to hold that a mortgage or charge or part of it which became "prior" by virtue of the Registry Act, under sec. 14, was a "prior mortgage or charge" in whole or *pro tanto* under sec. 8. To do so would present the curious spectacle of a mortgage or charge, prior in whole or in part as an incumbrance upon the land and buildings, as against the lien, and yet subsequent to it in whole or in part as to the increased selling value. The priority acquired under sec. 14 over the lien is upon the land, including the buildings and erections thereon. Both the lien and the mortgage are, therefore, charges upon the same thing; and, as increased selling value is derived from the buildings or erections, it cannot exist as a separate element under the conditions of that section. The true principle is to treat sec. 8 as confined to those

mortgages and charges which existed before work began, by reason of which increased selling value may arise, and sec. 14 as dealing with priorities among competing claims, all arising after work has commenced, and upon land and buildings together.

Whether the increase in the selling value upon which the lien is given, when once ascertained, is affected by the result of an actual sale, is not now before the Court, and it is unnecessary to express any opinion upon the subject.

An example of a case where the selling value was not increased by work done subsequently is to be found in *Kennedy* v. *Haddow* (*ante*).

Applying these considerations to this case, the mortgagee E. J. Kaake must be held, as to the $1,618.13, to be holder of a prior charge to that extent.

As to (2) the evidence as to the advances thereunder is very unsatisfactory. The mortgage is dated the 17th July, 1914, and is registered on the 18th July, 1914. From the evidence given, work was then going on and material being delivered, as Brown, the Watt company, Lantz & Silver, had all commenced some time previous to July, 1914. Cook began about August, 1914. If the mortgage had been discharged, and the amount included in the subsequent mortgage, it would be postponed to the liens. But I think the mortgagee can resort to the $1,050 for priority if he can establish it. Some more satisfactory case must, however, be made shewing an actual *bonâ fide* payment or advance of the $886.37, with the assent of Koldoffsky, to the Rosenfelds for the purpose of the buildings. The same remarks apply to the propriety of the payment to George Kaake of $101.08, which needs to be more definitely established.

It is probable that the amount included for interest will not be maintainable. As the case must go back, I am disposed to allow this mortgagee a further opportunity to prove a prior claim under sec. 14 for this $1,050, at his own expense, if he can. It is not, however, a prior charge within sec. 8.

As to (3) the remaining amounts purporting to be secured by the mortgages, it is clear that as to those two held by E. J. Kaake the balance of $631.87 was more than exhausted by the payment of $803.20 to George Kaake. It was his cheque for that amount that was brought to the solicitor, and the reasonable inference

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is that he got it back. As to James Kaake's mortgages on the two eastern houses, the payment of the balance of $171.33 (part of the $803.20) stands in the same position as the $631.87. The whole $803.20 was, however, paid out by the mortgagees, and the question arises whether anything short of written notice or registration will enable the lien-holders to dispute its priority to the liens other than that of Brown. The provisions of sec. 14 are definite. The lien has priority over "all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided."

By sec. 21: "Where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act."

Registration, under sec. 21, enables a lien-holder to secure the advantages given under the decisions upon the Registry Act which prevent a prior registered instrument holding its position if the person claiming under it had actual notice of the lien before its registration. See *McVean* v. *Tiffin*, 13 A.R. 1; *Reinhart* v. *Schutt*, 15 O.R. 325; *McNamara* v. *Kirkland* (1891), 18 A.R. 271.

Under sec. 14 actual notice is not provided for, but only registration, or in lieu thereof written notice. If under it actual, though not written, notice were sufficient, then it would be idle to specify that the notice must be in writing, for that is necessarily actual notice. And, when the alternative to written notice is registration, it cannot be said that actual notice will suffice, or that payment before registration has not priority, as stated in the section, but has priority only if made before registration without actual notice. The Registry Act does not apply to a lien unless it is registered, for its application is by sec. 21 predicated upon registration; and, if registered, the protection in sec. 14 is absolute. While a registered lien-holder is a purchaser *pro tanto*, and within the provisions of the Registry Act, sec. 21 restricts the application of that Act to him unless the Mechanics and Wage-Earners Lien Act otherwise provides. That Act only gives him the status of a purchaser whose right to interfere with a prior instrument depends upon actual notice of the instru-

ment, i.e., the lien when registered (sec. 72 of the Registry Act, R.S.O. 1914, ch. 124) or upon the absence of actual notice to him of a prior unregistered instrument.

It seems to me, where there is in the Mechanics and Wage-Earners Lien Act a definite provision dealing with mortgages, whether registered or unregistered, and providing that payments or advances under them may be defeated by a registered or unregistered lien in one of two ways, that such a provision overrides any other right accruing from or arising out of the Registry Act, which deals solely with priorities as between instruments. The fact that the Mechanics and Wage-Earners Lien Act merely confers the status of a purchaser *pro tanto* upon a registered lien-holder, and excludes the Registry Act in other respects, indicates that where there is a specific provision in the former Act it must be read as exclusive of any other provision of the Registry Act.

While actual notice was shewn, there was no written notice proved here, and, except in the case of the Brown lien, no prior registration of any lien; and so the payment of $803.20 becomes a protected payment or advance. And this will apply to the payments making up the $1,050 mortgage, if they are satisfactorily established. The remaining items, $1,028.77, almost all of which were paid to other lien-holders, are not, apparently for that reason, attacked, and must, therefore, be allowed as protected payments on the mortgages, which as to them will stand prior to all the liens, except the Brown lien, which was registered before the mortgages. This leaves the position of the mortgagees in this way:—

E. J. Kaake (1) holder of a prior charge under sec. 8 for $1,618.13.

E. J. Kaake (2) holder of two mortgages for the two west houses for $631.87, as to which he is prior to all liens other than the Brown lien.

James Kaake (1) holder of a mortgage on all the houses for $1,050, or so much thereof as is proved to have been in fact advanced to or on account of the mortgagor or Rosenfeld, as to which he is prior to all liens.

James Kaake (2) holder of a mortgage for $1,200 on the two east houses, which is prior to all the liens except the Brown lien.

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The appeal must be allowed. The judgment will be set aside except in so far as it finds the amounts of the liens which are not disturbed. The matter will be referred back to enable the Referee to deal with the claim made by the lien-holders to have priority on the increased selling value, and with the priority or otherwise of the $1,050 mortgage, and to pronounce the proper judgment. The present judgment directs the Master in Ordinary to conduct the sale. If this is an error, it may now be corrected.

The parties should bear their own costs of the appeal, as, while the mortgagees succeed as to the increased value, the amount due them has been varied. *Appeal allowed.*

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Re LAND REGISTRY ACT.

British Columbia Supreme Court, Macdonald, J. April 11, 1916.

1. STATUTES (§ II A—95)—INSTRUMENTS—SIGNATURE BY COMPANIES—COMPLIANCE WITH COMPANIES ACT.

Sec. 76 of table A of the Companies Act, R.S.B.C. 1911, ch. 39, requires an instrument not only to be signed by two directors but also by a secretary who is not one of such directors, and the seal only becomes effective to bind the company when accompanied by compliance with such requirement.

[*Aggs* v. *Nicholson*, 25 L.J. Ex. 348; *City Bank* v. *Cheney*, 15 U.C.Q.B. 400; *Re Barneds Banking Co.*, L.R. 3 Ch. 105, distinguished.]

2. DEEDS (§ I A—1)—CONVEYANCE BY COMPANY—IRREGULARITY APPARENT—DUTY OF REGISTRAR AND OTHER PARTIES.

Parties dealing with a company must be taken to have read the general Act under which the company is incorporated and also to have read the articles of association, so if the articles have not been complied with and such non-compliance appears on the face of the instrument, the registrar examining the title is bound to consider its effect.

[*Re County Life Ass. Co.*, L.R. 5 Ch. 288, referred to.]

Macdonald, J.

MACDONALD, J.:—Petitioner applies for an order directing the registrar to register a deed from the Burrard Trust and Loan Company, Ltd. The registrar refused to register such deed, on the ground that it was not properly executed. It is admitted that table "A" of the Companies' Act, being ch. 39, R.S.B.C., is applicable to and forms part of the regulations for the management of the company—clause 76 thereof provides as to execution of instruments that:—

> The seal shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and *these two directors and secretary or other person as aforesaid shall sign every instrument* to which the seal of the company is so affixed in their presence.

The deed in question has the seal of the company affixed and is signed by H. M. Daly and E. A.C. Studd as directors of the company and by the said Studd also, as secretary of the company.

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The question is whether this execution is sufficient. The registrar was not required to inquire into the regularity of the proceedings antecedent to the execution of the instrument, and I am assuming that it is within the scope of the powers of the company. If the deed is on its face regular, parties dealing with the company have a right to presume that the seal has been duly affixed, that the directors were duly appointed, and their signatures duly made: Palmer's Company Law, 9th ed., p. 257. While this presumption exists, still the parties so dealing with a company must be taken "to have read the general Act under which the company is incorporated and also to have read the articles of association" *vide: Re County Life Assurance Co.*, L.R. 5 Ch. 288 at 293, so if the articles have not been followed in the execution of a deed and such non-compliance appears on the face of the instrument a registrar examining the title is bound to consider its effect. It is contended that as to this deed, clause 76 has not been complied with, and that it required the instrument not only to be signed by two directors but also by a secretary who is not one of such directors. In my opinion, the seal only becomes effective to bind the company, when it is accompanied by such compliance with clause 76. It requires that not only should the seal be affixed but there should also appear the signatures of two directors and the secretary or such other person as may be appointed by the board of directors to be present at the affixing of the seal. Counsel for the petitioner in the first place submits that the signature of the secretary is only directory and is not essential, in order to render the instrument valid. It is apparently conceded that two directors must sign but that the secretary is in a different position. The cases of *Aggs* v. *Nicholson*, 25 L.J. Ex. 348, and *City Bank* v. *Cheney*, 15 U.C.Q.B. 400 (approving of the latter case), are cited in support of this contention. I do not think that they are in point and the facts are distinguishable from the cases supporting the statement of the law found in Hals. Laws of England, Vol. 10, p. 392, as follows:—

> Where by the constitution of a corporation any special mode of execution of its deeds is prescribed, or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding, be executed in the manner or with every formality so prescribed.

In *Aggs* v. *Nicholson*, *supra*, the note was "made" by the directors and only failed, after being so made, in not complying with the statute, through not being "countersigned" by the secretary.

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Lord Cairns in his judgment in *Re Barneds Banking Company; ex parte The Contract Corporation*, L.R. 3 Ch. 105, at 116, held that the transaction there in question was not invalidated by the transfer of stock being incomplete in form but he drew attention to law governing that particular trading company. The distinction is apparent between the right and manner of such a company executing an instrument and that of the company here under consideration and the following excerpt is appropriate:—

> The seal is affixed and the document is *ex facie* regular in all respects. The seal is the seal of a trading corporation. Neither in the memorandum of association nor by the articles, nor by the general law, are any particular formalities prescribed as to the mode in which, or the person in whose presence, the seal shall be affixed to any document. The case, therefore, differs from the cases cited at the bar, where formalities were presented either by the Act of Parliament or by the constitution of the corporate body.

Under said clause 76 the instrument requires to be "signed" by all the parties referred to. So that it does not appear on its face as a properly executed document without the seal and such signatures.

Assuming then that the signature of a secretary is compulsory and that it is necessary for all the persons referred to in the clause to sign, can one of such persons act in two capacities? Parties dealing with this company being bound by the articles of association must see that the instrument under which they expect to acquire title has been properly executed, so if Mr. Studd could not sign both as a director and secretary the deed was ineffectual for the purpose intended. The only point for consideration is whether a party who is a director and who has been appointed secretary can fill both positions and comply with the provisions of clause 76. This would mean that two persons would be sufficient to sign the deed. It may have been deemed advisable in framing the clause in question, as a matter of precaution and for the protection of a company, that it should provide that three persons should be present at the execution of any instrument requiring the affixing of a seal. The presumption is that words mean as they appear. I am not assisted by any authority on the point. I must form my own conclusion and I think the plain reading of clause 76 requires that there should be three distinct persons present who join in signing the instrument. A contrary decision would be opposed to the words as they appear in the clause. In my opinion the deed in question was not properly executed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 18, 1916.

1. GUARANTY (§ II—12)—VARIATION—INCREASE OF LIABILITY—DISCHARGE —ESTOPPEL.

A guaranty is not discharged because of a variation in the terms of the transaction which increased the liability, if the guarantor, at the time the change was made, knowingly acquiesced in it, and by his conduct subsequently ratified it.

[*K. & S. Auto Tire Co.* v. *Rutherford*, 27 D.L.R. 736, 34 O.L.R. 639, affirmed. See also *Robinson* v. *Ellis* (B.C.), 27 D.L.R. 391.]

Statement.

APPEAL by the defendant from the judgment of HODGINS, J.A., 27 D.L.R. 736, 34 O.L.R. 639.

George Wilkie, for appellant.

Leighton McCarthy, K.C., for plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Before the guaranty deed in question was made, a new scheme for carrying on the business of what was called the McDonell company and of the Kelly company, as well as other business, was arranged, McLaren the defendant's brother-in-law being chiefly interested, and the prime mover in it: and, although the defendant had no personal interest in any of these business arrangements, he was anxious to help McLaren and willing to go a long way in "backing" him for that purpose. The backbone of the new business was to be the Springfield Kelly Tire agency in Quebec, and that could be had only through the plaintiffs; and new business arrangements with them could be effected only by giving to them such a guaranty as the deed provided; and so it was given, and the foundation laid for the carrying out of the new scheme. But, for some reason, it was, soon after the guaranty was given, found to be impracticable and had to be abandoned; and in substitution of it another scheme was adopted, under which the plan to form a new company to carry on the Montreal business was abandoned, and, instead, it was arranged to carry it on in the name of the existing Montreal Kelly company: and that necessitated a change of the guaranty, which was for payment of the $4,000 and $2,800 and debts of the proposed new company only: that change was readily assented to by the defendant and effected by a later writing, which in substance guaranteed the payment of the $4,000 and $2,800 and new debts of the old company instead of the new; and no objection is now made upon

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that score: but it is said that other onerous arrangements were made by McLaren and others with the plaintiffs respecting the new business that were not comprehended in the first arrangement, and that, as the defendant did not in the second guaranty assent to them, that obligation is not binding on him: that the only assent contained in this writing is to the substitution of the old for the new company "just as if the new company had been formed;" and that that implies want of assent except to that expressly assented to: but I am not able to give my assent to that contention. The change assented to made other changes necessary, and there could be no implication that nothing was to be changed except the debtor. But, however that may be, all these things were the work of McLaren's hands, known to and acquiesced in by the defendant, who also took a lively interest in the business, making, with approval, large payments, by way of "commercial paper," under the guaranties, for months afterwards and until failure and loss were in sight, and then only sought to escape. The fact that some of these changes were not made binding in writing till a day or two after the second guaranty was given, if that is a fact, can make no difference: they were dependent, as the whole new business with the plaintiffs was, on such a guaranty being given, and so could not be made binding until it had been given.

Well knowing of and acquiescing in the things which he now complains of, knowing of and acquiescing in them when he gave the substituted guaranty, and by his conduct ratifying them afterwards, how is it possible for him to escape liability on account of them now?

The case is a very simple and plain one: no one could have any doubt of the defendant's liability, unless, on being led through a labyrinth of cases, he should lose his hold upon the simple facts of this case, confusing them with the circumstances of some of the other cases.

The appeal must be dismissed.

Lennox, J.

LENNOX, J.:—The argument upon the appeal was practically confined to two points: (a) Was the defendant released from liability under his agreement with the plaintiff company of the 7th February, 1914, by the circumstance that a new company was not formed, as contemplated, and the transaction of the

10th February, by which, amongst other things, McLaren was appointed the sole agent of the plaintiff company in the Province of Quebec? And (b) what is the effect of the defendant's letter to the plaintiff company of the 27th February, 1914? Incidentally, some portions of the evidence were referred to, but the findings of the learned trial Judge upon questions of fact were not seriously challenged.

It was strenuously argued that, owing to changed circumstances, the guaranty agreement of the 7th February never went into effect, or, if it did, that the defendant was released when the plaintiff company, as alleged, impaired the financial prospects of the Kelly company by obtaining from them an unprofitable agreement on the 10th February.

If a person who holds a guaranty does something inconsistent with the guaranty agreement and to the prejudice of the guarantor, it may be and probably is true that the guarantor will be thereby released. I can find nothing in what is complained of inconsistent with the terms of the agreement of the 7th February, nor was it pointed out in what way the defendant was prejudiced by this transaction, *per se*. As to the letter, I cannot for a moment accede to the argument that the letter is to be read as limited to the $4,000, the present indebtedness of the Kelly company, or to Kelly company transactions, or that it has not the effect of waiving the provisions of the main agreement as to the formation of a new company, and continuing the liability of the defendant for goods supplied under the new conditions. The defendant's examination upon discovery shews that what was done was in effect what he contemplated from the first—a reorganisation; and it cannot be disputed that the two companies referred to were reorganised.

The Kelly company was carried on by a new organisation, and, by consent of all, the business was done without change of name.

I have read the portions of the defendant's examination put in at the trial. This and his evidence at the trial shew that he entered into the guaranty arrangement to help his brother-in-law, McLaren; that he was not perhaps very inquisitive, but he had ample opportunities for knowing everything that was being done; that there was no concealment and no fraudulent

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dealing; that he saw the account frequently, knew that it was mounting up, and that he never made any objection. Whatever might otherwise have been argued, and I think ineffectively, if the letter of the 27th February had not been written, I think it and the defendant's knowledge, directly and through McLaren, conclusively establish the defendant's liability. The learned trial Judge appears to have gone very thoroughly into the whole subject, and I entirely agree with the conclusions he has arrived at as to the matters involved in this appeal.

I think the appeal should be dismissed with costs.

Riddell, J.
Masten, J.

RIDDELL and MASTEN, JJ., concurred. *Appeal dismissed.*

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Re SLATER AND CITY OF OTTAWA

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. June 28, 1916.

ARBITRATION (§ III—17)—*Municipal Corporation—Expropriation of land—Compensation—Wrong basis for award.*]—Appeal by the Corporation of the City of Ottawa, contestants, from an award of the Official Arbitrator for the city, in favour of the claimants, upon an arbitration.

F. B. Proctor, for appellants.

R. G. Code, K.C., for claimants, respondents.

The judgment of the Court was read by MEREDITH, C.J.C.P.:

The arbitrator took as the criterion the price of a single lot sold in a different locality; then made an imaginary subdivision of the lands in question into small lots, and an imaginary sale of all such lots to workmen at one-half the price of his standard; and then made a deduction of 25 per cent. from the imaginary total purchase-price of all these imaginary lots, for "slowness with which the lots would be disposed of, increased taxes to be paid during the sales, interest which would not be obtained during the sales" and "commission on the sales and other incidental expenses."

Whilst such a method may be taken into consideration in ascertaining the fair value of the lands taken, it is but evidence, and at best evidence of a most uncertain character. Evidence of the fair selling value of property is almost always available and should be had; and, having regard to the whole evidence, a reasonable purchase-price can generally, and should be, found and given effect to. The prospective subdivision, as shewn by subsequent events, was not feasible, and was not a proper means of arriving at the actual value.

The appeal should be allowed, and the matter referred back to the arbitrator to be dealt with upon proper principles; no order as to costs of the appeal.

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MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 9, 1916.

[*Mitchell v. Fidelity and Casualty Co.*, 26 D.L.R. 784 affirmed.]

INSURANCE (§ III E—75)—*Accident Insurance—Bodily Injury—Recovery Delayed by Presence of Disease — Warranty of Health.*] — Appeal by the defendants from the judgment of MIDDLETON, J., 26 D.L.R. 784, 35 O.L.R. 280, 9 O.W.N. 341.

R. McKay, K.C. for appellants.

A. C. McMaster, and *J. H. Fraser*, for plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment, in which he said that the plaintiff fell from a sleeping-berth in a railway carriage, and so sprained his wrist; that was the only immediate effect of the accident, and was an injury which ordinarily should have been quite recovered from in not many months; but the plaintiff's health and strength were at the time and had been for a long time before in such a condition that, instead of making a rapid recovery, he was yet, and might be for life, in ill-health, and unable to practise his profession.

The exact character of the latent physical weakness was of no great consequence; it was there, and it was started into activity by the accident. The case seemed to depend wholly upon three questions of fact: (1) Was the existence of that weakness a breach of the plaintiff's warranty that he was in sound condition physically? (2) Was the accident the cause of the plaintiff's injury now existing? (3) Is the injury total disability?

The findings of the trial Judge on these three questions, in favour of the plaintiff, could not be disturbed; and the appeal should be dismissed.

RIDDELL, J., read a judgment in which he discussed the evidence and the grounds of defence urged, and referred to some cases. He agreed with the views of the trial Judge.

LENNOX, J., in a short written opinion, stated that he agreed with the reasons of the trial Judge.

MASTEN, J., concurred. *Appeal dismissed with costs.*

PRUDENTIAL SECURITIES LTD. v. SWEITZER.

Ontario Supreme Court, Sutherland, J. April 27, 1916.

VENDOR AND PURCHASER (§ I B—5)—*Agreement for Sale—Guaranty of Rise in Value—Default in Payment—Judgment in*

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Alberta—Subsequent in Ontario]—Motion by the plaintiffs for judgment upon admissions made by the parties in an action to recover the amount of a money-judgment, recovered by the plaintiffs against the defendant in the Supreme Court of the Province of Alberta.

The motion was heard in the Weekly Court at London.

L. H. Dickson, for plaintiffs.

J. B. McKillop, for defendant.

SUTHERLAND, J., set out the facts in a written opinion. On the 31st January, 1913, the plaintiffs, in writing, agreed to sell land in Alberta to the defendant for $1,200, payable $400 on the date of the agreement (that was paid) and $400 on the 31st July in each of the years 1913 and 1914. The agreement contained this clause: "The vendors hereby agree that the purchaser will realise an increase on the above-described lot, at the rate of 25 per cent. on the money invested in it, within the term of one year from this date." On the 13th March, 1915, the plaintiffs, alleging that the defendant had made default in the subsequent payments, obtained a default judgment against him in the Alberta Court for $1,008.15, which included principal, interest and costs.

This action was brought in the Supreme Court of Ontario to recover the amount of the Alberta judgment and interest, or, in the alternative, to recover the sum of $1,020.50, balance of purchase-money and interest under the agreement.

The admissions made by both parties included the fact of the recovery of the Alberta judgment; that the defendant was not at the time of the recovery nor at any time resident or domiciled in Alberta, and did not submit to the jurisdiction of the Court there; that the plaintiffs were the owners of the land and in a position to convey with a good title; that the defendant had personally inspected the land before purchasing; that between the 31st January and the 31st July, 1913, the land had advanced in value to the extent of $100, and could have been sold for $1,300; that the plaintiffs did not communicate to the defendant any information as to the increase, nor offer to sell the land for him at the advanced price; that the defendant did not employ the plaintiffs to sell the land; that the defendant had paid no more than the $400; and that the defendant had not tendered to the plaintiffs a reconveyance.

The Alberta judgment, the learned Judge said, was not binding upon the defendant in Ontario, and the action was maintainable

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here. The foreign judgment was not a merger of the original cause of action; the plaintiff might sue either upon the original cause of action or upon the judgment: Trevelyan v. Meyers (1895), 26 O.R. 430; Bugbee v. Clergue (1900), 27 A.R. 96; S.C., sub nom. Clergue v. Humphrey (1900), 31 S.C.R. 66.

The clause of the agreement above-quoted should be construed to mean that the lot would increase or advance in value within a year to such an extent that, if the defendant saw fit to sell, he could realise the profit mentioned. The plaintiffs did not agree to apprise the purchaser of an increase. The plaintiffs' covenant was satisfied by the fact of the increase.

Judgment for the plaintiffs for the balance due on the contract, with interest and costs.

BANK OF BRITISH NORTH AMERICA v. TURNER.

Ontario Supreme Court, Middleton J. April 25, 1916.

BILLS AND NOTES (§ I C—24)—*Demand Note Made by Directors of Company—Company Indebted to Bank—Action against one Director.*]—Appeal by the plaintiffs from an order of the Master in Chambers refusing the plaintiffs' motion for summary judgment under Rule 57.

G. Larratt Smith, for plaintiffs.

G. S. Hodgson, for defendant.

MIDDLETON, J., read a judgment in which he said that a certain incorporated company was a customer of the plaintiff bank, and the defendant was a director of the company. The company owed the bank, and as security held: (a) an hypothecation of the goods of the company; (b) an assignment of book-debts; (c) customers' bills current and past-due; (d) a note made by one Playfair; and (e) the notes upon which the defendant was sued. Payment of the notes had been demanded and refused, and the notes had been protested.

At the time the notes were endorsed to the bank, an hypothecation agreement was signed, not only by the company, but also by the makers of the notes. Under the agreement, the notes and the proceeds thereof were to be held as a general and continuing security, collateral to the debt of the company to the bank, and for any ultimate balance of such indebtedness.

The bank now sued Turner as maker of these notes, but limited their claim to the amount due by the company.

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The defendant filed an affidavit in which he set up as a defence that the bank could not sue him until it had realised upon all the other security which it held as collateral to the debt, basing this contention upon the reference in the agreement to the ultimate balance of the indebtedness.

This, the learned Judge said, ignored the terms of the agreement—the security was collateral to the whole debt, and not merely for the ultimate balance. The agreement shewed that the bank advanced money to the company on the faith of these demand notes, which gave the bank the right at any time they thought it necessary or advisable in their own interest to call for immediate payment, without waiting till other collateral security should become due or be realised upon.

It was argued that the bank must fail, because the defendant was, to the knowledge of the bank, a surety for the company, and so could not be sued till the debt had matured so far as the company was concerned.

This ignored the fact that the debt was due, so far as the company was concerned. The company and the directors were parties to the same note, and on one day's demand it became due as to all.

The appeal should be allowed and judgment should be granted for the amount now due the bank and costs; the amount to be shewn by an affidavit giving credit for all money received pending the action, on account of the debt, to be filed before judgment actually issues.

ASSINIBOIA LAND CO. v. ACRES.

Ontario Supreme Court, Middleton, J. June 5, 1916.

[See also *Assiniboia Land Co.* v. *Acres*, 25 D.L.R. 439, 27 D.L.R. 103.]

JUDGMENT (§ IV B—232)—*Company—Extra provincial—No license for Ontario—Recovery of judgment in Saskatchewan—Right to recover by action in Ontario.*]—Action to recover $6,681.33, the amount of a judgment obtained by the plaintiffs against the defendant in the Supreme Court of Saskatchewan and certain costs of an appeal therefrom.

The action was tried without a jury at Brockville.

H. A. Stewart, K.C., for plaintiffs.

I. Hilliard, K.C., for defendant.

MIDDLETON, J., in a written opinion, said that the plaintiffs

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were a loan company carrying on business in Saskatchewan, where a son of the defendant also resided. The son made a mortgage which was assigned to the plaintiffs. The defendant, a widow, lived in Ontario; the son, without her knowledge, conveyed to her the equity of redemption in the mortgaged land, and procured her to be registered as the owner of the land. The first knowledge the defendant had of the matter was when an action was brought upon the mortgage in the Supreme Court of Saskatchewan against her and her son, and she was served with the writ of summons at her home in Ontario.

By a provision of the Saskatchewan Land Titles Act, in every instrument transferring land subject to a mortgage "there shall be implied a covenant by the transferee . . . that (he or she) will pay the principal money, interest," etc.

The defendant sent the writ to her son, but gave him no authority to act for her or to instruct any solicitor on her behalf. The son, however, consulted a solicitor, who undertook to file a defence for her in the action. The defence set up was a denial of ownership, and it was held at the trial that this was not sufficient to raise the defences upon which the defendant might have succeeded—that there was not, in the circumstances, an implied covenant on her part nor any real ultimate liability to pay the mortgage-debt. The trial Judge refused to permit the necessary amendment except on terms to pay the costs, which terms the counsel purporting to act for the defendant refused, and the trial proceeded. Judgment was given against the defendant for the full debt and costs. An appeal on behalf of the defendant to the Full Court of Saskatchewan was launched by the same solicitor; but this action on the judgment was begun in Ontario before the appeal was heard.

When the plaintiff was served with the writ in this action, she took advice, repudiated her liability, but affirmed the authority of the solicitor who had acted on her behalf in Saskatchewan. The appeal was then heard, and dismissed, solely upon the ground that the defendant, having refused to accept the leave to amend upon the terms offered by the trial Judge, had no locus pœnitentiæ.

It was argued that in the present action, the Court had the right to relieve the defendant from the consequences of her attornment to the jurisdiction of the Supreme Court of Saskatchewan,

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because that attornment was brought about by the fraud of the solicitor representing the plaintiff. The alleged fraud was the failure of the solicitor to disclose to the defendant or her representative the position in which the case stood in Saskatchewan. The defendant, when she affirmed the solicitor's authority, did not know and was not told of the refusal to amend, and believed that there was nothing to prevent her real defences being raised before the appellate Court in Saskatchewan.

As to this, the learned Judge said that there was no express intention to mislead, and a case of fraud had not been made out.

An aspect of the case not discussed by counsel was this. The liability of the defendant was not based upon any actual contract on her part, but upon a liability arising from the statute of Saskatchewan, which had no extra-territorial effect. It might be that the Ontario Courts would refuse to enforce a judgment based upon the statute alone. But this was not argued; and the present judgment is not based upon it.

The plaintiffs, being an extra-provincial company, not having a license to transact business within Ontario, cannot maintain the action; and on this ground it should be dismissed; but, possibly, the obtaining of a license even now might reinstate the action; and the finding of fact against the defendant upon the defence of fraud may, in case of an appeal, be reviewed by the appellate Court.

Action dismissed with costs.

BARBER v. WADE.

Ontario Supreme Court, Boyd, C. June 20, 1916.

ASSIGNMENTS FOR CREDITORS (§ VIII A—65)—*Claim of Mortgagee-creditor — Valuing Security — Assignments and Preferences Act, R.S.O. 1914 ch. 134, secs. 25, 27.*]—Motion by the plaintiff for judgment on the pleadings in an action by a mortgagee-creditor of one Steen, who made an assignment for the benefit of creditors, under the Assignments and Preferences Act, R.S.O. 1914 ch. 134, for a declaration of the plaintiff's right to rank upon the estate of Steen in the hands of the defendant, as assignee, for the amount of a claim filed by the plaintiff against the estate.

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

Frank Denton, K.C., for defendant.

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THE CHANCELLOR, in a written opinion, setting forth the facts, said that the plaintiff had brought an action against Steen, the mortgagor, his wife, and the defendant and his predecessor as assignee, upon the mortgage, for payment or foreclosure, and had obtained judgment by default; the actual redemption or foreclosure had not yet taken place; time being current under the Master's report. The plaintiff, when he filed his claim with the defendant, placed it at $14,266, and valued his security at $13,200. The defendant served notice of contestation of the claim; and this action was brought by the plaintiff, claiming to rank on the estate for $1,066, the amount of his claim over and above the value placed on the security.

The question which arose was a novel one—whether the bringing and the prosecution so far of the foreclosure action was an irrevocable election so to enforce or realise the mortgage security.

Reference to secs. 25 (4) and 27 of the Assignments and Preferences Act.

The fact of an action to foreclose having being begun and prosecuted is not *per se* sufficient to debar the mortgagee from bringing in the property and dealing with it under the Act, for thereby the position of affairs as to the assets will be the same as if no action had been begun. All that is now claimed is what is due under the mortgage, with interest and taxes, and the tendency of the action may be regarded as negligible.

As a term of relief, the mortgage action should be dismissed as against the assignees, but without costs. The judgment should declare that the plaintiff is entitled to rank upon the estate in the defendant's hands, and that his claim is to be dealt with by the defendant having regard to the provisions of the Act, sec. 25 (4).

The plaintiff should be paid his costs of the action by the defendant, but without prejudice to the amount thereof being recouped and the defendant's own costs being paid out of the assets: *Grant* v. *West* (1896), 23 A.R. 533, 540; *In re Hurst* (1871), 31 U.C.R. 116, referred to.

WOOD v. WOOD.

Ontario Supreme Court, Garrow, Maclaren, Magee and Hodgins, JJ.A. June 12, 1916.

JUDGMENT (§ IV B—245)—*Divorce—Foreign judgment—Alimony—Action to recover in Ontario—Jurisdiction.*] —Appeal by the defendant from the judgment of the County Court of the

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County of York in favour of the plaintiff in an action upon a foreign judgment.

F. J. Hughes, for appellant.

A. Bicknell, for plaintiff, respondent.

HODGINS, J.A., read the judgment of the Court. He said that the judgment sued upon was pronounced by the Supreme Court, State of New York, Erie County, on the 16th January, 1912, and dissolved the marriage between the appellant and respondent; it gave the respondent the custody of the child born of the marriage, and ordered the appellant to pay to the respondent $50 per month for the support of herself and child, beginning on the 15th September, 1911. In this action, in the County Court, judgment for $605 had been given for the plaintiff, being about 12 months' arrears up to the 15th January, 1916. The appellant married again in Ontario on the 11th December, 1915.

A claim for arrears of alimony past due upon a foreign judgment is enforceable in Ontario: Robertson v. Robertson (1908), 16 O.L.R. 170; Swaizie v. Swaizie (1899), 31 O.R. 324. See also Phillips v. Batho (1913), 29 Times L.R. 600.

The want of finality attributed to the English decree for alimony (see Robins v. Robins, [1907] 2 K.B. 13) is not apparent in the foreign judgment here sued upon; but it appeared from the evidence at the trial that the New York Court could revise its adjudication upon the quantum allowed. In an action for alimony in Ontario, the power reserved by sec. 34 of the Judicature Act to deal with the permanence of the grant of alimony might affect the finality of the judgment; but an Ontario Court could not interfere with the New York judgment except by refusing to enforce it. See Moore v. Bull, [1891] P. 279.

There was nothing in the evidence to shew that the New York Court could revise the amount *past due*, and the judgment of that Court was a final one. The requirements set out in Nouvion v. Freeman (1889), 15 App. Cas. 1, 9, were satisfied.

Reference to Leslie v. Leslie, [1911] P. 203.

The objection that the judgment was recovered in a penal action could not be sustained: Huntington v. Attrill, [1893] A.C. 150; Raulin v. Fischer, [1911] 2 K.B. 93.

The judgment sued upon effectually terminated the bond of matrimony. The appellant is not, by satisfying this judgment, while married to his present wife, contributing to support two

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wives, but rather paying the legal penalty for those acts which, while enabling him to remarry, entail a yearly reminder of his past delinquencies.

The jurisdiction of the New York Court to grant permanent alimony following an absolute divorce was questioned at the trial, but nothing was elicited to cause difficulty on that point in this case. This decision is not to be taken as indicating that this Court has finally considered and adjudicated upon that point.

Appeal dismissed with costs.

GALBREATH v. CRICH.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. June 12, 1916.

CONTRACTS (§ IV C I—345)—*Building Contract—Work Improper—Interrention of Inspector—Substituted Work.*]—Appeal by the defendant from the report of R. S. Neville, K.C., Official Referee, in an action to enforce a mechanic's lien, finding $399.50 due to the plaintiff for work done under a building contract.

The plaintiff, an excavator, by the contract undertook to do necessary excavating and to build a concrete retaining wall where necessary, put in two windows and a door, for $175; this was to include all material necessary, also supporting through centre of cellar; and a concrete floor was to be put in for $33.50. Payment was to be made "on completion of job."

When the excavation was substantially finished, the stone foundation wall, which was to be supported by the cement retaining wall, slipped, and let the building down; and the cement wall could not be completed as contemplated. The plaintiff called in one Fess, who jacked up the building, charging $75 therefor. Afterwards, the municipal building inspector insisted on a change of plan, and the plaintiff built a solid cement cellar wall to support the building.

The Referee allowed the plaintiff the cost of the whole work, done partly under the contract and partly as necessitated by the subsidence, at $324.50, plus the $75 paid to Fess.

A. Cohen and *W. C. MacKay*, for appellant.

R. G. Agnew, for plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said, after stating the facts, that the retaining wall could have been built before the cellar was excavated; and the plaintiff must accept responsibility for the method actually adopted, it not being shewn

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that the defendant actively intervened to direct or superintend: Duncan v. Blundell (1820), 3 Stark. 6.

The plaintiff's work not having been finished, owing to the subsidence, he could not recover, even if this was caused by accident without negligence. He might have abandoned it, subject to the defendant's claim for damages; but, if he went on and did what was necessary to accomplish the designed end, in a different way, he must either prove a new contract for an additional sum, or be limited to his original contract price, if the new work was to be treated as a substituted performance of the old contract.

Reference to Thorn v. Mayor and Commonalty of London (1876), 1 App. Cas. 120.

Sufficient was not proved to warrant a finding that there was an express contract to pay, even on the basis of a quantum meruit. But the work as contemplated was probably improper from the beginning; and, when the inspector intervened, its further performance was both legally and practically impossible. The completion of the work under the old contract was prevented and the doing of new and additional work necessitated. This added to the value of the defendant's house. The direction by the defendant to the plaintiff to go on and do the work, which was fairly proved—coupled, shortly after, with a mention of damages—was sufficient to sustain the claim of the plaintiff to the extent of $324.50 found by the Referee.

But it did not follow that the defendant should pay for the work necessary to prevent further damage—the necessity for jacking up arose in consequence of the plaintiff's operations.

The defendant's damages should be assessed at $50, subject to the right of either party to take a reference back.

The appeal should be allowed and the judgment set aside. If no election to take a reference is made within one week, $50 will be allowed to the defendant and deducted from the $324.50, and judgment will be entered for the plaintiff for $274.50, with costs as allowed by the Referee in the report appealed from, but with no costs of appeal. If a reference is desired, it will be to the same Referee, as to damages only; and, after his report, judgment will be entered for the plaintiff for $324.50 and costs as aforesaid, less the amount found by him. The costs of the reference will be determined by success in increasing or decreasing the $50 suggested.

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MEDLAND LIMITED v. COWAN.

Ontario Supreme Court, Clute, J. March 1, 1916.

HUSBAND AND WIFE (§ IB 2—26)—*Promissory Note Signed by Wife at Request of Husband—Absence of Independent Advice—Failure to Shew Misrepresentation or Misconduct.*]—Action upon a promissory note made by the defendant Margaret Cowan and her husband and co-defendant R. G. Cowan in favour of the plaintiff company.

G. W. Mason and *S. Rogers* for plaintiff company.

L. F. Heyd, K.C., for defendant Margaret Cowan, contended that the facts of the case brought it within the decision in *Bank of Montreal* v. *Stuart*, [1911] A C. 120.

CLUTE, J., in a written opinion, summarised the evidence of the wife thus: she signed the note because her husband asked her to; he brought the note home for her to sign, and she signed it; he told her that he owed some money and was giving the note; she had no one to advise her, and she signed it at once, as soon as asked; she thought her husband would pay it; she never received any consideration for herself; she believed that the note was given for merchandise; she knew nothing about her husband's affairs; she knew of an incorporated company of which her husband and another had the controlling interest; she attended a meeting, whereat she was appointed secretary of that company, but she did not know of her appointment until she was examined for discovery in this action.

The learned Judge said that it was now settled law that, in a case like the present, the absence of independent advice was not sufficient in itself to make void a transaction of this kind.

It was not argued, nor would the evidence support a contention, that there was any misrepresentation or misconduct—unless the mere asking the defendant Margaret Cowan to go security for her husband could be called misconduct—on the part of the husband to induce her to sign.

The circumstances bore no relation to the facts in the *Stuart* case.

Reference to *Euclid Avenue Trust Co.* v. *Hohs* (1911), 23 O.L.R. 377, 385, 24 O.L.R. 447, 450.

Judgment for the plaintiff company for the amount of the note with interest and costs.

CANADIAN CRIMINAL CASES.

The following cases have been reported in full in "Canadian Criminal Cases Annotated," Vol. XXV., Part 3, published in June, 1916.

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REX. v. FELTON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Scott, Stuart and Beck, JJ. December, 21, 1915.

1. EVIDENCE (§ II E 6—182)—CRIMINAL INTENT—SEDITIOUS WORDS—INFERENCES.
On a charge of speaking seditious words (Cr. Code, sec. 134), it is always open to the jury, or to the judge if trying the case without a jury, to infer the seditious intention from the words and the circumstances under which they were spoken.

2. SEDITION (§ I—5)—SPEAKING SEDITIOUS WORDS—CR. CODE, SECS. 132, 134.
Under Cr. Code, secs. 132 and 134, it is an indictable offence to speak seditious words, *i.e.*, words expressive of a seditious intention, and a conviction will be sustained if the words were a slander on the British Government and were uttered either with the intent of raising disaffection and discontent among his Majesty's subjects, or with intent to promote public disorder by insulting and annoying the hearers so that a breach of the peace is a probable consequence.
[*R.* v. *Burns* (1886), 16 Cox 355; *R.* v. *Aldred* (1909), 74 J.P. 55, referred to.]

3. SEDITION (§ I—5)—SPEAKING SEDITIOUS WORDS—NATIONALITY OF HEARERS NEED NOT BE PROVED.
Alien residents of Canada owe a temporary allegiance to the King while they reside under his protection and are included amongst the King's "subjects" in the sense in which that term is used in a charge for speaking seditious words with intent to raise disaffection or public disorder amongst his Majesty's subjects, and it is, therefore, unnecessary to prove on the trial that any of the hearers were natural born or naturalized British subjects.

James Short, K.C., for the Crown.

F. W. Griffiths, for defendant.

REX v. MURRAY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Scott, Stuart and Beck, J.J. December 21, 1915.

1. JURY (§ II A—53)—CROWN'S DIRECTION THAT JUROR STAND BY—APPLICATION TO ALBERTA AND SASKATCHEWAN.
The provisions of the Criminal Code (secs. 927, 933), relating to the right of the Crown to have jurors stand aside, are not inconsistent with the provisions of the North West Territories Act (Can.), as it stood immediately before September 1, 1905, and are consequently not excluded from being operative in Alberta (and Saskatchewan) under sec. 9 of the Criminal Code.

2. JURY (§ II D—65)—PEREMPTORY CHALLENGE BY CROWN.
The number of peremptory challenges by the Crown is limited to four in Alberta, both by the N.W.T. Act as of August 31, 1905 (see. Cr. Code, sec. 9), and by Cr. Code, sec. 933.

James Short, K.C., for the Crown.

J. McKinley Cameron, for defendants.

REX v. NIER.

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Alberta Supreme Court, Appellate Division, Harvey C.J., and Scott, Stuart and Beck, JJ. December 21, 1915.

1. PERJURY (§ II D—77)—NON-JUDICIAL PROCEEDING—FALSE STATUTORY DECLARATION ON INSURANCE PROOF OF LOSS—CR. CODE, SEC. 175.

A statutory declaration, made in the form provided by the Canada Evidence Act, by the assured, wherein he states the loss by fire, of the goods insured under a fire insurance policy and assigns a value to same is a "solemn declaration," which the assured is "required or authorized by law" to make, within the terms of Cr. Code, sec. 175, and the declarant is liable to conviction under sec. 175, if statements therein contained would amount to perjury if made in a judicial proceeding, the same being known by him to be false and being intended by him to mislead the insurance company or its adjuster. (*Per* HARVEY, C.J., and SCOTT, J.)

2. INDICTMENT, INFORMATION AND COMPLAINT (§ II A—6)—FORMAL CHARGE—SURPLUSAGE—FALSE DECLARATION—STATING THE AUTHORIZING STATUTE.

A conviction under Cr. Code, sec. 175, for making a false solemn declaration in an extra judicial proceeding, may be supported in respect of a statutory declaration authorized by the Canada Evidence Act, and taken with the formalities which the latter Act requires, although the formal charge was that the accused "being required or authorized by law, to wit, by the Alberta Insurance Act, Alta. 1915, ch. 16, to make a solemn declaration," made the false statements with knowledge, etc., "contrary to sec. 175 of the Criminal Code," the reference to the Alberta Insurance Act being treated as surplusage. (*Per* HARVEY, C.J., and SCOTT, J.)

3. OATHS (§ I—5)—DECLARATION REQUIRED BY LAW.

Where the law makes the taking of a statutory declaration or other solemn declaration a condition to the recovery of a demand or to the exercise of a legal right, the declaration so taken is one "required by law" within Cr. Code, sec. 175 (false extra-judicial declarations.) (*Per* STUART, J.)

CROWN case reserved by WALSH, J.

James Short, K.C., for the Crown.

C. F. Adams, for defendant.

HARVEY, C.J., concurred with SCOTT and STUART, JJ., BECK J. dissenting. *Conviction affirmed.*

REX v. HAZZA.

Alberta Supreme Court, Hyndman, J. March 18, 1916.

1. THEATRES (§ I—5)—STATUTORY REGULATIONS—THEATRES ACT, ALTA.

Clause 39 of the regulations under the Theatres Act, Alta, is ineffective to support a conviction thereunder because it fails to state who shall be responsible that its terms shall be observed and whether the owner, the occupant, or other person connected with a moving-picture theatre, shall be responsible for seeing that the halls and passageways are kept unobstructed.

2. THEATRES (§ I—5)—KEEPING AISLES AND PASSAGEWAYS CLEAR—TICKET-HOLDERS AWAITING ENTRANCE.

Clause 39 of the statutory regulations made under the Theatres Act, Alta, requiring free and unobstructed passageways and forbidding that the public be allowed to stand in any aisle or approach thereto or at any place where it would hinder the entrance or egress of the public from the theatre, is not intended to prevent persons who have bought tickets at a moving-picture theatre holding a continuous performance from standing in the lobby between the box-office and the auditorium

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entrance while waiting for seating space in the theatre, if there is a separated space kept clear for exit from the theatre.

MOTION to quash a summary conviction.

O. M. Biggar, K.C., and *G. B. O'Connor*, K.C., for the motion.

F. D. Byers, for the Crown. *Conviction quashed.*

REX v. JUN GOON.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ. A. January 4, 1916.

1. CRIMINAL LAW (§ II A—49)—SPEEDY TRIAL ON CONSENT—CR. CODE SEC. 827.

The validity of a speedy trial at a County Court Judge's Criminal Court at which counsel professed to act for the Crown is not affected by the lack of proof that he had been appointed "prosecuting officer" and was therefore entrusted with the statutory duty under Cr. Code sec. 827 (amendment of 1909), of preferring the charge on which the accused had been committed for trial; the maxim *omnia præsumuntur*, etc., applies where the contrary does not appear; and (per Martin and McPhillips, JJ. A.), it is to be assumed notwithstanding the unnecessary signature of a Crown counsel to the written charge that the same is being prosecuted by the duly appointed clerk of the peace for the county whose duty it is, under the provincial statute constituting the court, "to issue all process, arraign prisoners, record verdicts," etc.

2. CRIMINAL LAW (§ II A—49)—JURISDICTION OF COUNTY JUDGE'S CRIMINAL COURT—DEFENDANT ON BAIL APPEARING FOR TRIAL.

The jurisdiction of speedy trial under Part XVIII. at a County Judge's Criminal Court attaches where the defendant had been committed to gaol for trial but was subsequently released on bail to appear at the County Judge's Criminal Court, if he attends and elects speedy trial under Part XVIII., although he may not have been formally taken into custody by the sheriff before the trial commenced.

[*R.* v. *Lawrence*, 1 Can. Cr. Cas. 295, 5 B.C.R. 160; *R.* v. *Cameron*, 1 Can. Cr. Cas. 169; *R.* v. *Komiensky*, 7 Can. Cr. Cas. 27; *R.* v. *Day*, 20 Can. Cr. Cas. 325, 16 B. C. R. 323, referred to.]

3. APPEAL (§ XI—721)—CRIMINAL CASE—LEAVE TO APPEAL ON QUESTION OF LAW.

On a motion under Cr. Code, sec. 1015, for leave to appeal from a conviction at a County Judge's Criminal Court the court of appeal is restricted in the determination of the legal question of jurisdiction to such facts as appear on the face of the proceedings in the lower Court, as there is no appeal on questions of fact except under Cr. Code, secs. 1012 and 1021. (Per MARTIN and MCPHILLIPS, JJ. A.)

[*R.* v. *Carter* (No. 2), 6 Can. Cr. Cas. 507; *R.* v. *Spintlum*, 15 D. L. R. 778, 22 Can. Cr. Cas. 483, 18 B. C. R. 606 and *Mulvihill* v. *The King*, 18 D. L. R. 217, 23 Can. Cr. Cas. 194, 49 Can. S. C. R. 587, specially referred to.]

MOTION under Cr. Code sec. 1015 for leave to appeal from a conviction in the County Court Judge's Criminal Court.

The objections raised were that no "prosecuting officer" had been appointed who could legally perform the statutory duties required by Part XVIII. of the Criminal Code, and further that the accused who had been admitted to bail had not been returned into close custody when they appeared and elected speedy trial, and both these grounds were set up as affecting the jurisdiction of the County Court Judge's Criminal Court to try the case.

Joseph Martin, K.C., for appellant, the prisoner. B. C.

W. M. McKay, for the Crown. C. A.

MACDONALD, C.J.A., would dismiss the appeal for reasons given by Irving, J.A.

MCPHILLIPS, J.A., expressed concurrence in the reasons of Martin, J.A.

GALLIHER, J.A., agreed in dismissing appeal but gave no written reasons.

REX v. SANDS (No. 2.) MAN.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. November 8, 1915. C. A.

1. EVIDENCE (§ XII L—995*a*)—SUFFICIENCY—DISORDERLY HOUSE—HOUSE OF ILL-FAME.

Evidence of the general reputation of a house as being a house of ill-fame is not alone sufficient to convict the person whose residence it is of keeping a common bawdy-house without proof that the people who go there are of ill-fame or that prostitution is there carried on.

[*R.* v. *St. Clair*, 3 Can. Cr. Cas. 551, 27 A.R. 308, and *R.* v. *McNamara*, 20 Ont. R. 489, referred to; *State* v. *Anderson*, 72 Atl. Rep. 648, distinguished.]

2. EVIDENCE (§ XII L—989)—"SPOTTER" SENT BY POLICE—DISORDERLY HOUSE CASES.

Pretended negotiations by persons in the pay of the police made merely for the purpose of getting evidence against the accused woman and with no intent of returning at the time appointed by her for purposes of prostitution will not support a charge against her of keeping a common bawdy-house.

[See *Rex* v. *Sands* (No. 1), 25 Can. Cr. Cas. p. 116.]

M. N. Doyle, for defendant, appellant.

John Allen, Deputy Attorney-General, for the Crown.

RE SIGURDSON (No. 1) MAN.

Manitoba King's Bench, Curran J. January 3, 1916. K. B.

1. APPEAL (§ III E—91)—SERVICE OF NOTICE—DISMISSAL OF INFORMATION—AFFIDAVIT OF BONA FIDES UNDER SPECIAL STATUTE.

The filing of the appellant's affidavit with the magistrate under the Illegitimate Children's Act, R.S.M. 1913, ch. 92, on appealing from his dismissal of an information thereunder, is intended to take the place of the service on the magistrate of any other formal notice of appeal, such affidavit in itself declaring both the intention to appeal and that the appeal was not being prosecuted for delay; consequently where the appellant has personally served the respondent with a notice of appeal, has given the prescribed bond and has within ten days from the decision complained of filed the statutory affidavit, a preliminary objection for failure to serve the like notice of appeal upon the magistrate will be overruled.

[*Davis* v. *Feinstein*, 24 Can. Cr. Cas. 160, 24 D.L.R. 798, 25 Man. L.R. 517, referred to.]

2. PROHIBITION (§ I—4)—INFERIOR COURT—NON-JURISDICTIONAL ERROR—APPEAL IN SUMMARY PROCEEDINGS.

Error in law upon a question apart from the jurisdiction to try, will not give a right to prohibition, and the forcing of respondent into the witness box, whether justified or not under the provincial statute under

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which the prosecution was brought, does not raise the question of jurisdiction of a county judge to hear an appeal from the dismissal of a summary conviction.

[*Re Royston Park* and *Steelton*, 13 D.L.R. 454, 28 O.L.R. 629, and *Re McLeod* and *Amiro*, 8 D.L.R. 726, 27 O.L.R. 232, referred to.]

3. AFFILIATION (§ I—5)—STATUTORY PROCEEDINGS—R.S.M. 1913, CH. 92.

Where a county judge hearing an appeal from the dismissal of an information under the Illegitimate Children's Act, R.S.M. 1913, ch. 92, has compelled the accused respondent to give evidence on behalf of the prosecution on the re-hearing of the case on appeal pursuant to Cr. Code, sec. 752, made applicable by the provincial law, that fact does not furnish any ground for prohibition against his decision in the event of such ruling not being justifiable, as to which *quære*.

[See also *Re Sigurdson* (No. 2), *infra*.]

MOTION for prohibition in respect of an appeal in proceedings before a police magistrate.

Ward Hollands, for defendant in support of motion.

H. A. Bergman, for informant, respondent. *Prohibition refused.*

RE SIGURDSON (No. 2).

Manitoba King's Bench, Mathers, C.J.K.B. March 17, 1916.

1. AFFILIATION (§ I—5)—STATUTORY PROCEEDINGS—COMMITMENT.

Affiliation order made under the Illegitimate Children's Act, R.S.M. 1913, ch. 92, may direct payment of a lump sum for past maintenance, a monthly allowance for future maintenance for a fixed term and the giving of a bond for the fulfilment of the order, or in default the payment of a fixed sum in lieu of the maintenance allowance; and imprisonment may be imposed for default in complying with such order.

[*Davis* v. *Feinstein*, 24 Can. Cr. Cas. 160, 24 D.L.R. 798, 25 Man. L.R. 507, and *R.* v. *Book*, 25 Can. Cr. Cas. 89, 25 Man. L.R. 480, referred to.]

2. APPEAL (§ VII C—303)—QUASI-CRIMINAL MATTER — TRIAL DE NOVO—ILLEGITIMATE CHILDREN'S ACT, R.S.M. 1913, CH. 92.

Sec. 32 of the Illegitimate Children's Act, R.S.M. 1913, ch. 92, has the effect of making secs. 749 to 760 of the Criminal Code applicable to appeals under that Act, except in so far as the proceedings on such appeals are regulated by that Act; and the powers which the Act expressly confers by sec. 30 upon the Judge hearing the appeal, are to be considered as supplemented by the powers given by sec. 754 of the Code, which include the power to make the order which the magistrate appealed from should have made and to impose costs and to commit for non-compliance.

HABEAS corpus application in respect to a commitment in affiliation proceedings.

R. B. Graham, for prisoner.

H. A. Bergman, for informant, contra.

REX v. HUBLEY.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Drysdale and Ritchie, JJ. March 16, 1915.

1. SUMMARY CONVICTIONS (§ VI—60)—RECORD OF CONVICTION — STATING NATURE OF OFFENCE.

A summary conviction under a municipal by-law must state the nature of the offence and not merely recite that defendant violated a specified section of the by-law.

2. COSTS (§ I—12)—ON CERTIORARI QUASHING A CONVICTION. N. S.

It is a ground for granting costs to the successful applicant for a certiorari that a term is imposed that no action shall be brought for proceeding under the conviction which is set aside. S. C.

REX v. McDONALD.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, JJ., Ritchie, E. J., and Harris, J. July 28, 1915.

1. THEFT (§ I—5)—OF PROCEEDS HELD "UNDER DIRECTION"—CR. CODE, SEC. 357.

Cr. Code sec. 357 declaring the offence of theft by misappropriating proceeds held "under direction" has reference to cases other than those for theft or embezzlement by a clerk or servant.

2. APPEAL (§ VIII B—673)—RENDERING MODIFIED JUDGMENT—PUNISHMENT APPROPRIATE TO SUPPORTABLE COUNTS.

Cr. Code sec. 1020 would enable the Court of Appeal on a case reserved upon a general verdict to affirm a sentence appropriate to counts properly framed and which were supported by the evidence without regard to other counts framed upon the wrong enactment and therefore not supported by the evidence.

B. W. Russell, for prisoner.

S. Jenks, K.C., Deputy Attorney-General, for the Crown.

REX v. BORROR. ONT.

Ontario Supreme Court, Britton, J. October 4, 1915. S. C.

1. MUNICIPAL CORPORATIONS (§ IIC 3—111*a*)—REGULATION OF TRANSIENT TRADERS.

The mere delivery of goods within a municipality by a person employed to make delivery in accordance with customers' orders for fixed quantities given elsewhere, with the taking of which the defendant employee was not connected, will not support a conviction of such employee for conducting the business of a transient trader in contravention of a transient traders by-law passed under the Municipal Act, R.S.O. 1914, ch. 192, sec. 420 (6).

The motion was heard at the London Weekly sittings.

G. S. Gibbons, for defendant.

J. J. Coughlin, for complainant.

REX v. SPERA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. October 25, 1915.

1. EVIDENCE (§ XI C—774*a*)—PROVING AGE WHERE MATERIAL ON CRIMINAL CHARGE—SEDUCTION—CR. CODE SEC. 212.

On a criminal charge of seduction of a girl under twenty-one where the evidence of the girl's parents is not available, the girl's own testimony that her age was nineteen and the testimony to the like effect given by the woman under whose care she had been when a small child based upon information then received and upon personal observation is admissible in proof of her age being under twenty-one.

[*R.* v. *Cox* [1898], 1 Q.B. 179, 67 L.J.Q.B. 293, 18 Cox 672, followed.]

2. EVIDENCE (§ XI C—774*a*)—CRIMINAL CHARGE—AGE OF CHILD OR YOUNG PERSON—CR. CODE SEC. 984.

Cr. Code sec. 984 does not exclude any other class of evidence that is by law admissible, but provides for another means of determining the age of the child or young person against whom the offence was com-

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mitted in the specified classes of cases where the age is material, by enacting that the jury or the magistrate, as the case may be, may infer her age by the girl's appearance.

REX v. GEDDES.

Ontario Supreme Court, Boyd, C. December 21, 1915.

1. MUNICIPAL CORPORATIONS (§ II C—105)—REGULATION OF TRANSIENT TRADERS—FRUIT PRODUCED IN ONTARIO CONSIGNED FOR SALE.

A fruit farmer who consigns a carload of fruit to his town agent and gives him written authority to sell the same on his account is not liable to conviction as a "transient trader" in respect of sales made to the public generally by the agent from the car at its destination, although he did not take out a "transient trader's" license under a town by-law passed in conformity with the Municipal Act, R.S.O. 1914, ch. 192, sec. 420: the words "transient traders and other persons whose names are not entered on the assessment roll, etc." which appear in that section mean transient traders and other trading persons, and do not include a farmer selling his own produce, although he may ship in carload lots to a far distant point in the province, nor is the farmer *pro hâc vice* a trader within the meaning of the section read in conjunction with the exemptions of farmers' produce contained in other sections of the Municipal Act.

W. J. Tremeear, for the prosecutor.

H. E. Rose, K.C., for the defendant.

REX v. McCUTCHEON.

Ontario Supreme Court, Middleton, J. March 9, 1916.

1. CONSPIRACY (§ II—5)—TO DEFRAUD THE PUBLIC—EVIDENCE.

On a charge under Criminal Code sec. 444 of conspiracy to defraud the public, if there is no direct proof of the existence of the unlawful agreement between the defendants and the acts proved are not such as to show from their very nature that they are parts of a common scheme, the jury must separately consider the case of each defendant and determine from his conduct whether there is evidence of the conspiracy alleged; it is only after the conspiracy has been proved that the acts of the one become evidence against the other.

TRIAL of two brothers named McCutcheon upon a charge of conspiracy to defraud the public in respect of certain transactions in Western Canada lands.

N. Ferrar Davidson, K.C., for the Crown.

I. F. Hellmuth, K.C., for defendants.

THE JURY brought in a verdict of not guilty.

Defendants acquitted.

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K. B.

DE PAOLI v. THE KING.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. January 21, 1915.

1. EVIDENCE (§ VIII—674)—CRIMINAL CASE—WRITTEN CONFESSION OF DEFALCATION—PROOF THAT VOLUNTARY.

A written confession of his defalcations, signed by the accused after it had been read over and explained to him, is admissible, although no part of it but the signature was in his handwriting, if it be also shewn that no

inducement was held out or threat made to obtain his signature, and that the confession was therefore a voluntary one.

[See also as to confessions, *R.* v. *Anderson*, 16 D.L.R. 203, 22 Can. Cr. Cas. 455, *R.* v. *Kong*, 24 Can. Cr. Cas. 142, 20 B.C.R. 71; *R.* v. *Bogh Sing*, 12 D.L.R. 626, 21 Can. Cr. Cas. 323, 18 B.C.R. 144; *R.* v. *Farduto*, 10 D.L.R. 669, 21 Can. Cr. Cas. 144; *R.* v. *Hurd*, 21 Can. Cr. Cas. 98, 10 D.L.R. 475.]

CROWN case reserved.

R. Chênever, for appellant.

E. Languedoc, K.C., for the Crown.

REX v. FOURNIER.
MARTIN v. FOURNIER.

Quebec King's Bench, Pelletier, J. January 20, 1916.

1. TRIAL (§ V C—290)—CRIMINAL LIBEL—VERDICT NOT A JUDGMENT.

The verdict itself is not a "judgment for the defendant" in terms of Cr. Code, sec. 1045; but the order of the Court directing the defendant's discharge and made in the enforcement of the jury's verdict of not guilty is a "judgment" for the defendant upon which an order may be made against the private prosecutor for payment of costs in a criminal prosecution for defamatory libel.

[*R.* v. *Blackley*, 8 Can. Cr. Cas. 405, approved.]

2. LIBEL AND SLANDER (§ IV—121)—CRIMINAL LIBEL—PRIVATE PROSECUTOR'S COMPLAINT TAKEN UP BY CROWN.

The person who laid the information for defamatory libel, which was followed by a commitment for trial and indictment of the accused, is none the less a "private prosecutor" liable for costs of the defendant under Cr. Code, sec. 1045, on judgment going in the latter's favor, although the Crown counsel took up the proceedings after the preliminary enquiry and conducted them as Crown business.

[*R.* v. *Patterson*, 36 U.C.R. 129, followed; *R.* v. *St. Louis*, 1 Can. Cr. Cas. 141, specially considered; *R.* v. *Blackley*, 8 Can. Cr. Cas. 405, 13 Que. K.B. 472, referred to.]

3. COSTS (§ II—70) CRIMINAL LIBEL—TAXATION AGAINST PRIVATE PROSECUTOR—COSTS FIXED BY TRIAL JUDGE.

The trial Judge may himself tax the costs payable to defendant under Cr. Code, sec. 1045, by the private prosecutor on dismissal of a criminal prosecution for defamatory libel.

MOTION to dispose of the question of costs in a prosecution for criminal libel after a verdict of not guilty.

Monsieur Jules Fournier, the proprietor of the journal "l'Action" was arrested for defamatory libel upon the information of Mr. Médéric Martin, Mayor of Montreal.

The magistrate found there was evidence warranting a commitment for trial and an indictment was laid before the grand jury who found a true bill; the trial took place before the petit jury in the November term of 1915 and on the 22nd of November the jury returned a verdict of "not guilty, but with recommendation that, inasmuch as it is not proved that Mr. Médéric Martin was personally pecuniarily benefited by the errors committed, the defendant should so mention in his paper."

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As soon as the verdict was given, counsel for the accused moved for the discharge of his client and this motion was granted.

Immediately afterwards counsel for the accused made a motion based upon art. 1045 C.C. to the effect that Mr. Martin be condemned to pay the costs.

Order for costs against prosecutor.

D. A. Lafortune, K.C., counsel for the Crown and also for the private prosecutor on the motion for costs.

Peter Bercovitch, K.C., and *Gustave Monet*, counsel for defendant.

REX v. KANE.

Quebec King's Bench, Pelletier, J. April 18, 1916.

1. CRIMINAL LAW (§ I B—6)—TEMPORARY INSANITY THROUGH DRINK—MANSLAUGHTER.

Homicide by shooting a person unknown to the accused, done without premeditation when the latter was temporarily insane from excessive drinking is not murder but manslaughter; a sentence of fifteen years was imposed because the jury made a recommendation to mercy, but without that recommendation life imprisonment would have been the appropriate punishment.

[See also *R.* v. *Wilson*, 21 Can. Cr. Cas. 448, 46 N.S.R. 59.]

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MARSIL v. LANCTOT.

Quebec Superior Court, Charbonneau, J. February 4, 1914.

1. FORGERY (§ I—1)—ASSUMED NAMES IN PETITION TO LEGISLATURE.

To petition the provincial legislature, under assumed names for an Act of incorporation is not a criminal offence.

2. JUSTICE OF THE PEACE (§ III—12)—MINISTERIAL AND JUDICIAL ACTS—ISSUE OF WARRANT OF ARREST.

The issue of a warrant for arrest upon a sworn information, is in itself a ministerial act of the magistrate, but his preliminary decision under Cr. Code sec. 655 on the question whether a warrant or summons is the more appropriate, or whether in fact any offence is disclosed in the information, is a judicial act.

3. MANDAMUS (§ I B—7)—TO COMPEL EXERCISE OF CRIMINAL JURISDICTION—SAFE CONDUCT GRANTED BY LEGISLATURE TO WITNESS.

Mandamus will not lie to compel a magistrate to issue a warrant for the arrest on a criminal charge of conspiracy of persons resident out of Canada who are temporarily therein solely for the purpose of giving evidence before a committee of a provincial legislature in respect of the very matter which is sought to be made the subject of the criminal charge, while such non-residents are under the protection of a safe-conduct granted to them by the legislature.

4. BRIBERY (§ I—4)—PARTIES TO BE CHARGED—INFORMATION NOT INCLUDING NAME OF PARTY BRIBED.

Bribery is an act to which it is necessary that two persons be parties, the briber and the corrupted party, and an information for the completed offence should include the names of both as parties charged; but, if only an attempt to bribe is alleged, the offence is unilateral and the information is sufficient, if it charges only the person making the attempt.

The petitioner appeared in person.

J. C. Walsh, K.C., for the magistrate.

BISCHINSKI v. CITY OF MONTREAL.

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Quebec Superior Court, Charbonneau, J. January 4, 1915.

1. CONSTITUTIONAL LAW (§ II A 5—248)—SUNDAY LAWS—KEEPING OPEN SHOP—MUNICIPAL BY-LAW UNDER PRE-CONFEDERATION STATUTE—MONTREAL CHARTER.

The special powers conferred upon the City of Montreal in 1860, by the legislature of the Province of Canada, 23 Viet., ch. 72, to pass by-laws "for the better observance of the Sabbath," not having been repealed by Dominion legislation since Confederation, and having been continued in the Montreal Charter, article 300, para. 75 and 76, the by-law of that city prohibiting a tradesman from selling goods on Sunday is not ultra vires, such by-law being a mere continuation of the by-law passed by the city in 1865, prior to the British North America Act; and a grocer who kept his store open on Sunday and sold a pound of sugar is properly convicted under that by-law.

[*Re Sunday Legislation*, 35 Can. S.C.R. 581 and *Ouimet* v. *Bazin*, 20 Can. Cr. Cas. 458, 3 D.L.R. 593, 46 Can. S.C.R. 502, referred to.]

APPLICATION by a writ of certiorari against the condemnation to a fine of $5, pronounced by the Recorder of the city of Montreal on the 24th of July, 1914, declaring the applicant guilty of having kept his grocery store open on Sunday, the 7th of June, 1914, and of having sold on that day a pound of sugar for seven cents.

Cohen & Goldenberg, for plaintiff.

Laurendeau & Archambeault, for defendant.

CANADIAN RAILWAY CASES.

The following cases have been reported in full in Part 3, Vol. XVIII, "Canadian Railway Cases Annotated"

TOWN OF COURTNEY v. ESQUIMALT & NANAIMO R. CO.

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Board of Railway Commissioners. December 2, 1914.

RAILWAYS (§ II B—18)—CROSSED BY HIGHWAY—OPENING—RIGHT-OF-WAY.

The Board will not invoke its compulsory powers to compel a railway company to supply a right-of-way across its own lands for a municipal highway to be used for highway purposes quite irrespective of railway purposes.

APPLICATION to direct the respondent to permit the Provincial Government to make a road from the respondent's freight shed to connect Cumberland Road with Union Street, across the lands of the respondent.

CITY OF WINNIPEG v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners. June 26, 1914.

RAILWAY COMMISSION (§ 1—2)—MUNICIPAL IMPROVEMENT—GRADES—SEPARATION—PUBLIC INTEREST—DOMINION FRANCHISES—APPORTIONMENT OF COST—JURISDICTION.

The jurisdiction of the Board is confined in cases of separation of grades to the public interest in so far as Dominion franchises are concerned and the proper administration of them by Dominion railway companies. It is not the business of the Board to decide an issue of

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municipal expediency, whether or not municipalities should make certain improvements in cases where the whole cost will be on the municipality.

APPLICATION to construct a subway at the crossing of the respondent over Salter street, Winnipeg.

T. A. Hunt, K.C., for applicant.

L. J. Reycraft, and *C. Murphy*, for the respondent.

Aldermen Beath and *Munroe*, for the Citizen's Committee.

CITY OF WINNIPEG v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners. June 26, 1914.

RAILWAYS (§ II A—10)—CROSSED BY HIGHWAY—OPENED—SENIOR AND JUNIOR—RULE—EQUITIES — TITLE — SUBWAY—CONSTRUCTION AND MAINTENANCE—APPORTIONMENT OF COST.

A street having been opened across the right-of-way of the respondent, the applicant was given permission by the Board to construct and maintain a subway under the railway at its own expense and the respondent, under the senior and junior rule, was not ordered to contribute to the expense, but if the applicant agrees to close a neighbouring street, notwithstanding this rule and that the equities as well as the title are in the respondent's favour, the cost of the subway will be apportioned equally between the applicant and respondent.

APPLICATION for the construction and maintenance on Talbot Street already opened by the Board across the right-of-way of the respondent of a subway on the ground that the level crossing would be very dangerous, and to apportion the cost between them.

T. A. Hunt, K.C., for applicant.

L. J. Reycraft, for respondent.

E. Anderson, K.C., for Winnipeg Electric Ry. Co.

LACHINE, JACQUES CARTIER & MAISONNEUVE R. CO. v. MONTREAL GAS CO.

Board of Railway Commissioners. September 25, 1913.

EMINENT DOMAIN (§ I D—55)—LANDS PUT TO PUBLIC USE—PROVINCIAL STATUTE—RAILWAY ACT, SEC. 178.

Lands dedicated to a public use under a provincial statute may be expropriated under the Railway Act for railway purposes.

THE application was heard at Montreal, July 8, 1913.

Mr. Henri Jodoin, for applicant.

Mr. G. H. Montgomery, for respondent.

Mr. W. H. Butler, for City of Montreal.

NOTE.

Expropriation of Lands Dedicated to Public Use.—In the case of *In re Grand Trunk R.W. Co. and Cities of St. Henri and St. Cunegonde*, the Board (1905), 4 Can. Ry. Cas. 277 (Killam,

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Chief Commissioner), decided that railway companies might expropriate, under the Railway Act, the lands of municipal corporations used by them for municipal purposes—leave was granted to the municipalities to appeal to the Supreme Court of Canada from this decision, but no appeal was prosecuted. In the case of *In re Bronson et al and the Corporation of Ottawa* (1882), 1 O.R. 415, an application to quash a resolution of the City of Ottawa purporting to grant to the Canada Atlantic Ry. Co. certain lands or the use of them, consisting of waterworks property acquired by expropriation under a Provincial statute, was refused by Mr. Justice Osler. After a full review of the authorities, English and American, the learned Judge came to the conclusion (p. 430), that "if powers granted for one public or quasi-public purpose, such as the construction of a railway, cannot be exercised without acquiring lands already expropriated for another public purpose, and yet may be so exercised consistently with the existence of the latter and without substantial interference therewith, the right to exercise such power exists by necessary implication."

GRAND TRUNK R. CO. v. HAMILTON & TORONTO SEWER PIPE CO.

Board of Railway Commissioners. July 23, 1914.

RAILWAYS (§ II A—14) — SPUR — OWNERSHIP — CONSTRUCTION — OPERATION — RIGHT-OF-WAY—EMINENT DOMAIN.

When the order of the Board authorizing the construction and operation of an industrial spur provides that the respondent should retain the ownership of the right-of-way on which the siding is located, the Board can only authorize the applicant to take expropriation proceedings to enable it to acquire the right-of-way across the lands of the respondent so as to reach by an extension of the spur another industry which it desires to serve.

APPLICATION to direct the respondent to replace the siding leading to the premises of the Fowler Canadian Co. in the same condition as it was before it was interfered with.

The application was heard at Toronto July 3, 1914.

W. C. Chisholm, K.C., for applicant.

M. K. Cowan, K.C., for respondent.

FERNIE-FORT STEELE BREWING CO. v. CANADIAN PACIFIC R. CO.

Board of Railway Commissioners. February 28, 1915.

CARRIERS (§ III C—387)—CARS—HEATED — SHIPPERS — RELEASE — COMMODITIES — PERISHABLE—NEGLIGENCE — TOLLS—FREIGHT—DAMAGES—LIMITATION OF AMOUNT.

The carrier should be obliged to accept shipments of perishable commodities, providing heated cars, subject to the stipulation that the shipper must sign a release waiving all claim for frost damage unless he can prove that the heating appliances were missing, with a further

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exception that if the fires in the heaters are allowed to go out through the negligence of the carrier, the damages recoverable will be limited to one half the freight tolls charged on the shipment in question.

THE application was disposed of on material on file with the Board.

WOLFEVILLE MILLING CO. v. DOMINION ATLANTIC RY. CO.

Board of Railway Commissioners. February 1, 1915.

RAILWAYS (§ II A—14)—SPURS—MAINTENANCE—OWNERSHIP—RIGHT-OF-WAY—CONSTRUCTION—AGREEMENT.

When a spur is constructed so that it becomes part of the railway company's property, the company should repair and maintain it, but where part of the right-of-way of the spur is upon the property of the railway company and part upon the applicant company's property, the railway company, in the absence of an agreement to the contrary, should maintain that part of the spur upon its own right-of-way and renew the rails (belonging to it) of the extension of the spur into the applicant company's property, but the applicant company should maintain and repair the understructure on its own lands.

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REX v. JEAN CAMPBELL.

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British Columbia Supreme Court, Hunter, C.J. June 9, 1916.

1. CRIMINAL LAW (§ II C—50)—CONVICTION—WARRANT OF COMMITMENT—SUFFICIENCY OF.

After conviction under sec. 238 (*i*) of the Criminal Code, it is not necessary that the warrant of commitment should set out the fact that the accused was first asked to give a satisfactory account of herself; if the order sets out all the ingredients of the offence, it is within sec. 723(3) of the Code.

[*Reg.* v. *Levecque*, 30 U.C.Q.B. 509; *Reg.* v. *Arscott*, 9 O.R. 541, *Rex* v. *Harris*, 13 Can. Cr. Cas. 393; *Rex* v. *Pepper*, 15 Can. Cr. Cas. 314; *Rex* v. *Regan*, 14 Can. Cr. Cas. 106, distinguished; *Rex* v. *Leconte*, 11 Can. Cr. Cas. 41, *Re Effie Brady*, 10 D.L.R. 423, 21 Can. Cr. Cas. 123, applied.]

Statement.

APPEAL from a decision of Morrison, J., dismissing an application for a writ of *habeas corpus* upon the return of an order *nisi*. The facts of the case are as follows.

The prisoner is in custody under a warrant of commitment issued by H. C. Shaw, P.M. at Vancouver, B.C., following her conviction by him "for that at the said City of Vancouver, on the 10th day of May, 1916, she was a loose, idle, disorderly person or vagrant, who, being a common prostitute or night-walker, wandered in the public streets and did not give a satisfactory account of herself."

Morrison, J.

MORRISON, J. (June 6), held that the warrant of commitment was sufficient and dismissed the application.

A second application was heard (June 9), at Victoria.

A. C. Brydon-Jack, for prisoner.

R. L. Maitland, for the Crown.

Maitland took the preliminary objection, that the *habeas corpus* application on the same grounds having been dismissed by Morrison, J., it is not open to bring another application. The objection was overruled.

Brydon-Jack for the prisoner attacked the warrant of commitment because it did not set out the fact that she was first asked to give a satisfactory account of herself. See *Reg.* v. *Levecque*, 30 U.C.Q.B. 509; *Reg.* v. *Arscott*, 9 O.R. 541; *Rex* v. *Harris*, 13 Can. Cr. Cas. 393; *Rex* v. *Pepper*, 15 Can. Cr. Cas. 314; *Rex* v. *Regan*, 14 Can. Cr. Cas. 106.

Maitland for the Crown:—The warrant of commitment sets out all the ingredients in the offence. It follows the wording of the Code, and is therefore within sec. 723, sub-sec. 3.

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See *Rex* v. *Leconte*, 11 Can. Cr. Cas. 41; *Rex* v. *Effie Brady*, 10 D.L.R. 423, 21 Can. Cr. Cas. 123.

The Chief Justice held that the warrant of commitment was sufficient under sec. 723 of the Criminal Code, and dismissed the application. *Application dismissed.*

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Re LE BRUN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. February 21, 1916.

1. WILLS (§ III H—171)—PAYMENT OF DEBTS OUT OF MIXED ESTATE—CONTRIBUTION—MORTGAGE DEBT.

Where a testator creates out of both real and personal estate a fund for the payment of debts and charges, he is presumed to have intended that the burden of the charges should be contributed to ratably by the personalty and realty from which the fund is derived. His direction to pay his debts "and any charge by way of mortgage that may be against the property" signifies a clear intention that the mortgage debt was to be paid out of that particular fund; otherwise by the Wills Act (R.S.O. 1914, ch. 120, sec. 38), the mortgaged real estate would be primarily liable for the mortgage debt.

Statement.

APPEAL from the judgment of Britton, J., on motion by the executors of Honoré Le Brun, deceased, upon originating notice, for an order determining certain questions as to the proper construction of the will of the deceased.

J. M. Ferguson, for appellant.

E. C. Cattanach, for the Official Guardian.

H. E. Rose, K.C., for the sisters of Carisse LeBrun, respondents.

H. S. White, for the widow of Carisse Le Brun.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the widow of the testator, Honoré Le Brun, from the order dated the 23rd December, 1915, made by Britton, J., on an originating motion for the construction of the will of the testator.

The will is dated the 23rd January, 1911, and by it the appellant, Joseph Picard, and John Corkery, are appointed executrix and executors and trustees. The whole estate of the testator is devised and bequeathed to the trustees, upon trust, as soon after his death as conveniently may be, to call in, sell, and convert into money such parts of it as should not consist of money, "except as is herein otherwise provided for . . ." Then follows a direction to the trustees "to pay my just debts and funeral and testamentary expenses, and any charge by way of mortgage that may be against my property at the time of my death."

The testator then directs the trustees to give to his wife, for

her sole use absolutely, certain chattel property, including his household effects.

He then directs the trustees to hold his property on Simcoe street, in the city of Peterborough, and his island and summer cottage, for the benefit of his wife during her lifetime, and after her death to sell them and to divide the proceeds of the sale in equal shares "amongst" his brother Carisse, his, *i.e.*, the brother's, wife, Alphonsine Le Brun, and the testator's nephew, son of Carisse, and he directs that if his brother predeceases his wife she is to have her husband's share.

Then follows a direction to the trustees, as soon as may be convenient, to sell the island.

He next directs that $500 be given to a step-daughter.

Then follows an authority to the trustees to sell the property held by them for the benefit of the appellant, but only with her consent if sold in her lifetime, and a direction to invest the proceeds of the sale for the benefit of his wife during her lifetime.

Next is an authority to the trustees to sell the testator's interest in the business he was carrying on in partnership with Joseph Picard, who, he directs, shall have the option of purchasing it, and if he should buy he is to be allowed to pay the purchase-price in four equal annual instalments with interest at four per cent. per annum.

By the next paragraph provision is made for the disposition of the proceeds of the sale of the interest in the partnership business, and it is directed that one half of the proceeds be invested for the benefit of the appellant during her lifetime and the other half be divided in equal shares between the testator's brother Carisse, his wife, and the testator's sisters who should be alive when the division is made, the time for which is fixed at three months after the trustees shall have received the whole of the proceeds of the sale.

Then follows the disposition of the residue, which is to be divided between the brother Carisse, his wife Alphonsine, their son, the testator's nephew, and such of his sisters as should be alive at the date of the death of the appellant, it being the testator's intention, as the paragraph states, that "should either of the said legatees die before the period of distribution of the proceeds from the sale of said business, that the same shall be divided amongst the

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survivor or survivors of them, except in the case of my brother Carisse, or his wife Alphonsine, dying, then the share of the one so dying is to be given to the survivor of them . . . ." Following the residuary disposition is a direction to the trustees to give to Carisse the testator's watch and the rest of his jewellery and his clothes. The testator then provides for the repair and upkeep of his "household property" (meaning no doubt his houses) by the trustees, who are to deduct the outlay from the revenues and rents derived from the property.

The next provision is a direction to the trustees to purchase a lot in a cemetery and to erect a monument to the testator's memory, the cost of both not to exceed $400.

The last provision is as to the mode of settling differences of opinion or disputes between the trustees.

When the will was made and at the time of the testator's death, the land in Peterborough was incumbered by mortgages made by him, upon which there remained unpaid $11,100.

The sale of the testator's interest in the partnership realised, including accumulations of interest, $7,082.34.

Since the death of the testator, the trustees have paid off all the mortgages except one for $3,000.

The debts and funeral and testamentary expenses (not including mortgage-debts), amounting to $3,161.70, have been paid by the trustees, and the undisposed-of personal property is of trifling value. It consists of one share in a golf company and five shares in a lock company, together of the nominal value of $510, but of which the trustees have as yet been unable to dispose.

The island lot "and chattels" have been sold for $2,000, and the furniture and household effects there have been sold for $400; and this latter sum has been paid to the appellant. She has also received $592.62, the proceeds of the sale of part of the furniture and household effects and books and pictures which were at the time of his death in the testator's residence in Peterborough. It would appear from the accounts that the trustees have collected the rents of the Peterborough property and have made payments from time to time to the appellant out of the money so collected.

The contest is as to how the mortgage-debts are to be paid, the contention of the respondents being that the land devised passed to the devisee *cum onere*, and to that contention my brother Britton gave effect.

The contention of the respondents is, that there is nothing in the will to shew a contrary intention within the meaning of the provisions of sec. 38 of the Wills Act, R.S.O. 1914, ch. 120*, which correspond with the provisions of the English Act known as Locke-King's Act and the amendments made to it since the original Act was passed; and the argument is, that in order to take a case out of sec. 38 the testator must have created or designated a fund out of which the mortgage-debts are to be paid, and constituted it the primary fund for paying them, and that that has not been done by the testator whose will is now in question.

I am unable to agree with this contention. In my opinion, the testator has by his will signified the contrary or other intention necessary to displace what otherwise would have been the effect of the section.

The trustees are directed to pay the testator's debts, including his mortgage-debts. The only fund available to them for that purpose is the proceeds of the sale of the property which they are directed to convert into money, and the direction to pay is, therefore, in my opinion, a direction to pay out of that fund.

* 38.—(1) Where any person has died since the 31st day of December 1865, or hereafter dies, seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum of money by way of mortgage, and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage-debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage-debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage-debts charged on the whole thereof.

(2) In the construction of a will to which this section relates, a general direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in sub-section 1 contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage-debt, either out of the personal estate of the person so dying or otherwise; and nothing herein shall affect the rights of any person claiming under any will, deed or document made before the first day of January, 1874.

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The effect of a general direction by the testator that his debts shall be paid charges them on the real estate devised by his will: Jarman on Wills, 6th ed., p. 1990.

The leading authority for this proposition is *Legh* v. *Earl of Warrington* (1733), 1 Bro. P.C. 511.

Even in the case of an executor, a direction to him to pay debts, if he is devisee of real estate, will cast them on the realty so devised: Jarman on Wills, 6th ed., p. 1993.

The reasoning upon which this conclusion is reached appears from what was said by the Master of the Rolls (Sir John Leach) in *Henvell* v. *Whitaker* (1827), 3 Russ. 343. In that case the testator directed that his debts and funeral expenses should be paid by his executor thereafter named, and by a subsequent provision of the will all the testator's real and personal property was devised and bequeathed to the nephew William Whitaker, who was named as executor. In delivering judgment the Master of the Rolls said: "When the testator in his will directs that all his just debts and funeral expenses be fully paid by his executor thereinafter named, it must be intended that he had then fully determined who that executor should be; and the will is to be construed as if he had said, 'I direct that my just debts and funeral expenses be paid by my nephew William Whitaker, whom I hereinafter name my executor.' In such case the obligation to pay his debts and funeral expenses would be a condition imposed upon the nephew William Whitaker, to be satisfied as far as the property, which he derived under the will, would extend, whether personal or real."

The application of this rule to the will in question in the case at bar leads to the conclusion that it is out of the fund which is to come to the hands of the trustees, viz., the proceeds of the sale of the property which they were directed to convert into money, that the payment which they are to make is to be made.

The direction to convert as soon as conveniently may be is subject to an exception in these words, "except as is herein otherwise provided for," which I understand to refer to the subsequent direction that the land devised to the appellant for life is not to be sold in her lifetime without her consent, and possibly to the subsequent direction that his partner is to have the option to purchase the testator's share in the partnership business which

he and Joseph Picard were carrying on. The language of the exception is more appropriate to the time and manner of selling than to the subject of the sale, and the exception, in my opinion, has reference to the former and not to the latter.

The conclusion being that the fund to be created by the conversion which the trustees are directed to make is a fund out of which his funeral and testamentary expenses and his debts, including mortgage-debts, are to be paid, the next question is as to how these are to be borne by the beneficiaries.

The rule of law, as I understand, is that, "where a testator creates out of real and personal estate a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary fund and the realty the auxiliary for those charges, but that each shall contribute ratably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate:" Jarman on Wills, 6th ed., p. 2033.

It is not sufficient to exempt the personal estate from its primary liability that the real and personal estate are given together "out of the issues, dividends, interest and profits thereof to pay debts, legacies or annuities," but to effect that purpose "there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will:" *per* Sir G. Turner, L.J., in *Tench* v. *Cheese* (1855), 6 DeG. M. & G. 453, 467; Jarman on Wills, 6th ed., p. 2033.

The fund which the testator in this case has created is a mixed fund within the meaning of the rule, for he has directed the sale of the real estate, and therefore the burden of the charge must be contributed to ratably by the personalty and realty from which the fund is to be derived, which is, in my opinion, the whole of the real and personal estate except the life estate devised to the appellant.

I would, for these reasons, vary the order appealed from by striking out the first paragraph and substituting for it a declaration that, according to the true construction of the will:—

1. The funeral and testamentary expenses and the debts of the testator, including his mortgage-debts, are payble out of the proceeds of the real and personal estate which the trustees are directed to sell and convert into money, upon which they are charged.

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2. That these proceeds form a mixed fund for the payment of the funeral and testamentary expenses and debts, including mortgage-debts.

3. That the estate for life devised to the appellant does not form part of the fund, and is not subject to the charge.

4. That the real and personal estate, the proceeds of which form the fund, are liable to contribute ratably to the burden of the charge.

5. And that the costs of the motion and of the appeal be paid out of the mixed fund. *Order below varied.*

ALTA.

S. C.

LUSK v. CITY OF CALGARY. WHEATLEY v. CITY OF CALGARY.

Alberta Supreme Court, Appellate Division, Harvey, C.J. and Scott, Stuart and Beck, JJ. March 2, 1916.

1. HIGHWAYS (§ IV AI—120)—DEFECTIVE BRIDGE—LIABILITY OF MUNICIPALITY—CONTRIBUTORY NEGLIGENCE.

The obligations of the municipality, under sec. 158 of the Calgary (Alta.) Charter, which vests every public highway in the city, to keep every bridge or public highway "belonging to the city" in good repair, extends to a bridge forming part of a highway, notwithstanding the statutory obligation of a railway company under the Irrigation Act (R.S.C. 1906, ch. 61, sec. 25) for its safe maintenance, and a failure of the municipality to equip such bridge with proper railings will render it liable for injuries sustained by a vehicular traveller in consequence thereof. The absence of the railings being the real cause of the accident, the question of contributory negligence becomes immaterial.

[*Lusk* v. *City of Calgary*, 22 D.L.R. 50, affirmed; *B.C. Electric R. Co.* v. *Roach*, 23 D.L.R. 4, referred to. See also *Linstead* v. *Whitchurch* (Ont.), 27 D.L.R. 770.]

Statement.

APPEAL from the judgment of McCarthy, J., 22 D.L.R. 50, in plaintiff's favour, in an action against a municipality for personal injuries sustained on a defective bridge. Affirmed.

C. J. Ford, City Solicitor, for city.

I. W. McArdle, for Lusk and Wheatley.

Stuart, J.

STUART, J.:—The embankment over which the plaintiffs' horse and buggy fell was some 8½ ft. high at the point of the accident. The roadway was at most 17 ft. wide. The angle of declivity does not seem to have been expressly stated in the evidence, but the drop was 8½ ft. in 15 ft. according to the evidence of the engineer, McKinnon, and this would give the angle as slightly over 30 degrees from the horizontal and slightly under 60 degrees from the vertical. Even a width of 17 ft. gives barely room for two waggons to pass. I agree, therefore, with the trial Judge that at such a place there is real danger unless a railing is provided.

The first question is whether the absence of this railing amounted to non-repair within the meaning of the statute. I am unable to accept the view that the obligation to keep in repair involves no more than a duty to keep the highway in as good a condition as it was originally when the municipality acquired jurisdiction over it. It seems to me that this is tantamount to saying that if a municipality, upon which rests an obligation to keep a highway in repair, never does anything upon the highway at all it will never be required to do anything except to keep it as good as it originally stood by removing any effect which may have been produced by continual travel. There would appear to me to be quite clearly an obligation to initiate such improvements as owing to the nature of the locality, the amount of travel and the expense involved, might reasonably be demanded. See *Plant* v. *Tp. of Normanby*, 10 O.L.R. 16, a case of very similar facts and which, though decided by a single Judge, did not go to appeal.

The defendant corporation, however, contended that there was no liability to keep the highway in repair at the particular place in question. Before the boundaries of the city were extended to include that spot the C.P.R. had obtained authority under the Irrigation Act of the Dominion (R.S.C. 1906, ch. 61) to divert water from the Bow River and to construct a canal for irrigation purposes. The proposed line of this canal passed diagonally across the place where the original surveyed road allowance running north and south along the 5th mer. crosses the road allowance coming in from the west between secs. 12 and 13 in tp. 24, r. 1 w. 5th and passing easterly between secs. 9 and 16 in tp. 24, r. 29, w. 4th. A bridge constructed on the road allowance running east and west would have crossed the canal diagonally and it was found to be more convenient to build the bridge at a right angle to the canal. In order to do this, it became necessary to divert the road allowance between secs. 12 and 13. By an arrangement with the Public Works Department of the province of Alberta, the C.P.R. Co., which was the owner of secs. 12 and 13, gave a new road through sec. 12 and received in return a conveyance from the Crown of the original road allowance. It seems clear that, as a result of this exchange, the new road assumed exactly the same character in every respect as the old road allowance, and I cannot see that anything specially turns upon the fact

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that the exchange was made at the request of the railway company. It is not clear that it was not also to the advantage of the public that the bridge should cross the canal at right angles. The railway company constructed the bridge across the canal and also the approach up to it upon which the accident happened. This was all done before the boundaries of the city were extended. When the extension was made, it went only as far as the western boundary of the road allowance along the 5th mer., the result being that the approach and perhaps a third of the western end of the bridge came within the city limits.

In order to cross road allowances with its canal the railway company had to get permission from the Public Works Department of the province. It was contended by the defendant that inasmuch as by virtue of the provisions of the Irrigation Act and of this permission obtained from the province the railway company were bound to build and keep in repair bridges on all highways crossed by the canal and suitable approaches thereto, therefore, the liability to repair the approach at the point where the accident occurred lay upon the railway company and the city was thereby relieved. The railway company are not a party to this action and I do not, therefore, think it advisable to declare that it is liable to keep this approach in repair. It is preferable, and, in my opinion, sufficient for the purpose of considering the defendants' contention, merely to assume that the liability on the part of the railway exists.

It seems clear upon the authorities that there can be a liability both in the private corporation and in the municipality and that the existence of the former does not remove the latter. *Mead* v. *Tp. of Etobicoke*, 18 O.R. 438; *Fairbanks* v. *Tp. of Yarmouth*, 24 A.R. (Ont.) 273; *Hawks* v. *Northampton*, 116 Mass. 420; *Reg.* v. *Brightside Bierlow*, 13 Q.B. 933, 116 E.R. 1520. All the cases cited by the appellant were cases in which the municipality sought a declaration as against the private corporation that the latter was liable *as between the parties to the action* to keep the highway in repair. I do not think it was the intention of the statute to relieve the public authority of all responsibility to individuals, but the intention was rather to furnish a means of relief from the expense. No case was cited wherein the person injured was suing the municipality and the latter was relieved because of

the existence of a duty in another corporation. Upon this point the authorities are all the other way (37 Cyc. 228).

I was at first inclined to think that there might be something in the view that, owing to the necessary conflict of jurisdiction over the highway, the body whose authority rested possibly upon superior legislative authority, should alone be liable, because a simultaneous attempt of both bodies to perform the duty of repair would lead to possible practical difficulties. But this, after all, is only an argument *ab inconvenienti* and I do not imagine that the eagerness to spend money is so great in either body that any breach of the peace, to say the worst, would be likely to occur. Such a dispute could easily be settled by a declaratory action as was done in the cases cited by the appellant.

The appellant, however, contended that, by the true construction of the statute or ordinance incorporating the city, there was no liability imposed upon the city in any case to keep the approach in repair.

Sec. 158 of the Ordinance, says:—

Every public street, road, square, or other highway within the city, shall be vested in the city and shall be kept in repair by the corporation.

Sub-sec. 2, subsequently passed, enacts that

Every public road, street, bridge, highway, alley, or other public place, *belonging to the city* including all crossings, sewers, culverts and approaches, grades, sidewalks, and other works made or done thereon by the city or by any person with the permission of the council, shall be kept in repair by the city,

and the sub-section goes on to impose civil liability for damages caused by reason of default. The argument of the appellant is this: the sub-section imposes the duty to repair only with respect to roads and highways "belonging to the city." It is contended that this phrase means vested in the city, as provided by the preceding clause, that the preceding clause does not contain the word "bridge," that the bridge over the canal was therefore not vested in the city and so did not "belong to the city," that the term "bridge" includes under the law all approaches to a bridge, that therefore the approach not being "vested in the city" did not "belong to the city" and therefore the sub-section does not impose any obligation to repair with respect to it.

It seems to me that this argument is a very strained one. In the first place, I am not sure that the expression "belonging to the city" might not very properly be interpreted in a wide

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general sense as "forming part of or being within the city." But even if that suggestion is not acceptable and if we must interpret the phrase in the light of the words of the previous clause and take it to mean "vested in the city" in the sense of ownership, I am unable to see how this helps the appellant. It is true that the statute, *i.e.*, the Irrigation Act, and the cases, which impose an obligation on the private corporation to keep bridges in repair, declare that this obligation extends to the approaches. But this is very far from extending the right of ownership or of property to the approaches. The private corporation may own the bridge and be bound to repair it, but I cannot see that because the obligation to repair is extended to the approaches therefore the right of ownership is extended also. I do not think this is the case. Indeed, I am not sure that, by virtue of the enactment vesting all highways in the city, it ought not be fairly and reasonably argued that the real ownership also of the bridge, which is indisputably part of the highway, was vested in the city, leaving the obligation to repair as between the city and the company resting upon the latter. This latter may not be so, because there is in the cases a distinction drawn between the bridge, the actual structure, and the highway *over the bridge*. But in any case, I am clearly of opinion that this approach is part of the highway that the section vests the ownership of it in the city, though the city may be entitled to compel the company to keep it in repair, and that even if the ownership of the bridge does, as perhaps it may, still remain in the company this ownership does not extend to the approaches merely for the reason that the duty resting upon the company to repair the bridge is also by law extended to the approach.

It was finally contended by the appellant that the plaintiffs were guilty of contributory negligence in not stopping and turning out at a safe and wider part of the approach which immediately adjoined the end of the bridge and in not there waiting till the buggy coming to meet them and the pigs being driven by the persons in that buggy, which probably caused the plaintiffs' horse to shy, had got past. After a careful perusal of the evidence, I cannot say that the trial Judge was wrong in the conclusion at which he evidently arrived that there was no contributory negligence. But more than that, it seems clear that even if the plaintiffs were also negligent the real cause of the accident was after

all the absence of a proper railing. No doubt, some sort of accident might still have happened even if there had been a railing. But we are concerned here, not with hypothetical accident, but only with the accident which did, in fact, happen. And there is no doubt that *that* accident would not have happened if there had been a sufficient railing, the absence of the railing continued after the plaintiffs had gone on and up to the moment of the accident and was, as I say, its real cause. I refer to the recent case of *B. C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, 113 L.T. 946, which seems fortunately to have put the question of ultimate negligence upon a sensible and satisfactory basis at last. It was indeed time. But, of course, it ought to be said that the case is only applicable, if at all, upon the assumption that the charge of an omission by a municipality to repair stands in the same position as a charge of negligence and that the doctrine of contributory negligence and of any proper answer thereto applies to a case of non-repair. I think the appeal should be dismissed with costs.

SCOTT and BECK, JJ., agreed that the appeal should be dismissed.

HARVEY, C.J., dissented. *Appeal dismissed.*

DAVIS v. TOWNSHIP OF USBORNE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. February 21, 1916.

1. HIGHWAYS (§ IV A 4—147)—DUTY OF REPAIR—SAFETY OF TRAVEL—UNGUARDED DITCH—LIABILITY OF MUNICIPALITY.

The statutory duty imposed upon a municipality by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, to keep roads in good repair, requires it to make them reasonably safe for the purposes of travel, and so safe from any additional danger incident to the lawful use of the highways by motor vehicles. A municipality is liable for injuries sustained by a vehicular traveller, in consequence of her horse becoming frightened by an approaching motor vehicle and throwing her into a deep ditch beside the road, which was unguarded by any railing.

[See also *Robinson Little & Co.* v. *Township of Dereham* (Ont.), 23 D.L.R. 321; *Connor* v. *Brant*, 31 O.L.R. 275; *Von Mackensen* v. *Dist. of Surrey* (B.C.), 22 D.L.R. 253; *Coleman* v. *Halifax* (N.S.), 22 D.L.R. 781; *Lusk* v. *City of Calgary* (Alta.), 28 D.L.R. 392, affirming 22 D.L.R. 50.]

Statement.

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Huron, after trial of the action without a jury, dismissing it with costs. Reversed.

R. S. Robertson, for appellant,

F. W. Gladman, for defendants, respondents.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Huron, dated the

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8th December, 1915, which was pronounced by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury, on the previous 20th October.

The action is brought to recover damages for injuries sustained by the appellant owing, as she alleges, to the default of the respondents in the performance of the duty imposed upon them by sec. 460 of the Municipal Act, of keeping in repair the roads under their jurisdiction.

The injuries were met with while the appellant was being driven by her son, after nightfall, in a covered buggy drawn by a single horse, on a leading road known as the London road, and were caused by the horse taking fright at a motor vehicle coming in the opposite direction, and having shied and overturned the appellant and the buggy into a ditch on the east side of the road.

The London road, is, as I have said, a leading road, and is much travelled. There are open ditches on each side of it. The depth of the easterly one at its lowest point is four feet seven inches, which is the extent of the fall from the shoulder of the road in a distance of five and a half feet. The space between the ditch and the travelled part of the road is only about eighteen inches, and the width of the road between the ditches, or, as the witness Farncombe spoke of it, between "shoulder" and "shoulder," is twenty-four feet. I take these figures from the plan and Mr. Farncombe's evidence explaining it. The plan also shews that the part of the travelled way east of the crown of the road is practically level, while that west of the crown slopes from it to the ditch, and has a fall of two feet two inches in a distance of less than thirteen feet.

It is not suggested that the accident was caused or contributed to by any negligence on the part of the appellant or of her son, or that the motor vehicle was not lawfully upon the road.

The learned Judge of the County Court, as I understand his reasons for judgment, was of opinion that the road was reasonably safe for the purposes of public travel by the means in use before the advent of motor vehicles, and that the respondents, having provided such a road, were under no obligation to improve it so as to make it reasonably safe against the added danger which was or might be occasioned by its being used by motor vehicles.

This reasoning, in my opinion, implies that the road was not reasonably safe for public travel under existing conditions—that

is, now that it is made use of by motor vehicles, and that that was the view of the learned Judge is apparent, I think, from his reasons for judgment and his observations during the course of the trial.

I confess that I do not understand how it properly can be said that the road was reasonably safe for the purposes of public travel by the means in use before the advent of motor vehicles. An accident such as that which happened to the appellant might just as well have happened by her horse having taken fright at an approaching waggon or some other object on or near the road, and having shied, and if the ditch was likely to prove dangerous if a horse should shy, the cause of the shying, whether due to fright caused by an approaching motor vehicle or by an approaching waggon or by some other object on or near the road, is immaterial. The question is, was the road reasonably safe for public travel? And in considering that question account must be taken of the fact that horses do shy, and a road is not, in my opinion, reasonably safe for public travel where there is close to the travelled way a ditch four feet seven inches deep, with but little slope to its sides, into which, in the case of a horse shying, there would be danger of a horse and vehicle being overturned, and a like danger to persons using the road at night if they should happen to drive into or too close to the ditch.

It is said that a ditch was necessary for draining the road, but the proper conclusion upon the evidence is, that so deep a ditch was not necessary, and that there was no reason why a shallower one should not have been made or why the sides of it should not have been made more sloping. But, if such a ditch as exists was necessary, it should have been guarded by a railing. An open ditch, however, was unnecessary. The water it was designed to carry off might have been carried away by an underground tile drain, which would not have been a source of danger to travellers.

I am unable to agree with the view of the learned Judge that the respondents' duty was fulfilled if they had provided a road reasonably safe for the purpose of travel upon it before the advent of motor vehicles. It may be that it would have been unreasonable to require a corporation at once after motor vehicles came into use to make their roads, otherwise sufficient, safe for travel under the changed conditions; but that is not this case. Motor vehicles have been in use for several years, and are a common

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means of transportation in general use throughout the Province, as well as elsewhere; and, in my opinion, the statutory duty imposed upon the respondents required them to make the road in question reasonably safe for the purposes of travel, and so safe from any additional danger incident to the use of it by motor vehicles.

The nature and extent of the obligation imposed upon municipal corporations of keeping in repair the highways under their jurisdiction has been stated in varying language in numerous reported cases.

In the early case of *Colbeck* v. *Township of Brantford* (1861), 21 U.C.R. 276, 278, 279, Robinson, C.J., said: "If, for instance, an accident should arise on a new side line or concession line lately opened in a township but thinly settled, the argument would be probably urged that what should be understood by the words 'keeping in repair' should be construed with a reasonable attention to circumstances, for such a road could hardly be expected to be found in as perfect condition as an old highway in a well-settled township."

In *Toms* v. *Township of Whitby* (1874), 35 U.C.R. 195, 223, it is said that "the road or bridge must be reasonably safe for the public use, and if it be not so, the fact that the horse was running away or unmanageable will not prevent the person injured from recovering for the damage he has sustained."

In *Castor* v. *Township of Uxbridge* (1876), 39 U.C.R. 113, 122, it was said by Harrison, C.J.: "When a highway is in such a state from any cause, whether of nature or man, that it cannot be safely or conveniently used, it may in a large and liberal sense be said to be out of repair."

In *Foley* v. *Township of East Flamborough* (1898), 29 O.R. 139, 141, Armour, C.J., said: "The word 'repair,' as used in the Municipal Act, has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated, whether in a city, town, village, or township, and if in the latter, to the situation of the road therein, whether required to be used by many or by few, to how long the township has been settled, to how long the particular road has been opened for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the re-

quirement of the public using the road . . . And I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

In *City of Kingston* v. *Drennan* (1897), 27 S.C.R. 46, 55, Sedgewick, J., used the following language: "The obligation of the city was to keep the streets and sidewalks in a reasonable state of repair—in such a condition that the traveller using them with ordinary care might do so with safety."

In *Walton* v. *County of York*, 6 A.R. 181, the Court of Common Pleas (1879), 30 C.P. 217, had held that the having a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair, and had granted a nonsuit; but on appeal to the Court of Appeal that ruling was reversed, and it was held that it was a question of fact for the jury whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel. In delivering the judgment of the Court of Common Pleas, Wilson, C.J., said (p. 223): "I will not say that no country ditch is to be fenced off or guarded. This county has made a rule to fence off all ditches of four feet depth or more. I do not say whether that is the proper rule in such cases or not. It is only necessary I should give an opinion upon the ditch which is now in question, at the side of the road, as that road has been described."

Applying the test which, according to these cases, is to be applied, I am of opinion that the proper conclusion is, that the respondents failed to perform their statutory duty of keeping in repair the road in question, and that the injuries of which the appellant complains were sustained by reason of that default; and I would, therefore, allow the appeal with costs, reverse the judgment of the Court below, and substitute for it a judgment for the appellant for $150 with costs.

If my view of the respondents' duty imposes too onerous a burden on municipal corporations, relief can be had only from the Legislature, which has already imposed restrictions upon the use of highways by traction engines and by motor vehicles.

Appeal allowed.

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REX v. SIMPSON; Re WHITLA.

Manitoba Court of Appeal, Richards, Perdue and Cameron, JJ.A. February 21, 1916.

1. EXTRADITION (§ I—15)—WITHIN BRITISH EMPIRE—DEPOSITIONS TAKEN EX PARTE—REFUSAL OF WITNESS TO TESTIFY—FUGITIVE OFFENDERS ACT.

As a magistrate is expressly empowered by sec. 29 of the Fugitive Offenders Act, 44-45 Vict. Imp., ch. 69 [R.S.C. 1906, ch. 154, sec. 27], to take depositions for the purpose of that Act in the absence of the person accused, he must be held to have the like power to punish a witness for refusing to testify in proceedings so taken in Manitoba in the absence of accused for the purpose of bringing the latter back from England to Manitoba to answer the charge.

[*Ex parte Lillywhite*, 19 N.Z.R. 510, specially referred to.]

Statement.

APPEAL by one Whitla, a witness, from an order of Mathers, C.J.K.B., refusing an order of prohibition to a magistrate in respect of the enforcement of the magistrate's order to compel the applicant to attend and give evidence in ex parte proceedings under sec. 29 of the Fugitive Offenders Act.

The judgment appealed from and which was affirmed was delivered January 16, 1916, as follows:

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an application on behalf of H. W. Whitla, K. C., for an order prohibiting P. A. Macdonald, Esquire, Police Magistrate, from compelling him to give evidence against the accused under The Fugitive Offenders Act, 1881. An information was laid before the said Police Magistrate some time ago charging the accused with an indictable offence committed in Manitoba, and a warrant issued for his apprehension. A short time ago he was arrested in London, England, and brought before a Magistrate there and remanded to await the arrival of evidence from Manitoba.

A subpœna was regularly issued and served upon Mr. Whitla, commanding him to appear before Mr. Macdonald for the purpose of giving evidence on behalf of the prosecution. Mr. Whitla attended in obedience to the subpœna but objected to be sworn or give evidence, contending that the Magistrate has no jurisdiction to either compel him to attend or give evidence. The Magistrate overruled the objection, but permitted the matter to stand to enable Mr. Whitla to move for an order of prohibition. Such an application was made before me on Saturday.

The objection to the Magistrate's jurisdiction is based on the first paragraph of section 29 of the above Act. That paragraph says: "A Magistrate may take depositions for the purposes of

this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him." The argument is that whereas this section enables the Magistrate to take the depositions of those who attend voluntarily before him it confers upon him no power to enforce the attendance of one unwilling witness. Although this statute has been in force not only in England but in the Overseas Dominions as well for upwards of thirty-four years, I am informed by counsel that they are unable to find that this point has ever before arisen and my own industry has met with no greater reward. That fact, although somewhat significant as indicating a general opinion that the Magistrates of the demanding state have power to compel the attendance of witnesses, is, of course, in no way conclusive against the applicant. It may be that in every previous case the witnesses for the prosecution were willing witnesses or, if unwilling, that the objection here taken did not suggest itself to any of them.

The jurisdiction of a Magistrate to compel the attendance of a witness under the circumstances stated, if it exists, must be conferred by statute. He has no common law jurisdiction to enforce the attendance of a witness. I do not think section 29, standing alone, confers any such power; but I have arrived at the conclusion, after as careful consideration as was possible in the limited time at my disposal, that the power is conferred by that section read in combination with the provisions of the Criminal Code relating to preliminary inquiries. When the information was laid before the Magistrate, if he had not been satisfied as to its sufficiency to justify him in granting his warrant, he might under section 655 have issued his subpœna and in that compelled Mr. Whitla or any other witness to have testified before him. That course was not followed, but as is the usual practice a warrant was granted upon the information alone. The Magistrate is now seised of the case and all that stands in the way of proceeding with the preliminary hearing and for that purpose enforcing the attendance of witnesses under section 671 *et seq.*, is the absence of the accused. If he were present either by voluntary attendance or otherwise the inquiry could proceed. In that case there would be no force whatever in the objection now urged. But here section 29 of The Fugitive Offenders Act steps in and says that a Magistrate may take depositions in the absence of

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the accused in like manner as he might take them if the accused were present. This removes the only obstacle in the way, and the Magistrate may therefore proceed as if the accused were present.

I suggested this view of the case during the argument without at that time entertaining any settled conviction upon that point. Further consideration has convinced me that it is sound. I find that the same view was taken of the first part of section 29 by Mr. Justice Edwards of the Supreme Court of New Zealand in *Ex parte Lillywhite*, 19 N. Z. R. at 510 (1901). He there says:

"But for the provisions contained in the first paragraph a Magistrate could not take depositions in the absence of the person charged; and the object of the first paragraph is to get rid of that difficulty."

With that statement I agree. I believe the purpose in enacting the first paragraph of section 29 was to overcome the objection that the Magistrate in the demanding Dominion could not exercise the powers conferred by the local law without the presence of the accused. Having removed that difficulty, it was not necessary to confer upon the Magistrate power to compel the attendance of witnesses because he already had that power under the local statute, in this case sections 671 *et seq.* of the Criminal Code.

I am strengthened in this view by a consideration of section 5 of The Imperial Act. That section empowers the Magistrates of the Dominion where the fugitive is found to deal with the case. As the alleged crime is not committed within the Dominion of which he is a magistrate he could have no jurisdiction over the fugitive or the offence charged unless the Act conferred such jurisdiction upon him. Consequently section 5 provides that when a fugitive is brought before him he "shall hear the case in the same manner and have the same jurisdiction and powers as near as may be (including the power to remand and admit to bail) as if the fugitive were charged with an offence committed within his juridsiction." No such wide power is conferred upon a Magistrate by section 29. This section applies when England is demanding the return of a fugitive from one of the other Dominions and *vice versa*. It is to be presumed that Parliament would have conferred upon the Magistrate acting under section 29 as wide powers as it was deemed necessary to confer upon the Magistrate

acting under section 5 had it not believed that these powers already existed under the general criminal procedure Acts.

In my opinion the Magistrate was right in overruling Mr. Whitla's objection. The application for an order of prohibition will be dismissed.

From that judgment the witness Whitla appealed.

C. P. Fullerton, K. C., for the appellant, Whitla.

J. B. Coyne, for the Crown.

RICHARDS, J.A.:—The facts are set out in the judgment appealed from. Richards, J.A.

There are apparently no reported decisions to help us. To construe section 29 of the Fugitive Offenders Act, 1881, as giving power to punish a witness for refusing to testify, is going far in implying what is not explicitly enacted. On the other hand, to stop short of that construction might enable a witness, if he chose, to defeat the ends of justice. The section empowers a magistrate to take the depositions in the absence of the accused "in like manner as he might take the same if such person were present and accused of the offence before him."

If the accused were present and accused of the offence before the magistrate, there is no doubt that the magistrate could punish a witness who refused to testify. Do the words quoted above give the magistrate power to enforce the giving of evidence, or do they only extend to the manner of receiving and recording it? The latter construction, at first sight, appears to be the natural one. But, as stated above, it might make the section useless. With great hesitation, I have, for that reason, formed the opinion that we should imply from the language of the section the power to enforce the giving of the evidence.

I would dismiss the appeal.

PERDUE, J.A.:— In considering the questions that arise in this case, there are certain points which must be kept in mind. There was the necessity for legislation dealing comprehensively with the question of the surrender of fugitive offenders as between different parts of the British Empire. What is accomplished with foreign countries by means of extradition treaties must be done as between the different self-governing portions of the Empire by statutory enactment. The Imperial Parliament, and it alone, has the power to pass a law of general application to the whole of the British Empire dealing with the question of apprehending a Perdue, J.A.

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fugitive offender in one portion of the Empire and returning him to the part where the offence was committed, in order that he may be tried and punished. If authority is required as to the power of the Imperial Parliament so to enact, reference may be made to the authorities summed up by Mr. Lefroy in his treatise on Canada's Federal System, pages 51–58. Such an enactment, made applicable as it is to the whole of His Majesty's Dominions, must be expressed in wide and comprehensive terms and cannot be expected to contain all the minutiæ of procedure. The proceedings to be taken under the Act must necessarily be indicated in such a general manner as to be applicable to all the British possessions. Such an Act must receive a beneficial construction. The whole difficulty that arises in this case centres upon the construction to be placed upon section 29 of the Fugitive Offenders Act (44 and 45 Vic. c. 69, Imp.). The first clause of that section enacts that: "A magistrate may take depositions for the purpose of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him."

The word "magistrate" is defined by section 39. It is argued that section 29 gives no power to the magistrate to compel the attendance of witnesses or the answering of questions. A comparison is made with section 5 which explicitly confers upon the magistrate before whom an apprehended fugitive is brought full and complete jurisdiction and powers in order to deal with the question of the committal of the fugitive to await his return to the place where the offence was committed.

Section 29 is intended to enable a magistrate in the British possession in which the offence was committed to take evidence for use under the Act, in the absence of the accused person. In Canada the evidence of the witnesses on the preliminary inquiry must be taken in the presence of the accused: See Crim. Code, s. 682. Probably a similar rule prevails generally throughout His Majesty's Dominions.

It appears to me that the Act contemplates that when an offence to which the Act applies has been committed in one British possession and the party accused has taken refuge in another British possession, the ordinary law prevailing in the place where the offence was committed may be set in motion,

that an information may be laid before a magistrate and that a warrant may be issued by him for the apprehension of the accused person. The magistrate, however, cannot proceed further with the inquiry by reason of the absence of the accused. Then the Act steps in with the provision contained in section 29 and enables the magistrate to proceed with the taking of depositions, in like manner as he might if the accused were present and charged with the offence, but such depositions are to be used against the accused person only for the purposes of the Act, that is, to enable the authorities of the British possession in which the fugitive is found to come to a conclusion whether he should be returned to the place where the offence was committed in order to take his trial. In this view it was not necessary for the Act to confer more particular or definite powers upon the magistrate who is acting in the place where the offence was committed. He is empowered by the Act to take depositions as if the accused were present. The magistrate could therefore follow the procedure and invoke the powers provided by the law of that place in respect of preliminary inquiries by magistrates where the commission of an indictable offence has been charged.

This view is, I think, strengthened by a comparison of sec. 29 with sec. 5. The latter section deals with the procedure to be adopted by the magistrate in the place where the fugitive is apprehended. In the absence of a statutory provision such magistrate would have no power to deal with the accused in any way. It was therefore necessary to confer upon the magistrate power to enquire into the charge and commit the accused, and it was also necessary to provide a procedure to be followed. By sec. 5 it is provided that the magistrate "shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction." The same particularity was not required in respect of section 29. The magistrate in the place where the offence was committed had already jurisdiction in respect of the offence. It is intended that he should act, when taking depositions for use abroad for the purpose of obtaining the return of the fugitive, just as if the offender were present and the magistrate were conducting the preliminary inquiry in respect of the offence charged. The magistrate might, therefore, use all the powers

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conferred upon him by the local jurisdiction to summon witnesses, compel their attendance and enforce the giving of evidence. But the safeguard is provided that the evidence so obtained is to be used for the purposes of the Act only and cannot be used at the trial of the accused. If the power to compel the attendance of witnesses and the answering of questions put to them has not been conferred upon the magistrate, the purposes for which the Act was passed has been largely frustrated. I think, therefore, the Act should, if it is possible so to do, be construed as conferring the necessary power, and I think its terms can be so construed.

For the reasons given, I think the appeal should be dismisssed.

Cameron, J.A.

CAMERON, J. A.:—This is an appeal from the judgment of the Chief Justice of the King's Bench dismissing an application for an order prohibiting P. A. Macdonald, Esquire, Police Magistrate, from compelling H. W. Whitla to give evidence against the accused under The Fugitive Offenders Act, 1881. The facts are set forth in the judgment appealed from.

It seems to me that by the Act of 1881 the Imperial Parliament, for the purposes of that Act, recognizes and adopts the magistrates of the various British possessions with the authority and powers conferred upon them in their various jurisdictions. Here a prosecution has been pending against the accused since November 20 on an information duly laid. The Police Magistrate, having authority, could, if the accused were present, proceed with taking evidence in the manner prescribed by the Criminal Code. The accused, is not here present, but is in England. That difficulty would be insuperable but for the first paragraph of sec. 29 of the Act of 1881, which says: "A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him." I would not consider this paragraph as conferring a new jurisdiction, but rather as removing an obstacle in the administration of justice, which, had it been allowed to remain, would have rendered the carrying out of the principal provisions of the Act impossible. The view taken by Mr. Justice Edwards of the Supreme Court of New Zealand in *Ex parte Lillywhite*, 19 N. Z. R. at 510, cited and approved by the Chief Justice, appears to me as stating accurately the meaning and intent of the first paragraph of section 29.

Furthermore, I must say that, to my mind, the wording of the first paragraph of section 29 is sufficiently broad, if not directly to confer upon, certainly clearly to imply in, the Magistrate all the powers he would possess were the accused present. And one of those powers is plainly that of compelling a witness to attend and give evidence.

I would affirm the judgment of the Chief Justice.

Prohibition refused.

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Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. March 6, 1916.

1. DISCOVERY AND INSPECTION (§ IV—34)—AFFIDAVIT OF PROTECTION—"MIGHT CRIMINATE"—INSUFFICIENT DESCRIPTION OF DOCUMENTS.

An affidavit to a claim for protection against the production of documents, on the ground that the same "might" tend to criminate the deponent, which fails to furnish a sufficient description of the documents sought by the discovery, is insufficient and will not be received.

[Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 5; Manitoba Evidence Act, R.S.M. 1913, ch. 65, sec. 5, considered.]

APPEAL by defendants from the order of Galt, J. Statement.

C. P. Wilson, K.C., for Attorney-General.

Edward Anderson, K.C., for defendants.

RICHARDS, J.A.:—Appeal by defendants from so much of an order of Galt, J., as directs that the defendants shall "file a further and better affidavit in respect to their claim for protection against production of the documents set forth or referred to in the second part of the first schedule" of their affidavits of documents. Richards, J.A.

Only the affidavit of Thomas Kelly was shewn on the appeal. So I assume that those (if any), of the other defendants were similarly worded. It says, in par. 2:—

2. I object to produce said documents set forth in the second part of the first schedule hereto on the ground that the production of same might tend to criminate me.

In the second part of the first schedule, the description of the first 6 items is as follows:—

1. 20 bundles of vouchers with invoices and receipts attached; 2. 4 bundles of vouchers with invoices, receipts and cheques attached; 3. Bundle of cheques; 4. Cash book; 5. Journal; 6. General ledger.

There are other documents referred to in a similar way. Except one cheque, the number and date of which is given, the descriptions are not more definite than those quoted above.

Counsel for the plaintiff took the following objections to the affidavit:—

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1. That it was insufficient in claiming the protection, to state that the production "might" tend to criminate the defendant, and that he must at least swear that it "would" so tend.

2. That the description of the documents referred to was too vague, and that the plaintiff was entitled to such a description as would identify them.

He further contended that the provisions of the Evidence Act applied, and that under it a defendant has no privilege to refuse to produce documents, even if they would tend to criminate him, but that his only protection is that on their being produced and protection claimed, they can not be used against him in a prosecution for crime.

This last contention does not seem to me available on an appeal by the defendants. If the plaintiff wished to raise it he should, I think, have also appealed against the order. I therefore express no opinion as to the application of the Evidence Act.

As to the sufficiency of the word "might," I am against the plaintiff's contention. The cases seem to shew that either "might" or "would" is proper. There is only one case to the contrary that I can find—one cited by counsel for the plaintiff on the argument: *Roe* v. *New York Associated Press*, in 75 L.T.Jour. 31. There Grove and Smith, JJ., sitting as a Divisional Court, are said to have held that "might" was insufficient and that the party claiming the privilege must say that the production "would" tend to criminate him.

In that case the language of the judgments is not given, though they are said to have been in writing; all we have is what some person thought they meant. The case is apparently not reported elsewhere than as above; and, except in *D'Ivry* v. *World*, 17 P.R. (Ont.) 387, at 392, where it is mentioned on another point, I have been unable to find it referred to in reports of later cases. It is not cited in Bray on Discovery, either in the 1885 edition or in the 1910 supplement or in Ross on Discovery. In fact, it is ignored in all of them: the views of the learned authors being that either word will do. Those views, I think, are supported by the reported cases other than the *Roe* one. In some of them "might" is used; in others "would;" in others both words are used. But in none except the *Roe* case, is it stated that "might" is insufficient. The *Roe* case is mentioned in Odgers' Law of Evidence as an authority that "will" is sufficient but not as holding that "may" or "might" is not.

Cotton, L.J., uses "would" in *Webb* v. *East*, 5 Ex. D. 108, at 114, and "may" in *Allhusen* v. *Labouchere*, 3 Q.B.D. 654, at 666.

It is difficult to believe that such a decision as the *Roe* one, on such a point, would not be better reported, and more referred to, if thought correct.

The leading case, apparently, is *Lamb* v. *Munster*, 10 Q.B.D. 110. Counsel for the plaintiff here argued that that case turned on the facts shewing (as they undoubtedly do), that it was apparent to the Court, irrespective of the language used in claiming privilege, that the production of the document would tend to criminate, and that, therefore, the word used was immaterial.

The report of the *Roe* case seems to shew that there the Judges distinguished *Lamb* v. *Munster* in the same way. I cannot accept that view. Reading the language used in *Lamb* v. *Munster* convinces me that the Judges, in stating that "might," or "would," could be used, were not confining their remarks to the circumstances of the case before them, but were stating a general principle of law. That view of it is, I think, taken in many later cases other than the *Roe* one.

As to the description in the schedule of the documents, I think the plaintiff's contention that it is insufficient must be upheld. It is impossible to identify them by it, except, perhaps, as to the item of the one cheque, of which the date and number is given. As to that cheque, I express no opinion as there must, I think, be a new affidavit with a better description. That point was settled in *Taylor* v. *Batten*, 4 Q.B.D. 85, which was approved of in *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432, and in several later cases.

I would dismiss the appeal.

PERDUE, J.A.:—The question involved in this appeal arises from the refusal of the defendants to produce certain documents under the order to produce obtained by the plaintiff. Each defendant appears to have filed an affidavit on production in the same terms. In the affidavit of Thomas Kelly, which is the only one set out in the record, he states that he has in his possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule to the affidavit. The first part of the schedule shews a large number of documents, plans, blue prints, books, etc., which the

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deponent does not object to produce. He objects to produce the documents and books mentioned in the second part of the schedule upon the following ground as stated in the affidavit: "*that the production of same might tend to criminate me.*"

When the list of documents, production of which is refused, is examined, there is nothing to indicate the nature of these documents or the effect production of them might cause. They are described in the most general manner. The following are some of the items taken from this part of the schedule:—

1. 20 bundles of vouchers with invoices and receipts attached; 2. 4 bundles of vouchers with invoices, receipts and cheques attached; 3. Bundle of cheques; 4. Cash book; 5. Journal. Item 6 is a general ledger with a number of sheets referred to. Item 7 refers to contract ledger sheets, giving the numbers of them. The other items consist of: 8. Cheque No. 2911, dated July 2, 1913; 9. Caisson progress estimates, Nos. 1 to 6; 10. Bundle of cheques; 11. Part of pay roll.

This suit was brought to have it declared that the several contracts between the Province of Manitoba and the defendants referred to in the statement of claim should be declared to be null and void; or, that all the contracts should be declared to have been obtained by fraud and that they were collusive and obtained by conspiracy, fraud and collusion with officers and employees of the Crown; to recover damages and for repayment of monies improperly obtained by the defendants. Proceedings on the part of the Crown have been taken for the extradition of the defendant Thomas Kelly, the charges against him being perjury, obtaining money under false pretences, larceny or embezzlement of money.

The plaintiff applied to a Judge in Chambers for an order to strike out the defence of the defendants or for leave to sign judgment for failure on their part to comply with the order to produce, in that the defendants had failed to deposit with the proper officer of the Court the documents set out in the first schedule to the affidavit. This motion resolved itself into an application to compel the defendants to deposit the documents with the Prothonotary, or for such order as the Court might make in the matter. Galt, J., before whom the application was heard, in a very carefully considered judgment, decided that the documents mentioned in the first part of the first schedule should be deposited with the prothonotary, and that the defendants should make a further and better affidavit in respect of their claim for protection against

production of the documents referred to in the second part of that schedule. From that order the present appeal is brought.

It is a principle of English law that no man can be compelled to criminate himself (*nemo tenetur seipsum accusare*). I will deal with this question in the first place apart from the provision contained in sec. 5 of the Manitoba Evidence Act, because, in so far as I can find, there is no English statute applicable to all proceedings and matters, which contains provisions similar to those in that section. The principle applies not only to a witness giving evidence at a trial, but also to a party answering interrogatories administered in a suit or making an affidavit on production of documents. That inference is readily drawn from the observations of the Judges in *Webb* v. *East*, 5 Ex. D. 23 and 108:

> The rule appears to apply to the discovery of criminatory documents, equally to the discovery of facts, and the objection must similarly be taken on oath in the affidavit of discovery: Taylor on Evidence 10th ed., p. 1058.

See *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q.B. 124, and particularly the observations of A. L. Smith and Chitty, L.JJ., at pp. 133-134; also *Roe* v. *New York Associated Press*, 75 L.T.Jour. 31; *D'Ivry* v. *World Newspaper Co.*, 17 P.R. (Ont.) 387.

But,

> in all cases where an objection to answer is taken on the ground that the answer may tend to criminate the deponent, the Court . . . requires to see, from the surrounding circumstances, and from the nature of the evidence sought to be obtained from the witness that reasonable ground exists for apprehending danger to him from being compelled to answer: Taylor on Evidence 10th ed., p. 1058.

In *Lamb* v. *Munster*, 10 Q.B.D. 110, Field, J., shews that, after the witness' claim of privilege has been received:—

> Then it becomes the duty of the Judge to look at the nature and all circumstances of the case and the effect of the question itself, to see whether it is a question the answer to which will really tend to criminate the witness.

Stephen, J., was of the same opinion. See also *R.* v. *Boyes* (1861), 1 B. & S. 311; *Re Reynolds*, 20 Ch. D. 294.

In *Webb* v. *East*, 5 Ex. D. 108, Jessel, M.R., said, at p. 112:—

> But even assuming, for the purpose of argument, that such a ground (that production would tend to criminate) could avail a defendant called upon to produce such a document, it is clear to my mind that it could only avail him on such terms as it could avail him in answering interrogatories or giving other discovery, namely, upon his pledging his oath that to the best of his knowledge, information and belief, the result of his production of the document would be to criminate him.

In *Roe* v. *New York Associated Press*, 75 L.T. Jour. 31, one of

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the defendants did not deny that he was in possession of documents, letters, etc., which were relevant or related to the matters in question, but objected to produce them because, as he stated in his affidavit, "*the production may, to the best of my information and belief, tend to criminate me.*" Grove and A. L. Smith, JJ., held that the affidavit was insufficient as not distinctly stating that the production of the documents would tend to criminate. They also held that the affidavit was insufficient because the documents were in the possession of the defendant himself, and he alone could know their contents and whether or not their production would tend to criminate him, and yet he did not in distinct terms, nor indeed at all, state that they would tend to criminate him.

In the present case, the statement used in the affidavit on production in order to claim privilege is, "*that the production of same might tend to criminate me.*" This is not a sufficient allegation under the last two cases cited above. Then when the description of the documents contained in the second part of the first schedule is referred to, we find that no information is given by which they could be identified as documents in the hands of the deponent when he made the affidavit, documents which he objected to produce. No information is furnished which would enable the Court to come to a conclusion as to whether the documents are privileged or not. What information is given by the expression "20 bundles of vouchers with invoices and receipts attached?" Or by "bundle of cheques," or "cash book," or "journal?" There is nothing to shew how such documents relate to the case beyond the admission of the deponent and there is absolutely nothing to suggest how the production of them or any of them could possibly criminate the party making the affidavit.

In Daniell's Chancery Forms (1914), the practice as to objecting to produce documents is stated in a footnote to p. 1015, as follows:—

> Notwithstanding the objection to produce the documents, they must be described with sufficient distinctness to enable the Court to order production if the objection should be over-ruled: Dan. Pr. 592: Seton, 73. The affidavit must also state, clearly and distinctly, the reasons or objections against production, and must verify the facts upon which such reasons or objections depend.

The affidavit in the present case is defective in respect of both of the foregoing requirements.

The Manitoba Evidence Act, R.S.M. 1913, ch. 65, sec. 5, enacts that:—

No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person;

Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any proceeding thereafter instituted against him.

The effect of this clause is to take away from the witness the former protection against answering a question which would tend to criminate him and to make him compellable to answer, but at the same time to give him protection in that his evidence so given shall not be used in any proceeding "thereafter instituted against him." The Act applies to all proceedings and matters whatsoever respecting which the legislature of the province has jurisdiction (sec. 2). As the Parliament of Canada has exclusive jurisdiction over the criminal law, including the procedure in criminal matters, the protection afforded by sec. 5 of the Manitoba Act would be illusory in case a criminal charge should afterwards be laid against the person so compelled to give evidence. But the Canada Evidence Act, R.S.C. 1906, ch. 145, here intervenes and provides the necessary protection to the witness. Sec. 5 of that Act contains in its first paragraph a provision similar to that contained in the first paragraph of sec. 5 of the Manitoba Evidence Act, the only difference worth noting being that "person" is used in the latter Act and "witness" in the former. The section of the Dominion statute then declares:—

5(2). If with respect to any question, a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, *or the act of any provincial legislature*, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, *or by reason of such provincial act*, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

The result is that the Dominion statute extends to a person who has been compelled by force of a provincial enactment to answer criminatory questions, protection against the use in a criminal proceeding of the evidence so obtained. If then, a party who has been ordered to produce documents in his posses-

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sion relating to the matters in question in the action seeks to excuse himself from so doing on the ground that the documents, if produced, might tend to criminate him, there is much to be said in favour of the view that his refusal should not be placed upon a plane different from that of a witness who refuses to answer a question for exactly the same reason. This view would seem to receive support from the decisions under a somewhat similar statute, 46 Geo. III., ch. 37 (Imp.). See Taylor on Evidence 10th ed., pp. 1062, 1063.

A person compelled to make discovery on oath was allowed formerly to avail himself of the principle that a man is not compelled to criminate himself. He was in that respect treated as a witness giving evidence. If the legislature modifies or does away with that principle, it may reasonably be urged that the person compelled to make discovery should be placed in the same position as any other witness who is compellable to give evidence.

Upon the grounds set out in the earlier part of my judgment, I would dismiss the appeal.

Cameron, J.A.

CAMERON, J.A.:—The production and inspection of documents, the administration of interrogatories and the giving of evidence at the trial all appear to be treated as being upon the same basis in so far as claiming protection from compliance or answer, on the ground of tendency to criminate, is concerned. That conclusion is deducible from the observations of the Judges in *Webb* v. *East*, 5 Ex. 23 and 108. The rule appears to apply to the discovery of criminatory documents, equally to the discovery of facts. Taylor on Evidence, p. 1058. I refer also to *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q.B. 124, wherein the observations of A.L. Smith, L.J., and Chitty, L.J., at pp. 133 and 134, are in point.

The provisions of the Evidence Act, R.S.M., ch. 65, appear to apply to affidavits on the production of documents under our King's Bench rule. It is true production is not expressly named in the Act (which is entitled "An Act respecting Witnesses and Evidence"), but it must surely be governed by the provisions thereof. An affidavit on production is, in effect, a series of answers to questions necessarily arising out of the order pursuant to which it is made. On this subject, I refer to the opinion of Osler, J., in *D'Ivry* v. *World Newspaper Co.*, 17 P.R. (Ont.) 387, 392, and the authorities referred to by him. It is to be noted that seven Judges joined in the decision in that case. A provision in the Ontario Evidence Act similar to our sec. 5 was not introduced in

that province until 1904, Edw. VII., ch. 10, sec. 21, now in R.S.O. 1914, ch. 76, sec. 7. This fact is to be kept in mind in examining the Ontario decisions, including *Attorney-General* v. *Toronto Junction*, 7 O.L.R. 248. This last case was decided a short time before the statute of Edw. VII. came into force.

The statute, Geo. III., ch. 37, declaring that a witness cannot refuse to answer on the ground that his answer might establish a debt to the Crown, was held to apply to production of documents, though not doing so in terms. Taylor, p. 1063.

Apart from the effect of the statute, I would consider the affidavit here insufficient, under the authorities, in two respects.

A declaration on oath by a witness that he *believes* that the answer will criminate him, will, if it appear to the presiding Judge that it is, under all the circumstances, likely to be well founded, protect him from answering, either when in the witness box or in reply to written interrogatories. In all cases where an objection to answer is taken on the ground that the answer may tend to criminate the defendant, the Court requires to see, from the surrounding circumstances, and from the nature of the evidence, that reasonable ground exists for apprehending danger to him from being compelled to answer. Taylor, pp. 1057-8.

See *R.* v. *Boyes*, 30 L.J.Q.B. 302, and *D'Ivry* v. *World Newspaper Co.*, *supra*, at p. 392. Lord Hardwicke says: These objections to answering should be held to very strict rules. *Vaillant* v. *Dodemead*, 2 Atk. 524.

The form of the affidavit must, it seems to me, be positive and not indefinite. The affidavit in question was sworn outside this jurisdiction, and in such case particularity should obviously be required.

The party claiming it (the privilege) must pledge his oath that the answer to a question or the production of a document would tend to criminate him. Odgers' Law of Evidence, Can. Ed., p. 222;

Webb v. *East*, *supra*, p. 112. Cases such as *Lamb* v. *Munster*, 10 Q.B.D. 110, and the *D'Ivry* case, actions for libel where the object of the production is the document whose criminatory character is self-evident, are distinguishable. This distinction is clearly indicated in *Roe* v. *New York Associated Press*, 75 L.T. Jour. 31.

The question of the applicability of our Evidence Act was considered by Galt, J., but for reasons stated by him, not taken into consideration in arriving at his decision. My present opinion is that that Act applies to and governs the production of documents, and that the defendant is not excused from discovery on

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the ground that he might thereby criminate himself. But the plaintiff has not appealed against the order and we must deal with this appeal as it is.

I have read the judgment of Perdue, J., and concur in his conclusion that the appeal must be dismissed.

HAGGART, J.A. (dissenting):—In my opinion the defendants are entitled to the privilege asked for. I would allow the appeal.

Appeal dismissed.

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MARTIN v. PROTECTIVE ASSOCIATION OF CANADA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 18, 1916.

1. INSURANCE (§ VI B 3—285)—ACCIDENT POLICY—INTENTIONAL ACT—JUMPING FROM MOVING TRAIN.

Injuries received while jumping from a moving train in order to stop at a station which the train passed are the indirect result of an "intentional act" amounting to a "voluntary or negligent exposure to unnecessary danger" within the meaning of sec. 172 (1) of the Insurance Act, R.S.O., 1914, ch. 183, and precludes recovery therefor on a policy of accident insurance.

Statement.

APPEAL by the defendants from the judgment of the County Court of the County of Carleton, in favour of the plaintiff, for the recovery of $650 upon a policy of accident insurance, for the loss of a hand, which was caused by the plaintiff falling when jumping from a moving train. Reversed.

A. H. Armstrong, for appellants.

H. S. White, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—In this action the plaintiff is seeking compensation from an insurance company, under his contract of insurance with them, for the loss of his left hand, as a result of getting off a railway train in motion. The contract provides for the payment of $650 for the loss of a hand; and also that the insured shall at all times exercise due care and diligence for his personal safety and protection; but it is admitted that the laws of this Province, relating to the conditions of a contract of this character, are applicable to this contract; and that the law,

Sec. 172.—(1) In every contract of insurance against accident or casualty or disability, total or partial, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger; and no term, condition, stipulation, warranty or proviso of the contract varying the obligation or liability of the assurer shall as against the assured have any force or validity.

upon the one question now in issue between the parties, the question whether the plaintiff is disentitled to the compensation by reason of his want of such care, is, as applicable to the circumstances of this case, that, so to disentitle the plaintiff, his injury must have been "the indirect result of his intentional act," such act "amounting to voluntary or negligent exposure to unnecessary danger."

That the injury was the indirect result of his intentional act is undeniable; his intention, carried into effect, was to get off the moving train; it could make no difference if the conductor of the train or any one else advised him to do so, and if he would not but for such advice; it was equally his intentional act; but, if such advice could aid his claim in this respect, it is not proved that it was ever given; the conductor denies it, and, to the contrary, asserts positively that he warned the man not to get off, a thing much more likely under the circumstances; and a brakesman of the train also testified that he too warned the man against getting off. The indirect result in question was: that, when the man was thrown down on the ground, his left hand went under a wheel of the car. His statement that something struck him, as he was rising from his fall, and sent him down again with his hand on the rail, is not proved; it is very unlikely that he would know just what happened, and still more unlikely that anything was protruding from the train beyond the steps that could give such a blow—it must have been, if anything, some part of the train; but, whether or not, just the same, it would be an indirect result of his attempt to alight from the train in motion.

Then, was it a voluntary exposure to unnecessary danger? What else could it be? A desire to get to his home as soon as possible, just because he desired to be there, can hardly be the opposite of voluntary—compulsory. It was his voluntary act in going upon a through train, which he knew did not stop at his home station, a thing which, as a commercial traveller, he must have known it was not his right to do: he voluntarily took the chance of getting the indulgence of the conductor of the train in permitting him to travel on a train which never stopped at the man's home station, taking his chances of getting off some little distance from that station where trains usually stopped, and, it is said, ought always to stop, before crossing the track of another line of a railway, but never to stop there for letting down or taking

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up passengers. That it was a danger, a great danger even to agile trainmen, is self-evident.

So, too, it was a negligent exposure to unnecessary danger, great danger, as I have said. The man, in his application for this insurance, made in May, 1913, stated that he was then 47 years of age, weighed 200 pounds, and was five feet and eight inches in height; he had been under medical treatment at one time for indigestion, which, his physician thought, was caused by his obesity, which he also thought might be affecting his heart. On the 11th February, in the neighbourhood of Smith's Falls, about 5 o'clock in the afternoon, with the temperature 32° below zero, and with ice and snow upon the ground, this man, dressed in a winter overcoat, and carrying a travelling bag in his right hand, stepped off a through train, the speed of which he says he did not know, but which the conductor of the train testified was from 8 to 12 miles an hour, a mile or so before coming to the place where it usually stopped, and we are seriously asked to find that that was not a negligent exposure to unnecessary danger. It hardly needed the testimony of the train conductor, of 22 years' railroad experience, that it was so much so that he would not have attempted it; but there is that testimony, and that is all there is on that subject. See *Cornish* v. *Accident Insurance Co.*, 23 Q.B.D. 453; and *Garcelon* v. *Commercial Travelers' Eastern Accident Association* (1907), 195 Mass. 531.

If the man's life, or a great fortune, depended upon it, one might not blame him for taking the risk; but, even in such a case, how could the risk be, justly, put upon the insurance company? No part of the fortune would in any case have come to them.

Being a commercial traveller, the plaintiff must have known that he would not have been carried very far without payment of the fare, and he had paid to Kemptville only; and he probably knew the law that he could not be put off except at some safe place: the result of all of which is that he would probably have been let down at Kemptville, or at the worst the next station.

But all that is not very material; nor was a good deal of the evidence which would have been material if the action had been against the railway company. The plaintiff was a man of mature years, entirely his own master, and under no compulsion, except

his desire to get home by that train: and it is but proper to add that where passengers will not wait for, or for other reasons will not take, the regular and proper trains, stopping for passengers to alight and board, at their destinations, they ought to remember that they are acting in breach of their contracts and of the rights and interests of the railway company, and are taking risks.

So, too, when entering into an insurance contract, the insured should make sure of the nature of the insurance effected, and not carry away a policy not covering his negligent acts, of all kinds, if he expects after an accident to be treated as if it did.

The learned County Court Judge seems to have treated the *obiter dicta* of a learned Judge of a Court, the shadow of which is much nearer to him than that of this Court, and not the words of the enactment in question, as the law governing the case; so that we are really not reversing his finding of fact: if the case had been dealt with by him upon the very words of the Act, I have the hope and belief that our findings are quite in accord with that which his would have been.

I would allow the appeal.

Of sympathy for the plaintiff it ought to be needless to speak: it does the man no substantial good, and must be known unexpressed as well as expressed, for, in human nature, how could it be but abundant?

RIDDELL, J.:—This appeal from the County Court of the County of Carleton involves an interpretation (1) of the terms of a contract of accident insurance and (2) of the statutory provision, R.S.O. 1914, ch. 183, sec. 172 (1). Riddell, J.

The plaintiff, a commercial traveller, procured a policy of accident insurance from the defendants providing (amongst other things) for the payment to him of $650 if he should from external violent accidental causes lose a hand at or above the wrist: "the insured shall at all times exercise due care and diligence for his personal safety and protection."

Being a commercial traveller, using trains every day, he on the 11th February, 1915, was at Smith's Falls, where he had stayed over night—he had a commercial ticket from Brockville to Kemptville, and desired to go to the place last named. Accordingly, he boarded at Smith's Falls a Canadian Pacific Railway train which passed through Kemptville on the way to Montreal.

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It is sworn and not contradicted that on the train he was asked if he had not heard the brakesman announce that the train did not stop for passengers between Smith's Falls and Montreal, and said "Yes." He admits that he knew that it was a through train, which did not stop with passengers at Kemptville, "only that they usually stopped there . . . at what is known as the Diamond," about 1½ or 2 miles from Kemptville. The conductor took up the ticket—and, later on, upon being asked whether he was going to stop at the Diamond, answered in the negative. The plaintiff, who is described as a stout, obese man, took his "grip" and stepped down on the steps of the car and stepped or jumped off. The speed of the train at the time does not seem to be definitely fixed—the conductor says 8 to 12 miles an hour. No one says any less; the plaintiff does not know. The place was not the place where the train usually stopped, but some distance away—the plaintiff says the conductor said to him as he stepped out of the door, "You had better jump"—this the conductor denies, and says that he told the plaintiff not to jump.

The plaintiff fell, and in some way his arm got under the wheels, and he lost his hand above the wrist.

The County Court Judge held that he had not disentitled himself to relief, and gave him judgment against the insurance company—the company appeal.

The learned County Court Judge is apparently impressed by a definition of "voluntary" in this connection given by Sedgewick, J., in *Canadian Railway Accident Insurance Co.* v. *McNevin* (1902), 32 S.C.R. 194—that to be a voluntary exposure to unnecessary danger the act must, according to the view of a reasonable man, be madness, except on the hypothesis of voluntary suicide or self-mutilation.

This definition—or description—is *obiter*, not necessary for the decision, and is not concurred in by other Judges. It does not seem to me that "voluntary" has any such extreme connotation: but, in any case, the words of the statute are "voluntary or negligent," and there may be and often, hourly, is negligence without anything that looks like suicide or self-mutilation.

The question here is—was this unfortunate accident the result of (1) an intentional act (2) not amounting to voluntary or negligent exposure (3) to unnecessary danger?

That the act was intentional is undoubted—was it a negligent exposure to unnecessary danger? This is a question of fact within reasonably wide limits.

The danger was obvious, the plaintiff knew it well—it seems to me to have been unnecessarily incurred. No reason is given why it could be necessary for the plaintiff to get off as and when he did—he lived at Kemptville indeed, but no great exigency called for him to risk life or limb, the only reason he gives is that he had been accustomed to get off at the Diamond when the train stopped (as it usually did)—and that this day the train was not going to stop. That the conductor told him to jump (if he did) adds nothing to the necessity.

I do not press the point that the conductor, having taken up the ticket reading only to Kemptville, would probably not take the chance of carrying him to Montreal, but would almost certainly put him off at or near Kemptville.

Then was the exposure negligent? I accept the criterion of the County Court Judge—was it something "which reasonable and ordinary prudence would pronounce dangerous?" And, on the evidence, I think that this was negligent, something which reasonable and ordinary prudence would pronounce dangerous—the insured did not exercise due care and diligence, as required by the terms of the policy, and the statute does not help him.

As this is a question of fact, not much assistance, except in a general way, can be derived from the cases. The following contain statements of more or less importance in cases not dissimilar: *Neill* v. *Travelers' Insurance Co.*, 12 S.C.R. 55; *Canadian Railway Accident Insurance Co.* v. *McNevin*, 32 S.C.R. 194; *Cornish* v. *Accident Insurance Co.*, 23 Q.B.D. 453; *Cook* v. *G.T. Ry. Co.*, 19 D.L.R. 600, 31 O.L.R. 183; *Lovell* v. *Accident Insurance Co.* (1874), 3 Ins. L.J. 877; Cyc., vol. 1, p. 259; Am. & Eng. Encyc. of Law, 2nd ed., "Accident Insurance," vol. 1, p. 284 *et seq.*

The appeal should be allowed with costs and the action dismissed with costs.

LENNOX, J., agreed with the opinion of the Chief Justice. Lennox, J.

MASTEN, J., agreed in the result. *Appeal allowed.* Masten, J.

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Re BAEDER AND CANADIAN ORDER OF CHOSEN FRIENDS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 18, 1916.

1. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARIES BY WILL—CONFLICT OF LAWS.

The change of the beneficiaries of an insurance policy issued by an Ontario company, which may be made under the provisions of the Insurance Act, R.S.O. 1914, ch. 183, ss. 171, 177, 179, can be validly made by the will of a testator domiciled in a foreign jurisdiction at the time of his death, despite the fact that by the law of that jurisdiction beneficiaries named in an insurance policy cannot be changed; such law does not, if it could, purport to have any such application.

Statement.

MOTION by the society for leave to pay insurance moneys into Court and for an order determining who were the persons entitled to share therein. Reference by MIDDLETON, J., to Appellate Division.

Lyman Lee, for the society.

S. F. Washington, K.C., for claimants.

F. W. Harcourt, K.C., for the infant Caroline Wagner.

J. R. Meredith, for the Official Guardian.

Middleton, J.

MIDDLETON, J.:—The late Jacob Baeder, who died on the 30th March, 1915, originally was domiciled and resided at Guelph, Ontario. While so domiciled, on the 24th July, 1890, he became a member of the Canadian Order of Chosen Friends, an Ontario organisation, and obtained a beneficiary certificate for $2,000, which provides that this sum shall, upon his death, be paid to Charles, Minnie, and Henry Baeder, his children, equally.

Subsequently Baeder changed his domicile and residence from Guelph to Rochester, New York. By his will, made there on the 24th February, 1915, he gave all his life insurance to his grandchild Caroline Wagner. The rest of his estate he directs to be divided between his children.

It is now contended on behalf of the children that, although this policy was issued by an Ontario company in Ontario, the law which governs the operation and effect of the will upon the policy is the law of New York, and that, according to the law of New York, beneficiaries in an insurance policy cannot be changed by will. That this is the law of New York is not disputed.

The contention on the part of the infant is, that the policy is governed by the law of Ontario, and that the insurance money is to be regarded as a trust fund subject to the law of Ontario, which in effect defines the terms of the trust, and that, regarding the

provisions of the Ontario statute as constituting and defining these terms, the will is operative, and the grandchild takes.

This view commends itself to me. By the Insurance Act, R.S.O. 1914, ch. 183, sec. 178 (2), the policy and declaration in favour of a preferred beneficiary create a trust in favour of that beneficiary, subject to the powers conferred by sec. 179, enabling the insured to change the beneficiary to some other person falling within the preferred class. This change may be made either by a declaration or by a will.

The statute has become in effect a statutory deed of settlement, reserving to the insured a special power of appointment, to be exercised in the mode pointed out by the statute. The change of the domicile of the insured can have no effect upon the terms of the trust or of the statutory power of changing the beneficiary which is vested in the insured.

It follows that a will executed in accordance with the laws of Ontario must be regarded as an appointment or declaration within the terms of the statute.

In no conceivable way can the statute-law of the country where the insured happens to be domiciled be deemed to be grafted upon this statutory deed of trust. As soon as the contract is made, the rights and powers are crystallised and defined; they cannot be regarded as mutable and subject to change as the domicile of the insured changes. Similar contracts issued in Ontario in favour of the insured cannot be subject to different construction and operation dependent upon the accident of the domicile of the insured. The contract is clearly intended to be governed by the law of Ontario, and the statute expressly so declares.

That a will in accordance with our laws is a proper exercise of a power of appointment, even though it be not valid according to the law of the domicile, cannot now be disputed: *Murphy* v. *Deichler*, [1909] A.C. 446.

Two cases are relied upon by Mr. Washington as opposed to this view.

In *Lee* v. *Abdy* (1886), 17 Q.B.D. 309, an assignment was made in Cape Colony by the insured to his wife. By the law of Cape Colony, a husband cannot convey to his wife, and the assignment was void. It was held that the validity of the contract between the husband and wife had to be determined by the law of Cape

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Colony, even though the subject-matter of that contract was an insurance policy made in England. Clearly that case has nothing to do with the problem here presented.

In *Toronto General Trusts Co.* v. *Sewell* (1889), 17 O.R. 442, a policy was issued in a Quebec company by a man domiciled in Ontario; and, while yet domiciled in Ontario, the insured made a declaration by endorsement on the policy. It was held that the law of Ontario governed. This would seem to me beyond controversy, when it is borne in mind that under the Insurance Act the contract was an Ontario contract, to be governed by the law of Ontario; but the ground upon which the decision seems to be placed is that in *Lee* v. *Abdy* it was determined that the validity of the declaration depended upon the law of the domicile. If that is the true principle, and it is here applied, then the will in question is not valid.

The question is manifestly one of importance, and I do not think it should be left in this unsatisfactory position. I think my proper course is to enlarge the motion before the Appellate Division, where the decision in *Toronto General Trusts Co.* v. *Sewell*, or rather the reasoning upon which it is founded, will be open to reconsideration and review.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This case is not regularly before this Court. It should first have been considered at Chambers: The Judicature Act, sec. 43 (2). A Judge of the High Court Division has power to refer a case before him, to a Divisional Court, only when a prior known decision of any other Judge of co-ordinate jurisdiction stands in the way of giving effect to his own opinion, and he deems the previous decision to be of sufficient importance to be considered by the higher Court: sec. 32 (2) and (3). No such decision existed. The decision in the case of *Toronto General Trusts Co.* v. *Sewell*, 17 O.R. 442, did not stand in his way, even if logical deductions from it might, but that is quite a different thing. But the case is now here, and has been argued here, and the parties desire that it should be considered here, and being a case proper for consideration here, it would be inexcusable to send the parties back to Chambers merely to get a ruling there and come here again: though, it should be added, this should not be deemed an encouragement to the sending of cases here irregularly.

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The one question argued was: whether a change of beneficiaries, under a benevolent society's benefit certificate, made by will in a foreign country, where its statute-laws did not, speaking generally, permit such a mode of transfer, is good, the will being duly executed with the formalities required to give validity to a will made here and there.

On the one side, it is said that the change is nothing more, nor less, than an assignment of a chose in action, which, being invalid by the law of the State in which the transfer was made, and in which the parties to it were domiciled, is invalid everywhere. And, if that were a full and accurate statement of all the material circumstances, that might be so. But I cannot think it is.

On the other side, it is said that all that was done amounted to no more than the exercise of a power of appointment, and, therefore, if sufficient according to the law here, it is valid. This, too, does not seem to me to be an accurate view of the matter. It is true that the Ontario Insurance Act provides that such a contract of insurance as this was shall, subject to the right of the assured to change beneficiaries within a certain class, create a trust in favour of the beneficiaries. But there is nothing in the name, when all that it is based upon is made plain. The contract is to pay only upon the assured's death; he may or may not, as he sees fit, let it die at any time before he dies; he has made what is tantamount to a partially irrevocable assignment of its benefit, if he chooses to, and can, keep it alive till his death; he may, in effect, cancel that assignment, at any time, provided he makes another, of the same character, to any one within the class. The contract was his, he gave its benefit, if any there should be, to persons within a certain class; he can take it away from them and give it to others, or another, within the same class. It is not very like a power of appointment, which cannot be of the owner's property: it is more like an assignment or a will; and in the English cases has been likened to each, but never, that I know of, to an appointment: see *In re Griffin*, [1902] 1 Ch. 135: so too in the United States of America, where the cases are innumerable, I know of none in which the right of the insured has been treated, or even spoken of, as a power of appointment: the common expression descriptive of it seems to be "designation of beneficiaries," and these very words are those almost invariably employed in the enactment, of this

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Province, in question; and in the enactment itself there are such words as these: "Nothing . . . shall restrict the right to effect or *assign* a policy in any *other* manner allowed by law," meaning any *other* effect or assignment than by change of beneficiaries: sec. 171, sub-sec. (8): so too, under sec. 171 (3), the assured may "identify" the contract as his policy of insurance. It must never be forgotten that the subject-matter is not money nor property, but only a contract, upon which there may never arise any right of action.

But these things seem to me to miss the mark in more than one respect: whether the right of the insured was or was not to exercise a power of appointment, it must be whether it was a dealing with property in Ontario, or with property in the State of New York. One must know why the exercise of a power of appointment without Ontario is valid if it complies with the requirements of the laws of that Province. Here the "property" dealt with was not even, and might never become, a right of action. In law it would ordinarily be "property" in the State of New York, where its owner, subject to the rights of beneficiaries already designated, was. As to him and as to his rights over it, to abandon it or to take away entirely any possible interest of these beneficiaries in it, how can it be said that they did not move with him?

But that is not all: the real case appears to me to be this: the insurers are a provincial benefit society, and can carry on business only in such manner as the law which gives them legal existence permits, and so only in accordance with the provisions of the Ontario Insurance Act, which the society's rules regulate and give effect to. So, by the terms of the contract in question, the beneficiaries can be changed by will, that is, a will valid as a will in the domicile or place of residence of the testator: see sec. 177 (4); and the laws of the foreign State do not purport to affect, if they could, such a case as this; they expressly except it, according to the evidence.

So that, if the beneficiaries have been changed in accordance with the provisions of the provincial enactment, the new beneficiary takes and the old are excluded altogether.

The change relied upon is the bequest by the insured to his granddaughter, the infant party to these proceedings, made in these words: "I give devise and bequeath to my granddaughter

Caroline Wagner all my life insurance that I may have and in force at the time of my death;" and afterwards in the same will referred to thus: "except insurance moneys which I have willed to my grandchild Caroline Wagner."

The fifth sub-section of sec. 171 of the Insurance Act, very widely cutting into the provisions of the first sub-section of that section, is in these words—"Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration"—words which seem to be wide enough to support the claim of the grandchild that a valid change of beneficiaries was made by the words of the will which I have quoted: and wide enough, at all events, to cause Mr. Washington to admit, for the former beneficiaries, that they cut out their earlier right, if the laws of the State of New York do not render the change invalid.

The infant party is entitled to the moneys in question: but it is not a case in which any order as to costs should be made, except that those of the Official Guardian should be paid out of the money in question.

Riddell, J.

RIDDELL, J.:—In 1890, Jacob Baeder, resident and domiciled in Guelph, Ontario, became a member of the Canadian Order of Chosen Friends, an Ontario friendly society, and obtained a beneficiary certificate for $2,000, payable to his three children (named) equally. In 1900, he changed his residence and domicile to the State of New York: still residing and domiciled there, he made his will on the 25th January, 1915, which would, if our law prevails, give the benefit of the insurance to his granddaughter; and died two months thereafter. The question arising whether the will was effective to change the beneficiary, it was brought before Mr. Justice Middleton, and that learned Judge referred the matter to the Appellate Division under the provisions of the Judicature Act, sec. 32 (2).

It is said that by the law of the State of New York the beneficiaries under an insurance policy of this kind cannot be changed

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by a will, but that the method laid down by the rules of the society must be strictly followed. That this is so is shewn by the cases cited: *Garner* v. *Germania Life Insurance Co.*, 110 N.Y. 266; *Sangunitto* v. *Goldey* (1903), 88 App. Div. N.Y. 78; *Fink* v. *Fink*, 171 N.Y. 616, etc.

This is because there is no statute in New York similar to our R.S.O. 1914, ch. 183, sec. 178: and, accordingly, in all policies governed by the law of New York the terms of the contract govern, and no change can be made in it except under the provisions (if any) of the contract itself.

There is no statute in New York forbidding an attempted change in any other way: such an attempted change is wholly ineffectual, but that is all.

Nor do the decisions affect to govern policies under any law than that of the State of New York, and I cannot see that they can be appealed to in the case of this policy, which, by sec. 155 of the Act, is to be construed according to the law of Ontario—rather, the effect of the decisions would be that all the elements of the policy, whether apparent on the face or annexed thereto by valid authority, must be considered. Nowhere do the Legislature or the Courts in New York purport to change a contract made in a foreign country: and it seems to me that all the elements of this contract, expressed or statutory, remain in full force—and that includes the power to change the beneficiary.

The difficulty felt by Mr. Justice Middleton arises from the language employed by Ferguson, J., in *Toronto General Trusts Co.* v. *Sewell*, 17 O.R. 442. In that case it seems to have been considered that a declaration of beneficiary under the statute was in the same position as an assignment of a policy—and that, applying *Lee* v. *Abdy*, 17 Q.B.D. 309, the validity of a declaration would depend on the domicile of the declarant. Applying this reasoning to the present case, it would follow that the declaration contained in the will would be governed by the law of the State of New York, and therefore would be invalid. This conclusion my learned brother thought would be wrong—and I agree with him.

While the decision in *Toronto General Trusts Co.* v. *Sewell* is right, there is a marked difference between the assignment of an insurance policy by its owner, an assignment of his own property—and a declaration of beneficiary, which does not deal with his

property at all, but simply directs where property not his is to go; *Lee* v. *Abdy* has no application to such a case.

The cases cited in Dicey's Conflict of Laws, pp. 706, 707, are quite conclusive of the matter: *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *In re Mégret*, [1901] 1 Ch. 547; and *Re Bald*, *Bald* v. *Bald*, 66 L.J. Ch. 524, 76 L.T.R. 462. See also Westlake's Private International Law, 5th ed., p. 85, and *In re Kirwan's Trusts* (1883), 25 Ch. D. 373.

If there be a power of appointment given over property in England, that power of appointment will be well exercised if the instrument be in the form required by English law, however ineffective it might be in respect of the property of the person executing the instrument by the law of his domicile: *e.g.*, in the first case above named, a sum of £4,000 was settled by Mme. H., an Englishwoman married to a Frenchman, upon trust to pay to herself the income for her life, and after her death "as she should by deed or will appoint." Domiciled in France, she made a will there exercising the power of appointment. By French law this would have been an invalid appointment, at least had the property been French. It was held that this was "no disposition of property belonging to the testatrix:" and that the appointment was valid under the trust deed, "an English document to be construed according to English law."

In re Mégret, [1901] 1 Ch. 547, is very similar in its facts: while *Re Bald*, *Bald* v. *Bald*, 76 L.T.R. 462, is on the conflict between English and Scottish law—it being held that the effect of an appointment depends on the law under which the power was created, not the law under which the power is exercised.

How far the Courts will go in making the law of Ontario applicable to a policy of insurance may be seen in *Gillie* v. *Young* (1901), 1 O.L.R. 368.

The words of the Act itself make this policy a trust over which the assured has no power of alienation or other power except that of appointment (including change of appointment) until the death of the preferred beneficiaries.

I think, therefore, that it was open to the assured to change the beneficiary by following the words of the statute. It remains to consider whether the words of the will are a sufficient declaration. They are: "All my life insurance that I may have and in force at the time of my death."

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It is contended that this language is sufficient under R.S.O. 1914, ch. 183, sec. 171 (3), (5), which is the same as (1912) 2 Geo. V. ch. 33, sec. 171 (5)—it modifies most materially the previously existing law.

The history of the decisions on the subject of declarations, etc., is not long:—

In *Re Lynn, Lynn* v. *Toronto General Trusts Co.* (1891), 20 O.R. 475, the declaration by will was a devise of all the real and personal estate of the deceased, including his insurance in the Northwestern Masonic Aid Association, for the benefit of his wife and children—the policy, not otherwise identified, was considered effectively dealt with. This was approved in *McKibbon* v. *Feegan* (1893), 21 A.R. 87. These were both cases in which the insurance was (in substance) in favour of the assured. So that we are bound to hold that a bequest of a sufficiently identified policy is effective as a declaration, at least in policies in favour of the assured.

Re Cheesborough (1897), 30 O.R. 639, is explained by Boyd, C., in *In re Cochrane* (1908), 16 O.L.R. 328, at pp. 332, 333. The testator had three policies payable to himself, and two designated to beneficiaries, his son and his other children. He devised "all my property, real and personal, and including life insurance policies and certificates to my executors and trustees upon trust . . . for . . . my children." The Chancellor says: "It does not appear to have been suggested that the words of the will would have any effect" on the two which had been designated; but Ferguson, J., held (30 O.R. at p. 643) that the other three were validly dealt with by the will: "I am . . . of the opinion that, though not identified by number, the policies are otherwise identified when all the policies are given."

In *Re Harkness* (1904), 8 O.L.R. 720, Teetzel, J., held a direction in a will, "I give the residue of my property, including life insurance, to my wife . . . and to my two youngest children," effective upon a policy in favour of "his order or heirs."

In *Re Walters* (1909), 13 O.W.R. 385, Clute, J., held it sufficient to bequeath to a daughter "$1,000 to be paid out of my insurance moneys at my decease . . "—but there the policy, as in the *Harkness* case and other cases, was in his own favour. Before this, *In re Cochrane*, 16 O.L.R. 328, had been decided. There a beneficiary certificate for $1,000 existed in favour of the wife.

The will contained these clauses (p. 332): "(2) I give and bequeath out of my life insurance funds the sum of $200 to my sister, L.C. (3) All the rest, residue and remainder of insurance funds, real and personal estate of what kind so ever, I give and bequeath to my daughter, C. C. B." Meredith, C.J.C.P. (now C.J.O.), held that clause (2) was invalid, as a sister is not one of the preferred class: but that (3) was effective to give the daughter the whole fund. The Divisional Court (Boyd, C., Magee and Mabee, JJ.) considered that, as the insurance fund under the policy was not his, and the policy was not his, the cases cited did not apply, and that the policy payable to the wife was not in any certain way dealt with by the testator; that, therefore, the direction was invalid, and that the widow was entitled to the whole fund.

It will be seen that it was taken for granted in that case that, had the sister been within the class, the declaration by will would have been effective, although the policy was not in favour of the assured. The case of *Book* v. *Book* (1900-01), 32 O.R. 206, 1 O.L.R. 86, also takes it for granted that a bequest of a policy properly identified is a declaration under the statute, even although there had been a previous declaration—see also *Re Edwards* (1910), 22 O.L.R. 367. The will must, however, be validly executed: *In re Jansen* (1906), 12 O.L.R. 63. (This last has not yet been considered by the Appellate Division, and we do not decide as to its accuracy).

In re Cochrane came up for consideration in *Re Earl* (1910), 16 O.W.R. 901, 1 O.W.N. 1141. The insured had endorsed upon a policy in the Canadian Home Circles a declaration in favour of his wife; by his will he devised his property, real and personal, to be sold and divided, including "the money that shall come from the Home Circle," one-third for the wife for life and the remainder amongst others coming within the class of preferred beneficiaries. Sir William Meredith, C.J., held that he was bound by *In re Cochrane* to hold the attempted change effective.

At the time of the passing of the Act of 2 Geo. V. ch. 33, the law as laid down in our Courts was:—

1. A direct bequest of an insurance policy is a declaration under the statute.

2. A bequest of "all my policies" covers all policies not already declared.

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It would seem that sec. 171 (5) of 2 Geo. V. ch. 33 was enacted to change the law as laid down in *In re Cochrane*, and I think it is effective for that purpose. Notwithstanding a previous declaration by the assured, and notwithstanding that the assured may have described the policies which are not in law his, as his or as his insurance fund, the declaration now is to be effective.

I think the will in question here is a declaration as required by sec. 171 (3)—and that it is effective to change the beneficiary.

Judgment should go accordingly—costs follow the event.

Masten, J.

MASTEN, J.:—I adopt the statement of facts contained in the judgment of Mr. Justice Middleton as follows (setting out the first four paragraphs, as above).

I think this case differs fundamentally from any of the cases cited in support of the applicants' claim.

Toronto General Trusts v. *Sewell*, 17 O.R. 442, seems broadly distinguishable. In that case no question of foreign domicile arose. The whole transaction was in substance an Ontario transaction. The agreement for the policies was negotiated in Ontario, through the duly authorised agents of the insurance company. The policies were delivered in Ontario to the insured. He was then and until his death a resident of Ontario. He died in Ontario. The funds in question were paid into the High Court in Ontario, where they stood at the time of the application. Lastly, and most important, the endorsements on these policies, appointing his wife to be the beneficiary under them, were executed at Belleville, in Ontario.

Under these circumstances, no question of a foreign domicile subsequently acquired by the insured or of an appointment by him under his will or otherwise, made in any foreign domicile, arises, and no such question was considered by the late Mr. Justice Ferguson.

Neither does the case of *Lee* v. *Abdy*, 17 Q.B.D. 309, apply. The head-note of that case is as follows: "The plaintiff sued the trustees of an English life insurance company as assignee of a policy of life insurance granted by such company. The assignment of the policy was made in Cape Colony, and at the time of such assignment the assured, the assignor, was, and he remained till his death, domiciled in Cape Colony, and the plaintiff was his wife. By the law of that colony such an assignment was void by reason of the

alleged assignee being the wife of the assignor: *Held*, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment."

In that case the proceeds of the insurance policy belonged to the estate of the insured. It was his property to realise, assign, or otherwise deal with as he saw fit. He chose to assign it to his wife, he and she being at the time domiciled in Cape Colony. It was the assignment of a chose in action; and the right and capacity of the husband to assign and of the wife to receive an assignment of such chose in action depended on the law of Cape Colony.

In the present case we have a policy of insurance issued in Ontario by an Ontario company to a person then resident in Ontario, with loss payable to his three children. The proceeds of the policy are payable in Ontario, and have in fact been paid into Court here.

After the issue of the policy, the insured removed his domicile to the State of New York, and died there, having made his will there, by which will he appointed the proceeds of the policy in question to his grandchild, in lieu of his children.

The fund in question formed no part of his estate, but was, according to the statute, a trust fund in Ontario in respect to which he was by statute given a limited power to appoint. The original policy and its subject-matter is something in Ontario governed by the laws of Ontario, and is not a chose in action belonging to the testator, nor governed by the law of his domicile.

The statutory provisions relevant to the question are to be found in the Insurance Act, R.S.O. 1914, ch. 183.

By sec. 178, sub-sec. (1), both children and grandchildren are declared to be within the class of preferred beneficiaries.

Sub-section (2) is as follows: "Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration."

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Section 179, sub-sec. (1), is as follows: "The assured may by a declaration vary a contract or declaration previously made so as to restrict, extend, transfer or limit the benefits of the insurance to any one or more persons of the class of preferred beneficiaries to the exclusion of any or all others of the class or wholly or partly to one or more for life, or any other term, with remainder to any other or others of the class, but the assured shall not, except as provided by sub-section 7 of section 178, revoke or alter any disposition made under the provisions of this Act in favour of any one or more of the preferred class except in favour of some one or more persons within the preferred class so long as any of the persons of the preferred class in whose favour the contract or declaration is made are living."

The result of these sections appears to make the insurance moneys a trust fund available only to the class of preferred beneficiaries, and with a special and limited power to appoint conferred on the person whose life is insured.

This case is in principle, I think, governed by the decision in *Pouey* v. *Hordern*, [1900] 1 Ch. 492. In that case, a domiciled Frenchwoman, having under an English settlement a special power of appointment by will over funds in England, was held entitled to exercise the power in such a way as to dispose of the property in a manner inconsistent with her status and capacity under the law of France. And it was held that the exercise of such a power was not a disposition of property belonging to the testatrix. In the course of his judgment Farwell, J., remarks: "The distinction between power and property is well settled, and it is really not relevant to the consideration of the execution of a power to inquire whether the donee of the power can dispose of his property, unless of course there be absolute incapacity to execute any document arising from lunacy or the like."

That case was followed in *In re Mégret*, [1901] 1 Ch. 547 and in *Re Bald*, *Bald* v. *Bald*, 76 L.T.R. 462. It was considered and distinguished on the facts, but not dissented from in principle, in *In re Pryce*, [1911] 2 Ch. 286.

In the case of *Murphy* v. *Deichler*, [1909] A.C. 446, it was held that "where an English power of appointment by will is exercised by a will executed in English form, though the appointor be domiciled abroad and the will be not validly executed according

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to the law of domicile, the document may be admitted to probate as a will for the purpose of the appointment, though not admissible for other purposes. This practice has been too long observed to be now disturbed."

This power of appointment or declaration respecting the beneficiary might have been exercised by will or by any other method which complied with the Ontario statute, and the law of the place where the insured executed the power does not govern. Neither the rule that a chose in action follows the domicile of its possessor, nor the rule that the validity of a testamentary disposition of movables is governed by the law of the testator's domicile, has anything to do with this case.

It is a special, and not a general, power, and is, therefore, in its circumstances, nearer to the case of *Pouey* v. *Hordern*, [1900] 1 Ch. 492, than it is to any of the other cases cited, and none of the cases appear to me to be in conflict with the view contended for by the respondent.

For these reasons, I think that the new appointment was valid, and that the infant grandchild is entitled to the fund.

LENNOX, J., agreed in the result. *Order accordingly.*

Lennox, J.

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Re STRATFORD FUEL ETC. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J. Idington, Duff, Anglin, and Brodeur, JJ. June 1, 1914.

1. CORPORATIONS AND COMPANIES (§ VI F I—345)—WINDING-UP—RIGHT OF CREDITORS—SURETY PAYING BALANCE DUE CREDITOR AFTER COMPROMISE OF CLAIM WITH LIQUIDATOR —RIGHT TO RANK THEREFOR.

The fact that a creditor who filed an affidavit of claim with the liquidator of the company accepted the proceeds of certain securities in compromise of his claim, and agreed not to rank for the remainder, will not prevent sureties for the debt against whom the creditor expressly reserved his rights, from ranking in respect of the balance of the creditor's claim when compelled to pay the creditor.

[*Re Stratford Fuel, etc., Co.*, 13 D.L.R. 64, 28 O.L.R. 481, 4 O.W.N. 1051 affirmed on appeal.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 28 O.L.R. 481; *Sub nom Re Stratford Fuel, etc., Co.*, 13 D.L.R. 64, setting aside the order of Mr. Justice Middleton and restoring that of the local Judge.

The respondents, Coughlin and Irwin, sought to rank on the insolvent estate of the Stratford Fuel, etc., Co. as creditors for money paid to the Traders Bank for whom they were sureties for advances to the company. The bank, in settling an action

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brought by the liquidator of the company, had agreed not to rank on the assets and the claim of respondents was resisted on the ground that such agreement by the principal creditor was binding on the sureties. The matter came before Judge Barron, a local Judge of the High Court, who decided that the respondents were entitled to rank and gave the following reasons:—

"The claim of Coughlin and Irwin is to rank on the estate of the Stratford Fuel, Ice, Cartage and Construction Company, Limited, in the hands of the liquidator, John Brown, for the sum of $5,624.80, of which the sum of $400 is admitted.

"The claim is made, and it is opposed under the following circumstances: The company while in business, became heavily indebted to the Traders Bank of Canada in the sum of $40,000 or thereabouts. They continued in business for some time, but on the 7th January, 1908, an order was made to wind up the said company under the R.S.C. 1906, ch. 144, and amending Acts.

"Coughlin and Irwin, with others, had become and were at the time of the liquidation proceedings, guarantors to the bank of the company for their full indebtedness. Exhibit 'A' contains this guarantee. The bank also held a mortgage dated August 27, 1907, from the company securing the full amount of its indebtedness. The liquidator, John Brown, brought an action against the bank, on February 13, 1908, to set aside the mortgage (and a second mortgage) as void against the creditors, which action was settled on the eve of trial, and the settlement itself appears in the memorandum attached to the record. There still remains due to the bank, after this settlement, the sum of $....., or thereabouts, and the bank demanding payment from the guarantors on the guarantee bond, exhibit 'A,' the present claimants, Irwin and Coughlin, in pursuance of the demand, paid the sum of $6,624.80, of which they claim the sum above mentioned in regard to which there is no dispute.

"Mr. Harding, in opposing the claim of Coughlin and Irwin contends, first: That the settlement made of the action of Brown against the Traders Bank had the effect in law of releasing the guarantors on their bond to the bank, and, therefore, that the payment by Coughlin and Irwin was a purely voluntary one on their parts, one which the bank could not legally insist upon, and *sequitur*, that Coughlin and Irwin cannot now legally rank

on the estate in liquidation for a payment illegally made by them as against the liquidator. Secondly:—Mr. Harding maintains that Coughlin and Irwin were privy to the settlement of the suit of *Brown* v. *The Traders Bank*, and, therefore, that they are bound by this settlement, and being so bound cannot now rank on the estate in the liquidator's hands. As to the latter contention the first question to be decided is one of fact, namely, were Coughlin and Irwin privy to the settlement in question. I do not find that they were. Hence it is neither necessary nor prudent to pursue the law applicable to a fact which is not found to exist.

"I may add, however, that in law information to a surety of time being given to the principal debtor by the creditor, when there is a reservation of rights against the surety, is no bar whatever either to the creditor proceeding against the surety or the surety proceeding against the debtor. (*Webb* v. *Hewitt*, 3 K. & J. 438.)

"Then as to the first objection. The facts in this case must not be confused with a case of an absolute and unqualified release of a debtor without condition or proviso. In such a case the debt is gone and it is impossible to preserve a right against a surety when the debt is satisfied. It is said by Mr. Harding that though the entire debt is not entirely gone, yet a substantial security, namely, the mortgage referred to, is gone, and that the guarantors have lost the right to be subrogated to the bank in regard to this security. If there is anything in this, it is a matter for the guarantors, and they do not complain. If they have been deprived of the benefit of subrogation, it is their loss and no one else need complain if they don't, and they don't. But of what benefit is it to be subrogated to a creditor in regard to a security which is paid off by the debtor to that creditor, and for which payment full credit is given by that creditor to the debtor? The security in question can only be paid once by the debtor. The company having paid it by the carrying out of the settlement they cannot be asked to pay it over again to the guarantors. The guarantors are already benefited by the payment. They gain, they do not lose. By the lessening of their liability on the amount of their indebtedness or their liability on the guarantee bond, they happily have had so much less to pay on account of the debtor to the creditor.

"The law of subrogation, as I understand it, has no application

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here. Broadly speaking, subrogation is this:—A surety on paying the debt of his principal is entitled to be subrogated to all the securities, funds, liens and equities which the creditor holds against the principal debtor, or has a means of enforcing payment from him. The case in question is not a case of an obligation being extinguished by payment by a surety under such circumstances as entitled him to claim the obligation as still subsisting for his benefit. It is the simple case of payment by a debtor to his creditor of one of the securities that the creditor holds. I can quite appreciate that a creditor must not play pitch and toss with his security and negligently impair the position of the surety and increase the amount that the surety has ultimately to pay, but in this case it is not contended that the settlement made by the bank of the security in question, was other than a reasonable one under all the circumstances, and which, while it satisfied the bank *pro tanto*, likewise benefited the guarantors, the claimants, and lessened the amount of their claim as guarantors against the estate in liquidation.

"Then as to the settlement, while it extinguished the debt *pro tanto* there still remains a large portion of the debt due to the bank. It is said that as to this balance the bank lost its right by the settlement in question, that they can not in law pursue the guarantors, and that, therefore, the guarantors have no right to rank on the estate in regard to a payment by them for which they were not liable in law. But first, what is the contract of suretyship, and next, what does the settlement say?

"The contract of suretyship is to be seen in exhibit 'A' and the settlement by the indorsement on the record. It is thus seen that the rights of the bank are specially preserved by both documents against the guarantors by the reservation of remedies against them. Now, what is the result in law of a reserve of remedies when the surety does not consent to the discharge of the debtor? Such a reservation prevents the discharge of the surety upon the principle that it rebuts the implication that the surety was meant to be discharged, and it prevents the rights of the surety against the debtor being impaired. (See *Bateson* v. *Gosling*, L.R. 7 C.P. 9.) The debtor may even be discharged and the surety held provided the contract between the surety and creditor so provides, and in this case the contract of surety does so provide. (See *Cowper* v. *Smith*, 4 M. & W. 519, 520, 521.)

"There is not in this case the element of novation as there was in *Commercial Bank of Tasmania* v. *Jones*, [1893] A.C. 313, at 316, and in *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464. In the cases cited, there was substitution of one debtor for another as to portion of the debt, as to which portion there was held to be accord and satisfaction, and, therefore, to that extent the creditor could make no claim against the surety. In the case *sub judice* the bank by their settlement did not procure their claim in full. Part of their original debt still remained unpaid. It is obvious, of course, that if the bank had been paid in full there would be an end of the matter. There was a balance still unsatisfied. This balance has been now partly satisfied by the payment of $6,624.80, of which $400 is admitted, and from which $1,000 has to be deducted, and for which balance I think the sureties should rank on the estate in liquidation.

"It is said that the bank also claims the right to rank for dividend on the claim of $39,600, but while their claim of $39,600 was originally filed prior to the settlement of the suit, that settlement positively provides that they, the bank, shall not rank on the estate in the hands of the liquidator. In other words, they agree to abandon and forego one of their remedies. They carefully preserved their rights and remedies against the guarantors, whose right in turn to rank for dividend is not lost to them any more than they, the sureties, would lose their rights had the bank undertaken not to sue the company, which they could have done without impairing the remedies of the surety in regard to any sum that they have paid or may be called upon to pay.

"For these reasons, then given in brief, I think that the claimants, Coughlin and Irwin, have the right to rank on the estate in question for the sum first mentioned, and a report by me as Master will follow accordingly."

An appeal was taken to Mr. Justice Middleton, who reversed the local Master's order, but it was restored on further appeal to the Appellate Division of the Supreme Court.

Sir George Gibbons, K.C. and *R. T. Harding*, for appellant.

Hellmuth, K.C. and *R. S. Robertson*, for respondents.

FITZPATRICK, C.J.:—I would dismiss this appeal with costs. The appellant was the debtor of the Traders Bank at the time the agreement was made. The bank renounced its right to rank

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on the estate in consideration of the payment of $25,000, but reserved its recourse against the sureties among whom were the respondents. The latter being obliged to pay the debt now claim to rank against the estate of the principal debtor whose debt they paid. It appears to me obvious that they are entitled to rank on an estate of which they are creditors by reason of the payment made to the bank. The claim is not filed in subrogation of the bank's claim under sec. 69 of the Act, but as that of a creditor under sec. 76.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant, who is a liquidator of said company, which is in process of being wound up under the Winding-up Act, brought an action against the Traders Bank to set aside some securities obtained by it from said company and comprised the action by a brief memo. indorsed on the record entered for trial of which clauses 1 and 5 are all that are material for consideration of the question raised herein.

Said clauses are as follows:—

1. The defendants to be entitled to the proceeds of the real estate and ice franchise, twenty-five thousand dollars referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of its debt.

The respondents were sureties to the bank for the general balance due by the company to it.

The instrument by which they became such sureties has been lost, but is shewn to have, in the main at least, consisted of a general printed form in common use by banks to be signed by guarantors for securing payment of such general balance as may be found due by a customer of the bank.

One term thereof was as follows:—

This is a continuing guarantee intended to cover any number of transactions, and we agree that the said bank may deal or compound with any of the parties to the said negotiable securities, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply hereto.

The questions raised herein must be solved by the correct appreciation of this power of compromise and the relation thereto of the said stipulations one and five above quoted from the memo. of settlement between the parties thereto.

Can it be maintained that the said memo. of settlement was a compromise within the meaning of the guarantee whereby the

claims of the bank as against the debtor were compounded and the principal debtor so absolved thereby that the sureties could have no recourse against it? I do not think so. I assume the guarantee is possibly capable of some such operation, though I doubt such construction. I put it thus to test the only ground on which it seems to me the matter could be resolved in favour of appellant's contention. So long as the debt exists and the surety is called upon to pay it, he must in law be entitled to pursue his usual remedies of a surety against the debtor when once he has paid his debt; unless he has contracted himself out of such right in some such way as I have suggested.

This ground not being open to appellant by virtue of what has transpired, what answer can he have to the statutory right of the surety to rank as a contingent creditor and in virtue thereof to rank for what he has been called upon to pay by the concurrence of appellant permitting the sureties to be pursued?

If the liquidator intended to avert such consequences it was open to him to have refused his assent to such recourse against the surety or to have insisted upon the sureties assenting to the settlement.

I cannot see how the surety can, short of some such methods, be deprived of his right to rank in respect of what at the date of the winding-up order was a contingent claim which in light of what has transpired has become an actual claim against the debtor whose assets are in the appellant's hands.

I think the appeal must be dismissed with costs.

DUFF, J.:—Unless precluded by agreement express or implied or by some equity or estoppel arising from some conduct of the parties the surety (by reason of the relation created by the contract of suretyship) is entitled to require the principal debtor to discharge his obligation to the creditor in so far as that may be necessary to relieve the surety. The debtor in other words comes under an obligation to the surety to save the surety harmless from any prejudice which might arise from the non-performance of the principal obligation. It is not disputed that the correlative right of the surety may be enforced in a winding-up where the principal obligation is to pay a sum of money and the principal debtor is the company in process of winding-up. I do not think it is really disputed either, at all events, it is obviously so, that the surety

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cannot by any act of the creditor alone be deprived of his right to compel the debtor to protect him by discharging the debt, or to indemnify him against the consequences of his failure to do so. The substance of the argument in this case is, that by the terms of the suretyship contract, the creditor, the bank, was made the agent of the sureties and as such agent empowered to enter into arrangements on their behalf with the principal debtor binding on the sureties as if made by them in person, and that by the agreement of June 15, 1909, an arrangement was entered into pursuant to this authority between the creditor and the debtor whereby the creditor agreed on behalf of the sureties as well as on behalf of itself that no claim should be made in the winding-up in respect of the debt in question. There are two answers to that: The documents are as follows:—

To the Traders Bank of Canada.

In consideration of the Traders Bank of Canada making advances to the Stratford Fuel, Ice, Cartage and Construction Company, Limited, either by the discount of negotiable securities consisting of bills of exchange or promissory notes, or by overdrafts, or otherwise, from time to time as the said bank may think fit; we jointly and severally hereby guarantee payment in full of such negotiable securities or overdrafts or other indebtedness provided, however, that the amount to be paid by us under this guarantee shall not exceed $38,000. This is a continuing guarantee intended to cover any number of transactions, and we agree that the said bank may deal or compound with any of the parties to the said negotiable securities, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply thereto. It is also agreed that the guarantors shall be liable for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount which shall be owing from the Stratford Fuel, Ice, Cartage and Construction Company, Limited, to the said bank; provided, however, that they shall not be liable for a greater amount than the said sum of $38,000, but the said bank shall not be bound to exhaust all such resources against all parties previous to making demand upon us for payment, the intention being that the Traders Bank of Canada shall have the right to demand and enforce this guarantee in whole or in part from the guarantor whenever the principal debtor or any party or parties concerned fail to discharge any obligation they have entered into.

This guarantee shall subsist notwithstanding any change in the constitution of the company.

As witness our hands at Stratford this 24th Day of October, 1907.

J. J. COUGHLIN, W. G. IRWIN, W. J. MOONEY, F. B. DEACON, G. R. DEACON, JAS. A. GRAY (Seal.)

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1. The defendants to be entitled to the proceeds of the real estate and ice franchise, twenty-five thousand dollars referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

2. The defendants to pay to the plaintiff the sum of one thousand dollars.
3. Each party to pay own costs of suit.
4. The other securities held by the defendants to be declared valid.
5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of its debt.

GEO. C. GIBBONS, for Plaintiff.
June 15—'09 GIDEON GRANT, for Defendants.

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First, the document of October 24, 1907, above quoted, does not in express terms invest the bank with any authority to act as the agent of the sureties in dealing with the principal debtor. Nor does the document in apt terms limit the rights or the remedies of the sureties as against the debtor. The stipulation that "the doctrines of law or equity in favour of a surety" shall not apply to compositions between the bank and the principal debtor, although it is perhaps capable of being read as applying to the rights of the surety as against the principal debtor does not necessarily relate to such rights, and the context would appear to indicate that such rights are not within the contemplation of the clause. Without analysing the language further I will simply say that I do not think the construction contended for accords with the real intendment of the stipulation. But assuming the appellant to be right in his contention as to the construction of this document, I think the compromise of June 15, 1909, when rightly read, does not amount to a release of the sureties' rights. I think when the first paragraph is read with the last it becomes apparent that according to its true meaning the instrument only embodies a stipulation by the bank that the bank will not press its own claim to rank upon the assets of the company in the hands of the liquidator.

Anglin, J.

ANGLIN, J.:—In order to give its full legal effect to the reservation in the document of compromise of the bank's rights against the sureties, its agreement not to rank on the debtor's estate in liquidation must be deemed similar in its results to a covenant not to sue. It does not operate as a release of the debtor. It is in fact an agreement that the bank will not claim to rank in the liquidation for the balance of its demand as a creditor. It is said that on payment the surety becomes subrogated to the rights of the creditor, and that it is only by virtue of such subrogation that his right to proceed against the primary debtor arises. It follows, the appellant maintains, that in the present case the sureties cannot rank on the estate in liquidation because the creditor had debarred himself from so ranking. But as the creditor's

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covenant not to sue the principal debtor does not preclude the surety who pays the creditor from bringing action against the debtor for indemnification, so the agreement not to rank in the present case left that right open to the sureties on their making payment. Moreover, while it would appear to be the purpose of the bond sued upon that dealings between the creditor and the primary debtor, which would ordinarily operate to discharge the sureties, should not have that effect, there is nothing in that instrument which, in the event of the sureties being compelled to meet the primary debtor's obligation, necessarily deprives them of the right, which the law otherwise gives them, to claim indemnification by the primary debtor or out of his estate in liquidation; and I do not think it should receive such a construction.

The appeal, in my opinion, fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—I fail to see how the guarantors who have paid the debt of the principal debtor could be prevented from ranking on the assets of the estate of the latter. The liquidator who is contesting the claim of the sureties invokes an agreement which he has made with the principal creditor who undertook not to rank upon the estate. But at the same time it is stipulated in the same agreement that the creditor could demand and enforce his right against the sureties.

By that agreement the principal creditor could not claim personally from the estate. And if he had not succeeded in collecting anything from the sureties he would lose the balance of his claim, but if he collects something from the sureties the latter become entitled to make a claim against the estate. The agreement was a personal one as far as the creditor was concerned, but it did not bind the sureties.

The reservation of rights against the sureties leaves the debt alive. *Kearsley* v. *Cole*, 16 M. & W. 128; *Green* v. *Wynn*, 4 Ch. App. 204.

The sureties' right to be indemnified by the principal debtor or his estate will not be held to have been abandoned unless a contract on their part to abandon it has been proved. There is no evidence that such an undertaking exists in this case. The reservation of the principal creditor's remedies against the guarantors necessarily implies the continuance of their right to be indemnified. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. February 21, 1916.

1. LANDLORD AND TENANT (§ II B 2—15)—LEASE—MOVING PICTURE THEATRE —IMPLIED COVENANT—HEATING.

In a lease of a building with all its contents, to be used as a moving picture theatre, there is, as in the case of a furnished house, an implied covenant that the premises are fit for that particular use and purpose. Where the letting period covers the winter months, inadequate heating appliances render the building unfit for human habitation, and constitute a breach of the covenant.

[*Wilson* v. *Finch Hatton*, 2 Ex.D. 336; *Smith* v. *Marrable*, 11 M. & W. 5, followed; *Davey v. Christoff*, 26 D.L.R. 765, 35 O.L.R. 162, affirmed. See also *Brymer* v. *Thompson* (Ont., 25 D.L.R. 831, affirming 23 D.L.R. 840.]

Statement.

APPEAL by the defendants from the judgment of MASTEN, J., 26 D.L.R. 764, 35 O.L.R. 162; and cross-appeal by the plaintiff as to the damages awarded to him, affirmed.

W. A. Henderson, for appellants.

J. W. Payne, for plaintiff, respondent.

The judgment of the Court was delivered by—

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment of Masten, J., dated the 17th December, 1915, pronounced after the trial before him sitting without a jury; and there is a cross-appeal by the plaintiff as to the damages which were awarded to him, which, he contends, should have been greater by $200 than the amount which he was held to be entitled to recover.

The facts as to the main question are not seriously in dispute, and are simple:—

The appellants were tenants of a moving picture theatre known as "The Temple," 1032 Queen street west, in the city of Toronto, which occupied the ground-floor of a building owned by a man named Vogan, and one of the terms of the tenancy was that the appellants were to heat the upper part of the building. The building was heated by means of a furnace or boiler which was situate in that part of the building of which the appellants became tenants. The appellants carried on the moving picture business for about eleven months, when they sublet the theatre to the respondent. The lease to the respondent is dated the 8th October, 1914, and is for two years from the 12th day of that month, and one of its terms is that he was to "keep the building other flats heated at his own expense."

Before deciding to take the lease on the terms offered by the

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appellants, the respondent visited the theatre on several occasions and satisfied himself that the business which was being done there warranted him in accepting the offer, and he told Begoin Christoff, one of the appellants, that he would accept it.

Nothing was said as to the heating of the building until the parties met to have the lease prepared and executed. In discussing the terms, Begoin Christoff told the respondent that he must agree to heat the upper part of the building. The respondent demurred to this, and asked how much coal it would take to heat the place, and the reply was either that three tons a month would be sufficient for that purpose or that the quantity the appellants had used was three tons a month. The respondent took possession on the 12th October, and was satisfied with the business until the cold weather came on, when it was found that the heating appliances were quite inadequate, not only to supply heat to the upper flats, but insufficient to heat the part of the building rented by the respondent. The result of this was that the attendance at the theatre fell off. Complaints as to the heating were made to the appellants, but they refused to do anything to remedy the defects in the heating appliances. The head landlord, Vogan, however, put in a new boiler; but this did not remedy the difficulty. The flue was too small and there was not sufficient draught. No effort was made by the appellants to remedy this defect, and on the 8th January, 1915, the respondent left the premises, and the lease was subsequently surrendered.

The action is brought to recover damages for the loss occasioned to the respondent owing to the insufficiency of the appliances for heating the premises, and in the statement of claim this was alleged to have been a breach of the appellants' covenant for quiet enjoyment. The appellants counterclaim for damages for "breach of covenant to pay rental and carry on the business" and for the respondent's refusal to transfer the license for the theatre to the appellants.

The claim that the defect in the heating appliances and the consequences of it constituted a breach of the covenant for quiet enjoyment was manifestly untenable, and the learned trial Judge so held, but he also held that there was an implied warranty that the heating appliances were adequate for heating the demised premises, and that there had been a breach of that warranty, and he awarded damages to the respondent in respect of it.

The learned Judge also awarded damages to the appellants on their counterclaim for the refusal to transfer the license, set off these damages against the damages awarded to the respondent, and gave judgment against the appellants for $350 with costs.

The question as to the implication in such a case as this of a warranty that the demised premises are fit for the purpose for which they are intended to be used is an important one, and I have been unable to discover any direct authority in favour of implying such a warranty.

It is abundantly clear, I think, that such a warranty is not to be implied in the case of a demise of realty only.

In *Smith* v. *Marrable* (1843), 11 M. & W. 5, which was the case of letting a furnished house, Baron Parke, after stating that the case involved "the question whether, in point of law, a person who lets a house must be taken to let it under the implied condition that it is in a state fit for decent and comfortable habitation, and whether he (*sic*) is at liberty to throw it up, when he makes the discovery that it is not so," and referring to two earlier cases, *Edwards* v. *Etherington* (1825), Ry. & M. 268, 7 Dowl. & Ry. 117, and *Collins* v. *Barrow* (1831), 1 Moo. & Rob. 112, said: "These authorities appear to me fully to warrant the position, that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up."

In *Sutton* v. *Temple* (1843), 12 M. & W. 52, which was the case of a demise of the eatage of twenty-four acres of land, it was held that on a demise of land or the vesture of land (as the eatage of a field) for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken.

In *Hart* v. *Windsor* (1843), 12 M. & W. 68, which was the case of an agreement to let a house and garden ground, with the use of the fixtures therein, for the term of three years, the defendant pleaded that the house was demised to him for the purpose of his inhabiting it; that before and at the time of the agreement and when he entered, and from thence until and at the time of his quitting and abandoning the possession of it, the house was not in a fit state or condition for habitation, but in that state that the defendant could not reasonably inhabit or dwell therein or have

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any beneficial occupation of it, by reason of its being greatly infested with bugs, and not by reason of any act or default of the defendant; that before the rent or any part of it became due he quitted the possession, and gave notice thereof to the plaintiff, and ceased all further occupation of the same, and derived no benefit therefrom; and that, from the commencement of the term until his so quitting, he had had no beneficial occupation of the same. The jury having found for the defendant on this issue, it was held, on motion for judgment *non obstante veredicto*, that the plea was no answer to the action, inasmuch as the law implied no contract on the part of the lessor that the house was at the time of the demise, or should be at the commencement of the term, in a reasonably fit state and condition for occupation; secondly, that the demise being of a house and *garden ground*, in order to make the plea good, it must be held that, if a house be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation as that its breach would authorise the tenant to give up both; thirdly, that there is no implied warranty on a lease of a house, or of land, that it is or shall be reasonably fit for habitation, occupation, or cultivation; and that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The defendant in support of his plea relied chiefly upon *Smith* v. *Marrable*, and in delivering judgment Baron Parke said that his judgment in that case certainly proceeded upon the authority of the two earlier cases I have mentioned, but that from the full discussion that they had undergone in argument, and in argument in the then recent case of *Sutton* v. *Temple* (*supra*), he felt satisfied they could not be supported, if the reports of them were correct, and that all the members of the Court concurred in the opinion that they were not law.

In *Chappell* v. *Gregory* (1864), 34 Beav. 250, 252-3, the Master of the Rolls (Sir John Romilly) said: "A promise by the lessor to put the house into a complete state of repair before the lease is executed, and upon the faith of which the lease is taken, is a distinct engagement which must be fulfilled by him. But, in the absence of such a promise, a man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor, 'this house is not in a proper condition, and you or your builder must put it into a

condition which makes it fit for my living in.' Accordingly, in the present case, unless the preliminary promise by Mr. Chappell is established by Mr. Gregory, he must fail; for not only is there no implied warranty in the letting of a house, but in this instance, the defendant had, himself, previously inspected the house, and knew, or had the opportunities of knowing, what the condition of it was."

In *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122, 131, Blackburn, J., said: "And we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purpose for which it is let: see *Hart* v. *Windsor*" (*supra*).

The same Judge, then Lord Blackburn, said, in *Westropp* v. *Elligott* (1884), 9 App. Cas. 815, 826: "In the civil law and French law founded on it a lease of land was but one instance of the *locatio rei*, and according to that foreign law a contract on the part of the letter is implied that the thing, whether land or chattel, should be reasonably fit for the purpose for which it was let. There have been several cases in which the question has been discussed whether such a contract on the part of the letter was implied in English law. These cases, or most of them, will be found collected in Sir E. V. Williams' Notes to Saunders, vol. 2, 838. The decision in *Hart* v. *Windsor* was that there was no such contract on the part of the lessor of real property implied by English law. Now, in every case in which that question was raised, it must have been first decided that the property was let for a particular purpose."

In *Wilson* v. *Finch Hatton* (1877), 2 Ex. D. 336, 342, which was the case of a furnished house, Kelly, C.B., referring to the cases cited by the plaintiff's counsel, said that all of them were "cases of agreements for the letting and hiring of real property," and that "the circumstances in which furnished houses are, and those in which real property is, demised, differ very greatly." And Pollock, B., at p. 343, expressed the opinion that, "if this were the case of an agreement for the letting of real property, the well-established rules of law would apply, and they would force us to hold that the tenant could not succeed in this case;" and on p. 344 he said: "The cases which refer to real property do not govern this contract."

In *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C.P.D.

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507, 510, 511, which was the case of a lease of floors in a warehouse, Lord Coleridge, C.J., delivering the judgment of the Court, said: "We are of opinion that the plaintiffs are not liable to damages by reason of any implied covenant or warranty by them that the building was fit for the purpose for which it was to be used. No authority has been found which decides that there is any such warranty; what authority there is on the point is against its existence: *Hart* v. *Windsor; Sutton* v. *Temple;* and we are of opinion that no such warranty can be implied. There are, it is true, some cases relating to furnished apartments and houses which tend to shew that a person who lets them impliedly warrants that they are fit for residential purposes: *Smith* v. *Marrable* and *Wilson* v. *Finch Hatton;* but we are not prepared to extend these decisions to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty."

This rule was also recognised and acted upon, and *Sutton* v. *Temple* and *Hart* v. *Windsor* were followed, in *Murray* v. *Mace* (1874), 8 I.R. C.L. 396, and in the leading text-books on the subject of landlord and tenant; and in Halsbury's Laws of England the rule is stated to be as laid down in those two cases. In the United States, also, the rule is recognised and acted upon: Cyc., vol. 24, pp. 1048, 1049.

The only case in which any doubt may be thought to have been suggested as to the application of the rule to the letting of an unfurnished house which, to the knowledge of the lessor, is taken for immediate habitation, is *Bunn* v. *Harrison* (1886), 3 Times L.R. 146. That was the case of an agreement for the lease of an unfurnished house, and it had been found by the trial Judge that the defendant had been induced to become tenant of the house on the faith of a representation and warranty that it was in a sanitary condition, and that the drainage, water supply, and ventilation were all perfect; that the house was at the time of the letting in an insanitary condition, and that the defendant had left within a reasonable time; and the plaintiff's action, which was brought to recover a quarter's rent, was dismissed, and judgment was given for the defendant on her counterclaim for breach of the warranty. The plaintiff appealed, and upon the appeal the defendant's counsel relied upon the express warranty, and also contended that, as the house was for immediate habitation, there was an implied

warranty that it was fit for habitation. The appeal was dismissed upon the ground that the warranty that was found to have been given was "not only . . . a warranty, ordinarily so called, but also a warranty which went to the whole root and condition of the contract;" that it was a condition; that there were, therefore, a condition and a warranty; that the condition upon which the defendant was to take the house was broken, and she was not bound to pay the rent, "as she did not take to the house, but left within a reasonable time," and that there was a breach of the warranty upon which she could recover damages. As to the question of an implied warranty, the Master of the Rolls reserved his opinion until the case arose. Lindley, L.J., said that "it was not necessary to decide whether or not the doctrine of *Smith* v. *Marrable* and *Wilson* v. *Finch Hatton* applied, where it was understood by both parties that the unfurnished house was for immediate habitation;" and Lopes, L.J., said that "it was not necessary to express any opinion as to implied warranty in the case of unfurnished as distinct from furnished houses."

Notwithstanding what was said in this case, in my opinion *Sutton* v. *Temple* and *Hart* v. *Windsor* ought to be followed, and, if followed, there is nothing to exclude from the application of the rule there laid down the case of an unfurnished house let for immediate habitation; and it follows from the rule that the doctrine of such cases as *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, does not apply.

An exception has been made to the rule in the case of furnished houses or apartments let for immediate and temporary occupation, but it is difficult to understand the exact ground upon which the exception is based. It was first applied in *Smith* v. *Marrable* (*supra*). The letting in that case was of a furnished house for five or six weeks at the option of the tenant, and was for immediate occupation by him. The tenant, who at once entered into possession, finding that the house was infested with bugs, left it and sent the key with a week's rent to the landlord. The landlord sued for use and occupation, claiming to recover a balance of five weeks' rent, and the defence was that there was an implied condition or warranty that there was nothing about the house so noxious as to render it uninhabitable, and the Lord Chief Baron, before whom the action was tried, so directed the jury. A motion

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for a new trial on the ground of misdirection was made by the plaintiff, but a rule was refused.

As I have already said, Baron Parke based his judgment on the earlier cases I have mentioned, and would have decided in favour of the defendant even if the house had not been a furnished house; but Lord Abinger, C.B., apparently confined his decision to the case of a furnished house, and said: "A man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it? I entertain no doubt whatever on the subject, and think the defendant was fully justified in leaving these premises as he did: indeed, I only wonder that he remained so long, and gave the landlord so much opportunity of remedying the evil."

In *Sutton* v. *Temple* (*supra*), it was sought to apply the decision in *Smith* v. *Marrable*, but Lord Abinger (p. 60) distinguished it on the ground that the contract in that case was a contract of a mixed nature—for the letting of a house *and furniture* at Brighton, and said that every one knew that the furniture, upon such occasions, forms the greater part of the value which the party renting gives for the house and its contents. "In such a case," said he, "the contract is for a house and furniture fit for immediate occupation; and can there be any doubt that, if a party lets a house, and the goods and chattels or the furniture it contains, to another, that must be such furniture as is fit for the use of the party who is to occupy the house?" And, after referring to some cases by way of illustration, he added (p. 61): "On the same principle, if a party contract for the lease of a house ready-furnished, it is to be furnished in a proper manner, and so as to be fit for immediate occupation. Supposing it turn out that there is not a bed in the house, surely the party is not bound to occupy it or to continue in it. So also in the case of a house infested with vermin; if bugs be found in the bed, even after entering into possession of a house, the lodger or occupier is not bound to stay in it . . . . Where the party has had an opportunity of personally inspecting

a ready-furnished house by himself or his agent before entering on the occupation of it, perhaps the objection would not arise; but if a person take a ready-furnished house upon the faith of its being suitably furnished, surely the owner is under an obligation to let it in a habitable state. Common sense and common justice concur in that conclusion. On this ground, I put the case of *Smith* v. *Marrable* out of the question in the present case, from which it is materially distinguishable."

Baron Parke said (p. 65) that *Smith* v. *Marrable* was distinguishable on the ground upon which the Lord Chief Baron had put it: "that there the contract was of a mixed nature, being a bargain for a house *and furniture*, which was necessarily to be such as was fit for the purpose for which it was to be used. It resembles the case of a ready-furnished room in an hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation. In such case the bargain is not so much for the house as the furniture, and it is well understood that the house is to be supplied with fit and proper furniture, and that, if it be defective, the landlord is bound to replace it."

Gurney, B. (pp. 65, 66), concurred with some difficulty, because he thought it not easy to distinguish the case from *Smith* v. *Marrable*: but said that, as it related to land, and not also to goods and chattels, it might admit of some distinction.

Rolfe, B. (p. 67), thought it very probable that the two cases might be distinguished, on the ground pointed out by the Chief Baron and Baron Parke, but that if they were not he would prefer at once to overrule *Smith* v. *Marrable*, rather than to follow it in the case he was dealing with.

In *Hart* v. *Windsor* (*supra*), *Smith* v. *Marrable* was again relied on, and was again distinguished on the ground on which it was put by Lord Abinger, "both on the argument of the case itself, but more fully in that of *Sutton* v. *Temple;* for it was the case of a demise of a ready-furnished house for a temporary residence at a watering-place. It was not a lease of real estate merely" (p. 87).

In *Wilson* v. *Finch Hatton* (*supra*), the exception was carried a step farther. There the defect was in the drainage of a furnished house let for a temporary period and for immediate occupation, and it was held that there is in an agreement to let a furnished house an implied condition that the house shall be fit for occupa-

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tion at the time at which the tenancy is to begin, and that if the condition is not fulfilled the lessee is entitled thereupon to rescind. The Lord Chief Baron came to that conclusion both on the authority of *Smith* v. *Marrable* and "on the general principles of law."

Pollock, B., distinguished the case from one in which the subject of the demise was real property, and said that: "Although in the case of a furnished house many of the incidents which attach to a demise of realty may be applicable, inasmuch as the rent does, in a sense, issue out of the realty, still the rent paid for a furnished house such as this is not merely rent for the use of the realty, but a sum paid for the accommodation afforded by the use of the house, with all its appurtenances and contents, during the particular period of three months for which it is taken." The learned Baron, apart from authority, thought it clear that the plaintiffs had "not supplied to the tenant that which both parties intended they should supply," and that the tenant then had "done what she was entitled to do, as she repudiated the contract without delay. . . . . " and that *Smith* v. *Marrable* was good law and furnished the Court with an authority for its decision. The real principle, he said, of *Smith* v. *Marrable* was unassailed, and he thought was unassailable, "for, as is said in the judgment of Lord Abinger: 'A man who lets a ready-furnished house, surely does so under the implied condition or obligation that the house is in a fit state to be inhabited;' " and he added: "It has been assumed, too, that it was the furniture and not the house that was infested; but it would seem that that was not the case, and that the animals were found in both." This latter statement is supported by the report of *Smith* v. *Marrable*, although, as I read Lord Abinger's reasons for judgment, he emphasised the fact that the difficulty complained of was in the furniture.

It is also to be noticed that in *Wilson* v. *Finch Hatton*, before the agreement was signed, the defendant wrote to the plaintiff's agent to make inquiries as to the state of the drainage, and that the agent wrote in reply that "Mrs. Hale" (*i.e.*, the person for whom the house was held by the plaintiffs as trustees) "believes the drainage to be in perfect order."

I refer also to *Bird* v. *Lord Greville* (1884), Cab. & El. 317; *Harrison* v. *Malet* (1886), 3 Times L.R. 58; *Charsley* v. *Jones* (1889), 53 J.P. 280, 5 Times L.R. 412; *Sarson* v. *Roberts*, [1895] 2 Q.B. 395;

and *Campbell* v. *Wenlock* (1866), 4 F. & F. 716, in which Cockburn, C.J. (p. 734), told the jury that "upon principles of law, there was an implied contract that a furnished house, let for present occupation, should be fit for such occupation."

After much consideration, I have come to the conclusion that the letting in the case at bar comes within the exception established by *Smith* v. *Marrable* and *Wilson* v. *Finch Hatton*, and that there is to be implied a warranty or condition in the contract between the parties that the theatre was fit for immediate occupation and use as a moving picture theatre.

The property demised was not realty only, but there were included in the demise the whole contents of the theatre, "including 387 seats, more or less, piano, machines, and all other necessary equipment for the operation of the theatre." The demise resembles in its essential features that of a furnished house; it was of a furnished theatre, the whole let as a going concern and for immediate occupation and use as a moving picture theatre. The condition or warranty that it was fit for occupation and use as a moving picture theatre was undoubtedly broken. In a climate such as that of Ontario there can be no doubt, I think, that if there were no adequate heating appliances in a furnished house intended to be heated by steam or hot water or air, and let for a period covering the winter months, the house would be unfit for human habitation within the decision in *Smith* v. *Marrable*, and I can see no difference between such a case and that of a furnished moving picture theatre let for immediate occupation and use.

My view that a warranty or condition that the premises demised were fit for immediate occupation and use as a moving picture theatre should be implied is, I think, strengthened by the provision of the lease requiring the respondent to heat the upper flats and by the discussion which took place as to the quantity of coal which was required to do the heating—which indicates that the parties were dealing with premises that were supplied with adequate heating appliances. Indeed, if it were not for the finding to the contrary of the learned trial Judge, I should have thought that the evidence warranted the conclusion that there was an express warranty that not more than three tons of coal per month would be required to heat the theatre and the upper flats, and that there was a breach of that warranty.

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I would, for these reasons, dismiss the appeal with costs, and affirm the judgment of the learned trial Judge.

No case was made for disturbing the disposition made of the claim of the appellants for damages for the refusal of the respondent to transfer the license; $200 were awarded for these damages, and, upon the finding of fact made by the learned Judge upon this branch of the case, were rightly awarded; and the cross-appeal should, therefore, be dismissed with costs.

I have written at greater length than I should have written but for the importance of the question of law involved in the determination of the appeal, and a desire that nothing should be said by the Court which would tend to unsettle the well-established rule of law that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied. *Appeal dismissed.*

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PAQUET v. NOR-MOUNT REALTY CO.

Quebec Court of Review, Malouin, Cannon and Tessier, JJ. January 31, 1916

1. LANDLORD AND TENANT (§ III A—43)—NEGLECT OF TENANT TO MAKE "TENANT'S REPAIRS"—CONSEQUENT DAMAGES—LIABILITY TO OTHER TENANTS.

Neglect to make "tenant's repairs" (Art. 1635, Code Civil, Que.) in that portion of the building which he occupies renders a tenant liable for damage from such neglect to occupiers of other portions.

2. LANDLORD AND TENANT (§ II—16)—LESSEE—PRESUMPTION AS TO CONDITION OF PREMISES.

A lessee is presumed to have received the premises in good condition, and is obliged to restore them in the same condition; saving his right to prove the contrary (Art. 1633, Code Civil, Que.), this presumption regulates not only the relations between landlord and tenant, but may also be invoked by third parties.

Statement.

APPEAL from a judgment of the Superior Court, dismissing the plaintiff's action.

Belleau, Baillargeon & Belleau, for plaintiff.

Gallipeault, St. Laurent, Metayer & Laferte, for defendants.

Malouin, J.

MALOUIN, J.:—The plaintiff, as tenant, occupies the first storey of a house where he keeps a shoe shop. The defendant, which is a real estate company, occupies the second storey. The third storey was unoccupied at the time of the accident of which the plaintiff complains.

During the night of the 19th to 20th November, 1914, a water-pipe, which supplies the third storey and which passes through the lavatory of the second storey, burst near the ceiling, from the effect of cold and freezing, and flooded the shop of the plaintiff,

causing him damages. The plaintiff brought the present action against the defendants claiming $1,141.75 damages. He alleges, among other things, that the bursting of the pipe was caused by want of care of the defendant who had neglected:—1. To close the window of the water-closet during the night; 2. To put panes in two windows of the closet so as to keep out the cold.

The defendant pleaded to the action, denying the essential allegations of the declaration and added, in substance:—That the water which flooded the shop did not come from the lavatory but from the third storey; that the window was ill-fitted and would not close, in consequence of age and the settling of the building, and that the defendant was not obliged to make these repairs: that, if the pipe had frozen, it was due to the insufficiency of the heating for which the plaintiff was responsible.

The Court of first instance dismissed the plaintiff's action. It held that the plaintiff had not proved the *quasi-délit* upon which his action was based.

It is admitted by both parties that the plaintiff's recourse, if he has any, must result from *quasi-delit*.

It is proved that the waterpipe burst in the lavatory of the second storey, and that this bursting was caused by the freezing of the water in consequence of the cold coming in by the window in this room.

The defendant does not deny that the water coming from this bursting of the pipe flooded the plaintiff's shop and caused certain damages. The evidence establishes that several panes of the double-window and of the inside window of the lavatory were broken and that the latter window did not close completely. Whoever is responsible for the condition of the windows of the closet and of the lavatory at the time of the accident is, certainly, guilty of negligence and may be sued for damages.

As the defendant for several years occupied the premises where the pipe burst, the plaintiff looked to it to be indemnified for the damages he had sustained. Primarily, the presumption is that the defendant should be held responsible for the state of things existing, at the time of the accident, in premises which it had been occupying for several years. Art. 1238 C.C. declares that presumptions are established by law, or result from facts which are left to the appreciation of the tribunal.

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Moreover, art. 1633 declares that, if there has been no statement made as to the condition of the premises, as mentioned in the article which precedes, the tenant is presumed to have received them in a good state of repair, and he is obliged to return them in the same condition, save on proof to the contrary.

The defendant contends that this article regulates relations between landlord and tenant, but cannot be invoked by a third person. I cannot accept this contention. When the legislature intends that a presumption created by law should merely enure to the benefit of the landlord it has expressly so declared. That is what it has done in regard to the presumption created against the tenant in the case of a fire (arts. 1629, 1630 C.C.)

In order to escape liability, the defendant wishes to blame the proprietor for the bad condition of the premises which it occupies. The third party, certainly, may answer, as the landlord might answer: You are, by the law, responsible for this state of things. Because the plaintiff merely denies a responsibility which the defendant wishes to place upon the proprietor. As to the rest, the presumption created by art. 1633 is, in this case, in accordance with the presumption resulting from the facts and justified by the laws and the evidence.

In order to escape responsibility, the defendant alleges first that the window would not close, on account of displacement of the wall and age of the building.

This reason of defence was received by the Court of first instance. I am led to believe that repairs to be made to the window, in order that it might shut, although of small account, are not tenant's repairs and cannot be placed at the charge of the defendant. But the defendant may be blamed for failing to have recourse to art. 1641 which affords the means of having them made, if necessary.

But the defects of the window were not the principal cause of the trouble. The essential cause, that which occasioned the accident, was the broken panes in the double-window and the inside window, because the cold must have come into the lavatory by these openings, even if the inside window had been closed. The defendant must be held responsible for the broken panes. The presumption is against it until there is proof to the contrary. Art. 1635 states that the tenant is obliged to make minor repairs

which may become necessary to the building or its dependancies during his occupation. And, among the number of these repairs the law mentions panes of glass, unless they are broken by hail or unavoidable accident.

The neglect of the defendant to replace the panes in lieu of broken ones constitutes negligence which makes it liable for damages resulting from this fact.

It is said that this article creates an obligation only in favour of the landlord, and that third persons, strangers to the lease, cannot avail themselves of this text. That is a mistake. This article determines, it is true, the obligation of the tenant with regard to the landlord, but a third person has the right to rely upon the same article, in a case like this, to establish who was obliged to make the repairs to the broken panes. Because it is certain that if the tenant was obliged, with regard to the landlord, to make the repairs to the broken panes, it is he who, in the end, should pay the damages caused by his negligence. There is no doubt that the party injured has always the right to recourse against the author of the act which has caused the damages.

Art. 1635 does not create a presumption but an obligation. If the defendant wished to contend that the broken panes were broken when he took possession of the premises, it was incumbent on him to allege and prove this. The presumption was against him. It is matter for an exception.

> Quiconque, dit Bonnier (Traité des preuves, p. 31), allègue un fait nouveau, contraire, à la position acquise de l'adversaire, doit établir la vérité de ce fait.

In his action, at par. 7, the plaintiff alleges:—

> The said window, moreover, had broken panes, and the defendant had neglected to put in others.

And the defendant answered as follows: "Par. 7 is denied." The defendant, by his defence, far from contending that the panes were broken when it took possession of the premises, pleaded that the panes were not broken at the time of the accident.

How can the defendant now contend that the panes were broken prior to its entry into possession of the premises? Not having alleged this fact it cannot be admitted to make proof of it. But this fact, if it had been alleged, is not proved. The only witness of the defendant who speaks of it is a clerk in its employ,

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the witness Riendeau. It is true this witness says that the panes had been broken for 2½ years, but he adds that he did not enter the employ of the defendant until two months after the latter had taken possession of the premises in question. Consequently, his evidence does not establish in what condition the window in question was at the time the defendant went into possession. The contention that the window of the lavatory was in this condition ever since the defendant took possession of the premises, that is to say since over 2½ years, is, therefore, unsupported. If the window had been in this condition for such a long time, the water-pipe would have frozen before the month of November, 1914, if one takes account of the intense cold which prevails during our long winters.

I would add that, in order to relieve a person of liability and to place it upon another person, it is necessary in my opinion, to have strong and conclusive proof, which I do not find in the present case. Because, if the defendant is not responsible the proprietor is, and the defendant was obliged to make proof shewing clearly the responsibility of the proprietor, which it has not done.

I am of opinion that the judgment should be reversed and the action maintained.

(The Court granted to the plaintiff the sum of $558.36 for damages, and the costs.)

Cannon, J. CANNON, J., dissented.

Tessier, J. TESSIER, J., concurred with MALOUIN, J. *Appeal allowed.*

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REX v. THERRIEN; THERRIEN v. MALEPART.

Quebec Superior Court, Greenshields, J. December 31, 1915.

1. CRIMINAL LAW (§ II B—49)—SPEEDY TRIAL WITHOUT JURY—FORMALITIES OF ELECTION—PRESUMPTION.

A conviction on a "speedy trial" (Part XVIII. of the Criminal Code), need not recite that the presiding Judge on taking the prisoner's election of trial without a jury had stated to him that he had the alternative of remaining in gaol until the jury Court or being admitted to bail as the Court might decide; in the absence of any proof appearing in the record that this statutory statement had been made to the prisoner in conformity with Cr. Code, sec. 827 (Amendment of 1909), the presumption is that the statement was regularly made.

2. CRIMINAL LAW (§ II B—49)—PLEA OF GUILTY ON ARRAIGNMENT BEFORE SUMMARY TRIAL MAGISTRATE—COMMITTAL FOR TRIAL AND SUBSEQUENT PLEA BEFORE DISTRICT JUDGE.

A district Judge or other official, qualified under Cr. Code sec. 823 to hold a "speedy trial" under Part XVIII. of the Criminal Code after a committal for trial, acquires jurisdiction to hear and determine the case if the accused has given his consent under Code sec. 827, notwith-

standing that the accused had, when arraigned before a city magistrate with jurisdiction of "summary trial" under Code sec. 777, offered a plea of guilty without being put to his election under Cr. Code sec. 778 of trial before the magistrate.

Statement.

SECOND motion for discharge on *habeas corpus*. The previous application is reported in 28 D.L.R. 57, 25 Can. Cr. Cas. 275.

L. Houle, for accused.

D. A. Lafortune, K.C., for Crown.

Greenshields, J.

GREENSHIELDS, J., rendered the following judgment: The Court, having heard the petitioner upon the merits of his petition in support of a writ of *habeas corpus;* having examined the proceedings of record, and deliberated:

Seeing the petitioner alleges in substance:

"(1) That he is illegally detained in the St. Vincent de Paul Penitentiary under the guard of the respondent.

"(2) That on August 10, he was sentenced by Judge Bazin, a Judge of the Sessions of the Peace, to 4 years in the penitentiary, where he now is.

"(3) That the Judge so sentencing him had no jurisdiction so to do.

"(4) That the petitioner was brought before Magistrate St. Cyr on August 7, and on being arraigned he consented by a plea of "guilty" to be tried before Magistrate St. Cyr, and the Magistrate St. Cyr should have then and there sentenced him, he having jurisdiction so to do.

"(5) That the subsequent trial before Bazin, J., was illegal, because the petitioner had already submitted to a trial.

"(6) That although the petitioner made an option for trial before Bazin, J., and pleaded guilty, the Judge did not acquire jurisdiction, because he omitted to state to petitioner that he "could remain in gaol or be admitted to bail," as provided for in sec. 827 of the Criminal Code.

"(7) That all the proceedings were null and void."

Considering that it appears by the conviction (which by consent of counsel is before the Court), that the consent of the accused, petitioner, to be tried before Bazin, J., without the intervention of a jury, was obtained before the accused petitioner pleaded guilty.

Considering that it appearing that the accused gave his consent, the presiding Judge acquired full jurisdiction to hear and determine the case.

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Considering that it is not necessary that it should appear in the conviction that the presiding Judge did state to the accused that he could remain in gaol or be admitted to bail as the Court might decide.

Considering that the consent of the accused gave jurisdiction to the presiding Judge, and in the absence of any proof appearing in the record that the presiding Judge omitted to make the statement contained in sub-par. (*b*) of sec. 827 (Criminal Code), it cannot be presumed that such statement was not made, but the presumption is to the contrary.

Considering that the petitioner's petition is unfounded.

Doth quash and annul the said writ of *habeas corpus*.

Discharge refused.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. February 4, 1916.

1. MECHANICS' LIENS (§ II—8)—"OWNER"—VENDOR AND PURCHASER—"MORTGAGEE"—REQUEST AND PRIVITY.

An unpaid vendor who advances funds to the purchaser to build upon land is a "mortgagee" within sec. 14 (2) of the Mechanics Lien Act, R.S.O. 1914, ch. 140, but not an "owner" within sec. 2 (*c*) of the Act; and the land, having reverted to the vendor for non-payment, is not subject to a mechanics' lien for work done or for materials supplied to the purchaser's contractor without the request, privity or consent of the vendor; mere knowledge and non-interference will not render a mortgagee liable as owner.

[*Orr* v. *Robertson*, 23 D.L.R. 17, 34 O.L.R. 147; *Cut-Rate Plate Glass Co.* v. *Solodinski*, 25 D.L.R. 533, 34 O.L.R. 604, considered. See also *Northern Plumbing* v. *Greene*, 27 D.L.R. 410.]

Statement.

APPEAL by the defendants from the judgment of an Official Referee, in a mechanic's lien proceeding, finding the plaintiffs entitled to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 14 (2). Reversed.

B. N. Davis and *W. Cook*, for appellants.

C. L. Fraser, for plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The main question involved in this appeal is: whether the appellants are owners of the lands in question, within the meaning of the word "owner" as interpreted in sec. 2, clause (*c*), of the Mechanics and Wage-Earners Lien Act.

The appellants were owners of the lands, and sold them to Irving, two of the conditions of the sale being: that Irving should build upon the lands according to plans and specifications prepared by or for him; and that the appellants should advance to

him a certain sum of money to be paid by him for the construction of the buildings.

The whole transaction was a speculation, and one which fell through, like so many others, because of the war: and so there have been losses all around; and the question is: who is to bear them? Irving's rights have been forfeited; and the appellants now have their lands back again, with the buildings, as far as they have been built, upon them, and are out of pocket the amounts paid out by them under their agreement with Irving regarding advances for the construction of the buildings; and the contractors for, and workmen upon, the buildings, are largely unpaid for their work done, and materials supplied, in the construction.

The 14th section of the Act very plainly provides (sub-sec. (2)): that, in the case of an agreement for sale of lands with all or part of the purchase-money unpaid and no conveyance made, the purchaser shall, for the purposes of the Act, be deemed a mortgagor and the vendor a mortgagee: and that is this case, the appellants are to be deemed mortgagees: and the mortgage is prior to the liens: and in such a case, under sec. 14, sub-sec. (3), the lien attaches in priority to the mortgage upon the increased value of the land, caused by the work and material, but upon that only.

That, however, does not prevent mortgagees from being more than mortgagees, they are "owners" if they come within the definition of that word contained in the interpretation clause of the Act before mentioned. The definition is: one having an estate or interest in land upon which work is done or materials placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity and consent, or for whose direct benefit, the work is done or materials supplied.

The work was done and materials supplied by Irving's contractor, Campbell, and his sub-contractors, and by workmen and tradesmen who sold materials to them. The appellants had nothing to do with these contracts nor any control over the contractor, sub-contractors, or workmen or tradesmen. Their dealings were with Irving only: they could keep him up to his obligations to them: but, apart from that, Irving was substantially owner of the lands and could do as he pleased.

That being so, how can the "mortgagees" be deemed "ow-

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ners?" Nothing was done or supplied by contractor, sub-contractor, or workman, at their request or on their credit: Irving was in no sense their agent in making his contracts, the work was done at his request and upon his credit solely: so too on his behalf: the appellants were strangers to the building contracts of Irving with the builders: there was no privity and consent: and plainly it was not for their direct benefit, it was for Irving's direct benefit: all that the appellants could get would be an indirect benefit in the additional security they would have if the value of the lands were increased by the buildings more in amount than the sums they paid to Irving, under their agreement with him, towards the erection of the buildings: and so they are without sec. 8 of the Act, and within secs. 14 and 8 (3).

"Privity" must mean knowledge and acquiescence, for, if knowledge only were meant, that word should and would have been used, not the less familiar and perhaps ambiguous word; but, whether or not, the requirement of "consent" as well as "privity" makes the question unimportant.

The onus of proof of consent is upon the respondents: and clear the evidence should be when the result would be a judicial finding that a canny loan company, advised by a careful solicitor, gave a consent which was tantamount to saying "heads we lose, tails you win;" that is, if the speculation succeeded Irving should have all the profit, whilst if a failure his vendors' interest in the land should become chargeable with all his building debts.

It was known to all the larger lien-claimers that the appellants were, under the Act, in the position of prior mortgagees; it was known that the whole agreement between them and Irving, the mortgagor under the Act, was in writing and accessible to them. They were in no sense misled by word or circumstance. They might, and should, have asked the appellants to consent, so that their position should be changed from that of prior mortgagees to that of "owners:" but they did not, and so, it seems to me, have much assurance in asking a court of justice to find as a fact that such a consent, never asked for, was given: and in a case in which it is difficult to see how, if it had been asked for, there could have been anything but a refusal.

Ordinary prudence would seek a written consent; less pru-

dence a verbal one; and, as I think, there would be a great lack of any kind of prudence in being content with a tacit consent; though that would be enough. No one should be encouraged in taking a course, or neglecting an ordinary precaution, so that judge or juror has to grope about, in circumstantial evidence, for the very truth upon which the rights of the parties depend, in any matter of consequence.

No reason has been given, and no circumstance indicates, why the mortgagees, sure in the fair position in which the Act put them, should, in effect, guarantee the debts of Irving to his creditors, these respondents, who did not even take the pains to ask for any kind of assurance from them.

I would allow the appeal with costs; and, as the case now stands, would dismiss the action, without costs—without costs because substantially the whole trial before the Referee was as to the merits and amounts of the several liens claimed, in nearly all of which inquiries the appellants have failed; so that, but for the question raised here, and now decided in their favour, nearly all the costs of the action would fall on the lands, and so on the appellants. The radical question should first have been finally settled.

I said, as the case now stands, having in view what was called an abandonment of all claims if the appellants are prior mortgagees only. Notwithstanding the apparently unconsidered "abandonment," I would give leave to the respondents to apply here, within a week, for a reference of the case again, so that the claims of the respondents may be reviewed on the basis of the appellants being only prior mortgagees; or for leave to redeem as subsequent incumbrancers.

RIDDELL, J.:— The York Farmers Colonisation Company Limited, on the 17th July, 1914, entered into an agreement with Irving for the sale to him of four lots on Edmund avenue for $2,400, $600 a lot, $120 down and the balance on passing the deed:

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Irving went on to build, made contracts with material-men, &c., but did not finish the houses. Making default, the York company served notice of forfeiture and took possession, and Irving does not complain here.

A number of persons registered claims of lien: the Referee

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has allowed liens to the amount of over $3,000: in default of payment of amount into Court, he ordered a sale of the land, and payment of the liens therefrom. The result would be that the York company, who furnished the money to erect (so far as they have been erected) the buildings, would lose their advances—and accordingly the company appeal.

The position of the company in respect of mechanics' liens is fixed by the statute, sec. 14 (2), as that of mortgagees: the Referee has, however, determined their status as owners by an application of sec. 2 (*c*) of the Act—because, he says, this work was done (1) at their request and (2) with their privity and consent.

I do not find myself able to agree in this conclusion.

It will be well to examine how far and in what direction we are bound.

The important cases are not numerous. In *Graham* v. *Williams*, 8 O.R. 478, Heney leased certain land to Williams with an option to purchase and the right to build (given orally)—but, while Heney agreed to supply two-thirds of the money required for building, by way of a loan to Williams on the security of the property, "there was no agreement between Williams and Heney that Williams should build the house for Heney" (p. 481). Williams began to build, the plaintiff supplied him with bricks, and was not paid. Heney knew that the work was going on, but took no part in it in any way: the Chancellor decided that, though the work might turn out to his advantage, it was not for his "direct benefit." He further thought that merely permitting a tenant to build, &c., as in the case under consideration, would not be satisfying the requirements of the statute as to "privity and consent"—and it is in connection with "privity and consent" that the statement is made. "The Act contemplates a direct dealing between the contractor and the owner" (p. 482.)

This judgment was affirmed by a Divisional Court, 9 O.R. 458—Proudfoot, J., at p. 461, thought "the privity and assent must be in pursuance of an agreement," and that the case did not come within the statute. Ferguson, J., agreed; but in *Blight* v. *Ray*, 23 O.R. 415, he indicates that the expressions used are not of general application (p. 421.)

In *Gearing* v. *Robinson* (1900), 27 A.R. 364, the McGees were owners of the leasehold of certain land, the buildings upon which

were partly burned; they leased to the Robinsons for part of the term, with permission to the sublessees to make changes in the internal arrangements of the buildings, and the sublessees were to erect, &c., buildings, the McGees advancing some part of the expenditures. The McGees do not seem to have interfered at all in the building, although they knew it was going on. Judge McDougall held them liable as "owners;" but this decision was reversed by the Court of Appeal. No "privity and consent," it was considered, had been shewn, "and there was no evidence of any request by the sublessors, nor of any dealing of any kind between them and the plaintiff" (p. 372). On p. 371, apparently, approval is given the rule laid down in *Graham* v. *Williams*, that to render any person, other than him for whom the building is being erected, liable, "there must be something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged." This very vague statement seems to be the correlation of what immediately precedes—"mere knowledge of, or mere consent to, the work being done is not sufficient"—if so there can be no objection to the statement, which probably was advisedly left in this vague form, unnecessary as it was to the decision, since the element of request was wanting.

The unreported case of *Tennant Planing Mill Co.* v. *Powell*, referred to in *Gearing* v. *Robinson*, will be found in the Printed Cases in the Court of Appeal in the general library at Osgoode Hall, vol. 111—it is quite a different case from this, turns on a question of fact and is not helpful.

All these decisions are decisions of fact, the sole law laid down with precision being that mere knowledge of or mere consent to the work is not "privity and consent." With that I wholly agree; but, beyond that, it seems to me that there can be no precise general rule laid down, and that each case must be determined upon its own facts.

It was urged that a recent case took the law further—at least made it more definite. I wrote the judgment of the Court in that case: it affords a very good illustration of the importance of getting into the atmosphere of a case: most if not all of the difficulty arises from the perhaps undue brevity of the report—a fault not too common, and readily overcome.

This case of *Orr* v. *Robertson*, 23 D.L.R. 17, does not lay down any such proposition of law as has been argued. "Every

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judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case:" *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506, *per* Halsbury, L.C.

In *Orr* v. *Robertson*, Tyrrell was the lessee of certain property in the city of Toronto for a long term (nearly 20 years). He sublet for 10 years to Hyland, and by a contemporaneous agreement Hyland agreed to have plans, &c., prepared by his architect for buildings upon which his lessor was to expend $11,500. These plans were to be submitted to and approved by the lessor, Tyrrell, and thereupon the sublessee was to build, paying the balance of the cost himself, it being understood that at the end of the subterm the buildings were to belong to Tyrrell. Tyrrell went over the plans with the architect and approved them: thereafter he was frequently consulted about the building, and took such part in ordering some of the work that the Referee held him personally liable for $3,870: and the Divisional Court sustained this finding: Tyrrell also took out the building permit. There was no dispute or controversy that the work had been done with his privity and consent—the facts were abundantly proved—outside of the personal liability, the argument on the appeal was solely on the question of "request." So far as that part of the work was concerned, for which he had rendered himself personally liable, of course the request was clearly proved: but it was argued that, as to the remainder of the work, the request was wanting. We thought that there was no need of a personal request by Tyrrell to the contractor, but that the exaction by him of a contract that Hyland should build was, in the circumstances of the case, a sufficient implied request, i.e., taken in connection with the signing by him of the plan, the taking out by him of the building permit, &c. The language, "even if Tyrrell took no further or other part in the matter," refers to such acts of interference as rendered him personally liable, which had been the subject of our consideration immediately before, and not to the circumstances already spoken of. We did not, and did not intend to, lay down any general rule—and the generality of the language employed must be restricted.

Much of this explanation is given in *Cut-Rate Plate Glass*

Co. v. *Solodinski*, 25 D.L.R. 533, 34 O.L.R. 604, at p. 607—but (*mea culpa*) it should have been made perfectly clear in the report itself.

In the *Solodinski* case, Blanchard, the owner of certain land, sold to Solodinski: Solodinski went on to complete certain buildings commenced by Blanchard, employing the T. Eaton Company to do certain work. Blanchard knew of this, visited the place once or twice a week, but what the T. Eaton Company did was not done at his request, express or implied, &c., and the Referee's holding that the T. Eaton Company could not look to Blanchard was supported by the Divisional Court.

With the law that mere knowledge and non-interference will not render a mortgagee liable as an owner, and that each case is to be determined upon its own facts, I can find nothing in the present case to shew that the work in question was done at the request of the company: the decision of the Referee should he reversed with costs here and below.

LENNOX, J.:—This is an appeal by the York Farmers Colonisation Company Limited against the judgment of R. S. Neville, Esquire, K.C., Official Referee, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140. Lennox, J.

The principal question raised is, whether the York company are to be treated as mortgagees simply of the lands in question, or is their interest in these lands, as regards liens, to be placed upon the same footing as the interest of the contracting owner, the defendant Harry Irving, as the judgment in appeal declares? It is not claimed that the York company are personally liable.

The York company were the owners of the lands in question, and on the 17th July, 1914, agreed to sell them to the defendant Irving for $600 a lot, or $2,400 in all, and, reciting the payment of $1 thereon, the company agreed to lend Irving $6,400, being $1,600 in respect of each lot, for the purpose of enabling him to erect a semi-detached brick dwelling-house upon each, of a character defined by the company, and according to its plans and specifications, at intervals as the work progressed, and in the manner in the agreement specified.

The agreement, amongst other things, also provides that Irving is to satisfy the company that the advances have been put into the buildings, and that there were no liens thereon. Irving agreed to pay taxes and insurance. The buildings were to be com-

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menced by the 20th July; two of them to be completed by the 20th October, and the other two by the 20th November, 1914. Time is made of the essence of the agreement; and if at any time the work was discontinued for two weeks the company could take possession, and all moneys paid and improvements made are forfeited to the company, and the agreement becomes null and void.

The title is to remain in the company; and one month after completion, and upon Irving paying the purchase-money and all advances with six per cent. interest, the lands are to be conveyed to him.

I have not yet seen the agreement, and do not know whether the giving and acceptance of a mortgage is provided for. No conveyance or mortgage, however, has been executed.

Without the aid of the statute, I would not have come to this conclusion as to the relation created between the parties; but sub-sec. (2) of sec. 14 definitely says that, in a case of this kind, "the purchaser" (Irving) "shall, for the purposes of this Act, be deemed a mortgagor and the seller" (the company) "a mortgagee."

Therefore, it is not open to question that at the date of this transaction, the 17th July, 1914, and at the time Irving and Campbell began to obtain credit, the relation between these two principal parties was that of mortgagor and mortgagee. *Cook* v. *Belshaw* (1893), 23 O.R. 545, shews that whether an instrument is "a prior mortgage," within the meaning of sub-sec. (3) of sec. 8, is not determined by the date of registration, but upon the question of whether as a matter of fact it existed prior to the time the liens arose. It is, therefore, quite clear that not only was the relationship that of mortgagor and mortgagee, as I have said, by force of sub-sec. (2) of sec. 14, and that the statutory mortgage thereby created was "a prior mortgage," within the terms of sub-sec. (3) of sec. 8, but it follows that, by reason of this sub-section, if this is all, liens can only attach to the estate of the mortgagee if the selling value of the land is increased by the work, services, or materials performed or placed upon mortgaged land, and then only upon such increased value in priority to the mortgage.

There was no evidence of increased value.

The result is that if, at the time of its execution, the agreement was a statutory mortgage, and so continued, and if there is nothing more than this, then not only is the company's interest as a mortgagee overcharged, as claimed upon the argument, but the company's interest in the land is not liable at all: *Broughton* v. *Smallpiece* (1877), 25 Gr. 290; *Patrick* v. *Walbourne* (1896), 27 O.R. 221; and *Cook* v. *Belshaw* (*ante*).

But there may be something more, and I think there are other important questions to be considered; and as to these questions the status of the company does not in any way depend upon the character or extent of their interest in the land as a question of fact. I have dealt only with the case of a prior mortgagee who does nothing. It may be unwise for a lessor or lessee, remainderman, joint tenant, or tenant in common, or mortgagee, or any one having only a remote or limited interest in land, to put up costly buildings; but there is nothing to prevent him from doing it.

The further question then is, have the defendant company made themselves liable as "owners" within the terms of sec. 6 and sub-sec. (1) of sec. 8 of the Act, under the conditions set out in clause (*c*) of sec. 2? Upon a careful consideration of the scope and object of these provisions, I have come to the conclusion that they have not.

A hasty reading of *Orr* v. *Robertson*, 23 D.L.R. 17, might suggest that the company are liable; but that case is clearly distinguishable from the matters pertinent to the decision of this appeal; and the principles enunciated in *Gearing* v. *Robinson*, 27 A.R. 364, apply here, and have not, so far as I can discover, been departed from. This case was expressly followed in *Webb* v. *Gage*, 1 O.W.R. 327: and, although not specifically referred to in the judgment, was followed in this Court in the recent case of *Cut-Rate Plate Glass Co.* v. *Solodinski*, 25 D.L.R. 533, 34 O.L.R. 604.

For these reasons, I think that the judgment of the Referee must be set aside.

But it may be that the mortgagee's interest was increased in value by the work done upon the property; and, although at the trial Mr. Fraser abandoned any claim upon this head, he did so because of too great faith in a contention upon which he fails. It would not be right to hold him to this.

The action should be referred back to the Official Referee for

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further evidence, if this is desired; and the question as to whether the mortgagees are entitled to have their *primâ facie* liability, if any, reduced by the amount put into the buildings—proceeds of the loan—need not be considered, in fact does not arise, as the matter stands at the present time. It may be that the lien-holders should have a right to redeem secured to them, if this is necessary.

MASTEN, J.

MASTEN, J., agreed in the result as stated by the Chief Justice.

Appeal allowed.

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REUCKWALD v. MURPHY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. November 13, 1914.

1. CORPORATION AND COMPANIES (§ IV G5—130)—COMPANY DIRECTORS—JUDGMENT FOR WAGES—PERSONAL LIABILITY—CONTRIBUTION OR INDEMNITY.

The personal liability of company directors under the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 98, for an unpaid judgment against the company for wages of a company employee is joint and several, and a plaintiff is not bound to join them all as defendants; if there is a right of contribution or indemnity it is open for the parties sued to take third party proceedings against the director not sued.

2. CORPORATIONS AND COMPANIES (§ IV G5—130)—UNPAID WAGES—PARTY SUING FOR—RIGHT TO DISCONTINUE AGAINST ANY DIRECTOR.

The plaintiff suing to enforce the personal liability of directors for unpaid wages due him, as to which he had not realized on execution against the company (R.S.O. 1914, ch. 178, sec. 98), is at liberty to discontinue as to any defendant, although the statutory limit of one year after such defendant ceased to be a director may have expired pending the action.

3. PARTIES (§ II B—119)—ADDING PARTY DEFENDANT—ONTARIO RULE 134—APPLICATION OF.

Ont. rule 134 as to adding a party defendant applies only in the case of a person who ought to have been joined or whose presence is necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the action.

Statement.

AN appeal by the defendants other than the defendant Kohler from the judgment of the Senior Judge of the District Court of the District of Nipissing in favour of the plaintiff in an action brought in that Court to recover from the defendants, as directors of an incorporated company, the amount of a judgment recovered against the company for wages due to the plaintiff as a workman employed by the company.

The defendant Kohler lived in a foreign country, and as against him the plaintiff discontinued the action.

G. H. Kilmer, K.C., for appellants.

H. D. Gamble, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants

other than Kohler from the judgment of the District Court of the District of Nipissing, dated the 11th June, 1914, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him sitting without a jury, on that day.

The respondent's action is brought to recover against the appellants and Kohler, as directors of the W.S.M.K. Mining Company Limited, the amount of a judgment recovered by the respondent against the company on the 26th February, 1913, for wages due to the respondent as a workman employed by the company.

Kohler is a resident of the United States of America, and, pending the action, it was discontinued against him.

The contention of the appellants is, that, by discontinuing his action against Kohler, after the expiration of a year from the date when he and the appellants ceased to be directors, the respondent lost his right to recover against the appellants.

According to the finding of the learned Judge, the appellants and Kohler ceased to be directors on the 18th November, 1912.

The action was commenced on the 5th May, 1913, against the appellant James Edward Murphy the younger, and the other defendants were added by order on the 27th October, 1913, and the notice of discontinuance was given on the 26th March, 1914.

The company was incorporated under the Ontario Companies Act, and the liability of the directors depends upon the provisions of sec. 96 of the Ontario Companies Act, 2 Geo. V. ch. 31, now sec. 98 of ch. 178 of R.S.O. 1914.

So far as its provisions bear upon the question for decision, sec. 96 provides as follows:—

"(1) The directors of the company shall be jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively.

"(2) A director shall not be liable under sub-section 1 unless

"(*a*) The company has been sued for the debt within one year after it has become due and execution has been returned unsatisfied in whole or in part; or,

"(*b*) The company has within that period gone into liqui-

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dation or has been ordered to be wound up and the claim for such debt has been duly filed and proved,

"nor unless he is sued for such debt while a director, or within one year after he has ceased to be a director."

The liability of the directors being several as well as joint, the respondent was entitled to sue them separately, and was not bound to join all of them as defendants. He was also entitled to sue one or more or all of them in the same action: Rule 67.

The defendant Kohler was not a necessary party to the action to enforce the several liability of the directors; nor, if the liability had been joint only, could the other defendants, under the old practice, if he had not been made a defendant, have taken advantage of his not having been joined, as it was necessary to a plea in abatement for non-joinder of a joint debtor to shew that he "resided within the jurisdiction of the Court:" Tidd's Practice, p. 319; and the same rule, I apprehend, applies under the present practice where a defendant seeks under Rule 134 to add persons who he alleges ought to have been joined as defendants: *Wilson Sons & Co. Limited* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q.B. 422; *Robb* v. *Murray* (1890), 13 P.R. 397, and cases there cited: *Aikins* v. *Dominion Live Stock Association of Canada* (1896), 17 P.R. 303.

It was argued on behalf of the appellants that the course taken by the respondent of first joining Kohler as a defendant and then discontinuing as to him, after the year mentioned in sec. 96 had elapsed, had prejudiced the appellants, because, as it was contended, had he not been originally made a defendant, the appellants could have obtained an order under Rule 134 adding him as a defendant for the purpose of claiming contribution from him.

This contention is not, in my opinion, well-founded. The Rule applies only in the case of a person who ought to have been joined or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action; and Kohler is not a necessary party, and his presence is not required for the purpose mentioned in the section. If the appellants are entitled to contribution or indemnity from or any other relief over against Kohler, the third party procedure, Rule 165, enables them to take proceedings to enforce their rights, although Kohler is not a party to

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the action; and, in my opinion, the appellants would not have been entitled to insist upon Kohler being added as a defendant.

If the appellants were right in their contention, the respondent would be in a worse position than he would have been in if the directors' liability had been joint only.

In my opinion, the judgment is right, and should be affirmed, and the appeal should be dismissed with costs.

Judgment accordingly.

GOLDIE v. CROSS FERTILIZER CO., LTD.

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Nova Scotia Supreme Court, Graham, C.J., and Longley, Drysdale and Harris, JJ. March 14, 1916.

1. MASTER AND SERVANT (§ 1 E—20)—TERM OF EMPLOYMENT—TERMINATION.

Where a contract of employment between the defendant company and its manager did not express the length of the hiring, but provided for stated amounts as annual salary, and contained a clause that the term of employment was to run "concurrently with the term of a certain agreement" between the defendant company and third parties, for a period of years, to commence at a time to be agreed upon by subsequent memorandum between the parties, and they never agreed upon a time of commencement, the hiring agreement was at most a hiring for a term of three years, and was terminable at any time during that period.

Statement.

APPEAL from the judgment of Russell, J., in favour of plaintiff, in an action for breach of an agreement for employment and unlawful dismissal from service.

H. Mellish, K.C. and *H. Ross*, K.C., for appellant.

J. L. Ralston, K.C. and *C. MacKenzie*, for respondent.

Drysdale, J.

DRYSDALE, J.:—The plaintiff and defendant company entered into a written contract for the employment of the plaintiff, under date of October 1, 1912, in the words and figures following:

(1). The Fertilizer Co. shall employ the works manager and the works manager shall serve the Fertilizer Co. in the conduct of the entire business of the said Fertilizer Co. carried on at Sydney.

(2). The works manager's remuneration shall be: (a) A salary fixed as follows: For year ending June 30, 1913, $1,620; For year ending June 30, 1914, $1,740; For year ending June 30, 1915, $1,860 per annum, payable monthly.

(b) An annual bonus of $250 subject to the works manager proving himself competent to make out an annual balance sheet of the company to the satisfaction of the auditor the Fertilizer Co. shall appoint, and of conducting the slag analyses necessary in connection with the business.

(c) A free house, coal and light: such house not to be used

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for any other purpose than to lodge the works manager and his family.

(d) The dividends accruing on the shares in Alexander Cross & Sons, Ltd., Glasgow, allotted to the works manager in accordance with separate agreement between him and Alexander Cross & Sons, Ltd. and Sir Alexander Cross, Bart., and Alexander Cross, Esq., of Knockdon.

(3) The works manager's employment hereunder shall run concurrently with the term of that certain agreement between Alexander Cross & Sons, Ltd., and the Dominion Iron and Steel Co. Ltd., of date December 10, 1910.

(4) The works manager shall devote himself exclusively to the business of the Fertilizer Co. and subject to such orders and directions as may from time to time be given him by the directors (all of which orders and directions the works manager shall promptly and faithfully obey, observe and comply with). The works manager shall assist in the general conduct of the business of the Fertilizer Co. and shall use all proper means in his power to maintain, improve and extend the business and to protect and further the reputation and interests of the Fertilizer Co.

On September 4, 1914, the defendant company discharged the plaintiff by a letter or written notice signed by the managing director of defendant company. This action for wrongful dismissal was tried before Russell, J., at Sydney, without a jury, and a judgment given in plaintiff's favour, assessing plaintiff's damages for such dismissal at $20,000. From this judgment the present appeal is asserted and various grounds of error alleged. The trial Judge held that on a proper construction of the hiring hereinbefore set out the plaintiff's employment was for a term of 21 years, or, in other words, he held that the agreement dated December 10, 1910, between Alexander Cross & Sons, Ltd., and the Dominion Iron and Steel Co. for the supply of slag was in force, and was for 21 years, and that by virtue of clause 3 of the hiring agreement, plaintiff's employment was to continue so long as the 21 years' agreement is in force.

The question that first arises herein is as to the construction of said hiring agreement. Is it on its face a hiring at most for a term of 3 years as contended by defendant company, or can it be reasonably interpreted as one covering a much longer period,

viz., 21 years, or the lifetime of the slag agreement (so called) as contended by plaintiff.

By sec. 3 of the hiring agreement it is stipulated that the works manager's employment (plaintiff's) thereunder shall run concurrently with the term of that certain agreement between Alexander Cross & Sons, Ltd., and the Dominion Iron and Steel Co. Ltd., of date December 10, 1910, herein for convenience referred to as the slag agreement.

The true meaning and effect of this cl. 3 is the important consideration herein. The slag agreement, so called, was one between Alexander Cross & Sons Ltd. and the Dominion Iron and Steel Co., dated December 10, 1910, by which Alexander Cross & Sons, Ltd., agree to purchase and the Dominion Iron and Steel Co. to supply the basic slag product of the steel company produced by the latter company at Sydney.

Cl. 2 of said slag contract provided it should extend to and cover the period of 21 years from the date that the slag company, viz., Alexander Cross & Sons, Ltd., had its mills erected and ready to start grinding, and that railway sidings with all necessary connections to the Sydney and Louisburg Railway had been laid down, such date to be fixed by a memorandum exchanged between the parties (viz., between the steel company and Alexander Cross & Sons, Ltd.), which should be attached to the agreement and form a part thereof. Provision follows in the said agreement for the determination thereof upon giving 6 months' notice at the end of 7 years from the date so fixed, and also the same right at the end of 14 years from said date. The first thing to be noted is that the period to be covered by said slag agreement was never fixed between the parties as contemplated by the agreement. On the contrary, by a series of correspondence in evidence, the parties to such agreement deliberately postponed bringing the agreement into operation. The parties who, by its terms, had the right to agree on the date when it should be operative and commence effectively not only did not do so, but by a deliberate exchange of correspondence agreed from time to time to postpone "the start of the contract," to quote the words used in the correspondence, and as late as the time of the bringing of the action, November 12, 1914, it had been agreed between such parties that the date when such contract should become operative or effectual was

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further postponed. Meantime, as the correspondence shews, the defendant company was receiving and accepting slag from the steel company upon terms other than those agreed upon by the contract of December 10, 1910, and by virtue of conclusions reached between the parties upon definite terms specified in the correspondence in evidence. This being undoubtedly the situation between Alexander Cross & Sons, Ltd., and the steel company and between defendant company and the steel company as to an agreement for slag, I do not think it can be reasonably said that the so-called slag agreement of December 10, was in force either at the time of hiring plaintiff or at the time of bringing this action, or even at the time of the trial, and I am of opinion that the trial Judge was in error in treating such agreement as effective for the purpose of establishing a long term of hiring of plaintiff by reference from cl. 3 of plaintiff's hiring contract.

Looking at the surrounding circumstances at the time of hiring plaintiff I have little doubt of the intention of all the parties at the time the agreement in question was concluded with plaintiff. Alexander Cross & Sons, Ltd., a foreign corporation, were no doubt behind this new venture to be carried on by the Cross Fertilizer Co. Ltd. (the defendant company), and the real promoters of the latter company, Cross & Sons, made the contract for the slag with the steel company. The undertaking at Sydney would from many circumstances be more or less of a doubtful venture, and whilst, no doubt, they were willing to employ plaintiff for a fixed term of three years, his employment would of a certainty be unnecessary if for any cause the Sydney venture proved futile from failure in quality of the product or from any other commercial reason. Hence the introduction of cl. 3 in the hiring agreement, which I think must be read as a clause of limitation. This clause is on its face to the effect that plaintiff's employment shall run concurrently with the term of the slag agreement. Concurrent means operating with or coincident, and in my opinion the parties to the agreement of hiring understood it as it fairly reads on its face, viz., employment for a definite term of three years, but ineffective if for any reason the slag agreement failed to be operative. The parties to the latter agreement never could agree to make it operative or effective, and this was a matter on its face entirely for them. Its operation was deliberately postponed by reason of various circumstances recited in the

correspondence, and there is no reason to doubt the bona fides of the parties in that connection.

If I am correct in my interpretation of this hiring agreement this construction strikes at the root of the plaintiff's right to recover. Plaintiff was employed, I think, until June 30, 1915, subject however to his employment running concurrently with the term of the slag agreement. His employment was dispensed with on September 4, 1914, at a time when it is obvious the slag agreement was not in force for the reasons recited in the correspondence. Were defendants therefore justified in dispensing with plaintiff's services without breach of the hiring agreement? In my opinion they were, and I think the plaintiff cannot recover. It is well in this connection to note plaintiff's own view as to the expiry of his engagement with defendant company as contained in a letter under his own hand, exhibit F/a in the case, written at a time when friction had arisen between him and the company. He certainly then had no thought of this long term theory, upon which the action and judgment is founded, but was then of opinion that his engagement expired at the latest in the summer of 1915, an opinion, no doubt, then shared by all the parties. I think his opinion was well founded.

In my opinion the appeal ought to be allowed and the action dismissed, all with costs.

GRAHAM, C.J., concurred. Graham, C.J.

LONGLEY, J.:—There is just one question on which I wish to add my opinion, and which may seem slightly to differ from others, and that is that though this Dominion Steel contract is out of the question, and has nothing to do with the amount payable to the plaintiff, yet, under the contract, it is provided that the Fertilizer Co. shall pay the plaintiff a salary of $1,620, $1,740 and $1,860, and while there seems to be considerable justification for the argument that the sweeping away of the slag contract takes away the necessity of employing the plaintiff, yet I wish to draw attention to the fact that that is likely to be made, in which case he would be entitled to his wages up to the end of the third year, which would be about 10 months of the year. This would be true if there were no improprieties or irregularities charged against the defendant. Now there are several charges against him which seem to me to be not "trumped up and so apparently frivolous Longley, J.

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that it calls for some patience to examine them." They were each and all of them matters within the control of the manager of the slag company, and in some of which, for instance in the mixing of the two between the B slag and the Z slag, which was clearly in disobedience to orders, seem to me to be a ground for justification of dismissal. On reading the evidence all over, I have to differ somewhat from the Judge who tried the cause. I see in the whole character of the evidence a lack of confidence in Goldie on the part of the company, a gradual disposition to regard his authority as of lessening importance and, finally, for three months previous to his dismissal, he was not in reality the analyst of the works, but was sent down to take charge of a farm which was run by the company and which he was not successful in, and was in no way discharging the duties of his office, and therefore I would be compelled to say that if it should be held by any Court that they were bound to keep him for the remainder of that three years, if there was no impropriety or wrongdoing on his part, I think there was sufficient wrongdoing on his part to justify his dismissal previous to that date.

I therefore concur in the judgment that the action be dismissed.

Harris, J.

HARRIS, J. (after reciting the facts set forth in the judgment of Drysdale, J.):—Now two interpretations have been suggested as to the duration of the plaintiff's contract:—

(1) That it was for 3 years, subject to a limitation that it might be terminated at any time within that period if the agreement between the steel company and the defendant company was for any reason not in operation.

(2) That the second paragraph dealt only with remuneration, and the third with the duration of the agreement, and, to use the language of the factum of counsel for the plaintiff, "the employment should run as long as the term of the steel company's agreement."

The last interpretation is that contended for by the plaintiff.

After giving the matter careful consideration, I have reached the conclusion that the first interpretation is the correct one.

Dealing with the plaintiff's contention first, the obvious thing which occurs to one is that, even admitting his interpretation, it does not assist him in this litigation. Admitting that the true meaning of the hiring contract is that it was to run as long as

the term of the slag contract, then it would seem to follow that it could not begin until the slag contract begins, and as that has not begun neither has the hiring contract, and therefore the plaintiff cannot succeed.

But the plaintiff couples with this another contention: he says that as the slag mills were erected and ready to start grinding, and the railways and all necessary connections had been laid down on January 1, 1912, that the slag contract is to be taken as being in force from that date notwithstanding what took place between the two companies by which its coming into force has been and still is delayed.

I find myself unable to adopt this reasoning. I think it leads to infinite difficulties. How are we to consider an agreement as in force which as a matter of fact is not in force at all? If in fact it never as between the parties goes into effect at all, how is it possible to say that it has any term, and if it has no term how can it be said that the terms of the two contracts are concurrent? How can the plaintiff's contract run concurrently with the terms of the slag agreement when the slag agreement is not running at all?

If the slag contract is to be taken as having begun on January 1, 1912, when is it to end? Is it 21 years from that date?

Suppose the slag agreement is really brought into force in the manner provided in it, say, 10 years after January 1, 1912, it will in that case run for 21 years from the time it is brought into operation or until 1943. And why should not the hiring agreement run until 1943 if it is to run concurrently with the term of the slag agreement? If it does then of course its term will be 31 years, not 21. If the hiring agreement is to stop at the end of 21 years from January 1, 1912, when the slag agreement still has 10 years to run, how can it be said that the two terms are running concurrently? Can there be two terms to the slag contract, a real and a fictitious one?

Again, if the slag contract never goes into operation at all, how can it be said to have any duration? The agreement existed as a writing but the term cannot expire because it never came into existence. A thing which never had life cannot expire.

Then again, there are conditions in the slag agreement which gave the defendant company and the steel company the right to

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terminate the contract at the end of seven years and again at the end of fourteen years. If the slag agreement never really goes into operation as between the parties to it then these provisions are gone—they never become operative—and of course if the plaintiff's argument is sound, that his contract for twenty-one years has begun, then he is to get the 21 years without the risk of its being cancelled. He is relieved of the burden or risk of having his contract cut short at the end of 7 or 14 years.

Again, if the plaintiff's contract is running for the reason given it would seem to follow that it will continue to run for 21 years certain and this whether the defendants are taking slag from the steel company under the agreement or otherwise. If the parties really intended to make an agreement for 21 years irrespective of whether the slag contract was or was not in existence, it is impossible to think they would have taken this method of expressing that intention.

These are some of the difficulties which stand in the way of adopting the plaintiff's contention.

Now, if we turn to the construction contended for by the defendant company, I think it must be at once admitted that there is much in the surrounding circumstances to assist it. What we are trying to get at is the intention of the parties, and we are entitled under the authorities to take the surrounding circumstances into consideration.

We find the venture of making fertilizer from slag was new in Canada. Everything depends upon the solubility of the slag and its richness in phosphoric acid. All slags are not soluble and the value of slag as a fertilizer depends on its solubility in the first place and its richness in the second place. The method employed in making steel has something to do with the solubility of the slag and methods change. The percentage of phosphorus in the iron ore is what really determines the percentage of phosphoric acid in the slag, and ores vary materially; not only ores in different mines but from the different parts of the same mine.

Under these circumstances is it not reasonably clear that what the parties had in mind was a three years' contract subject to termination at any time during the three years if for any reason the slag contract had to be given up? Of course—and this is unfortunate for the plaintiff—the parties having only in

mind the one contract with the steel company and not contemplating any other referred to that one only and their agreement is that the two contracts are to run concurrently.

I think what the parties really intended was a contract for 3 years subject to a limitation that it was to be defeated or terminated during that time if the slag contract ceased to exist or did not come into existence.

As the plaintiff's hiring is under the contract, and is terminated under an express provision of it, there is no room for implication, and it follows that he cannot recover for the unexpired balance of the 3 years.

Wages to the extent of $155 were due the plaintiff when dismissed, but he had the use of defendant's house, and had free coal and light for at least a year after his dismissal, so the account was more than paid.

I would allow the appeal and dismiss the action with costs in both Courts. *Appeal allowed.*

BACKMAN v. RITCEY.

Nova Scotia Supreme Court, Graham, C.J., Russell and Longley, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. April 22, 1916.

1. BROKERS (§ II B 1—12)—COMMISSIONS FOR PROCURING CHARTER PARTY;—PROCURING CAUSE—GRATUITOUS SERVICES.

A ship broker, employed to procure a charter party, has earned his commission when, having brought the parties together, an agreement to charter has resulted. The fact that the ship owner succeeded in procuring a slightly better rate than the broker does not justify an inference that the broker was not the efficient cause in procuring the charter party.

[*Burchell* v. *Gowrie*, [1910] A.C. 625; *Austin* v. *Can. Fire Engine Co.*, 42 N.S.R. 77, followed. See also *Chalmers* v. *Mackray* (Man.), 26 D.L.R. 529; *Powell* v. *Montgomery* (Sask.), 23 D.L.R. 213; *Kennerley* v. *Hextall* (Alta.), 24 D.L.R. 418; *Whyte* v. *National Paper Co.* (Can.), 23 D.L.R. 180; *Cyr* v. *Lecours*, 47 Que. S.C. 86; *Jacques* v. *Léonard*, 47 Que. S.C. 344.]

Statement.

APPEAL from the judgment of Forbes, Co. Ct. J., in favour of defendant in an action by a broker to recover 2½% commission on a charter of the schooner "Itaska" on a cargo of lumber. Reversed.

D. F. Matheson, K.C., for appellant.

J. A. MacLean, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—This is an action brought by a ship broker against a ship owner for a commission on a charter on the schooner "Itaska" to carry lumber from Gold River to New York. There are no material facts in dispute. The defendant

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as well as the master, Captain Cook, made inquiries of the plaintiff with a view to secure a lumber charter for this vessel for the voyage indicated. She was then discharging a cargo of coal. The plaintiff inquired over the telephone of the Kent Lumber Co., of which Mr. W. K. McKeen appeared to be the manager. Either that telephone or another was communicated in the presence of the parties and the plaintiff told it to the captain. The defendant asked him to find out what kind of lumber, and the plaintiff says:

> He called at my house to get the information and everything was satisfactory except cargo was assorted cargo and I told him to send his captain to Gold River to see cargo before discharging (the coal), and I said we would get company to hold cargo till captain arrived. I did this, and in my house Captain Ritcey (the defendant), present I got the offer from lumber company of $5 per thousand subject to receiving cargo. Next time saw Captain Cook, who was going to Gold River to see cargo, and I said not to take less than $5.25 and Cook went down and took vessel to New York.

The master entered into the charter party with McKeen for $5.25. The defendant denies that the plaintiff ever told him to send the captain to Gold River to demand or ask $5.25, but that contradiction is not material. The defendant relies on the fact that he told him he wanted $5.25 and he would not accept $5.

The letter of the defendant shewing his contention is as follows:

> Capt. J. E. Backman,
>
> Your bill came to hand a few days ago for commission on charter for schooner "Itaska," Nov., 1912, from Gold River to New York. If you can shew me where you chartered the Schr. "Itaska" I am quite willing to pay you. I am always willing to pay my bills, but this is an account that I consider that I don't owe you. I had spoken to you about chartering but you never chartered her. You said you could close her for $5 but you never did, and the captain went from Mahone Bay to Gold River himself and made his own bargain. So if you want to be honest about it I don't owe you anything. If you spent anything for telephones as far as you had gone I am quite willing to pay them. REUBEN RITCEY.

In the first judgment the County Court Judge allowed the plaintiff $1 for three or four telephone messages which he paid on this business. It is, I think, quite clear that the plaintiff earned his commission. He brought the parties together and a charter party resulted and was entered into. The fact that it resulted in a slightly better bargain for the ship owner is not such a change in the terms as would justify an inference that the plaintiff was not the efficient cause of the charter party which

was obtained. I quote from *Burchell* v. *Gowrie*, [1910] A.C. 625. One of the contentions was that the acts of Burchell, the agent, could not be held to be the efficient cause of a sale which he had in fact opposed. The judgment proceeds:

> The answer to the second contention is that if an agent, such as Burchell was, brings a person into relation with his principal as an intending purchaser the agent has done the most effective and possibly the most laborious and expensive part of the work and that if the principal takes advantage of that work and behind the back of the agent and unknown to him sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale. There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent.

In that case the change in the terms was that stock was to be given in a larger proportion than Burchell was authorized to accept. In all other respects the sale made and the sale authorized was the same.

In this case the only difference was that 25c. more a thousand was obtained, and that in no way prevents the theory that the plaintiff's services were the efficient cause of obtaining the charter.

I refer to another case which arose in our own Court, *Austen Bros.* v. *Canadian Fire Engine Co.*, 42 N.S.R. 77.

It was contended that the services were to be gratuitous, but two facts are at variance with that view. David Ritcey, a partner of the plaintiff in another business, selling and buying coal, says: "Trip before Capt. Reuben Ritcey (this defendant), paid me 2% commission on a former trip." And the other fact is that in respect to the charter of the "Itaska" with which this Ritcey had no connection:—"The defendant Reuben Ritcey asked me how much he owed me."

That, I think, is an admission that he expected to have to pay a remuneration, although addressed to a person not connected with it. Then of course there were the telephone tolls which are inconsistent with the idea of a gratuity.

It struck me that the claim was a bit stale. I think there was the lapse of a year. But I can understand persons delaying going to law about such a small matter for some time.

The Judge has cited a case which does not apply and no finding of facts which he has made prevents our disposing of the case in this way.

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BACKMAN v. RITCEY.

Ritchie, E.J.
Russell, J.

The appeal will be allowed in all the Courts with the appropriate costs and the plaintiff will have judgment for the amount claimed with those costs.

RITCHIE, E.J., and LONGLEY, HARRIS and CHISHOLM, JJ., concurred.

RUSSELL, J.:—If the Judge of the County Court had made a finding of fact in this case I should have felt bound to respect it. But I think he did not direct his mind to the question of fact involved in the case. He seems to have been under the impression that plaintiff could not recover unless he himself negotiated the particular contract arrived at by the parties. The case referred to by the Chief Justice decided by this Court negatives that proposition. The plaintiff, I think, under the evidence, brought the parties together and was employed for the purpose of doing so and his efforts resulted, through the direct negotiations between the parties, in a contract of charter party.

I think he is entitled to the commission claimed and that the appeal should therefore be allowed with costs. *Appeal Allowed.*

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Re TAYLOR.

Ontario Supreme Court, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. February 21, 1916.

1. WILLS (§ III G 3—131) — ESTATE FOR LIFE OR FEE-TAIL — "ISSUE" — "CHILDREN"—RULE IN SHELLEY'S CASE.

A devise of land to the testator's daughters for their lives as tenants in common, with remainder to "their respective issues in fee," so that the "children" of each take their mother's share, manifests an intention to treat the word "issues" as "children," and gives the daughters a life estate and not an estate in fee-tail. The words "in fee" are not necessarily the equivalent of "in fee simple."

[*Van Grutten* v. *Foxwell*, [1897] A.C. 658; *King* v. *Evans*, 24 Can.] S.C.R. 356, distinguished.]

Statement.

APPEAL from the judgment of Riddell, J., on a motion by executors for an order determining the proper construction of the will. Affirmed.

The judgment appealed from is as follows:

The sole question on this motion is, whether Marietta A. Weller took an estate (1) in fee, (2) in tail, or (3) for life, in the lands mentioned in the devise contained in the will made in 1883 of George Taylor, in the following words:—

"I give and devise unto my two daughters Marietta Weller and Jennie Campbell lot number 2 on the north side of Bridge street according to Davenport plan of lot number 24 on the west

side of Pinnacle street in the city of Belleville in the county of Hastings: to have and to hold to the use of them the said Marietta Weller and Jennie Campbell for and during the terms of their natural lives as tenants in common and after their decease the undivided share of each to the use of their respective issues in fee so that the child or children of each will take his her or their mother's share but in case the said Jennie Campbell should die without issue then I give and devise her share thereof to the children of the said Marietta Weller alone share and share alike."

There is nothing in the remainder of the will which, in my view, assists in the determination of the effect of this devise, and we must take the words simply as they stand.

"Issue" means *primâ facie* "heirs of the body:" *Roddy* v. *Fitzgerald* (1858), 6 H.L.C. 823, at p. 872, and, were it not for the case of *King* v. *Evans* (1895), 24 S.C.R. 356, cited by Mr. Clute, I should have had no doubt of the effect of this devise.

In that case, the devise read, "to my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple but in default of such issue him surviving then to my daughter Sarah Jane," etc., etc. Mr. Justice Ferguson held, *Evans* v. *King* (1893), 23 O.R. 404, that this gave an estate in fee tail according to the rule in Shelley's case: in the Court of Appeal (*Evans* v. *King* (1894), 21 A.R. 519), this was reversed, and James was held entitled to a life estate only. Three written judgments were given out—Hagarty, C.J.O., was appalled (as am I) at the mass of conflicting authority, and on the whole considered that James took only a life estate by virtue of the words "in fee simple"— Burton, J.A., and Maclennan, J.A., also gave written judgments, the latter saying, p. 537: "We have a plain and unmistakable gift of an estate for life only to James, and an equally plain and unmistakable gift at his death to his lawful issue in fee simple." In the Supreme Court of Canada, the language of Strong, C.J., was most explicit (p. 365): "The question is whether he meant the issue of his son to take in fee simple, and in so many words he said that he did."

Had then the language of this will been, as in that under consideration in *King* v. *Evans*, "in fee simple," and not "in fee," I should be bound by that case to decide that the devisee took only a life estate.

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RE TAYLOR.

Statement.

Is there any difference because the words used are "in fee" and not "in fee simple"?

All the way through the judgments of Hagarty, C.J.O., and Burton, J.A., as well as in many of the cases cited, the language "in fee" is used as equivalent to "in fee simple"—and of course it is so in ordinary parlance. I think it would be to make too subtle a distinction—always to be avoided if possible—to hold that because the testator used the words "in fee," instead of "in fee simple," the meaning of his will is changed. If such a distinction is to be drawn, I think it should be by the Supreme Court—or at least the Appellate Division—not by a single Judge.

And, while "I quite agree that we have nothing to do with what was or was not the intention of the testator," and "what we have to do is to ascertain what is the meaning of the words which we find in this will," I am glad that I am able, within the authorities, to give the interpretation to this will which I am convinced carries out the testator's real intention.

Costs out of the property concerned in this application.

R. S. Cassels, K.C., for appellants.

A. R. Clute, for respondents.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—Appeal by the executors of George Mackenzie Stewart from an order dated the 7th December, 1915, made by Riddell, J., on an originating motion for the construction of the will of the testator, dated the 3rd October, 1883.

The question for decision is as to the estate which Marietta Asenath Weller took under the will in lot number 2 on the north side of Bridge street, in the city of Belleville, the appellants contending that it was an estate tail and the respondents that it was a life estate. The learned Judge, being of opinion that the case was governed by *King* v. *Evans*, 24 S.C.R. 356, gave effect to the contention of the respondents.

[The Chief Justice set out the devise, as above, and proceeded:]

Unless *King* v. *Evans* is distinguishable because the words of the devise there were, "to my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple . . . " or if the testator has interpreted the language he has used so as to shew that by the word "issue" he meant "children," the conclusion to which my brother Riddell came was right.

It was contended by Mr. Cassels that the decision in *King* v. *Evans* is inconsistent with that of the House of Lords in *Van Grutten* v. *Foxwell*, [1897] A.C. 658, and is overruled by it.

By the will in question in that case, lands were devised to trustees in trust to receive the rents and profits to and for the use and benefit of such of the testator's child or children as should be living at the time of his death; and from and after such child or children should have attained the age of twenty-one years or be married, then in trust to permit and suffer such child or children, as they should severally attain the age of twenty-one, or be married, to receive and take the rents and profits, if more than one, in equal shares for her, his, and their own use and benefit for the term of her, his, and their life or lives; and if he left only one child then to permit and suffer such one child to receive the rents and profits for her or his sole use and benefit for the term of her or his life; and "the testator declared that his will was that from and after the death of such child or children, the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided between them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares as they should severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns for ever."

There was a gift over to collateral relatives, introduced in these terms: "And if it shall happen that I shall depart this life leaving no child or children, or issue of any child or children, or if such child or children as I shall leave, and the issue of such child or children, shall die before he, she, or they shall attain the age of twenty-one years or be married."

It was contended on the part of the appellants that by the words "to be equally divided between them," in conjunction with the subsequent direction to the trustees to convey to "such heirs" in fee, and with the other provisions of the will, there was enough to shew that the testator could not have used the words "heirs of the body and bodies of such child or children" in their legal sense, or intended thereby to designate the whole stock of inheritable descendants of his child or children in due course of succession (p. 664). That contention did not prevail, but it was held that the only child of the testator took the estate in fee tail, with

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a direction to the trustees to convey the reversion in fee to the heirs of the tenants in tail at a particular time, and that this direction was not inconsistent with the creation of estates tail in the children.

It was said by Lord Macnaghten at p. 679: "What the testator says in effect is this: 'If one or more of my descendants being tenant in tail, or tenants in tail in possession, should marry or attain twenty-one, I cancel all ulterior limitations in favour of collaterals, and give him or them the fee simple expectant on the determination of the estate tail.' "

Such a disposition differs widely from that which the testator made in *King* v. *Evans*. He had limited the remainder, after the determination of the life estate, "to the lawful issue of his son James to hold in fee simple." In the *Van Grutten* case what the testator had done was to devise the remainder after the determination of the life estate in such a way that, coupled with the devise for life by the operation of the rule in *Shelley's* case, the daughter was tenant in tail, and he had also devised the reversion in fee simple expectant on the determination of the estate tail to such one or more of his descendants being heirs in tail who should marry or attain twenty-one. These were separate and distinct estates, and the devise of the reversion in fee in no way controlled or affected the devise of the estate tail.

I am, however, of opinion that the case at bar is distinguishable from *King v. Evans*. In that case, as has been seen, the words were "to hold in fee simple," which was held to be an expression of "known legal import," which could admit of no secondary or alternative meaning: *per* Strong, C.J. (p. 364), who added: "Then we have the inconsistent word 'issue,' and as we cannot reconcile the two, except by reading 'issue' in its secondary meaning as equivalent to 'children,' that must be done."

This reasoning is, I think, inapplicable to the language we have to construe, which is to the "respective issues in fee." The words "in fee" do not necessarily mean in fee simple. An estate tail is accurately described as a "fee tail," and the words may mean "in fee tail." It is, therefore, unnecessary to give to the word "issue" any other than its primary meaning, *i.e.*, descendants, but, rather, effect should be given to both expressions if it is possible to do so, as I think it is.

I am of opinion, however, that the testator in this case has

interpreted his own language and has shewn that he used the word "issue" as meaning "children." This appears, I think, from the words which follow the devise "to their respective issues." These words are: "So that the child or children of each will take his her or their mother's share but in case the said Jennie Campbell should die without issue then I give and devise her share thereof to the children of the said Marietta Weller alone share and share alike."

This provision shews, I think, that by "issue" the testator meant "children," for they it is who are to take their "mother's share." "Mother's share" is, no doubt, an inaccurate expression. What is meant by it is the undivided one-half in which their mother was given a life interest. Besides this, the gift over shews that it was in the sense I have mentioned that the word "issue" was used. But for the gift over, if Jennie Campbell had children, they, or at all events those of them who survived the testator, would have taken a vested remainder in that undivided half, and the gift over was designed to prevent this and to give the undivided one-half to the children of Marietta Weller if Jennie Campbell should leave no issue who should survive her.

The effect of the gift over is to give, in the event upon which it was to become operative, the undivided half in which Jennie Campbell was given a life interest to the children of Marietta Weller in fee simple, and the gift indicates that the testator thought that what he had previously given was given to "children." The use of the word "alone" in the gift over points in the same direction. It indicates, I think, that the testator in the earlier part of the will, as he understood what he had done, had given the remainder in fee in the undivided half in which their mother had been given the life interest to her children, and to guard against this he gives the whole to the children of Marietta Weller "alone."

As I understand the order of my brother Riddell, the life estate which Marietta Weller takes is an estate for her own life, though that is not expressed. It may be open to question whether the estate is not for the joint lives of herself and her sister Jennie Campbell and the survivor of them; but that question was not raised or argued, and I therefore say nothing further as to it.

For these reasons, I would affirm the judgment of my brother Riddell, and make the same directions as to the costs of the appeal that he made as to the costs of the motion before him.

Appeal dismissed.

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MONTREAL TRAMWAYS CO. v. SÉGUIN.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 1, 1916.

1. JURY (§ I B1—14)—RIGHT TO TRIAL BY—PERSONAL WRONGS—LORD CAMPBELL'S ACT.

The right of action, under art. 1056 C.C. (Que.) (Lord Campbell's Act), is given to dependants of a person whose death is caused by the *delit* or *quasi-delit* (offences or *quasi*-offences), is an action resulting from "personal wrongs" within the meaning of sec. 421 of C.C.P. (Que.), in which there may be a trial by a jury.

2. APPEAL (§ VII J6—430)—OBJECTIONS—RIGHT TO JURY TRIAL.

After parties, in virtue of art. 422 C.C.P. (Que.), have elected trial by jury, objections to the right thereto cannot be urged for the first time on appeal to the Supreme Court of Canada.

3. TRIAL (§ III D—220)—CHARGE TO JURY—JUDGE'S OPINION UPON QUESTIONS OF FACT.

A Judge, in his charge to a jury, may express his opinion on questions of fact, providing he does not lead the jury to believe that they are being given a direction which it is their duty to follow.

Statement.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment entered by Guerin, J., upon the verdict of the jury at the trial in favour of the plaintiff.

The plaintiff brought the action, under art. 1056 of the Civil Code, claiming damages on behalf of herself and as tutrix to her minor children, in consequence of the death of her husband, the father of the children, caused, as alleged, by the negligence of the defendants. By the judgment appealed from, on the verdict of the jury, damages were awarded for $3,100 to the widow and $1,000 to the children.

Rinfret, K.C., for the appellants.

Aylmer, K.C., and *Bissonnett*, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—At first, I was inclined to think that the action might be said to be "for the recovery of damages resulting from the personal wrong done to the deceased." But, on further consideration, I have come to the conclusion that the right of action in this case is purely statutory and, if so, the right to trial by jury would not exist.

The foundation of the right is art. 1056 C.C., which gives an action for the damages occasioned by the death of the injured person to his consort and his ascendant and descendant relations.

The Quebec Act, 25 Geo. III., ch. 2, the provisions of which are now to be found in art. 421 of the Code of Civil Procedure, gives the right to trial by jury only in certain enumerated cases amongst which are "actions for the recovery of damages resulting from personal wrongs."

By art. 1056 of the Civil Code, where the person injured by the commission of an offence dies in consequence without having obtained indemnity or satisfaction, his consort has a right to recover from the person who committed the offence all damages occasioned by such death. The pecuniary loss caused by the death "is at once the basis of the action and the measure of damages." The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to the family, so that a jury, in assessing damages, cannot take into consideration the mental sufferings of the plaintiff in respect of bereavement. *Blake* v. *Midland R. Co.* (1852), 18 Q.B. 93.

The Privy Council held in the case of *Robinson* v. *C.P.R. Co.*, [1892] A.C. 481, and in subsequent cases, that the right of action given by this article is an independent and personal and not, as under Lord Campbell's Act, a representative right.

This right is a statutory one. No wrong has been done to one of those to whom the right of action is given for which any claim could be advanced were it not for the statute.

Speaking of Lord Campbell's Act, Lord Selbourne said, in *Seward* v. *The "Vera Cruz,"* 10 App. Cas. 59:—"The Act gives a new cause of action," and does not merely remove the operation of the maxim *actio personalis moritur cum personâ*, because the action is given in substance not to the person representing, in point of estate, the deceased man who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of person in the name of his executor. See also *per* Grive, J., in *Bradshaw* v. *Lancashire and Yorkshire R. Co.* (1875), L.R. 10 C.P. 189; *Leggott* v. *Great Northern R. Co.* (1876), 1 Q.B.D. 599; *Potter* v. *Metropolitan District R. Co.* (1874), 30 L.T. 765; *B.C. Electric R. Co.* v. *Gentile*, 18 D.L.R. 264, [1914] A.C. 1034; *B.C. Electric R. Co.* v. *Turner*, 18 D.L.R. 430, 49 Can. S.C.R. 470.

Such a statutory claim is not essentially dependent on any wrongdoing by the party made liable in damages. He may not have committed any wrong to the deceased or any wrong at all. As an instance of the latter, I may refer to sec. 298 Railway Act, R.S.C. 1906, ch. 37.

The Privy Council in the case of *C.P.R. Co.* v. *Roy*, [1902] A.C. 220, held that the defendant having been guilty of no negli-

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gence, was not liable for setting a fire on lands adjoining the railway whilst exercising the rights conferred on it by the legislature.

Sec. 298 of the Railway Act, however, expressly provides that notwithstanding a railway company may have been guilty of no negligence it shall be liable for any damages caused by a fire started by a railway locomotive to the extent of $5,000.

The provision in art. 421 C.C.P. (Que.) does not include such cases of statutory actions and, however suitable we might consider it that such claims should be submitted to a jury, we cannot extend the privilege to a class of cases which is clearly beyond what the statute has authorized.

The damages which the deceased might have recovered during his life for the wrong done him, are different from those which his widow is entitled to recover under art. 1056 C.C.; *Robinson* v. *C.P.R. Co.*, [1892] A.C. 481. The legislature has provided by art. 431 C.C.P. (Que.) for the assessment of the former by jury, but has made no similar provision for the latter.

There certainly has been a certain amount of practice in accordance with the course complained of; but that claims under art. 1056 C.C. have frequently been tried with a jury is easily explained, when we remember that, until the decision of the Privy Council in the case of *Robinson* v. *C.P.R. Co.*, [1892] A.C. 481, above referred to, it was thought that such actions were of a representative character and that the widow was authorized to sue in derogation of the legal maxim "*actio personalis moritur cum personâ.*"

Since the time when the nature of the action was established by the above decisions, it has not hitherto occurred to any one to notice that this difference removed the action out of the class of actions in which art. 421 C.C.P. (Que.), gives an option of a trial by jury.

I would allow the appeal with costs.

Idington, J.

IDINGTON, J.:—I think the objections taken to the learned trial Judge's charge, which it is to be observed were not taken at the trial, are untenable.

The objection that this is a case not triable by a jury comes rather late in view of the fact that appellants assented to that mode of trial, acquiesced in all that was done in that behalf, and only took the objections for the first time in the appellate Court.

If there is in law anything in such objections, then in view of

all that has transpired, it might well be urged that this is an appeal from a trial in and by a tribunal selected by the parties, and from whose judgment no appeal can lie to this Court. See the cases of *Atty.-Gen. of Nova Scotia* v. *Gregory*, 11 App. Cas. 229; *The Canadian Pacific R. Co.* v. *Fleming*, 22 Can. S.C.R. 33; *Burgess* v. *Morton*, [1896] A.C. 136; *White* v. *Duke of Buccleugh*, L.R. 1 H.L. Sc. 70; *Craig* v. *Duffus*, 6 Bell App. Cas. 308; *Dudgeon and Martin* v. *Thomson and Patrick* (1854), 1 Macq. 714; *Robin* v. *Hoby* (1856), 2 Macq. 478.

I am afraid the objection is rather late in another sense. The article of the Code as well as preceding legislation in same sense, having been so long interpreted as giving the right of trial by jury in the class of cases to which this belongs makes it rather difficult for us now critically to examine the article and declare all that, so done, was the result of grave error of law. Besides we are asked to apply a mode of interpretation and construction which might have commended itself more readily to the Courts of long ago when dealing in over refinements, than to us now.

The distinction counsel makes between the right of action a survivor passing through the ordeal of such an accident as in question would have and that given his representatives in case of his death, would have been looked on as very substantial at one time and is to be so yet in the proper application thereof; but, in these times, when the point of view has changed so sadly, to apply it as a necessary means of interpreting this art. 422 C.C.P. (Que.), would be going far, and especially so under all the foregoing circumstances.

If, however, any one thinks the question worth raising, he should begin at the right stage and not try to do so after such acquiescence as exhibited herein.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—There are two points argued by the appellants: First, that the trial Judge misdirected the jury in expressing his opinion that the appellants' theory of the accident was not a reasonable one. The trial Judge was entitled to express his opinion on the point so long as he did not lead the jury to think that he was giving them a direction it would be their duty to follow and it is quite clear that he did not err in this respect.

Secondly, it is argued that this was not a case for trial by jury

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under art. 421 of the Code of Civil Procedure. Art. 1056 of the C.C. involves a declaration that the dependents entitled to compensation thereunder have an interest in the life of the member of their family standing to them in a relation entitling them to recover under that article. I can see no good reason for saying that this is not an action for damages arising from a personal wrong within the meaning of art. 421 C.C.P. (Que.). If I had doubts upon the proper construction of art. 421 C.C.P. (Que.), it would be too late now, I think, in view of the course of interpretation to adopt the construction proposed by the appellants.

Thirdly, an order directing trial by jury was made and the case was tried without objection. The objection comes too late. *Pisani* v. *Atty.-Gen. for Gibraltar*, L.R. 5 P.C. 516.

Anglin, J.

ANGLIN, J.:—The appellant attacks the judgment against it on two grounds;—that there was misdirection by the trial Judge, and that the right to trial by jury exists only in cases in which it has been specially provided for and that this is not such a case.

The alleged misdirection consisted in the expression by the trial Judge in his charge to the jury of his own opinion upon the evidence on one point in the case. What is complained of the learned trial Judge immediately followed by this statement:—

> Now, I want you to remember that so far as any opinion of mine is concerned upon any of the facts I have mentioned, you are not bound to follow my opinion on any question of fact. You will determine those for yourselves and if you find in the expression of my views anything with which you do not agree on a question of fact, you are not obliged to agree with me, but you can render a decision quite at variance with what I have said with reference to any question of fact.

The course taken by the Judge was, in my opinion, quite within his rights and affords the appellant no ground of complaint.

By art. 421 C.P.Q. the right to trial by jury is conferred, *inter alia*, "in all actions for the recovery of damages, resulting from personal wrongs."

Giving to the words "personal wrongs" the most restricted meaning contended for by Mr. Rinfret, *i.e.*, wrongs causing injury to person or reputation, as distinguished from injury to source of revenue, means of support, property or estate, I think this action is within the purview of art. 421.

The plaintiff sues under art. 1056 C.C. to recover damages occasioned by the death of one Couvrette, who was injured by a

fault of the defendant. The damages sought to be recovered resulted from the personal wrong thus done by the defendant to the deceased Couvrette, although the plaintiff does not sue as representative of the deceased or upon the cause of action which he had. That the personal wrong caused to the deceased by an offence or quasi-offence of, or chargeable to, the defendant is the basis of the new cause of action given by art. 1056 C.C. for the recovery of the damages resulting from it to the consort and relations is made still more clear by the fact that that right of action exists only if the deceased had not himself obtained satisfaction or indemnity. Had the deceased survived he would have been entitled to recover compensation for any loss of income and diminution in his earning capacity ascribable to the injury which he sustained. That he would have had the right under art. 421 C.C.P. (Que.) to have his claim for these damages disposed of by a jury the appellants concede, and it seems to me indisputable that they would have resulted from the personal wrong done him. The failure of income and other elements of loss for which art. 1056 gives the consort and relations a right to recover damages result just as surely and directly from the personal wrong done to the deceased as would his own loss of income and diminished earning capacity had he survived. They are not the same damages as the deceased would have sustained, and could have sued for. The right of action to recover them does not flow directly and immediately from the injury to the deceased. His death is the condition on which it arises and the statute itself is its source. But while it is the statute which confers the right to recover them, and the death of the deceased is the condition of that right coming into existence and is in one sense the immediate cause of the damages to the consort and family (yet the death is an effect rather than a cause—an effect from which further consequences flow), the damages themselves result from the personal wrong which caused the death entailing them as a consequence neither remote nor indirect. Art. 421 C.C.P. (Que.), does not prescribe that the wrong resulting in the damages sued for should be to the person of the plaintiff or to the persons of those on whose behalf she sues. It suffices to bring the case within the letter of the article that the damage claimed should have resulted from a personal wrong whether the

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injury itself was to the person of the plaintiff or to that of another. I find nothing in the spirit of the article or in its history which requires that it should be given an application more restricted than is called for by its literal terms.

I express no opinion upon the question whether in the phrase "suits for the recovery of damages resulting from personal wrongs," now found in art. 421 of the C.C.P. (Que.) of 1897, which replaced art. 348 of the C.C.P. of 1867, which, in turn, was founded on the Consolidated Statutes of Lower Canada of 1860, ch. 83, sec. 26, continuing the right to trial by jury originally conferred by the 25 Geo. III. (L.C.), ch. 2, in the words

> actions grounded . . . in personal wrongs proper to be compensated in damages,

the words "personal wrongs" are susceptible of a construction which would include the wrong or injury done to the consort and relations by the death of the victim of the defendant's fault.

Hundreds of actions brought under art. 1056 C.C. and the earlier legislation (10 & 11 Vict. (Can.), ch. 6; Con. Stat. (Can.), 1859, tit. 9, ch. 781), have been tried by juries, many of them having been carried on appeal to this Court and to the Judicial Committee without any question of the competence of the trial tribunal having been raised. The statutory provision for jury trials thus interpreted and acted upon for many years has been at least three times re-enacted without alteration. *Casgrain* v. *Atlantic and North-West R. Co.*, [1895] A.C. 282, at p. 300. The weight of authority in the few cases in which the question has been raised in the provincial Courts, also seems to support the right to have such actions as this submitted to a jury. *Steele* v. *C.P.R. Co.*, 23 Que. K.B. 36; *Robinson* v. *Montreal Tramways Co.*, 23 Que. K.B. 60.

Moreover, I incline to think that the objection of the defendants, if otherwise good, having been taken for the first time in review and after acquiescence by them in all the proceedings leading up to the submission of the case to a jury, is probably too late.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—The main question which presents itself for decision in this case is whether or not an action in damages by the widow and the children of the victim of an accident may be submitted to a jury trial.

That question was raised for the first time before the Courts 2 years ago and was the cause of a serious diversity of opinion amongst the Judges of the Superior Court and of the Court of Appeal in the two following cases: *Steele* v. *Canadian Pacific R. Co.*, 14 D.L.R. 287; 44 Que. S.C. 455, 23 Que. K.B. 36; *Robinson* v. *Montreal Tramways Co.*, 15 Que. P.R. 77; 23 Que. K.B. 60.

The latter of those cases is now pending before the Privy Council.

The right of action of the widow and of the children of the victim of an accident is exercised under the provisions of art. 1056 of the Civil Code, in the chapter concerning offences and quasi-offences, which reads as follows:—

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

The article of the Code of Civil Procedure by virtue of which the plaintiff has claimed a jury trial is art. 421, which reads as follows:—

> A trial by jury may be had . . . in all actions for the recovery of damages resulting from personal wrongs or from offences against moveable property.

The plaintiff claims that her suit is for the recovery of damages "resulting from personal wrongs" and that consequently she is entitled to demand a trial by jury. What is the meaning of those words "personal wrongs?"

That expression originated in our statutory law when was introduced, in 1785, the trial by jury. That law had been drafted in English and the French version of it which was published in the ordinances of that time shew that it was but a translation from the English. The institution of the jury, as is known, is an English institution, and we may take all that as an authorisation to look in the English authors for the interpretation of those words "personal wrongs."

I find that Bigelow on Torts after, in his introduction, likening the word *wrong* to the word *tort* defines *tort* as being a *breach of duty fixed by law*, and he adds that *a tort* is distinguished from *a contract*

> in which the duty to be performed is fixed by the parties themselves in the terms of the agreement.

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Pollock on Torts likens the "torts" to the "civil wrongs."

It, therefore, follows that the "torts" or "civil wrongs" of the English law include the offences and quasi-offences of the civil law.

The qualification "personal" added to the word "torts" necessarily narrows the signification of the latter word. The "personal wrongs" necessarily cover only part of the offences, *i.e.*, the offences or wrongs concerning persons. The offences concerning immoveable property are not included. The case is the same concerning moveable property since in 1829 the legislature had to pass a special law permitting those latter offences to be submitted to a jury. Blackstone, Commentaries, vol. 3, p. 119, says:—

As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health or their reputation.

Wharton defines the words "personal rights," which are the counterpart of the words "personal wrongs" or (in French) "torts personnels," as follows:—

The rights of personal security comprising those of life, limb, body, health, reputation and the right of personal liberty.

So murder, bodily harm, sickness, libel, slander and imprisonment may be classified amongst personal wrongs.

As Mathieu, J., so well put it in the case of *Chouinard* v. *Raymond*, 3 Que. P.R. 184.

Torts are but a breach or violation of rights. Therefore the negative system of wrongs must correspond and tally with the positive system of rights. As all rights are divided into personal rights and property rights, so torts must generally be divided into torts affecting the rights of persons and torts affecting the right of property.

What have we got in the present case? A man has been injured through carelessness or negligence. It is undeniable that in his lifetime he would have had the right to obtain compensation for those injuries. A personal wrong had been done to him. The law says, however, that in case of his dying from such accident, his wife and next of kin have a right of action against the author of the offence. Does not this right of action result from the torts done to the person of the deceased? I, therefore, believe that the right of action of the plaintiffs is based on those injuries to the person of the deceased and falls under the provisions of art. 421 of the Code of Procedure which permit the parties to submit their claims to a jury.

If we examine the jurisprudence, we see that all those actions have always been thought to be susceptible of being tried by jury.

The point has never been raised, in so far as I know, before the case of *Steele* v. *Canadian Pacific R. Co.*, 14 D.L.R. 287; 44 Que. S.C. 455; 23 Que. K.B. 36, except in one case, *i.e.*, the case of *Bouissede* v. *Hamilton*, 2 Que. P.R. 135, decided in 1898, where Curran, J., has decided

that an action by a wife for damages resulting from the death of her husband is one for personal wrong and can be tried by jury.

A number of similar trials instituted by the wife or the children of the victim under art. 1056 of the C.C. have been submitted to juries, have been the subject of very important judiciary debates before this Court and before the Privy Council and it was never thought to question the right of the parties to submit them to a jury. See, as examples, *Miller* v. *Grand Trunk R. Co.*, [1906] A.C. 187, decided by the Privy Council in 1906 and which passed through the Superior Court, the Court of Review, the Court of Appeal and the Supreme Court; *Robinson* v. *Canadian Pacific R. Co.*, [1892] A.C. 481; *Ravary* v. *Grand Trunk R. Co.*, 1 L.C. Jur. 280, in 1869: *Curran* v. *Grand Trunk R. Co.*, M.L.R. 5 S.C. 251.

Another question to be decided in this case is whether or not the defendant appellant can now claim that this case should not have been submitted to the jury.

The plaintiff by her action had elected for a jury trial under the provisions of art. 423 of the Code of Civil Procedure.

If the defendant wanted to object it should have done it then and have such election rejected. But it does not deny the right claimed by the plaintiff to have a trial by jury. Issues are joined between the parties. Later on, on January 18, 1913, there is a motion under art. 424 C.C.P. to define the facts to be submitted to the jury. Both parties, including the appellant, supply the Judge with memoranda of the facts which they think necessary to submit for the appreciation of the jurymen. Judgment was rendered on that motion and memoranda. There is, therefore, *res judicata* on that point. There never was any appeal from or exception to that judgment. The acquiescence by the defendant binds it and it cannot now on appeal ask a judgment to be set aside which it has accepted and which has the force of *res judicata*.

A trial by jury is a mode of procedure which does not affect the competence *ratione materiæ* of tribunals.

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A case submitted to a jury is always under the control of the judge of the Superior Court. The tribunals may be a little embarrassed in the appreciation of the facts of the case because of the verdict; but they nevertheless remain entitled to reject the verdict if it is contrary to the weight of evidence (art.498). As to the points of law raised in the case, they remain, no matter whether there is a jury trial or not, subject to the entire discretion of the Judges.

Thomine-Desmazures, vol. 1st, Nos. 11, 12 and 13, discussed at length that question of absolute competence and relative competence. He tells us that one affair may give rise to a suit before different tribunals and cites the case of the creditor of an obligation called a bill of exchange which might be taken to the civil Court because it can be considered simply as a promise to pay. It need not necessarily be submitted, because of its commercial character, to the tribunal of commerce.

Even if, he says, the assignation is before a Judge who is incompetent only because of the quality of the parties or of the domicile of the defendant or of the situation of the things, and the defendant does not ask to be sent back before his natural Judge, the action will have been regular.

At No. 200, he says:—

If a merchant is brought for an affair concerning his commerce before a civil tribunal, the incompetence is not absolute but relative because of the quality of the person of the defendant.

And further on, he adds, after citing several cases of incompetence:—

The defendant himself will not be any more allowed to oppose this piece of incompetence, if he has acknowledged or is supposed to have acknowledged the jurisdiction before which he is summoned.

I find in our law reports the case of *Rivers* v. *Duncan*, Stu. K.B. 139, where it was decided:—

That if a party moved for a jury, he cannot afterwards reject the verdict on the ground that the jury ought not to have been allowed because, he, the mover, was not a merchant or a trader.

In the present case, the defendant has not itself asked for a trial by jury, but it has not opposed the election by the plaintiff and later on it has taken part and acquiesced in the judgment which has determined the facts to be submitted to the jury.

The parties have always the right to submit their differences to certain persons whom they are to designate *persona designata*. The proceedings in this case show the mutual intention of the parties to have their differences decided by a jury. It seems to me

that a judicial contract has thereby been established which they are not at liberty to break, the more so as their acquiescence has been the subject of a judgment which has the force of *res judicata*.

I am therefore of opinion that the defendant cannot, on appeal, try to be freed from that acquiescence and from that judgment. For those reasons, the appeal must be dismissed with costs.

Appeal dismissed.

FOULGER v. LEWIS.

British Columbia Supreme Court, Morrison, J. December 4, 1915.

1. VENDOR AND PURCHASER (§ I E—27)—AGREEMENT FOR SALE OF TIMBER LICENSES—AREA COVERED BY PRIOR LICENSES—MISREPRESENTATION OF MATERIAL FACT—RESCISSION OF AGREEMENT.

Where a purchaser enters into an agreement to purchase timber licenses on the footing that the licensed property is a "logging proposition," when in fact it is not, and this fact is known by the vendor, but not communicated to the purchaser, the agreement will be set aside.

A vendor of timber licenses is bound to acquaint the purchaser of the existence of other licenses, if any, over the same areas, if he knew or ought to have known thereof; failure to do so amounts to a misrepresentation.

[*Derry* v. *Peek*, 14 App. Cas. 337, *Newbigging* v. *Adam*, 34 Ch.D. 582, referred to.]

Statement.

ACTION for rescission of an agreement to purchase a timber license on the ground of misrepresentation and fraud.

E. V. Bodwell, K.C., for plaintiff.

E. P. Davis, K.C., for defendant.

Morrison, J.

MORRISON, J.:—The plaintiff, at the time of the issue of the writ herein, was a farmer residing at Duncans, B.C., and owned certain lands in Alberta. The defendants were brokers residing in Seattle and apparently dealt largely in the acquiring and selling of timber areas situate in British Columbia. On or about June 19, 1911, the plaintiff desiring to acquire timber areas in British Columbia entered into an agreement with the defendants Lewis, whereby the defendants agreed to assign, set over and transfer to him certain timber licenses covering areas in the Sechelt watershed, and issued by the Government of British Columbia. The consideration for this agreement was the sum of $50,000, the terms of payment being certain cash payments at stated periods and a conveyance of certain real estate of the plaintiff's situate in the Province of Alberta.

Pursuant to this agreement the plaintiff paid $7,500 and also conveyed the parcels of land in question. It turned out, however, that the licenses aforesaid covered timber over which it

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appears, as the matter at present stands, the Government had already issued licenses to a third party. After a great deal of correspondence and controversy the parties got at arms length, and the plaintiff commenced the present proceeding claiming a rescission of the agreement, a return of the money paid and a reconveyance of the Alberta property, alleging misrepresentation on the defendants part, inducing the contract.

I am satisfied that the plaintiff entered into the transaction on the footing, and under the influence, of the belief, that the proposition, to use the timbermen's phrase, was a logging proposition, and that the licenses transferred were the only licenses issued over those areas. I find that it was not a logging proposition, and that it was so known to the defendants. I also find that, unknown to the plaintiff at the time he entered into the agreement, substantially all the timber area or limits which he bargained for had been covered by prior licenses to one W. H. Whittaker. I am satisfied that had the plaintiff known, or even suspected, that the licenses so transferred to him were not the first and only licenses he would not have entered into this particular agreement. I also find that the defendants knew, or ought to have known, that the licenses in question were not the only licenses covering this property at that time.

I am not meaning hereby to determine whether the Whittaker licenses are good and valid licenses. That may be a matter for future determination in another action. But I do mean to say that I think it was the furthest thing imaginable from the plaintiff's mind when he signed the agreement, that he would be involved thereby in a contest with a third party as to the priority of his licenses. A careful search would have disclosed to the defendants the true situation, and a search in order to be a search in the eye of the law must be a careful one. It is the only kind of search that is of any possible ultimate value. For the defendants to base a solemn transaction on anything less is to do so at their peril. There was therefore a failure of consideration; or perhaps it may be more nearly correct to say there was no consideration.

In the view thus briefly stated which I take of the facts, it might be unnecessary for me to decide whether the consideration of the agreement is an executed or executory one. However, I think it is, if anything, an executory contract—one in which a

right *in personam* to a fulfilment of its terms are created. Apart from that it seems to me that the parties did not contract *ad idem*.

The plaintiff alleges fradulent representations against the defendants. Fraud is proved when it is shewn that a false representation has been made with knowledge of its falsity. And it is good law that one who makes a representation recklessly and regardless of whether it is true or false, can have no real belief in the truth of what he states—*Derry* v. *Peek*, 14 App. Cas. 337; *Newbigging* v. *Adam*, 34 Ch. D. 582; *Redgrave* v. *Hurd*, 20 Ch. D. 1.

It was contended for the defendants that the misrepresentations in any event were innocent. Assuming they were innocent representations however much it might help them in an action for deceit which this is not, it can avail them very little in an action based upon misrepresentation, failure of consideration and mistake which this is.

An innocent misrepresentation of a material fact is ground for rescission—*Derry* v. *Peek*, *supra*. If there was a mistake here, it was of such a character as to prevent any real agreement from being formed. Putting the case on the most charitable ground, I find there was and that the subject of the mistake or the point misconceived was the cause of the agreement or at least had an important influence upon it—*Kennedy* v. *Panama, New Zealand & Australian Co.*, L.R. 2 Q.B. 580.

So that taking the case in all its bearings and having regard to the parties hereto, there will be judgment for the plaintiff as claimed, other than his claim for damages.

Judgment for plaintiff.

McLENNAN v. KINMAN. KINMAN v. BANK OF VANCOUVER.

British Columbia Supreme Court, Clement, J. January 12, 1916.

1. BANKS (§ 1—4)—SECURITIES FOR SUBSCRIPTIONS FOR STOCK—SALE OF—LEGALITY.

Promissory notes given to a bank by subscribers to its capital stock may be validly sold by the bank for the purpose of making the deposit required by the Bank Act prior to the issue of a certificate permitting the commencement of business.

Statement.

ACTIONS to recover the amounts due on certain promissory notes.

R. S. Lennie, for Kinman.

C. W. Craig, for Dewar.

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Joseph Martin, K.C., for Bank of Vancouver.

E. B. Ross, for McLennan.

CLEMENT, J.:—In these two cases which were tried together before me, I expressed the view at the close of the trial that the plaintiff in the first action was entitled to recover upon the note sued on unless the alleged illegality in the method adopted by the provisional directors of the Bank of Vancouver to procure the sum ($250,000) which it was necessary under the bank Act to deposit with the Minister of Finance in order to obtain the certificate from the Treasury Board which would permit the bank to commence business, was made out. I must find on the evidence adduced that Kinman's subscription to the capital stock of the bank was a real subscription which he was and is legally liable to make good. At the most I would say that the optimistic gentlemen, including Kinman, who were trying to get a local bank established, were of opinion that subscribers would have little or no difficulty later on in disposing of their shares in such fashion as would relieve them from liability if they so desired. But that there was any fraud or deceit practised upon Kinman, I do not for a moment believe; and unless therefore there was the illegality I have suggested, the defendant Kinman must meet his obligations.

And, after careful consideration, I have come to the conclusion that the method adopted to raise the deposit required by the Bank Act was not illegal. On the evidence before me, I find that what was done was a sale out-and-out of subscribers' notes to the plaintiff McLennan. One of these was the note sued on. The money paid for it (its face value), became the absolute property of the bank, with no express or tacit charge upon it in favour of the plaintiff, McLennan; and there is no suggestion in the evidence before me that when, upon the issue of the treasury certificate, the deposit was returned to the Bank of Vancouver, it was used in any way to relieve the plaintiff McLennan of the liability he was under to the Royal Bank in respect of the loan which that bank had made to him to enable him to buy subscribers' notes from the Bank of Vancouver. It seems to me that what the Bank Act as it stood until 1913 indicated as the *desideratum* was that the bank should have on hand $250,000 of its own with which to commence business; and that was, so far as I can see through the evidence, the position of the Bank of Vancouver.

I cannot find in the Act anything to indicate that Parliament was concerned as to the financial standing of the subscribers apart from this, that out of their subscriptions or upon their subscriptions to the extent of $500,000 the bank should have been able to raise in cash $250,000. Whether this could legally be done by discounting the subscribers' paper with some other bank, the bank borrowing the money remaining liable as endorser, I am not concerned to enquire. But I am of opinion that an out-and-out sale of the securities held by the bank for subscriptions in order to put itself in funds to make the deposit referred to was not an illegal proceeding.

In the first action, therefore, there will be judgment for the plaintiff for the amount of the note sued on with interest from its date at 5 per cent.; and in the second action there will be judgment dismissing the action and in favour of the Bank of Vancouver upon its counterclaim for the balance due upon the subscription; all with costs against Kinman. *Judgments accordingly.*

GREEK CATHOLIC CHURCH v. McKINNON.

Alberta Supreme Court, Hyndman, J. June 24, 1916.

1. RELIGIOUS SOCIETIES (§II —5)—INCORPORATION OF—CANCELLATION FOR CAUSE—POWER OF LIEUTENANT-GOVERNOR—IMPARTIAL INQUIRY. The authority of the Lieutenant-Governor-in-Council (Alberta), to cancel the incorporation of a congregation for "cause" (N.W.T. Ordinances, ch. 38, sec. 25), is subject to the implied condition that a fair and impartial inquiry shall previously be held.

APPLICATION for an injunction, restraining the defendant from disposing of the assets of a religious corporation. Statement.

N. D. Maclean, for plaintiff.

C. C. McCaul, K.C., and *John Cormack*, for defendant.

HYNDMAN, J.:—It is a little difficult to say with absolute certainty whether the intention of all members of the congregation prior to or at the date of incorporation was that the church should be orthodox or uniate, but on March 15, 1909, an arrangement was consummated whereby the orthodox members agreed to purchase from the uniates their interest in the property including the church building and contents for the price of $1,400, which amount was duly paid, and a transfer was executed by the uniates vesting the property in three persons as trustees for the Greek Catholic Church of St. Mary's, Chipman, in which document it was acknowledged that at all times thereafter the said property may be used for purposes other than the use of the Greek Uniate Hyndman, J.

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Church, notwithstanding any claim that could or might have been made to the contrary. In the same year (1909), at or about the time the $1,400 was paid, at a meeting of the congregation, it was unanimously resolved that the church should be made orthodox for ever, and that thenceforth every member of the congregation was orthodox. In the following year about Easter another difference arose amongst the last mentioned members and about half of them desired that the church should become united to Rome, and endeavoured to persuade the others to agree to the change, but without success. Having failed to induce their brethren to agree with them, they ceased to further worship in this church and joined with a uniate congregation holding services in a dwelling house in the vicinity, and have never since returned to worship in the church or to pay dues or subscriptions or assist in the repayment of the said price of $1,400 which was raised by way of a mortgage to the Edmonton Trust Co., Ltd., on the security of the church property.

Various excuses are given why the uniates left in 1910, but I think it is clear that the church was wholly orthodox from the time of the arrangement referred to in 1909 until 1910, and that about half at least of the congregation remained orthodox or at least Greek Catholic, not in union with the Roman Catholic Church. I do not think the questions of dogma or ritual have anything to do with the case, the important point is that one section was in favour of remaining independent of Rome and the others desired such union. This was and is a fundamental difference which must determine the rights of the various members.

After the division in 1910 as related in the admission of facts, without any notice to or knowledge on the part of those who remained in the church, the other party headed by Tom Achtymochuk signed the petition set forth in the admissions, alleging that all the members of the said congregation as originally constituted, with the exception of four at most, are, and always have been, Catholic in union with Rome, and that the purpose of procuring incorporation was that the corporation should hold property for the purpose of enabling them to practise their religion and for no other purpose.

This, of course, is not correct and the fact is that a considerable number of members of the Westock church came over and

joined the congregation after the happenings in 1909 referred to, and became vested with equal rights with those originally forming the congregation, and who distinctly did so because the church was so-called orthodox or independent of any control by the Roman Church, and in any matter affecting the affairs of the congregation were entitled to equal consideration with the original members.

The petition referred to seeking a cancellation did not include any of these among its signatories, and so far as the evidence goes, they were not consulted nor had any knowledge of the proceedings and were given no notice or opportunity to be heard in relation to the matter.

On these grounds they now seek an injunction restraining the defendant from disposing of any of the assets of the corporation and for a declaration that the Order-in-Council cancelling the license and appointing the defendant receiver be cancelled and annulled.

Sec. 25 of ch. 38 of the N.W.T. Ordinances (Office Consolidation, 1915), reads as follows:—

> The Lieutenant-Governor-in-Council *for cause* may, at any time, cancel and annul the incorporation of any congregation incorporated under this Act, and upon notice of such cancellation being mailed to the said corporation, it shall cease to exist as such; provided, however, that nothing in this section contained shall be construed to impair the recourse of any creditor or claimant of the said corporation. AND in any such case, the Lieutenant-Governor-in-Council may appoint such person as he thinks fit to wind up the affairs of such congregation, and distribute its assets among the members thereof, and may provide for the remuneration of such person out of the assets of the congregation or otherwise as he thinks fit.

The plaintiffs contend that the words "for cause" make it necessary, as a condition precedent to cancellation, that there should have been held a judicial or quasi-judicial or at least a fair and impartial inquiry by the Lieutenant-Governor-in-Council, and that at least the other parties affected should have been given due notice of the petition and granted the right and given opportunity to appear and shew why such powers should not be exercised.

In my opinion, they are right in this contention. The Lieutenant-Governor-in-Council perhaps has the absolute right to pronounce whether or not there was cause, but should arrive at that conclusion only after an inquiry following along what I would call well established principles of British justice, which

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affords all parties concerned full opportunity to present their objections, if any, to the action sought by the petitioners. Even though there had been only four of the original congregation, the rights of this small minority would have to be respected quite as fully as though they formed a much larger number.

In Maxwell on Statutes, 5th ed., p. 589, it is stated:—

> Again, in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance, as that which requires that, before its exercise, the person sought to be prejudically affected shall have an opporunity of defending himself.

In *Ex parte Ramshay*, 21 L.J.Q.B. 238, which was a motion for a rule to shew cause why an information in the nature of a *quo warranto* should not be filed against Joseph Pollock, calling on him to shew by what authority he exercised the office of a Judge of a County Court of Lancashire, the ground of the application being that when he was appointed to the office it was not vacated, William Ramshay, who before filled it, not having been lawfully removed from it. By 9-10 Vict. ch. 95, it was enacted that it shall be lawful for the Chancellor of the Duchy of Lancaster if he shall see fit to remove for inability or misbehaviour any such Judge already appointed or hereafter to be appointed. Lord Campbell, C.J., in delivering the judgment, at p. 239, says:—

> The Chancellor has authority to remove a Judge of the County Court only on the implied condition prescribed by the principles of eternal justice that he hears the party accused; he cannot legally act upon such an occasion without some evidence being adduced to support the charges, and he has no authority to remove for matters unconnected with inability or misbehaviour in the office of County Court Judge. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been given in support of them, we think we cannot enquire into the amount of evidence or the balance of evidence, the Lord Chancellor, acting within his jurisdiction, being constituted a Judge upon this subject.

In the case at bar, the Lieutenant-Governor-in-Council has authority to cancel the license of a church for cause, but following what I conceive to be the principle of the cases referred to, I think it was his duty before acting to give opportunity to all parties concerned to appear and shew cause why the powers granted should not be exercised. The evidence is clear that no notice of the application for cancellation was given to any of the parties

either personally or through the medium of the church itself. I am, therefore, of the opinion that the Order-in-Council was *ultra vires* and the injunction prayed for should be granted with costs.

Injunction granted.

SMART HARDWARE CO. v. TOWN OF MELFORT.

Saskatchewan Supreme Court, Lamont, J. May, 3, 1916.

1. TAXES (§ III F—146)—ORDER CONFIRMING THE RETURN—REGISTRATION—EFFECT.

A town is not obliged to obtain a Judge's order confirming the return of unpaid taxes, required by sec. 349 of the Town Ordinance (R.S.S. 1909, ch. 35, as amended by ch. 28 Stats. 1912-13,) but may exercise a discretion; when the order has been obtained the town is bound to send it to the Registrar of Land Titles, and his duty is to register it against the lands therein mentioned; subject to the owner's right of redemption, the land thereupon becomes vested in the town in lieu of the right to collect the taxes; if not redeemed within the time limited, the land is held by the town free from all liens except those of the Crown or the town not merged; the lien of the town becomes merged after the town has procured a certificate of title to the land.

2. TAXES (§ IV—175)—LIEN FOR TAXES—HOW ENFORCED—DISTRAINT—STOCK-IN-TRADE OF MERCHANT.

A town has a lien upon land for the taxes assessed in respect thereof: this lien is not lost by reason of the fact that the land has become conditionally vested in the town by the operation of proceedings under a Judge's order confirming a return of unpaid taxes thereon.

Statement.

Action for damages for wrongful seizure of property for taxes.

C. E. Gregory, K.C., for plaintiffs.

J. F. Frame, K.C., for defendant.

Lamont, J.

LAMONT, J.:—The plaintiff company claims damages for the seizure by the defendant of the stock of hardware and other property belonging to the company, on the ground (1) that the seizure was wrongful, and (2) that, if the defendants had a right to seize at all, the seizure made was excessive. In the alternative the plaintiff, Sidney Smart, makes the same claim.

The facts are as follows: On May 10, 1915, the defendants seized a stock of hardware and other chattels which were the property of Sidney Smart for arrears of taxes. The amount seized for was $6,871.53; this amount was made up as follows:—taxes for 1912 and 1913, $3,127.06; taxes for 1914, together with penalty to May 10, 1915, $3,754.47.

In January, 1914, the defendant's treasurer—as required by sec. 339 of the Town Act—prepared a statement known as "The Tax Enforcement Return," which set out the name of each person on the last revised assessment roll who had not paid all taxes due by him to the town for the year next preceding the preparation

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of the return, or any former years; also a description of each parcel of land for which each person was assessed. This statement, as required by the statute, was then submitted to the auditor, and certified correct by him. It set out the taxes due by Sidney Smart for the years 1912 and 1913. Subsequently the defendants made an application to the Judge of the District Court to confirm said return, and on March 1, 1915, the Judge made an order confirming the return.

The statute (sec. 346, sub-sec. 4), requires a treasurer, upon confirmation, to forward a copy of the adjudication to the Registrar of Land Titles and directs that the registrar shall register the same against the lands named therein. The defendant's treasurer did not send a copy of the adjudication to the registrar, but instead the defendants on May 10, 1915, made the seizure above referred to. On the defendants' bailiff taking possession, Smart went to the mayor of the town and asked him to abandon the seizure until Saturday, May 15. He said if the town would do so the store would be just the same on Saturday as it was then, and that nothing would be done to interfere with it. He pretended that he wanted a new statement of the taxes made out, and that he was going to Prince Albert to see about some money. The mayor agreed and the seizure was in the meantime abandoned. Smart went to Prince Albert, and while there concluded the formation of the plaintiff company, and he gave to the company a bill of sale of all his stock-in-trade, goods and chattels. He returned to Melfort and on Saturday put a notice on his store door that the business belonged to the Smart Hardware Co. On the following Monday, the defendants again seized the goods, and some weeks later sold the same by public auction. The value of the goods and chattels seized I find to be $10,000, and the amount they brought at the auction sale was $5,500.

The contentions of the plaintiffs are: (1) that the goods seized were, at the time of the seizure on May 17, the property of the plaintiff company; (2) that whether they belonged to the company or Smart, the defendants having taken out the order of March 1, could not thereafter seize goods for any taxes unpaid on lands, and (3) That in any event they could not seize for the taxes confirmed by the order, but, at most, were limited to the taxes of 1914, and that therefore their seizure was excessive.

As to the first of the above contentions; I have no hesitation

in holding as a fact that Smart's request to the defendants to abandon the seizure made on May 10 was a ruse on his part to gain a few days' time to enable him to place his goods and chattels beyond the reach of the town. The company which he formed consisted of himself, his wife and his sister-in-law; the two latter with one share each, and that share—so far as the wife was concerned—has never been paid for. To that company Sidney Smart gave a bill of sale of all his stock-in-trade and goods and chattels for $10,000 of fully paid-up stock in the company.

In *Armorduct Manufacturing Co. Ltd.* v. *General Incandescent Co. Ltd.*, [1911] 2 K.B. 143, the defendants' solicitor and a director of the company led the plaintiffs' solicitor to believe that a cheque in payment of a judgment debt would be issued in a few days, and in consequence of this representation, the plaintiffs' solicitor delayed issuing execution. These few days were utilised by the defendant company in calling a meeting of the company and passing a resolution for voluntary liquidation. The plaintiffs then issued execution. It was held that the postponement of issuing execution had been caused by a trick on the part of the defendant company, and that the plaintiffs ought not to be prevented from proceeding with their execution. In giving judgment, Farwell, L.J., at p. 147, said:—

> The question is whether in these circumstances the Court, in the exercise of that discretion which it undoubtedly has, should permit the plaintiffs to obtain the benefit of the judgment by means of execution. I am not aware of any case in which it has been suggested that if the creditor has been prevented by force, as in *Re London Cotton Co.* (L.R. 2 Eq. 53), or by fraud or trickery, from issuing execution, the Court will not exercise its discretion in favour of the creditor. It is said that the persons who really will be affected by the execution are the other creditors of the company. That is true, but the rights of the other creditors were before the liquidation subject to the legal right of the plaintiffs to issue execution on their judgment. They were prevented from doing so by the trickery of the company, and the other creditors are not entitled to take advantage of that wrongful act and thereby become participators therein. The creditors cannot set up any right as third parties to take advantage of the trick of the company.

The remarks of Farwell, L.J., above quoted are, in my opinion, applicable to the facts of this case. Furthermore, the new company is in reality Sidney Smart and he cannot take advantage of his own fraud. The transfer of the stock to the company therefore did not prevent the defendants from proceeding with their distress.

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The chief question, however, is: Were the defendants entitled to distrain and, if so, for what taxes?

By sec. 317 of the Town Act (ch. 85, R.S.S. 1909), the taxes due on any land may be recovered from any owner or tenant regularly assessed therefor, and such taxes are declared to be a special lien upon the land and to be collectable by action or distraint.

Sec. 321 specifies the goods upon which such distress may be levied. Sec. 316*a* provides for the adding of a penalty in case such taxes become in arrears, and such penalty is also made a special lien upon the land. Then, by sec. 339, the treasurer is directed to prepare a statement known as "The Tax Enforcement Return" in January of each year; this statement is submitted to the auditor who, upon auditing the same, certifies to its correctness if it is in accordance with the roll. Secs. 342, 343 and 345 (ch. 28, 2-3 Geo. V.), read:—

342. The treasurer shall continue to collect arrears of taxes due to the town as shewn by the said return and upon receipt of any such payment, he shall enter in the said return the amount paid, followed by his initials and the date of payment.

343. On the application in chambers of the treasurer of the town or some solicitor authorised by the council to a Judge, such Judge may appoint a time and place for the holding of a Court of confirmation of the said return.

345. If, after the date for confirmation has been fixed, . . . any person interested in any . . . land contained in the return . . . desires to pay the taxes . . . as shewn by the said return (he) may do so, on condition that he pays in addition the sum of $2 . . . for costs.

The next section provides that, at the time and place appointed, the Judge shall hear the application, and, if he finds the taxes to be in arrear as set out in the statement, shall confirm the return. A copy of his adjudication, as I have already pointed out, is to be forwarded to the registrar of Land Titles, whose duty it is to register the same against the lands named therein. Upon registration, the said lands become vested in the town, subject to the owner's right of redemption. Upon default of redemption within the time provided, the town holds the lands freed from all liens and charges whatsoever, save such as may be held by or on behalf of the Crown or the town without merger thereof.

Then sec. 349 provides that, so soon as the return has been confirmed by the Judge, the treasurer of the town shall, out of the general revenues of the town, pay off all taxes levied for school purposes which are shewn to be due on the several parcels of land

in the confirmed return, and thereafter, while owned by the municipality, each parcel of land shall be assessed in the name of the town.

In the first place, it will be noticed that there is no statutory obligation upon the town to have the return confirmed. This is evidently left to the discretion of the town authorities. Up to the time they apply to the Judge to fix a date for confirmation, the owner has an unconditional right to pay his taxes; after that date it is conditional on his paying certain costs.

Then, upon the confirmation order being made, the town is required to pay over to the school authorities the taxes levied for school purposes as shewn on the return (sec. 349). This section, in my opinion, is a clear intimation that, on obtaining the order confirming the return, the town holds the lands in lieu of the taxes set out therein. As the municipality is directed by statute to pay the school taxes on the said lands, it seems to me to follow that these taxes having been paid by the town, no seizure or other proceedings could be taken against the person assessed for their collection, and if no proceedings could thereafter be taken for the school taxes embodied in the return, no proceedings could be taken in respect of any taxes therein set out.

It was contended that, as the order had not been registered, it was of no effect. I cannot accept this contention. There was a statutory obligation on the defendant's treasurer to send it in for registration, and the defendants cannot hide behind the non-performance by themselves or their official of the statutory requirement. The town being under statutory obligation to have it registered, equity will look upon that as done which should have been done in order to prevent the defendants from escaping the consequence of their own non-performance. I am, therefore, of opinion that after the town obtained the order of March 1st, no distress could subsequently be made for any taxes included in the confirmed return. It was further argued that no seizure could legally be made, subsequent to the order, for taxes not included in the return; that when the defendants took out the order they, by that act, took the land and unless it was redeemed they held it in lieu of all taxes thereon irrespective of when they were levied.

Although this argument is not without considerable force, I have reached the conclusion that effect cannot be given to it.

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Sec. 349 requires the town to pay to the school authorities only such taxes as are embodied in the return and penalties thereon, not taxes which may have been levied after the preparation of the return. The taxes for 1914 were properly assessed to Smart, and they became a debt due by him to the town, and the town had a lien on the lands assessed for these taxes. This was a separate lien from that which it had for the taxes of previous years, which lien they enforced by means of the order of March 1. The lien for the 1914 taxes they did not enforce and, under sec. 346, the failure to redeem vested the lands in the town but without merger of any lien held by the town, except, of course, the lien for the taxes included in and forming the basis of the order.

It is true that, upon taking out the certificate of title as provided by sec. 348, the town took the land freed from all liens save only such as were held by or on behalf of the Crown. The lien of the town for subsequent taxes would then be merged in the title, and no proceedings to collect would thereafter lie. Under sec. 346 the effect of the registration of the order is to vest the lands in the town without merging any lien held by the town. When the certificate of title is issued the liens are merged. It would therefore seem to me to have been the intention of the Legislature that any lien acquired by the town for taxes not included in the return was not to be affected by the vesting of the lands in the town until the certificate of title was issued.

If Smart redeemed the lands mentioned in the order, all he had to pay were the taxes therein confirmed and the costs. The taxes for 1914 would still be due by him. The defendants not having taken any steps to collect these were, in my opinion, at liberty to adopt any one of the statutory remedies for their collection. They adopted distress on the hardware stock, and I think they were entitled to do so. The taxes for 1914, with penalties, amounted to $3,754.47; the defendants were entitled to seizure for this amount and the costs of seizure. They seized for $6,871.53; this was an excessive seizure, and whatever loss the plaintiffs have suffered by reason of their seizing for too great a sum, the defendants must make good. The only way I can estimate this loss is to take the value of the goods, which I fix at $10,000, and the amount of $5,500, which is what the goods sold for, and allow the plaintiffs the value of the goods which should

not have been sold. The defendants were entitled to sell until they had received the amount of the 1914 taxes and costs of seizure.

As to the costs charged, they are outrageous. Had the defendants seized only for the amount due, a seizure of the hardware stock alone was more than sufficient, according to the estimate of their own bailiff. They are entitled to the costs of making one seizure only. The charge for appraisement I think is correct. A certain amount for advertising should be allowed, but the amount of $76 is not shewn to be either fair or reasonable. I make a reference of this item to the local registrar, to ascertain what would be a fair and reasonable charge for such advertising as would be necessary had the defendants seized only the stock-in-trade in the store. The charge of $54 for taking stock is disallowed. The appraisement covers the taking of stock.

The charge for selling the goods by auction I refer also to the local registrar to compute. The bailiff would be entitled to the statutory allowance on the goods necessary to be sold to pay the defendants' claim. The charge of $590.50 for keeping possession of the goods cannot be justified. Had they seized for only the amount due, one man in possession of the hardware stock would have been sufficient, and one man at the rate provided by statute is all that can be allowed. The charge of $154.50 by Bailiff McEwan for being in possession is disallowed. He was not the man in possession within the meaning of the statute. The man in possession means the man who is actually in charge of the goods; not the bailiff who makes a seizure, if he puts someone else in charge and goes his way.

The last item of $25 for making a report of the sale as requested by Mr. Smart, is disallowed; but as Mr. Smart requested a copy of the list of goods sold and prices therefor, he should pay whatever is a reasonable price for having the copy struck off. What that price should be, I leave to the local registrar to ascertain. If no evidence is submitted to him from which he can ascertain what should be allowed on these various items, they will be disallowed.

On ascertaining the costs to which the defendants would be entitled, the registrar will add that sum to the taxes of 1914. The total will be the sum which the defendants were entitled to collect. and they were entitled to sell Smart's goods until they got that

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amount. When they received it, they should then have stopped the sale and handed the balance of the goods back to Smart. The value of these goods will be a sum which bears the same proportion to $10,000 as the difference between taxes and costs and $5,500 bears to the latter sum. The registrar will compute this amount after ascertaining the costs of seizure. There will be judgment for the plaintiffs for the amount so found and costs. Any dispute as to the correctness of the computation may be referred to me. *Judgment for plaintiff.*

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Re McDOUGALL ESTATE.

Manitoba King's Bench, Mathers, C.J.K.B. June 22, 1916.

DIVORCE AND SEPARATION (§ VIII B—85)—SEPARATION AGREEMENT—MONTHLY ALLOWANCE TO WIFE—TERMINATION BY DEATH OF HUSBAND.

The obligation of a provision in a separation deed for the payment of a monthly amount "thereafter" to the wife, who covenants that out of the said money she will maintain the children of the marriage, is terminated by the death of the husband, where the object of the deed appears to have been to provide for a separation merely, and not to operate as a post nuptial settlement.

Statement.

Application by executors for advice under the Trustee Act (R.S.M. 1913, ch. 200).

J. S. Hough, K.C., for executors.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—In 1909 James McDougall and his wife Lillian McDougall entered into a deed of separation in the following terms:—

WHEREAS, differences have arisen between the parties of the first and second part, and it has been arranged that they should live separate and apart.

Now this indenture witnesseth that in consideration of the premises and of the mutual covenants hereinafter contained, the parties hereto agree as follows:—

1. The parties of the first and second part shall henceforth live separate and apart, and neither of them will take proceedings against the other for restitution of conjugal rights, or molest, annoy, or interfere one with the other.

2. The party of the first part shall pay over or cause to be paid to the party of the second part, the sum of one hundred dollars ($100) each month, hereafter, which payment shall be made on the 15th day of each month.

3. This money shall be received by the party of the second part in full of all claims of any nature and kind which she may have against her husband, whether for the support of herself or children or otherwise, and she covenants and agrees with the party of the first part that she will not pledge his credit or make him liable for her support or maintenance or for the support or maintenance of her children, but the said moneys shall be received in full of all claims of any nature or kind which she may have against her husband, and that she will support and maintain herself and the said children out of the said moneys for which purpose the said moneys shall be applied.

4. The party of the first part covenants to and with the party of the second part that he will pay and satisfy the monthly sums above specified according to the true intent of this agreement.

5. The party of the first part shall at all reasonable times have access to his children and shall be consulted as to their education at all times; and the party of the second part covenants with the party of the first part that she will not interfere with the said party of the first part visiting the children, or speaking to them whenever he might meet them, or sending them presents.

James McDougall died on June 29, 1915, leaving surviving him his wife Lillian McDougall and two children, Donald Hamilton McDougall, aged about 15, and Marguerite McDougall, aged 18.

In September, 1910, the deceased made his last will by which he appointed the Royal Trust Co. executor and trustee, and he gave all his property of every kind to his executor upon trust,—

To pay out of the income $100 per month to his wife for the maintenance and education of his children until the youngest child should be 25 years of age, with authority to the executor out of the income to advance such further sums for the education of the children or either of them as the executor should think fit, the money to be expended for education and not otherwise.

Upon the youngest child attaining 25 years of age, the estate to be divided between them, if living, and if dead, leaving child or children, such child or children to take the parent's share.

If no child or children or grand-children to take, then the estate to go to the children of the testator's brothers.

The question to be answered is whether or not the provision in the separation deed for the payment of $100 per month to the wife ceased with the death of the testator, or whether the executor is bound to continue to make these payments during the life of the wife. The monthly payments provided for by the separation deed are to be used by her for her own maintenance and for the support and maintenance of the children and she agrees to apply the moneys for that purpose.

The will directs the executor to pay to her $100 per month for the maintenance and education of the children with a provision for an additional amount for education if thought advisable; but makes no provision for the support or maintenance of the wife, nor is she given any share of the corpus of the estate upon distribution.

What I am to determine is whether, on the true intent and meaning of the separation deed, it was intended by the parties

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that the payment of $100 per month was to be permanent or was to come to an end at his death.

The deed was made on February 4, 1909, and the will on September 19, 1910, more than a year and 7 months later. The will cannot, therefore, be looked at for the purpose of construing the deed. The deed itself is vague in its terms and there is very little on its face from which a clue to the intention of the parties can be gathered. The recital refers only to a separation between the parties. The second clause provides for the payment of "$100 each month thereafter," and not, as is usual in such deeds, that the payments shall be continued either during the time that the parties shall live separate and apart or during the natural life of one or both of them. The husband does not purport to contract on behalf of his executors or administrators. So far as the liability of his executors or administrators are concerned, this is not important, because if from the other parts of the deed it can be gathered that the deed was to continue in force after his death his executors and administrators would be bound without being named: Addison on Contracts, 11th Ed. 249; Williams on Executors, 10th Ed. 1348. The omission to name the personal representatives may not carry with it any indication of intention that the deed was not to continue in force after his death, but on the other hand his having named them would have afforded an indication of intention that the deed was to continue and be carried out by them.

By clause three she agrees to accept the monthly payment of $100 in full of all claims which she may have against her husband, and she gives up all claims of every nature or kind which she may have against him. She covenants not to pledge his credit or to make him liable for the support or maintenance of herself or her children, and she agrees to apply the moneys so paid for that purpose.

It was admitted that the wife had at the time of the execution of the deed no estate of her own, and that she was entirely dependent upon the monthly allowance agreed upon for the support of herself and children, and that he had an estate yielding an income of about $2,400 per year. It was further admitted that at the date of the deed he was about 68 years of age and she about 35 years of age.

The general principle governing the interpretation of deeds

providing for the separation of husband and wife and the maintenance of the latter is that, if it appears to have been the intention of the deed to provide for a separation merely, it is terminated either by the parties resuming co-habitation: Lush on Husband and Wife, 3rd ed. 461, and cases there cited, or by his death: *Re Gilling*, 74 L.J. Ch. 335. But if the object of the deed is not only to provide for a separation, but also to effect a permanent provision for the wife for her life, in other words, if it amounts to a post nuptial settlement, it will not be terminated either by the resumption of co-habitation or the death of the settlor in so far as the property clauses are concerned: Lush, 463.

In all cases, the question for the Court to decide is what was the intention of the parties? If an intention that the payments should continue notwithstanding the resumption of co-habitation is expressed in the deed itself the Court will give effect to it: *Wilson* v. *Mushett*, (1832), 3 B. & Ald. 743; *Randle* v. *Gould* (1857), 8 El .& Bl. 457; or if such intention is not expressed in the deed, if it can be inferred from a consideration of the whole deed: *Byrne* v. *Carew* (1849), 13 Ir. Eq. R. 1.

I have found no case in the books in which a deed worded as this deed is has been construed as a post nuptial settlement. The cases which approach most closely are *Clough* v. *Lambert* (1839), 10 Sim. 174, and *Coates* v. *Coates*, [1898] 1 Ir.R. 258. In *Clough* v. *Lambert*, the husband covenanted that "he, his heirs, executors or administrators should and would yearly during the natural life" of the wife, pay to a trustee for her £100. The parties separated and lived apart until the husband's death up to which time the annuity was regularly paid. The Court held that the covenant might be enforced against the husband's executors. In *Coates* v. *Coates*, the covenant was in the same form and, following *Clough* v. *Lambert*, it was held that the annuity was payable during the wife's life and not merely during the life of the husband. In the latter case importance was attached to the fact that the husband covenanted on behalf of his executors and administrators and that the annuity was expressed to be payable "during the term of her natural life."

A case in which the annuity was held to be terminable by the death of the husband was *Re Gilling*, *Procter* v. *Watkins*, 74 L.J. Ch. 335. In that case the covenant by the husband was that he

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would pay or cause to be paid to the wife an annuity of £150 during her life "if she shall so long continue to live separate and apart." It was held that this covenant provided for a payment to the wife only so long as she filled the character of living separate and apart from her husband which she could not be said to be doing after he had died.

There are also a number of cases in which it has been held that a covenant in a separation deed by the husband on behalf of himself and his executors and administrators to pay an annuity to the wife during her life or natural life is not avoided by a subsequent reconciliation: *Walker* v. *Walker* (1872) 19 Gr. 37; *Negus* v. *Forster*, 46 L.T. (N.S.) 675; *Randle* v. *Gould* (1857), 8 El. & Bl. 457. The latter case turned upon a provision in the deed that it should not be avoided by a resumption of co-habitation pursuant to an agreement in writing, but there is a dictum in the judgment that, even without this provision, the deed would continue in force. This dictum is disapproved of by the Court of Appeal in *Nicol* v. *Nicol*, 31 Ch. D. 524, and is inconsistent with the views expressed by Stuart, V.C., in the earlier case of *Webster* v. *Webster*, 22 L.J. Ch. 837.

Another principle applicable to this class of deed is that if it provides for the interests of other parties than the husband and wife, as if the interests of children are provided for in it, the stipulation as to property will take effect as a permanent settlement and will not be avoided by a reconciliation between husband and wife.

That principle has been laid down in three cases, *McArthur* v. *Webb*, 21 U.C.C.P. 358; *Ruffles* v. *Alston*, (1875), L.R. 19 Eq. 539, and *Re Spark's Trusts*, [1904] 1 Ch. 451. In all of these cases property was by the terms of the deed to be held in trust to pay the income thereof to the wife during her life and after her decease for the children of the marriage. In each case there was a separation and a subsequent reconciliation which, however, it was held did not destroy the trusts in favour of the children.

The deed before me appears on its face to be nothing more than a deed of separation. The recital indicates that such was its whole purpose. The annuity is not expressed to be payable to the wife during her life nor did the husband covenant on behalf of his executors or administrators. No property is set apart as a trust for the wife during her life and after her decease for the

children, as in *Ruffles* v. *Alston* and *Re Spark's, supra*. The monthly sums provided for were not to be paid as a trust for the children, but she covenants to support and maintain herself and the children out of these moneys, a very different arrangement than the creation of a trust for the benefit of the children.

Had the parties resumed co-habitation after the execution of this deed, I entertain a very clear opinion that the whole deed would thereby have been avoided. I cannot gather from a consideration of all its provisions in the light of the surrounding circumstances that it was intended to be anything more than a mere separation deed to continue in force during the time that the parties lived separate and apart and in no sense a post nuptial settlement.

In my opinion, the agreement in question is a purely separation agreement and terminated with the death of the husband.

Costs of all parties to be paid out of the estate.

Judgment accordingly.

ALIE v. GILMOUR & HUGHSON Ltd. ALIE v. W. C. EDWARDS CO. Ltd.

Quebec Court of Review, Archibald, A.C.J., Charbonneau and Demers, JJ. February 12, 1916.

WATERS (§ I C—87)—NON-NAVIGABLE STREAM—USE OF FOR FLOATING LOGS —RIGHTS OF RIPARIAN OWNERS—NEGLIGENCE—DAMAGES.

Persons using a non-navigable watercourse for floating logs are bound to protect the riparian properties, and must, therefore, place booms for this purpose, where necessary; the omission to do this is such negligence as will entitle the owners of such properties to compensation for damages. [See arts. 7295 and 7298 R.S. Que. 1909.]

Statement.

APPEAL from a judgment of the Superior Court, in an action for damages for injury to a mill.

Devlin & Ste-Marie, for plaintiffs.

Aylen & Duclos, for defendant.

Charbonneau, J.

CHARBONNEAU, J.:—The defendants, in these two cases, cut wood behind the River Désert, a small watercourse floatable for loose logs only, which flows into the Gatineau River. The plaintiffs are owners of a mill situate on the shores of this river at a place called Red Fall.

In the spring and at the beginning of the summer of 1912, the logs of the defendants broke part of the mill of the plaintiffs, and the defendants, in the two cases, have been condemned to $650 each.

The defendants complain of these judgments on two grounds: 1. They have been condemned without it being said that there was negligence on their part, and this negligence ought first to

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have been established in order to render them responsible; 2. There has been negligence on the part of the plaintiffs in not putting a boom to close when the logs are going down the small bay which is on the upper part of the canal of the mill and in placing a boom at a place where it was more of a nuisance than a utility.

According to art. 7295 of the Revised Statutes of 1909, the plaintiffs were authorized to utilise the watercourse to construct the mill in question. According to art. 7298, it was permitted to the defendants to make use of the river, with the charge however of repairing, as soon as possible, damages resulting from the exercise of this right, as well as the fences, drains, etc., which have been damaged. I deduct from these few articles that the precautions to take or the repair of damages, which in my opinion is the equivalent of the responsibilities, are to be borne by the defendants. If there had been need of a boom to close the small bay, and if, in effect, as the defendants pretend, this glancing boom would have prevented all damage, I think it was for the defendants to place this boom at a proper time and in a useful place. If, on the other hand, as the plaintiffs pretend, it was necessary to place a boom at the upper part of the mill to close the river completely, as was done in the previous years, it was again for the defendants to do this. In this case, as in the other case, their negligence in not fulfilling the duties that the law and the location of the places imposed upon them has been the cause of the damages, and the judgment which condemned them must, in my opinion, be confirmed.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The defendant, in each instance, pleaded that the damage was caused by the absence of a glancing boom to prevent the logs from getting into the little bay leading to the plaintiff's flume.

If that be the case, and if it be true that the defendants were obliged to take every precaution against doing damage, the placing of such boom was an obvious precaution and was easily applied. Of course, it would be just as easy for the plaintiffs to place the boom for the protection of their own mill, but that boom was not necessary for their purposes; and if it was the duty of the defendants as an incident of their right to float logs to take precautions against doing damage, it was for them to place the boom. They neglected to do that. They allege the damage resulted from the fact that it was not done. Therefore, they must be held responsible for that damage. *Appeal dismissed.*

RE ALDRIDGE WILL (1).

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart, Beck and McCarthy, JJ.
February 16, 1916.

1. EVIDENCE (§ X F—720)—CIRCUMSTANCES AS TO VALUE OF DECEDENT'S ESTATE—LETTERS—ADMISSIBILITY IN CONSTRUCTION OF WILL.

For the purpose of determining the *object* of a testator's bounty or the *subject* of disposition, evidence of the value of the testator's estate at the time of the making of the will or codicil is admissible as a circumstance surrounding the testamentary acts; but a letter written by the testator after the making of the codicil is not admissible for that purpose.

[*Colpoys* v. *Colpoys*, Jac. 451; *Singleton* v. *Tomlinson*, 3 App. Cas. 404; *Re Granger*, [1900] 2 Ch. 750, referred to.]

Statement.

APPEAL on a reference relating to questions in an action for the construction of a will.

C. C. McCaul, K.C., for infant.

C. F. Newell, K.C., for executors.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—We have to decide the questions (1) Whether evidence of the value of the testator's estate at the date of his will and at the date of his codicil and (2) Whether a letter written by the testator after the making of his codicil is admissible to aid in construing the will and codicil. The will gives Mrs. Massie a pecuniary legacy of $10,000, which together with a number of pecuniary legacies to other persons is made subject to an abatement should certain circumstances arise. The codicil gives Mrs. Massie a legacy of the testator's interest in a certain designated mortgage. Several questions arise: (1) Is the legacy given by the codicil cumulative with that given by the will or in substitution therefor. (2) Is the legacy given by the codicil subject to the provision for abatement contained in the will?

In Vice-Chancellor Wigram's Extrinsic Evidence in aid of the Interpretation of Wills, 5th ed., p. 56—a work of very high authority—Proposition V. is laid down as follows:—

"For the purpose of determining the *object* of a testator's bounty or the *subject* of disposition or the quantity of interest intended to be given by his will, a Court may enquire into every material fact relating to the *person who claims* to be interested under the will and to the *property which is claimed* as the subject of the disposition, and to the circumstances of the testator and of his family and affairs (by which, at the time of expressing himself, he was surrounded, pp. 69, 70, 71), for the purpose of enabling the Court to *identify* the *person* or *thing* intended by the testator, or to *deter-*

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mine the quantity of interest he has given by his will. The case (it is conceived), is true of every other disputed point, respecting which it can be shewn that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."

This rule may be accepted without question.

The distinction between evidence of the circumstances surrounding the testator at the time he made his will and declarations of his intention on making it is clear and is pointed out in *Guy* v. *Sharp*, 1 My. & K. 589, at 602, by the Lord Chancellor as follows:—

> I may, however, observe generally, on the reception of extrinsic evidence with a view to aid the construction and give explanation not to alter or control the sense—a purpose for which it can never be received—that there is a manifest difference between the declarations, whether verbal or written, of a testator, and the proof of facts and circumstance, by the knowledge of which the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument and may thereby be the better able to understand his meaning.

Evidence of the amount of the testator's estate at the time of making his will, though in general inadmissible, is admissible where it is reasonably clear from the terms of the will that the testator made the dispositions in question having regard directly or indirectly to the value of his estate at that time. *Barksdale* v. *Gilliat*, 1 Swans. 562; *Fonnereau* v. *Poyntz*, 1 Bro. Ch. C. 472; *Colpoys* v. *Colpoys*, Jac. 451; *Singleton* v. *Tomlinson*, 3 A.C. 404, at 425; *Re Granger*, [1900] 2 Ch. 756.

I think that the will now under consideration is one to which this exception applies and that evidence of the value of the estate at the date of the will and at the date of the codicil is admissible. Again it is said in Wigram, p. 163:—

> The conclusion then which these cases appear to warrant is that the only cases in which evidence to *prove intention* is admissible, are those in which the description in the will is ambiguous in its application to each of several subjects. See *Charter* v. *Charter*, L.R. 7, E. & I. App. 364; In *Re Hubbuck*, [1905] P. 129.

Nevertheless declarations of the testator may be admissible as evidence either of the facts and circumstances surrounding the making of the will or of his attitude of mind regarding the subject or object of disposition even though they include in a sense evidence of the testator's intention, as for instance that he treated a certain description as involving more than the description would technically and legally cover or that a legatee to whom he gave a

legacy if she were in his service at his death was considered by him just previous to his death to be still in his service. Wigram, p. 89, pp. 174-5.

It seems from the cases which have been referred to that *facts* affording an inference of intention and declarations by the testator at the time of making his will are equally admissible. Declarations of intention, however, made before or after the date of the will are, it is said, inadmissible. Wigram, 175.

It seems clear then that the letter in question—which was written after the codicil, and which we have not seen—is not admissible as evidence of mere intention; it will depend on its terms whether or not it is admissible from any other point of view.

The question of its admission, however, requires consideration from still another point of view—one which appears not to have been treated of by Mr. Wigram but which is referred to in an appendix by Mr. Sanger, his last editor, at p. 225.

In substance, it is there pointed out that in certain cases equity raises a *presumption against the words of the will* and that in such cases parol evidence is admissible to rebut that presumption, *i.e.*, not to contradict but to support the words of the will; and further that if parol evidence is once admitted to rebut the presumption then parol evidence is admissible to support the presumption. All the questions I have been discussing are admirably put in Hawkins on Wills, 2nd ed. (1912), p. 14, as follows:—

> Evidence of the circumstances surrounding the testator at the date of his will, the state of his family and his property, is admissible in aid of construction. But evidence to shew what were the actual testamentary intentions of the testator (as the instructions for will, declarations as to what he would do or had done by his will and the like), are admissible only (a) to determine which of several persons or things was intended under an equivocal description: (b) to rebut or again to support a bare legal presumption.

Mr. Hawkins distinguishes rules of construction and presumptions of law as follows:—Rules of construction are rules

> determining the construction which the Courts are bound, in the absence of a sufficiently declared (by the will) intention to the contrary to put upon particular words, expressions and forms of disposition occurring in wills. (Preface VII.)

> "Presumptions" of law are in reality rules of construction derived from the civil law, which having obtained a lodgement in English Law, but being disapproved of, have been allowed to retain their own antidote in the shape of the capability of being rebutted by parol evidence (Ib. IX.)

So that, having determined the proper construction of the

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will by reference only to the words in their context; that is, having thus ascertained the expressed intention of the testator no extrinsic evidence is admissible to shew any other than the expressed intention; but if by reason of some presumption of law the Court will, *primâ facie*, give effect to the disposition in a sense contrary to the expressed intention, then that presumption of law may be rebutted by extrinsic evidence, that is the expressed intention may be supported by extrinsic evidence and extrinsic evidence being once admitted further extrinsic evidence to support the presumption may be adduced.

The only presumptions of law now existing seem to be four:—

(1) That a debt is satisfied by a legacy of equal or greater amount; (2) That a portion is satisfied by a legacy; (3) That legacies of the same amount with the same motive given by different instruments are substitutional; (4) That an advance adeems a legacy given as a portion (Hawkins 15).

None of these presumptions are applicable in relation to any of the dispositions of the will or codicil in question. Whatever determination we come to must be founded solely upon his intention as expressed by the words he has used and the application to those words of the ordinary rules of construction; and we can admit no extrinsic evidence to assist us in ascertaining the real intention. Evidence of the value of the testator's estate at the time of the making of the will and of the codicil is inadmissible because it is part of the facts and circumstances surrounding those testamentary acts, and they themselves indicate that the value of the estate was then a consideration in the testator's mind.

Evidence of the letter is not admissible for the purpose of shewing the testator's intention because there is no equivocation as to the *person* in favour of whom any disposition is made or the thing disposed of and because no presumption of law is raised against the primary construction of the instruments and so there is no place for the application of the rule as to admissibility of extrinsic evidence to rebut a legal presumption. The two works to which I have referred, Vice-Chancellor Wigram's and Mr. Harris, are of such high and recognized authority that I have thought it necessary to quote scarcely any of the decisions in support of the proposition which they have laid down. Unless, therefore, some other grounds than those I have dealt with be suggested the letter in question cannot be put before us.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. May 10, 1916.

1. WILLS (§ I F—60)—GENERAL BEQUEST—SPECIFIC GIFT BY CODICIL—SUBSTITUTION—"ALL MY INTEREST."

A specific gift by a codicil of "all my interest in a mortgage," in addition to a general pecuniary legacy by the will, is not substitutional of the latter, and not affected by an abatement provision in the will; the words "all my interest" are intended in the ordinary meaning that the principal as well as the interest be given.

2. WILLS (§ I F—60)—WORDS OF WILL APPLYING TO CODICIL.

A codicil and the will must be read together as one instrument and expressing the one final will of the testator; the words "residue of my estate" and "not hereby otherwise disposed of" refer also to dispositions made in the codicil.

[*Re Hunter*, 1 D.L.R. 456, 25 O.L.R. 400, referred to.]

3. WILLS (§ III H—170)—LIFE ANNUITIES—INVESTMENT OF CORPUS—POSTPONEMENT OF LEGACIES.

A direction in a will creating a number of pecuniary legacies and life annuities, to convert all the estate into money and to invest the "residue of the estate, being not less than a clear 75% of the residue" in trust for the testator's infant son, gives the annuitants a life interest in the income of sufficient of the corpus to produce the annuities, and entitles the legatees to insist upon having sufficient of the corpus invested to produce the annual income given to the annuitants, merely postponing distribution and enjoyment of the corpus until the death of the annuitants.

4. GIFT (§ II—10)—CAUSA MORTIS—DELIVERY.

Delivery is essential to a complete *donatio mortis causa;* a letter by a deceased to his solicitor directing him to pay a cheque drawn in favour of a patriotic fund which he left in his trunk, and that certain persons be given certain chattels, will not justify his executors, where there was no delivery of the cheque or the chattels, in carrying out these directions.

Statement.

Reference to the Appellate Division by Beck, J., of an application made to him by originating notice by the executors of the testator for direction as to the interpretation of the will.

C. C. McCaul, K.C., for the National Trust; *C. F. Newell*, K.C., for executors; *F. D. Byers*, for E. J. Massee; *J. M. McAllister*, for F. Aldridge; *A. McLeod Sinclair*, for Y.M.C.A.

Stuart, J.

STUART, J.:—The will was executed on January 13, 1914. By the terms of the will the testator after appointing the Royal Trust Co. his executors and trustees and appointing his sister, Emily Jane Massee, guardian of his infant son, Ainsley Davis Aldridge, devised and bequeathed all his real and personal estate (not hereby otherwise disposed of), to his executors trustees upon trust to convert it all into money and to pay his funeral and testamentary expenses and his debts. He then made a number of legacies as follows: $600 a year for her life to his niece, Olive Massee; $360 a year for her life to his housekeeper, Mrs. Newton; a lump sum of $10,000 to his sister, Emily Jane Massee; then,

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eight legacies of $1,000 each to certain other relatives; the sum of $3,000 to the Y.M.C.A., and the sum of $2,000 to the rector and church-wardens of the parish of All Saints, Edmonton. Then followed these two clauses:—

Provided always and I hereby declare that if after payment of my just debts, funeral and testamentary expenses it shall be found that the above mentioned legacies, but not including therein the annuities bequeathed to my niece Olive Massee and the said Mrs. Newton, shall exceed 25% of the residue of my estate, such legacies shall abate proportionately so as not to exceed in the aggregate one equal fourth part of such residue, my desire being that a clear three-fourths part of such residue, of my estate after payment of my just debts, funeral and testamentary expenses shall be held by my trustees under the trusts next hereinafter mentioned;

I direct my trustees to invest the residue of my estate, being not less than a clear 75% of the residue after payment of my just debts, funeral and testamentary expenses with power for my trustees from time to time to vary such investments and shall stand possessed of the said residuary trust moneys and investments for the time being representing the same (hereinafter called the residuary trusts funds), in trust for my said son, Ainsley Davis Aldridge, upon his attaining the age of 21 years, and in default of my said son attaining the age, then in trust for my said sister Emily Jane Massee, or if she shall then be dead in trust for her children in equal shares and I declare that my trustees may postpone the sale and conversion of any part of my real and personal estate for so long as they shall think fit, and that the rents, profits and income to accrue from and after my decease of and from such part of my estate as shall for the time being remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be paid and applied to the person or persons and in the manner to whom and in which the income of the proceeds of such sale and conversion would for the time being be payable or applicable under this, my will, if such sale or conversion had been actually made.

Next followed a clause permitting the trustees to rent any portion of his real estate for the time being remaining unsold and then the following clause:—

It is my earnest desire that my son, Ainsley Davis Aldridge, shall receive a thoroughly good commercial education and business training so that he may be able to make a proper use of the moneys to which he will be entitled hereunder upon his attaining the age of 21 years and I therefore direct that the guardian or guardians for the time being of my said son shall select a suitable school in England at which my said son may be trained as aforesaid.

On August 7, 1914, the testator executed the following codicil to his will:

Codicil to will of said H. Aldridge of January 13, 1914. This is to be considered to be an addition to said will of that date.

1. I wish to leave to my sister Emily Jane Massee of Gateacres, Kew Gardens, Surrey, England, all my interest in the mortgage on part lots forty-four (44) and forty-five (45), R. L. 6, Edmonton, certificate of title 28x15

registered February, 1912, No. 281AJ. None of the principal of said mortgage has been paid at this date.

2. Also to bequeath to my cousin Arthur C. Aldridge, 235 Rice St., Edmonton, Alta., the clear title to my lot (16) sixteen, block thirty-seven (37) Windsor Park sub-division, Edmonton, Alberta.

This codicil was drawn by the testator himself and not by the solicitor who prepared the original will. It was executed by him in the presence of that solicitor and another witness but with the main part of it so turned under as to be invisible to the solicitor. Although urged by the solicitor to shew the contents he refused to do so.

The questions upon which the advice and direction of the Court is sought are as follows:—

"(1) Whether the gift to Mrs. Emily Jane Massee, of Gateacres, Kew Gardens, Surrey, England, contained in the codicil of the will of the deceased is governed by the proviso for abatement of legacies contained in the said will of the deceased.

"(2) If this honourable Court should be of opinion that the gift referred to in the previous paragraph is not governed by the proviso for abatement of legacies contained in the will, should the legacies bequeathed by the will be paid in full seeing that they exceed 25% of the testator's estate after payment of debts, funeral and testamentary expenses.

(3) Whether the executors are justified in acting upon certain directions contained in a letter written by the deceased to his solicitor, Mr. Mount, asking him to arrange for his personal belongings, clothes, etc., to be handed over to his cousin, Mr. Arthur C. Aldridge, of Edmonton, together with his victrola and the records therefor.

(4) Whether the executors would be justified in paying over to the Edmonton Patriotic Fund the sum of $1,000 in view of the fact that the testator drew a cheque for that amount to the order of the fund and in the said letter to the said Mr. Mount requested him to see that the same was paid under the clause in his will arranging for all promises made by him to be fulfilled.

(5) Whether the executors would be justified in handing over to Mr. James Martin, of 548 Victoria Ave., the piano of the deceased in pursuance of the wish expressed in his said letter to the said Mr. Mount.

Questions three, four and five refer to the contents of a certain

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letter left by the deceased addressed to his solicitor and to a cheque spoken of therein. The matters involved in the questions are subordinate. The important points are raised by the 1st and 2nd questions.

One matter much discussed in the argument, viz., whether the gift of the mortgage to the sister made by the codicil was in addition to or in substitution for the legacy of $10,000 given in the will does not seem to be directly raised by the questions asked. But it was no doubt, the desire of the parties that this should be decided, it is indeed to some extent involved in the first two questions, and should, I think, be first disposed of.

I have come to the conclusion that the gift of the mortgage was not made by way of substitution. The legacy of $10,000 is a general legacy; the gift of the mortgage is a specific gift. There is no rule of law about the matter. What rules there are, are rules of construction and must yield in every case to the primary principle that the expressed intention is to govern. I can discover absolutely nothing in the will to indicate that the testator did not intend that his sister should have both the general pecuniary legacy and the specific gift. The fact that, by the gift, an important piece of property is withdrawn from the operation of the clause bequeathing and devising all his property to his executors upon trust to reduce it into money seems to me to be an argument rather against an intention to substitute that gift for the general pecuniary legacy than in favour of it. If, for example, the general pecuniary legacy had been for $1,000 and the specific gift that of a certain automobile worth $2,000 or of a certain house and lot worth $3,000 it surely could not be supposed that the testator intended to substitute the specific gift for the legacy. The testator no doubt had reasons influencing him in making the gift to his sister, but when he had decided to give her a gift worth as much as $50,000, it seems to me to be no matter of surprise at all if he really intended that she should get as much as $60,000.

If, indeed, we could look upon the gift of the mortgage as the gift of a certain sum of money, that is, merely as a general pecuniary legacy there might be some ground for considering it substitutional. But it seems clear that it cannot be so considered. (Theobald, 7th ed., p. 152).

No doubt it is dangerous to be guided too much by mere

definitions of terms which the cases have supplied, such as "general," "specific," "demonstrative," "cumulative," "substitutional." The use of these words is only after all intended to be interpretive of the meaning of the testator as expressed in the will. The tendency to be avoided is the taking of the definitions which cases and textbooks have evolved and turning them into rules of overshadowing importance. In this case the simple situation is that the testator by his codicil expressed the intention of giving a certain definite piece of property, namely, the mortgage, whatever it is worth, to his sister. It was stated to be a second mortgage and this may make the value uncertain.

I do not think much help is to be derived either one way or the other from the way in which the words "addition" and "additional" are used in the codicil. Any codicil is in a sense an addition to a will. If the word had occurred in the first clause containing the gift of the mortgage, it would perhaps have been decisive. But its omission from that clause and its insertion in the second has in my opinion no weight the other way. The testator uses it as a phrase in the second clause, giving a reason for what he was doing, and it is natural that the word "additional" would occur to him when writing that reason down. He did not give his reason for the gift in the first clause. He kept that to himself. If he had expressed it, perhaps the word would have appeared there also.

A point referred to on the argument, but not covered by the questions asked, was, whether the real meaning of the gift in the first clause of the codicil was not that the testator gave merely the interest on the mortgage but not the principal or corpus. For myself, I can see no reason for departing from the ordinary meaning of the words used, and I therefore think the principal was given as well as the interest.

The real and difficult questions asked still remain. If the gift of the mortgage could have been held to be substitutional, *i.e.*, as being given *instead* of the legacy of $10,000, it seems to me that the application to it of the abatement provision could not have been avoided. As stated by Teetzel, J., in *Re Hunter*, 24 O.L.R. 5, at 15:—

> The general rule is, that, where one legacy is given as a mere substitution for another the substituted gift is subject to the incidents and conditions of the original one although it is not so expressed in the testamentary instrument.

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There are qualifications of this as of all rules of construction. But if we could have looked on the gift of the mortgage as of a sum of money intended to take the place of the $10,000, I think the provision for abatement must have applied.

But that is not the situation. The sister can demand a transfer of that mortgage from the executors. They have no right to proceed to realise upon it and reduce it into money without her permission. She can insist that the mortgage be left in her hands and may decide if she so pleases to leave it as an investment. It is therefore withdrawn entirely from the operation of the 3rd clause of the will by which the testator devised and bequeathed all his personal and real estate to his executors upon trust to reduce it into money.

This being so it becomes necessary to endeavour to discover some solution of the abatement problem.

Now, what did the testator do? When he executed his will he bequeathed and devised "all his real and personal estate not hereby otherwise disposed of" to his executors upon certain trusts. These were: (1) To reduce it into money; (2) Pay his debts and funeral and testamentary expenses; (3) Pay the two annuities; (4) Pay certain general legacies amounting to $23,000, and (5) Keep the residue for his infant son.

The annuities were to be paid at all events. Then if the legacies amounted to more than one-fourth of the residue they were to abate proportionately so that the son should get a clean three-fourths. That is the general scheme of the original will, and it was perfectly intelligible and practicable.

By August he had decided to change it. In the codicil he expressed a different intention. While in the will he spoke of leaving to his executors all his real and personal property "not hereby otherwise disposed of" there was, in fact, no property at all which by the will as it then stood was otherwise disposed of. The phrase then was empty of meaning. In August, he determined to give it a meaning and to "otherwise dispose of" certain of his property and he did this by his codicil. The codicil and the will must be read together as one testament and as expressing the one final will of the testator. (See judgment of Moss, C.J.O., in *Re Hunter*, 1 D.L.R. 456, quoting from *Douglas-Menzies* v. *Umphelby*, [1908] A.C. 224, at 233.)

Therefore, the two clauses of the codicil must be treated as giving substance and meaning to the phrase "Not hereby otherwise disposed of." In the third clause of the will and therefore as being really the first disposition of property made by the testament of the deceased or at any rate as reserving entirely from what was placed upon certain trusts in the executors' hands the two pieces of property therein dealt with. This is of essential importance when we come to deal with the true meaning to be attached to the word "residue" as used in the two clauses above quoted. If we consider the opening words of the second clause quoted which are, "I direct my trustees *to invest* the residue of my estate being not less than a clear 75% of the residue after payment of my just debts, funeral and testamentary expenses," it will at once be seen that the testator is here dealing only with what his trustees have power and control over, with what he has devised and bequeathed to his executors upon trust. The payment of his debts and funeral and testamentary expenses is made the first charge, not upon the whole estate, but upon that part of it which is devised and bequeathed to the executors. It seems clear, therefore, that it is quite improper to take the phrase "After payment of my debts and funeral and testamentary expenses," as indicating that by the "residue of his estate" he meant everything, including the specific gifts contained in the codicil and not given to the executors upon trust at all, which would be left after a payment of those debts and expenses. The true interpretation in my opinion is to be arrived at in this way. First, two specific gifts or devises are made, then everything else is given to the executors upon trust, and the first trust is to pay debts and expenses. The "residue" of the estate after payment of the debts and expenses is therefore the residue not only after the payment of the debts and expenses, but also after the withdrawal of the two specific provisoes or gifts made by the codicil. It seems also clear that the "residue" means everything that is left after those two deductions and that the annuities are not to be also deducted before the residue is arrived at. The annuities are by the first clause above quoted excluded not from residue but from the sum which must not exceed 25% of the residue.

In my opinion, therefore, the gifts contained in the codicil do not abate.

With regard to the second question asked, I think something

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must first be said about the manner of dealing with the annuities. It would not seem to be just to the legatees to permit the executors to use sufficient of the "residue" as above defined to purchase annuities based on the probabilities of life of the annuitants. An examination of the will shews, as originally drafted, it contained a direction to the executors to purchase annuities. But that was deliberately altered by the testator before execution The executors are directed to pay these annuities themselves in monthly payments "if possible." If the executors used enough of the corpus to purchase annuities the annuitants might die very shortly and the legatees would suffer the loss, the annuity company gaining. In my opinion the legatees are entitled to insist if they please upon having sufficient of the corpus invested by the trustees to produce the annual income given to the annuitants and to wait the expiration of their several lives for the distribution of the *corpus*. In other words, I think the annuitants are given a life interest in the income of sufficient of the corpus to produce the annuities mentioned. This, I think, the legatees may insist upon, though, no doubt, they might agree to another method of dealing with it. But assuming that they insist then the general result seems to me to be as follows: The infant son is entitled to 75% of the residue as above determined. From the remaining 25% must be first deducted, if the legatees insist, sufficient to produce, when invested, the annual income given to the two annuitants. The balance is then to be distributed among the legatees, the sister included, in proportion to the legacies given them. The merely temporary withdrawal from the residue of the fund required to produce the annuities will thus not introduce a grave complication which would otherwise have arisen if a lump sum out of the residue had been permanently disposed of in the purchase of annuities. If this latter had been the real meaning then the two sums which were evidently intended to make the 100% of the residue, viz.; that left to the child and the total sum given to the legatees would not have made up the 100% of the residue at all because the amount required to purchase annuities would have been a third sum to be covered by that 100%. But when the corpus or fund to be invested to produce the two annual incomes is preserved intact and its distribution and enjoyment merely postponed until the death of the annuitants it follows that the two sums mentioned will make up 100% of the residue. I do not

think that, by the use of the word "annuitant" the testator meant that any of the *corpus* was to be permanently disposed of to purchase them. That was what he distinctly altered when he came to execute his will. When each of the annuitants die, the principal set apart to produce her income may then be distributed among the legatees in the same proportion.

With regard to the three subsidiary questions, I agree with the view expressed by Beck, J., in making the reference to the Court. It is not necessary to quote the letters. The deceased left a cheque for $1,000 in his trunk in favour of the Edmonton Patriotic Committee and in his letter to his solicitor he asked him to see that this was paid. He also asked that certain persons be given certain named chattels. But in no case was there even a delivery of the chattels nor was there of the cheque. This is essential to a complete *donatio mortis causa*. The last three questions should be answered in the negative. As suggested on the argument, no doubt if all parties were of age the wishes of the testator might be carried out by consent, but as there is an infant son involved, I do not see how this can be done, nor can the Court give any consent on behalf of the infant.

The costs of all parties should be paid out of the estate.

Beck, J.

BECK, J.:—On the argument for the Appellate Division, the original will was produced. An inspection of it made it clear that it was the intention of the testator that the annuities should be paid out of income and not that a capital sum should be expended in purchasing annuities. This appeared plainly by the wording of the will as originally engrossed and by alterations of the language made before execution. There should be a modification to this extent of what I said when the matter was before me in the first instance.

Having again considered the various questions in the light of the further argument, I see no reason to change my opinion, except as indicated above. *Judgment accordingly.*

FARES v. VILLAGE OF RUSH LAKE.

Saskatchewan Supreme Court, McKay, J. February 25, 1916.

STATUTES (§ 11B—110)—VILLAGE ACT SASKATCHEWAN—CONSTRUED AS IMPERATIVE.

The provision of sub-sec. 7, sec. 204, of the Village Act R.S.S. 1909, ch. 86 that "all appeals shall be determined before the 30th day of September," is imperative, and the Judge has no jurisdiction to hear the appeals or give his judgment after the date so fixed.

Re Nottawasaga & Simcoe, 4 O.L.R. 1, applied.

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McKay, J.

APPLICATION to quash the decision of a Dist. Ct. Judge in an assessment appeal.

H. Y. MacDonald, K.C., for applicant.

P. H. Gordon, for respondent.

McKAY, J.:—This is an application to quash the decision of Smyth, J., in the matter of an assessment appeal.

Several objections were urged, the principal of which is that the Judge had no jurisdiction to hear and determine the same after September 30, 1915.

Sub-sec. 7 of sec. 204 of the Village Act (ch. 86 R.S.S. 1909), reads as follows:—

> At the Court so holden, the Judge shall hear the appeals and may adjourn the hearing from time to time and defer judgment thereon at his pleasure, but all appeals shall be determined before the 30th day of September; all deferred judgments shall be in writing and when given, shall be filed with the secretary-treasurer;

Pursuant to sub-sec. 2 of this sec. 204, the secretary-treasurer of the village forwarded to the Judge a list of the appeals by letter dated September 8, 1915. The Judge appears to have been absent from his place of residence at Swift Current on the arrival of this letter at such place, and by letter dated September 27, 1915, acknowledged its receipt and fixed October 15, 1915, at the secretary-treasurer's office at Rush Lake at 10.30 a.m. as the time and place for hearing these appeals. Pursuant to sub-sec. 3 of said sec. 204, the secretary-treasurer by letter dated September 28, 1915, notified the solicitors of the appellants of the time and place so fixed for the hearing of the appeals by the Judge. The appeals were heard at said time and place on October 15, 1915, by said Judge, and he gave his written decision or judgment dated December 29, 1915.

Under sub-sec. 7 of sec. 88 of The Assessment Act in Ontario, a section similar to sub-sec. 7 of sec. 204 above referred to, the Court of Appeal held that such section directing that "the judgment shall not be deferred beyond the 1st day of August next after such appeal," was imperative *Re Nottawasaga & Simcoe*, 4 O.L.R. 1.

I cannot distinguish this case from the case at bar. But apart from this case, it seems to me that the intent and object of the Act plainly requires that this sub-sec. 7 of sec. 204 should be construed as imperative. The object is clearly to have all appeals

determined within some definite time, so as to enable the village authorities to strike a rate within the year, on the completed or revised assessment roll, and send out tax notices and impose the penalty under sec. 215.

I am, therefore, of the opinion that this sub-sec. 7 in limiting the time for the determination of all appeals before September 30, is imperative, and that the Judge had no jurisdiction to hear the appeals or give his judgment after the date fixed by this sub-section.

My attention was drawn to sec. 5 of The Village Act, but I do not think this can be invoked under the facts of the case at bar, as the secretary-treasurer notified the Judge in time, namely, September 8, 1915.

With regard to sec. 6 of the Act, this was also drawn to my attention and I was asked to give the respondent property owners three weeks within which to apply to the Minister under this section to cure the defects complained of. This was objected to, on the ground that they should have done so before now. The list of appeals, as above stated, was sent to the Judge in time, but, owing to being absent (no doubt on Court work), he did not receive it until September 27, too late to fix a time for hearing before September 30, so as to allow fifteen days notice to be given to the respondent, hence fixed October 15, 1915, as the time for hearing. The applicant gave notice accordingly, and appeared at the hearing so fixed and produced witnesses thereat and did not then object to the jurisdiction of the Judge, at any rate there is no evidence before me that he did. By its action, while I am not prepared to hold that it is sufficient to give the Judge jurisdiction in the premises, yet I think it is sufficient, coupled with the fact that the delay was not the fault of the respondent in any way, to justify me in giving the respondent property owners some time from the date of this judgment within which to apply to the Minister, under sec. 6 of the Village Act, to extend the time limited by sec. 204, sub-sec. 2 for hearing and determining appeals.

I think the Judge had some evidence before him on which he could hold that the land in question was worth $50 per acre, as his notes of William Cockell's evidence are as follows: "We paid $50 per acre for two acres for nuisance ground adjoining these lots." And, although in his judgment he directs that "the secre-

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tary-treasurer will assess accordingly," I do not think this means that the assessment is to be changed from an assessment upon the lot basis to an assessment upon the acreage basis, but that the lots are to be assessed at the rate of $50 per acre, the assessed value of the lots to depend upon their size.

The result will be that the respondent will have until March 12, 1916, within which to apply to the Minister under sec. 6 of the Village Act to extend the time limited by sec. 204, sub-sec. 2, of said Act for hearing and determining appeals so as to validate the hearing of the appeals in question and the judgment thereon.

In the event of such extension being granted by the Minister, this application will be dismissed without costs, but, in the event of such extension not being granted, the judgment of the Judge will be quashed without costs, and without the actual issue of a writ of *certiorari*. *Judgment accordingly.*

MAN.

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GOLDRICH v. COLONIAL ASSURANCE CO.

Manitoba Court of Appeal, Howell, C.J.M., and Richards Perdue, Cameron and Haggart, JJ.A. May 29, 1916.

1. CORPORATIONS AND COMPANIES (§ VI D—337)—WINDING-UP—LEAVE TO PROCEED WITH DISMISSED ACTION—INSURANCE CLAIM.

A County Court Judge has no power to reinstate an action upon an insurance policy which stood dismissed for non-compliance with an order for security at the time a winding-up order was in force against the insurance company; nor should a King's Bench Judge grant leave under sec. 22 of the Winding-Up Act (R.S.C. 1906, ch. 144), to proceed with such action, particularly where the claim, meantime, has become barred by limitations under a condition in the policy.

Statement.

APPEAL from the judgment of Metcalfe, J., granting leave to proceed with an action reinstated after dismissal, against an insurance company in liquidation. Reversed.

W. L. McLaws, for appellant, defendant.

T. R. Robertson, K.C., for respondent, plaintiff.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—On January 16, 1915, the plaintiff commenced an action in the County Court of Winnipeg to recover the sum of $437.93 for loss to goods sustained by fire, the goods being insured under a policy issued by the defendant. The loss occurred on May 18, 1914. The policy contained a condition limiting the time for commencing a suit or action to 12 months next after the date of the fire. On February 3, 1915, an order was made in the County Court directing the plaintiff to furnish security for the defendant's costs. This order was not complied with, and on

March 10, 1915, an order was made by Myers, J., dismissing the action for failure to furnish the security for costs.

On April 22, 1915, an order was made by Curran, J., under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, to wind up the defendant company. On March 8, 1916, nearly a year after the plaintiff's action had been dismissed, an order was made by Myers, J., in the County Court setting aside the order of March 10, 1915, and giving the plaintiff liberty to proceed with the action. The defendant made application to a Judge of the Court of King's Bench for a prohibition to restrain further proceedingsin the action. On the return of the motion, the plaintiff made a cross-application for liberty to proceed with the action,notwithstanding the winding-up order. An order was made by Metcalfe, J., dated April 5, 1916, giving leave to the plaintiff to proceed. The defendant's application for a prohibition was dismissed by order of Metcalfe, J., dated April 6, 1916. Leave was given by Galt, J., to appeal from each of the last mentioned orders to this Court.

From a reference to the above dates, it will appear that when the winding-up order was made the plaintiff's action had been dismissed. At the time the order was made by Myers, J., restoring the action and giving plaintiff liberty to proceed with it, the limitation of time provided in the policy for enforcing the claim by suit had expired.

The validity of the order made by Metcalfe, J., giving leave to proceed largely depends upon the validity of the order made by Myers, J., vacating his previous order dismissing the action. Unless the action was still pending, there was no power to give leave to proceed with it. If it was not pending, then the plaintiff had been barred by the lapse of time. The condition limiting the time for bringing action to twelve months from the time of the loss was valid and binding on the plaintiff: *Allen* v. *Merchants Marine Ins. Co.*, 15 Can. S.C.R. 488; *Knights of Maccabees* v. *Hilliker*, 29 Can. S.C.R. 397.

No appeal was lodged against Judge Myers' order of March 8, 1916. The questions, therefore, as to whether that order should have been made in the circumstances disclosed need not be discussed. But it is open to this Court on the present appeal to consider whether the County Court Judge had power to make the order, because that order was the main material upon which

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Metcalfe, J., acted in giving the plaintiff liberty to proceed with the action. Sec. 22 of the Winding-Up Act, R.S.C. 1906, ch. 144, is as follows:—

> After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes.

The word "Court" in the above section means, in Manitoba, the Court of King's Bench: sec. 2, sub-sec. 5. At the time the order of March 8 was made, the winding-up order against defendant was in force and had been in force for nearly a year. The County Court Judge had, therefore, no power to reinstate an action which had been dismissed before the winding-up order was made or to give liberty to proceed with such action while the winding-up order against the defendant in the action was in force. But, it is urged, the King's Bench Judge might give leave to proceed, that the County Court Judge might then reinstate the action and that the fact that the latter acted first should not affect the matter. In my opinion, effect should not be given to that argument. The King's Bench Judge should not have made the order if the plaintiff's suit was not pending, because if the plaintiff's action was not pending his claim had already been barred by the condition in the policy. Metcalfe, J. assumed the validity of the order of March 8, 1916, and evidently regarded the action in the County Court as reinstated and pending by the force of that order. The material before him and the form of the order made by him, which is entitled in the style of cause of the County Court suit as well as in that of the winding-up proceeding, shew that he made the order on the assumption that the action was pending. The foundation upon which he acted, namely, the County Court order of March 8, 1916, having failed, owing to want of jurisdiction in the County Court Judge, his own order must also fail.

The plaintiff urged that the order should be supported so as to save his claim from being barred. He relied upon *Canadian Oil Works* v. *Hay*, 38 L.T.R. 549, and *McDonald* v. *London Guarantee Co.*, 13 O.W.R. 403. These cases allowed a proceeding to be taken in a suit after the time limited for taking the proceeding had expired. In each of these cases no winding-up order had been made and no question existed as to the power to make the order. On the other hand, it has been held in several cases that a writ which has ceased to be in force will not be renewed in order to

prevent the claim from being barred by the statute of limitations: *Doyle* v. *Kaufman*, 3 Q.B.D. 7, affirmed, p. 340; *Hewett* v. *Barr*, [1891] 1 Q.B. 98; *Mair* v. *Cameron*, 18 P.R. (Ont.) 484; *Watons* v. *Bowser*, 18 Man. L.R. 425. There was no room for discretion in the application under consideration. The County Court Judge had no power to make the order he made, and the King's Bench Judge should not have made an order permitting an action in the County Court to proceed which had already been dismissed and which was barred by lapse of time when the order was made. The claim being barred, a new action should not be authorized.

I think the appeal should be allowed with costs and the order of April 5, 1916, should be rescinded. This order being set aside, the Winding-Up Act, sec. 22, operates as a stay of proceedings in the County Court suit. *Appeal allowed.*

REX v. POLLOCK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 16, 1916.

1. TRADING STAMPS (§ I—10)—VOTING CONTESTS—CR. CODE SEC. 505.

A voting ticket given by a trader to each purchaser of goods to enable the latter to become a contestant for prizes to be distributed in a voting contest or to aid another contestant by voting for him or by transferring the ticket to him, is a "trading stamp" within Cr. Code secs. 335 (*u*) and 505.

Statement.

Case stated by the Senior Judge of the County Court of the County of York, before whom, without a jury, the defendant (with his own consent) was tried on the 8th December, 1915, upon a charge that "he did, directly or indirectly, issue, give, sell, or otherwise dispose of trading stamps to one Montgomery and others, being merchants or dealers in goods, for use in their business, contrary to the Criminal Code."

The Crown contended that a system adopted by the defendant of distributing prizes and issuing voting tickets constituted a violation of sec. 505 of the Code.

By sec. 335(*u*), "trading stamps" includes, "besides trading stamps commonly so-called, any form of cash receipt, receipt, coupon, premium ticket, or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods *or a premium to the purchaser* thereof, which is redeemable," etc.

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Statement.

The defendant contended that the evidence disclosed a voting contest or competition, and that the voting ticket given to a purchaser of goods did not represent either a discount or premium on the price of the goods purchased, and was lacking in the elements necessary to constitute it a trading stamp.

The County Court Judge found the defendant "guilty" as charged; and, at the request of counsel for the defendant, reserved the question whether there was any evidence upon which the defendant could properly be convicted of the offence charged —making the charge-sheet and depositions a part of the case.

H. H. Dewart, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P., delivering the judgment of the Court, said that counsel for the defendant had placed the case very fairly before the Court. The whole question was whether the giving of the ticket was the giving of a "premium," within the meaning of sec. 335(*u*).

The person to whom the ticket was given was a purchaser of goods; and it was given to him as such, and to be of some advantage to him. It was not given to him as something that was worthless. If it was of any advantage to him, it was a "premium." Obviously it must have been considered by both parties to the transaction as such; and obviously it was, because it gave to the buyer a right to contest for, and to aid himself in the contest for, a prize, or to aid some one else in that contest, and also to sell his rights under the ticket.

The case was well within both the letter and the spirit of the enactment upon which the conviction was based.

Conviction affirmed.

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SAUNDERS v. DEAVITT.

Quebec Court of Review, Archibald, A.C.J., and Mercier and Maclennan, JJ. February 19, 1916.

1. SALE (§ III A—54)—SHARES—PROMISSORY NOTE—DELIVERY PREVENTED BY ATTACHMENT—NOVATION.

Where a promissory note is given for company shares, and made payable in another jurisdiction concurrently with the delivery of the shares, the seller is not entitled to maintain an action upon the original contract in the Court of Quebec, if he is unable, as a result of an attachment by his creditors in the other jurisdiction, to produce the note and tender delivery of the shares. The note does not operate as a novation of the debt.

[See arts. 1152, 1171, 1491, 1493-4, 1533, C.C. Que.; art. 680 C.C.P. Que.]

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Archibald, A.C.J.

APPEAL from the judgment of Demers, J., of the Superior Court, which is reversed.

McGoun and *Pelletier*, for plaintiff.

Perrault and *Perrault*, for defendants.

ARCHIBALD, A.C.J.:—In this case, Saunders sold to the defendants 50 shares of the capital stock of the Improved Match Co., Ltd., for the price of $1,650. The payment of the price was to be made by two promissory notes, one of $400 and the other of $1,250. The note of $400 was made payable at the Molsons Bank in Drummondville, and the one for $1,250 was made payable at a bank, in the City of Montpellier, in Vermont. Upon this latter note was written the following:—

This note is given for 50 shares of the capital stock of the Improved Match Company, of Drummondville, province of Quebec, which said F. C. Saunders warrants free from all encumbrances, a certificate of which is to be hereto attached when presented for payment.

As a matter of fact, the certificate of the 50 shares was attached to this note and the note with the certificate, or rather I should say, a note and certificate made as duplicates of the original note and certificate, which had been lost, were, about the month of December, 1909, sent to the bank of Montpellier where the note was made payable.

Payment was not made by the defendants; but almost immediately after the arrival of this note and certificate in the Bank of Vermont, proceedings were taken by Bailey and Whelan against the plaintiff in the County Court of Chittenden in Vermont which resulted in placing said note and stock in the hands of justice in the said United States Court. This being the case, the plaintiff was unable to obtain either the money for his note or the note itself and so he brought his action here in Montreal founded upon his contract with the defendant for the sale of the shares in question.

The Court below has given him judgment in accordance with this demand, on the grounds that the defendants have never been condemned to pay Bailey; that Bailey is not their creditor, and there is no novation, and they are still the debtors of the plaintiff; and that the plaintiff was entitled to this action in order to avoid prescription, to preserve his right to interest and to protect himself against the possibility of the insolvency of the defendants.

But considering that the defendants to avoid a condemnation and execution by the plaintiff should have deposited the amount

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of their debt in Court (art. 680 C.C.P., Beullac, No. 201), the defendants were condemned to pay the plaintiff $1,250 reserving their right to get the note and certificate from the Court of Chancery, Washington County, Vermont, and execution was allowed to issue accordingly after 15 days, except in case the defendants, within said delay, should prefer to deposit the money in this Court, to wait the decision of the Courts in Vermont, or file a certificate to the satisfaction of this Court, that said deposit has been made in the Chittenden County Court, in case of *Bailey* v. *Saunders*, on behalf of the plaintiff and his pretended creditor.

The Court of Review reversed the judgment for the following reasons:—

Considering the agreement signed at Montreal between the parties and the promissory note for $1,250 signed by the defendants and payable to the order of the plaintiff must be regarded as forming only one contract, inasmuch as it is in the promissory note that the parties stipulated the place where the contract was to be performed, where the payment was to be made by the defendants and where the title to the 50 shares of stock was to be delivered by the plaintiff;

Considering the Superior Court, in the district of Montreal, had no jurisdiction in this cause;

Considering the said promissory note for $1,250 has not been lost, and as it forms a material part of the cause of action upon which the plaintiff must rely, this action cannot be maintained in view of the fact that the said note is not produced in Court and tendered back to the defendants;

Considering that payment of said note for $1,250 and delivery of the certificate for the 50 shares of the capital stock of the Improved Match Company, Ltd., were to have been made concurrently, and the plaintiff does not tender in the present action delivery of the title of the said shares and is not entitled to ask for payment of their price without offering delivery of the property sold;

Considering there is error in the said judgment in the Court below rendered on April 27, 1915;

Doth reverse said judgment of the lower Court, and proceeding now to render the judgment which should have been rendered, doth dismiss the plaintiff's action with costs against the plaintiff

both in this Court and in the Court below and in consequence doth dismiss the cross-inscription of the plaintiff with costs.

I am of opinion that this judgment is wrong. It is true that the promissory note does not operate novation of the debt, but in this instance the promissory note was attached to the thing sold and it was understood that the thing sold was not to be delivered until the note was paid. The circumstances shewn in the case prove that the plaintiff is not now in a position to deliver the shares sold unless he pay to his creditors in the city of Vermont the sums which they are demanding. I cannot think that, under these circumstances, the Court ought to have condemned the defendants to pay in this district.

I am to reverse the judgment and to dismiss the plaintiff's action.

MACLENNAN, J.:—The present action was instituted in this Court on August 12, 1913, upon the written agreement executed in Montreal. The promissory note for $1,250 has not been produced or filed in this record, the plaintiff alleging his willingness to surrender the note upon payment, alleging that he is unable to obtain possession thereof and the return thereof having been prevented by certain legal proceedings over which he has no control The defendant Deavitt is described in the writ as of Montpellier, Vermont, and the defendant Harvey as of Drummondville, in the district of Arthabaska. The action was served personaly upon Harvey, at Drummondville; the defendant Deavitt was called in by newspaper advertisement. The defendants objected to the jurisdiction of the Superior Court, in the district of Montreal, by a declinatory exception which was dismissed by the late Honourable Beaudin, J., who reserved to the defendants the right to raise their objection on the merits.

Maclennan, J.

The agreement signed in Montreal between the parties and the promissory note for $1,250 must be regarded as forming only one contract, and it is impossible to separate the one from the other. The agreement is incomplete without reference to the promissory note, because it is in the latter that the parties stipulated the place where the contract was to be performed, where the payment was to be made by the defendants and where the title to the 50 shares of stock was to be delivered by the plaintiff (C. C., 1152), *Equitable Life Assur. Soc.* v. *Perrault*, 26 L.C.J. 382,

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387. On the authority of this case, the Superior Court in Montreal had no jurisdiction in the matter. This Court has nothing to do with the validity or legality of the actions taken by Bailey and Whelan in the Vermont Courts. Both these actions have been contested by Saunders, and if they are unfounded, no doubt they will be finally dismissed. No valid reason has been shewn which prevented Saunders from enforcing payment of his claim for $1,250 at the place where he agreed with the defendants that it should be paid. The bringing of this present action in the district of Montreal, in August, 1913, was an attempt to force the defendants to pay the $1,250 at a place different from the place where they undertook and agreed to make the payment, and where Saunders agreed to deliver title to the shares.

It is obvious that the plaintiff's object in suing here was to avoid meeting the issue raised in the Vermont Courts by the persons who claim to be his creditors and who have put a garnishee attachment in the hands of the defendants and had seized the certificate of the shares and the promissory note for $1,250. If the present action is maintained, there is danger that the defendants may have to pay their debt twice. As the note is not lost and as it forms a material part of the cause of action upon which the plaintiff must rely, this action, in my opinion, cannot be maintained in view of the fact that the note is not produced and tendered back to defendants, *Hudon* v. *Girouard*, 21 J. 15; *Dawson* v. *Desfossés*, 10 Rev. Leg. 127; *Tessier* v. *Caillé*, 25 Que. S.C. 207.

Another fatal objection to the plaintiff's action is, in my opinion, that the plaintiff does not tender delivery of the title of the shares. Payment of the note for $1,250 and delivery of the certificate for the shares were to have been concurrent, and the plaintiff is not entitled to ask for payment without offering delivery of the property sold.

In my opinion, the judgment of the lower Court should be reversed, and the plaintiff's action dismissed with costs.

Appeal allowed.

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McLEAN v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 13, 1916.

1. DISCOVERY AND INSPECTION (§ IV—20)—DEFINITENESS OF PERSONS NAMED—EMPLOYEES.

Under the Alberta Practice Rules (rr. 225, 234) an order for examination for discovery must plainly designate the person to be examined. The words "any person who is or has been employed by the defendant company" are too general and should be struck out.

2. DISCOVERY AND INSPECTION (§ IV—31)—RAILWAY EMPLOYEES—OFFICER OF CORPORATION.

One purpose of the Alberta Practice Rules (r. 234) is to enable a party to examine the opposite party, or such of his employees, as were directly connected with the transaction or occurrence, not merely as witnesses, but by reason of the character of their employment.

Present or past employees who appear to have some knowledge touching the question in issue may be examined for discovery only.

[*Nichols & Sheppard Co.* v. *Skedanuk*, 6 D.L.R. 115, 5 A.L.R. 110, referred to.]

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McLEAN v. CANADIAN PACIFIC R. CO.

APPEAL from the judgment of Walsh, J., on a motion for examination for discovery. Affirmed.

Statement.

H. P. O. Savary, for plaintiff.

G. A. Walker, for defendant.

BECK, J.:—On a motion for directions the local Judge at Macleod made an order that the plaintiff be at liberty to examine for discovery "any person who is or has been employed by the defendant company and particularly the following persons: Wm. Ansley, James Beattie, S. B. Fraser, J. Kunnburgh, L. G. Skene and J. L. Scott, each of the said persons being employees of the defendant company residing at Macleod."

Beck, J.

The action is for negligence resulting in the death of the plaintiff's husband, of whose will she is executrix, by his being run over at the Macleod station by a train of the defendant company. It was stated before the local Judge, that Ansley was a yardman, Beattie the brakeman on the train, Fraser the locomotive foreman, Skene the locomotive engineer and Scott a yardman, all being actively engaged in their duties at the time of the accident or before it in such a way as to be connected with the operation of the train.

On an appeal, Walsh, J., quite rightly struck out the words "any person who is or has been employed by the defendant company and particularly the following: William Ansley."

Ansley's name was struck out because he had, under r. 250, been selected by the defendant company as the person to be examined as representing it, and whose depositions might be used as evidence against it.

The general words were clearly properly struck out because the rules as to discovery (r. 234 *et seq.*), coupled with those relating to motions for directions (r. 225 *et seq.*), make it quite plain that the order for examination should designate—though doubtless this may be done by description—the person to be examined.

There seems to have been no real dispute before the local

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Judge as to the fact that the several persons named for examination were employed by the defendant company in the capacities and at the time I have stated. Had there been, it would undoubtedly have been the duty of the local Master to give leave to the plaintiff to file an affidavit with of course leave to the defendant Company to meet it.

As was pointed out in *Nichols & Sheppard Co.* v. *Skedanuk*, 6 D.L.R. 115, the purpose of an examination for discovery, even under our former rules, was two-fold: first, to obtain discovery or information as to the facts; second, to obtain admissions which may be used in evidence against the party who or whose officer is examined. This two-fold purpose is even more emphasized in our present rules. Under them, one definite purpose is to enable a party to examine the opposite party or such of his employees as were directly connected with the transaction or the occurrence not merely as witnesses but by reason of the character of their employment. The wide and general words of the rules must, I think, be interpreted impliedly as restricted in this sense. The persons named appear to come within the rules so interpreted.

Among the contentions which were urged on behalf of the defendant company, was one, that the intent of the rule is that one person only should, at all events in the first instance, be examined as representing the opposite party whether a corporation or an individual; that is, in the case of a corporation only one person selected by the corporation or designated by a Judge should be examined, and in the case of an individual or individuals being parties, if the opposite party desires to examine an employee or employees instead of the party, he should be confined to one such person—at all events in the first instance; inasmuch as under the traditional practice, a person subject to examination for discovery, whether as in England by way of interrogatory or as here by way of *viva voce* examination, is bound to inform himself in respect of such matters as are in question, as are within the knowledge of his servants or agents, or in the case of a corporation of its servants or agents acquired in the course of their employment, *Bolckow Vaughan & Co.* v. *Fisher*, 10 Q.B.D. 161, at 169; *Welsbach I. Gas L. Co.* v. *New Sunlight I. Co.*, [1900] 2 Ch. 1; *Knapp* v. *Harvey*, [1911] 2 K.B. 725, and the depositions of the representative of the corporation could be read against the corporation.

Under the English practice, a corporation could be required to answer by more than one officer (See cases collected in Bray's Digest of the Law of Discovery (1904), p. 44; Annual Prac. 1916, p. 515). The extent to which the English rules for discovery by way of interrogatories go is that in the case of individuals, the opposite party or parties may be examined, and in the case of a corporation being the opposite party, it may be examined through the medium of one or more of its "officers or members." Our rules go further. An opposite party may be examined, including a corporation, through the medium of a selected or designated "officer." In either case, the whole or any part of the depositions may be read against the party examined; but in addition to this our rule (234) says "or any person who is or has been employed by any party and who appears to have some knowledge touching the questions in issue." The examinations of present or past employees cannot be read against the party of whom he was an employee, and are therefore for the purpose of discovery only.

In the case of the examination for discovery of an individual litigant he, equally with an officer of a corporation, is under the English practice bound to inform himself of the matters within the knowledge of his employees: Bray on Discovery, p. 134. I should think he is equally bound to do so under our rules; but nevertheless these rules clearly say that his employees may themselves be examined; in other words, that the opposite party is not bound to be satisfied with the answer of the party with respect to what he has learned from his employees, but may examine the employee himself. I think the rules intended no distinction between an individual and a corporate litigant, and therefore that the opposite party may examine an employee of a corporation although the corporation submits to the examination of one or more of its officers; and I think too that the word "officer" by contrast with the words "person . . . employed" is meant to be construed much more restrictively than under the former rules.

It was for a long time preceding the present rules the practice of this Court, and the former Supreme Court of the North West Territories, to order the examination of another officer of a corporation where the examination of the officer first examined made it appear that he was not possessed of the knowledge he was sup-

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posed to have. There is nothing to indicate an intention to depart from this principle, and I think it should be applied in the case of the examination of employees; but where, on the question first coming up, it is apparent, as I think it was here, that each of the employees whose examination was asked occupied a different position with regard to the corporation, and had different duties with regard to the corporation's property or operations relating to the occurrence in question, I think it was quite proper to direct at once the examination of all of them. During the argument some questions were discussed which related to the extent to which an examination for discovery of a party, an officer, or employee might go. The parties must be left to raise any such questions at the time of the actual examination and to have them decided in the usual way.

I suggest that it is one of the purposes of the rules that facts learned upon an examination for discovery of an employee—which as I have pointed out cannot be made use of as evidence against his employer—should in an appropriate case be made the subject of a notice to admit facts. One of the purposes of discovery is to obtain admissions. One of the purposes of a notice to admit facts is to save costs.

As I have already indicated, I think the order in question as amended by Walsh, J., was right, and, therefore, that the appeal should be dismissed with costs.

Scott, J.
Stuart, J.

SCOTT and STUART, JJ., concurred.

McCarthy J.

MCCARTHY, J. (dissenting):—In my opinion, the examination of the yard-master should be proceeded with before any other employee of the defendant company is examined, because it may be found that discovery for both of the purposes referred to in *Nichols* v. *Skedanuk*, 6 D.L.R. 115, may be obtained from him and thereby relieve both parties from the additional inconvenience and expense. If further discovery is necessary, I think the further examination should be restricted to one of these subordinate employees at the election of the plaintiff, and to this extent the order in appeal should be modified. This seems to be the practice followed in Ontario with regard to the examination of officers of a corporation and r. 439 as it existed in 1898.

For the above reasons amongst others, I would allow the appeal, costs here below to be costs in the cause.

Appeal dismissed.

REX v. PORTER.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. January 10, 1916.

1. FRAUD AND DECEIT (§ IV—15)—TRADER FAILING TO KEEP BOOKS—FRAUDULENT INTENT—CR. CODE SEC. 417 (c).

The failure by a trader to keep books of account must have subsisted for five years before he became unable to pay his debts, otherwise subsec. (c) of Cr. Code sec. 417, as amended by 4 Edw. VII. (Can.) ch. 7 does not apply to make such neglect indictable; and an indictment under the sub-section is bad, as disclosing no offence, if it omits all reference to the time for which the failure to keep books had continued.

Statement.

CASE stated by the Senior Judge of the County Court of the County of York for the opinion of the Appellate Division of the Supreme Court of Ontario, as follows:—

"The defendant was tried before me on the 3rd day of November last on the charge that he, being a trader and being indebted to an amount exceeding $1,000 and unable to pay his creditors in full, did not keep such books of account in the said business as are required by section 417(*c*) of the Criminal Code of Canada.

"I found the accused 'guilty,' but have reserved for the opinion of the Court the questions following, and have made the evidence and exhibits at the trial, including the examination of the accused as an insolvent, part of this case:—

"(1) Must the defendant have been in the business in question for a period of five years next before his inability to pay, and does the being in business for a period of little more than nine months exempt him from the operation of sub-section (*c*) of section 417?

"(2) Should I have quashed the charge on the ground that no offence was shewn under the Criminal Code?"

T. C. Robinette, K.C., for defendant.

Edward Bayly, K.C., for the Crown.

The judgment of the Court was delivered by

Meredith,C.J.O.

MEREDITH, C.J.O.:—Case stated by the Senior Judge of the County Court of the County of York.

This is a prosecution under sec. 417(*c*) of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to a fine of $800 and to one year's imprisonment who . . . being a trader and indebted to an amount exceeding $1,000, is unable to pay his creditors in full and has not, for

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five years next before such inability, kept such books of account as according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to explain his losses to the satisfaction of the Court or Judge and to shew that the absence of such books was not intended to defraud his creditors."

We think that it is plain that it is an essential element of the offence that the person charged, for five years next before his inability to pay his creditors arose, should not have kept such books of account as are necessary to exhibit or explain his transactions, etc. The charge in this case is simply that the person, being a trader and indebted to an amount exceeding $1,000, and unable to pay his creditors in full, had not kept the necessary books.

This charge, in our opinion, disclosed no offence, as it omitted all reference to the time for which the failure to keep the books had continued.

If the contention of Mr. Bayly—which would require us to construe the section as meaning "at any time during five years" —were to prevail, a man who had carried on business for only a month, and during that time, or any part of it, had failed to keep books of account, would be, *primâ facie*, guilty of the offence mentioned in the section.

What the section is aimed at is the failure to keep books of account with the fraudulent intent of defrauding creditors; and it was deemed proper that, where that has continued for five years, shewing a systematic course of conduct, a presumption of intent to defraud should arise, which, however, the accused might rebut in the manner mentioned in the section.

The adoption of this construction is, no doubt, open to the observation of my brother Magee, made during the argument, that it would permit a man who had been in business for five years, and had for four years and eleven months failed to keep books of account, to escape liability if he were astute enough to keep them for the remaining month; but that is a matter for the consideration of Parliament; our duty is to construe the section.

Conviction quashed.

BOARD OF RAILWAY COMMISSIONERS.

The following cases decided by the Board have been reported in full in Part 2, Vol. XIX., "Canadian Railway Cases Annotated."

Re TRENTON, MAYNOOTH AND BANCROFT LINE.

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March 19, 1915.

1. TRAIN SERVICE — EARNINGS—DECREASE AND INCREASE—TRAFFIC—PASSENGER AND FREIGHT—CONSTRUCTION STAGE.

In answer to complaints that a railway company during a period of depression has decreased and impaired the passenger service upon one of its local lines forming part of its system, the company submitted figures shewing a deficit as a result of the operations of its system as a whole within the province. It appeared, however, that the earnings of the local line in question shewed a decrease in the passenger traffic but there had been an increase in its freight earnings, resulting in net increase, the Board held that the local line should not be blamed for the deficit on the system generally (due to the operation of lines which could hardly be said to have passed beyond the construction stage), that the former passenger service should be restored, and it so ordered.

APPLICATION to direct the Canadian Northern to restore the former train service on its Trenton, Maynooth & Bancroft line.

TAYLOR AND CANADIAN FLOUR MILLS CO. v. CANADIAN PACIFIC AND PERE MARQUETTE R. COS.

March 31, 1916.

1. TOLLS—INTERSWITCHING—MILLING IN TRANSIT—PRIVILEGE.

The toll for the milling in transit privilege does not include the toll for interswitching necessary to take the traffic from the line of one railway company to another. *Anchor Elevator Warehousing and Northern Elevator Cos.* v. *Canadian Northern and Canadian Pacific Ry. Cos.*, 9 Can. Ry. Cas. 175, followed.

G. B. Spence, for applicants.

E. P. Flintoft, for respondents.

ESSEX TERMINAL R. CO. v. TOWN OF SANDWICH.

March 23, 1915.

1. RAILWAY ON HIGHWAY—CONSTRUCTION—JURISDICTION—AUTHORIZATION.

Construction of a railway along a highway is objectionable, and, except under special circumstances, the Board will not exercise its jurisdiction to authorize such construction (for example, where the object of the company's incorporation would otherwise fail).

O. E. Fleming, K.C., for the applicant.

J. Sale, for respondent.

Messrs. *Bartlett*, *Morton*, *Henderson* and *Rodd*, for the property owners interested.

G. H. Henderson, for Canadian Salt Co.

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CITY OF TORONTO v. CANADIAN PACIFIC RY. CO.

(Symington Ave. Crossing Case.)

August 2, 1915.

1. HIGHWAYS CROSSED BY RAILWAY—PROTECTION—GATES AND WATCHMEN—TRAFFIC—HEAVY—APPORTIONMENT OF COST—EQUAL PORTIONS—RAILWAY GRADE CROSSING FUND.

Where the traffic on the highway is much heavier than on the railway by which it is crossed, and protection by gates and watchmen is necessary, the Board ordered 20% of the cost of protection to be paid out of the Railway Grade Crossing Fund, and the remaining 80% to be divided equally between the applicant and respondent as well as the cost of operation.

APPLICATION to decide the nature of the protection, apportioning the cost between the parties interested, where the respondent railway crosses Symington avenue in the applicant city.

G. R. Geary, K.C., for applicant.

E. P. Flintoft, for respondent.

TOWNSHIP OF LOUGHBORO v. CANADIAN NORTHERN R. CO.

September 30, 1915.

1. TRAIN SERVICE—OBLIGATION — EARNINGS — UNREMUNERATIVE — BY-LAW—BONUS.

Where the total freight and passenger earnings on a section of railway are unremunerative, the Board will not order the former train service to be restored, but where, under a by-law of the municipality, in consideration of a bonus of $5,000, the railway company's predecessor in title undertook to run a train from Sydenham to Harrowsmith in the forenoon and one back in the afternoon every week day, and if the company should at any time hereafter "fail to . . . run said train, they can only do so upon repaying said bonus of $5,000 to said municipality," it was held that this obligation was not met by running a train leaving Sydenham at 1.59 a.m. and arriving at Harrowsmith at 2.09 a.m., and that the bonus must be repaid unless the morning service was restored.

APPLICATION directing the respondent to restore the former train service between Sydenham, Harrowsmith Junction and Kingston.

Dr. J. W. Edwards, M.P., for applicant.

R. H. M. Temple, for respondent.

OSTRANDER v. CANADIAN PACIFIC, CANADIAN NORTHERN AND GRAND TRUNK PACIFIC R. COS.

September 30, 1915.

1. GRAIN — CARS — FACILITIES — PUBLIC INTEREST — CONGESTION — SWITCHING.

It is in the public interest that there should be no congestion of the railway facilities at elevator terminals. Accordingly, an application for switching cars of grain to private elevators at Fort William after the cars had been placed for unloading at other elevators was refused.

Under the provisions of sec. 8 of the Bulk Grain Bill of Lading, delivery

may be made at any of the elevators at Port Arthur, Fort William or West Fort, without waiting 48 hours after written notice of arrival has been sent or given.

THE application was heard at Fort William, June 14, 1915.

R. J. Henderson, for applicant.

W. B. Lanigan, for Canadian Pacific Ry. Co.

Geo. Stephens, for Canadian Northern R. Co.

A. E. Rosevear, for Grand Trunk Pacific R. Co.

SASKATCHEWAN BOARD OF HIGHWAY COMMISSIONERS v. CANADIAN NORTHERN R. CO.

October 2, 1915.

1. RAILWAY CROSSED BY HIGHWAY—APPORTIONMENT OF COST—SENIOR AND JUNIOR RULE—CONSTRUCTION—UNOBJECTIONABLE.

When a railway is sought to be crossed by a highway the Board will give authority for the construction of the crossing, as long as it is unobjectionable and is constructed in accordance with the standard regulation of the Board, on terms that the cost, under the senior and junior rule, is not thrown on the respondent railway company. The local authorities will determine whether or not to construct the crossing.

APPLICATION of the Board of Highway Commissioners for the Province of Saskatchewan to authorize the crossing of a street over the station grounds of the respondent at its expense.

QUEBEC CENTRAL RAILWAY CO. v. DOMINION LIME CO.

October 2, 1915.

1. REFUND—JURISDICTION — TOLLS — JOINT TARIFF — CANCELLATION — RAILWAY ACT, SEC. 338.

The Board has no power to authorize a refund from a toll properly quoted under a tariff duly filed. However, under sec. 338 a joint tariff cannot be cancelled without a new one being filed in substitution thereof, and a railway who charged a toll under a cancelled joint tariff, was authorized to make a refund of the difference between such toll and that chargeable under the substituted tariff.

TOWN OF ST. LAMBERT v. MONTREAL & SOUTHERN COUNTIES R. CO.

October 19, 1915.

1. TRACKS—PAVING—AGREEMENT—APPORTIONMENT OF COST—JURISDICTION—PUBLIC INTEREST—RAILWAY ACT, SEC. 5, 8 & 9, EDW. VII, CHAP. 32, SEC. 26A.

Where a railway company laid "T" rails for an electric railway upon the street of a municipality under an agreement and confirmatory by-law containing the provision "the said rails to be level with the existing roadbed and that gravel be placed and maintained in good order by the company between the rails and two feet on either side thereof," such company is not bound at the request of the municipality, at a later date, to construct a permanent foundation of any character and pave between the

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rails. The Board has jurisdiction under secs. 5 and 26A (8 & 9 Edw. VII. ch. 32) and may authorize the municipality at its own expense to change the railway grade to conform to the altered grade of the highway and, if it desires, to surface the railway right of way in the same way and with the same foundations as the adjacent highway, the railway company contributing such portion of the cost as represents its contractual liability to lay gravel between the tracks and two feet on either side thereof.

APPLICATION directing the respondent to level its rails, place them upon permanent foundations, pave between the tracks and on the sides thereof on certain streets in the applicant town and requiring that the work be done at the cost of the respondent.

H. J. Elliott, for applicant.

W. C. Chisholm, K.C., for respondent.

CANADIAN PACIFIC R. CO. v. MONTREAL CORN EXCHANGE ASSOCIATION.

November 4, 1915.

1. STOP-OVER—PRIVILEGES—FURTHERANCE ORDERS—TOLL—EXTRA.

A stop-over privilege of 72 hours after arrival at Cartier is sufficient time for a trader to decide where to send his grain, and an extra toll should be paid for cars remaining on hand waiting for furtherance order after the expiration of that period.

APPLICATION to make an extra toll for cars remaining on hand at Cartier waiting for furtherance orders, after the expiration of 72 hours stop-over privilege from time of arrival.

E. P. Flintoft and *W. B. Lanigan*, for applicant.

W. S. Tilton, for respondent.

COUNTY OF PONTIAC v. CANADIAN PACIFIC R. CO.

December 29, 1915.

1. RAILWAY CROSSED BY HIGHWAY—ROAD ALLOWANCES—RESERVATION BY CROWN—BY-LAW—DEDICATION AND PRESCRIPTION—R.S.Q. 1909, SEC. 2052.

In the Province of Quebec, as distinguished from Ontario, there are no road allowances, highways being opened across railways (1) by resolution or by-law emanating from the municipal authority, (2) by the Lieutenant-Governor-in-Council under sec. 2052, R.S.Q. 1909, (3) by dedication and prescription. Where there is nothing in the application to shew that the highway concerned was opened before the railway under any of the above heads, the crossing should be authorized at the municipality's expense.

[*Township of Caldwell* v. *Canadian Pacific Ry. Co.*, 9 Can. Ry. Cas. 497, distinguished.]

APPLICATION to extend a municipal highway over the tracks of the respondent.

JONES v. DE MARCHANT.

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C. A.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Cameron and Haggart, JJ.A. May 29, 1916.

1. ACCESSION AND CONFUSION (§I—1)—FUR SKINS MADE INTO COAT—REPLEVIN.

Where beaver skins belonging to a wife have been wrongfully taken from among her effects by her husband, who has them made up into a fur coat which he makes a gift of to a third person, the property in the coat is in the wife under the principle of "accession," and the coat may be recovered by her in an action of replevin.

[See also *Doucet* v. *Salem Sode* (N.S.), 27 D.L.R. 731.]

APPEAL by plaintiff from a judgment in favour of defendant in action for replevin. Reversed. Statement.

A. K. Dysart, for appellant, plaintiff.

J. E. Robertson and *A. M. Doyle*, for De Marchant, respondent.

The judgment of the Court was delivered by

RICHARDS, J.A.:—The plaintiff gave to her husband her own moneys, to buy for her beaver skins, to be made into a coat for herself. He bought them and delivered them to her, and she put them, for safe-keeping, into a locker which she and he had control of and access to. Afterwards the husband, without the plaintiff's knowledge, promised the defendant to give her a fur coat, and arranged with a working furrier to make it, and furnish the lining and trimmings, for $50, he, the husband, to furnish the furs. Then, without the plaintiff's knowledge or consent, he took the skins from the locker and sent them to the defendant. Apparently, he did not then purport to give them to her. His intention in sending them seems to have been to shew her them as the furs from which the promised coat was to be made. Richards, J.A.

About the next day he, or the defendant, took them to the furrier, who made them into a coat, to fit the defendant. When finished it contained 18 skins that had been the plaintiff's property and 4 others furnished by the husband at the furrier's request, as the 18 were not enough to complete the coat with.

The husband went several times to the furrier's to see how the work was progressing. When it was finished he called and paid the furrier the $50 by his, the husband's cheque, took the coat away and gave it to the defendant.

Some months after the furs were so taken from the locker the plaintiff learned of the disposal her husband had made of them. She went to the defendant and accused her of having the coat. She swears that the defendant then denied all know-

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ledge of the coat and insisted that she, the defendant, was not the person who had it. That is not contradicted by the defendant, and I think we should assume that the defendant did make such denial.

After some further dealings, which are not material to the issue, the plaintiff replevied the coat in the County Court of Winnipeg. The trial Judge decided that it was the defendant's property, and ordered the Court bailiff, who apparently had it in his possession, to deliver it to the defendant. The plaintiff then appealed.

The defendant claims that, on the evening when the coat was given to her and before the husband went to get it, he said he had not with him the money to pay the furrier and that she then gave him $50 for that purpose. Though it would, perhaps, have made no difference whether she did or not, I think she failed to prove it. In any event, the furrier was paid by the husband's cheque, and not with her money. If she did hand it to the husband, she, on her own statement, apparently only loaned it, and she has not said that he did not afterwards repay her. If he did not, the transaction could, at the most, have only created a debt from him to her.

She claims to have known nothing of the plaintiff's ownership of any of the furs used. I do not think that should be believed in face of her denial to the plaintiff of all knowledge of the coat. Whether she did know or not, is, however, immaterial. She was a gratuitous donee and could stand in no better position than the husband.

The husband was plainly guilty of wilful trespass in taking the plaintiff's furs for a purpose that would deprive her of them. He never acquired a title of any kind to them. They were her separate property, bought with her own money, and the title to them remained in her.

In the finished coat they constituted the greater part of the material. In saying that I do not imply that if they had been the smaller part it would have affected her rights when they had been taken by a wilful wrongdoer. Their identity was not destroyed. The fact that it is impossible now, in examining the coat, to say which parts of it constitute the 18 skins, does not shew their identity to be lost. They are traced to the coat and shewn to be part of it, which sufficiently identifies them.

It is said that, as she cannot say which are hers, she cannot separate them. She is not called upon to do so. The case is governed by the law of accession, and the loss has to be borne by the wrongdoer or the defendant who claims through him.

Bouvier's Law Dictionary defines accession as,

> The right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accessory, either naturally or artificially.

Vol. 1 of the A. & E. Encyc. of Law, at p. 247, says:—

> Accession is a source of title to property, by virtue of its incorporation with, or annexation to, that which is already the property of the individual in whom the right to the acquisition is thus vested.

A foot-note to sec. 819, in vol. 22 of Halsbury's Laws of England, says:—

> The acquisition of ownership by "accession" is grounded on the right of occupancy and founded on a doctrine of the Roman Law.

That section itself says:—

> If any corporeal substance receives an accession by natural or artificial means, as by . . . the embroidery of cloth, or the conversion of wood or metal into vessels or utensils, the original owner is entitled by his right of possession to the property in its improved state.

In Blackstone's Commentaries, vol. 2, p. 405, after discussing the doctrine of accession and referring to the "confusion of goods, where those of two persons are so intermixed, that the several portions can no longer be distinguished," and, after discussing the civil law, which, in case of wilful intermixture, gives the property in it all to the person whose property has been wrongfully put into the mixture, yet "allows a satisfaction to the other for what he has so improvidently lost," the author says:—

> But our law, to guard against fraud, allows no remedy in such a case; but gives the entire property, without any account, to him, whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent.

A similar statement of the law is in Broom and Hadley's Commentaries on the Laws of England, vol. 2, p. 602.

On p. 251 of vol. 1 of the A. & E. Encyc. of Law, is:—

> If a trespasser, with knowledge that the property operated upon belongs to another, wrongfully makes additions thereto or performs labour thereon, the original proprietor will retain title to his original materials and acquire title to the completed product, without regard to the comparative value of the labour performed or materials added . . . provided the original materials can be traced.

I have quoted above from text books at some length because, with the exception of some very early, and very meagrely reported

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decisions, I can find no English cases dealing with the doctrine of accession in its relation to goods. There are modern English cases reported where there was a commingling of moneys, or where accounts were confused that should have been separately kept. In such cases the same rule as above seems to be applied where, by the wilful act of one owner, moneys, or accounts have become so confused by a wrongdoer that it cannot be ascertained what portion belongs to the wrongdoer and what to the other.

A translation of a much referred to case, in the Year Book, 5 Henry VII., folio 15, is given in a foot-note at pp. 335 and 336 of 4 Denio's Reports (N.Y.). In it the defendant justified the taking of certain boots and shoes from the plaintiff by pleading that he had bailed certain leathers to one J. S. who had given them to the plaintiff, who had made from them the boots and shoes in question. The plea was held good. In giving judgment the Court went further and said:—

> But in every case where the thing itself may be known, there the party may take it, notwithstanding that some other thing be joined or mingled with it.

A number of cases dealing with the law of accession as applied to goods are to be found in American reports. What is perhaps the leading one is *Silsbury* v. *McCoon*, 3 N.Y. 379, in which it was held, by the Court of Appeals of the State of New York, that, where corn had been wrongfully taken and converted into whisky, the title to the whisky was in the owner of the corn.

That decision goes much further than is necessary for the case before us. As the species was altered by the distillation from corn to whisky, the holding is perhaps contrary to *dicta* in some of the early English cases. But, though I express no opinion as to that, to the extent necessary to go in the present case it agrees with the English law. I quote, therefore, from it, passages that, except perhaps as to effect of change of species, agree with the law of England as I understand it; and I do so at some length because of the poverty of English reported decisions, and because of the able way in which the law is stated.

At p. 388 Ruggles, J., with whom the majority of the Court concurred, after referring to an argument advanced by counsel, that the common law does not, as the civil law does, distinguish between a wilful and an involuntary wrongdoer, but places the former on the same plane as the latter, says:—

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The Common Law on this subject was evidently borrowed from the Roman at an early day: and at a period when the common law furnished no rule whatever in a case of this kind.

At p. 390, he says:—

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labour of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred fold by the labour of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the remedy, and not at all to the right. . . . In all cases, where the new product cannot be identified by mere inspection the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

It would be most unjust if the plaintiff had no remedy for the loss of her furs, or could only bring an action for damages for the conversion, in which, even if she recovered judgment, she could probably realize nothing.

With much deference to the view taken by the trial Judge, I think that the title to her furs is still in the plaintiff, and that she is, under the law of accession, justified in claiming with them, against the defendant, the materials added to them by the wrongdoer, and the increased value given to them by the labour expended.

I would allow the appeal with costs, set aside the judgment entered in the Court below and enter judgment there for the plaintiff, with costs, and order the delivery of the coat to the plaintiff. *Appeal allowed.*

RIVERSIDE LUMBER CO. v. CALGARY WATER POWER CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 13, 1916.

1. NEW TRIAL (§ IV—31)—NEWLY DISCOVERED EVIDENCE.

An application for a new trial, on the ground of newly discovered evidence, will be refused where the applicant fails to shew that reasonable diligence had been exercised in searching for the evidence before the trial.

[*Riverside Lumber Co.* v. *Calgary Power Co.*, 25 D.L.R. 818, new trial therein refused; *Young* v. *Kershaw*, 81 L.T. 531, followed; *Robinson* v. *Smith* [1915,] 1 K.B. 711, distinguished. See also *McDonald* v. *McKay* (N.S.), 8 D.L.R. 78; *Willoughby* v. *Sask. Valley Co.*, 48 S.L.R. 454; *Menard*

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v. *Thibault*, 14 Que. P.R. 384; *Lorne* v. *Arnold*, 25 Man. L.R. 60; *Hagemeir* v. *C.P.R. Co.* (Man.) 20 D.L.R. 29; *Hanson* v. *Ross*, 42 N.B.R. 650.]

APPEAL from the judgment of Ives, J., 25 D.L.R. 818, dismissing an action for damages, and motion for a new trial. Dismissed.

H. P. O. Savary and *L. H. Fenerty*, for plaintiffs, appellants.

J. C. Brokovski, for defendant, respondent.

STUART, J.:—Without considering it necessary to decide what the proper rule is upon the point of the probable or necessary effect of the proposed new evidence, whether it be the stringent rule laid down by the English Court of Appeal in *Young* v. *Kershaw*, 81 L.T. 531, or the somewhat milder rule laid down in *Hosking* v. *Terry*, 8 Jurist N.S. 975, by the Judicial Committee of the Privy Council, the latter being probably the rule which is binding upon us, I think the application to adduce new evidence before this Court or to order a new trial should be refused on one ground taken by my brother McCarthy. All the cases adopt the rule that the applicant must shew that he exercised reasonable diligence in searching for evidence before the trial. In the affidavits presented to us all we find is a statement by the appellant's solicitor that he was advised by the plaintiffs that no evidence was available of any person who had actually seen the ice coming down the Bow River . . . "and diligent inquiries were made both by myself and by one of my partners with a view to discovering other evidence as to the manner in which the ice jammed;" and in addition a statement by Mr. Sereth, the general manager of one of the plaintiffs, that "the plaintiffs used their best efforts during the progress of the action and for some months before action to obtain any evidence available on the points in issue, and that the plaintiffs were unaware that the evidence of Cowing was available." These statements fall short of the requirements. The deponents testify as to the inference which the Court itself must make. What efforts were made in fact was not disclosed. One would have thought that it would have occurred to the plaintiffs to enquire from the owners of land adjoining the river at the place in question whether they or any one in their employ were employed in the neighborhood at the time in question. Particularly, it might surely have occurred to the plaintiffs to enquire at the City Hall whether there were any

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city employee at work in Meweta Park at the time. Whether any such enquiry was made is not stated in the affidavits.

I think therefore that the appellants have not shown that they used reasonable diligence in searching for evidence and that therefore the application must be refused.

The respondents should have the costs of the application.

As I understand the appeal is to go on upon the evidence as it stands, application may be made during the present sittings to fix the time for filing the appeal books.

Stuart, J.

SCOTT, J., concurred.

Scott, J.

BECK, J.:—Before the Judicature Act a party to a judgment, no matter of what or how high a Court, might file a bill in Chancery attacking the judgment not only on the ground of fraud but on the ground of discovery of new evidence; in the latter case it was necessary to obtain the leave of the Court to file the bill; in the former case it was not so: *Flower* v. *Lloyd*, 6 Ch.D. 297.

Beck, J.

Since the Judicature Act the same right exists though leave is not necessary where the action is grounded on the discovery of new evidence: *Boswell* v. *Coaks* (1894), 6 R. 167 (H.L.), *Chas. Bright & Co.* v. *Sellar*, [1904] 1 K.B. 6; the defendant having the right to move to stay or dismiss the action as being vexatious. When leave was required it was not given unless it was shewn that the new evidence "could not possibly have been used at the time when the decree was passed" being interpreted to mean "with due or reasonable diligence." *Hosking* v. *Terry* (1862), 15 Moore P. C. 493; *Falcke* v. *Scottish Imp. Ins. Co.* (1887), 57 L.T. 39. All this, as I have said, refers to a judgment already pronounced and entered and to a new proceeding attacking it.

The rule laid down for the reception of new evidence upon the hearing of an appeal either for the purpose of the appellate Court itself disposing of the action in the light of the new evidence or for the purpose of directing a new trial seems to be that (1) the new evidence must be such that had it been produced at the proper time it would in all probability have changed the result and (2) that it could not with reasonable diligence have been discovered in time to have been so used. See, in addition to cases already cited, those cited in Holmested & Langton Jud. Act, 4th ed., p. 1148. But it seems to me (1) that the rule should be applied less stringently where the action is still current than where it is concluded and (2) that each case ought to be dealt with on its

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own merits with the Court having in view solely the question of seeing that as far as possible the real matter in issue is properly decided; that in considering what stress would be laid upon either branch of the rule, much regard should be had to the extent of compliance or non-compliance with the other; that, for instance, if the new evidence is undoubtedly true and at the same time conclusive against the judgment as it stands, then the question of diligence is of little, if any, importance; for the party in default in this respect can be penalised in costs; while on the other hand, where there had been no want of diligence and there is doubt whether the suggested evidence will come up to the expectations of the applicant either in its substance or effect or the probability that it will change the result is not great, more freedom in the reception of the evidence should be exercised.

I would be in favour of a new trial, the plaintiff bearing the costs of the motion and appeal and the costs of the former trial, because, without thinking it necessary, inasmuch as my view is not to prevail, to discuss the facts, I am of the opinion that the proposed evidence if admitted and believed to the extent suggested would change the result, and that it was not for want of due diligence that the proposed evidence was not procured in time for the trial.

McCarthy, J.

MCCARTHY, J.:—In this case, tried before Ives, J., judgment was delivered by him on November 12, 1915, dismissing the plaintiff's action for damages occasioned as was alleged by the defendants constructing certain works in the Bow River which caused the ice to lodge and form a dam which resulted in forcing the water in the river over its banks and flooding plaintiff's land causing the damages claimed. Plaintiffs are appealing from this judgment and on the present application ask leave to amend their notice of appeal as set out in the notice of motion served on the defendants' solicitors on February 18, 1916, seeking in the alternative that the judgment be set aside and a new trial ordered for the reasons that: (a) the judgment was against the evidence and the weight of evidence; (b) that since the entry of judgment new evidence has been discovered which the plaintiffs were unable to discover before the trial, although exhausting every means of inquiry that occurred to them or that they be at liberty to give such evidence before the disposition of the appeal. The action as has been mentioned is brought for damages to plain-

tiff's property occasioned as is above set out. The obstruction in the Bow River consisted of a number of piles placed in the river for the purpose of making a run-way for the logs. The new evidence sought to be tendered is that of a city employee, Albert J. Cowling, whose affidavit was read in support of the plaintiff's application deposing in effect that he saw the formation of the ice jam which caused the flooding complained of and as to the existence of the obstructions in the river.

In support of the application to admit the evidence discovered since the entry of judgment, the applicants filed the affidavit of H. P. O. Savary, solicitor for the plaintiffs, who deposes in effect that he was advised by the plaintiffs that no evidence was available of any person who had actually seen the ice coming down the river and could speak as to the obstructions in the river, and that after inquiries made by himself and one of his partners they were unable to discover the evidence that they now desire to put in.

There is also the affidavit of Alex. Ferith, general manager of one of the plaintiff companies, deposing in effect that the plaintiffs used their best efforts during the progress of the action to obtain any evidence available bearing on the points in issue in the action.

The evidence referred to in the affidavit of Cowling doubtless would have been of assistance to the trial Judge in arriving at a decision as to whether or not the defendants were liable for the damages sustained, but under the authorities I take it that the applicants must go farther than that.

In Holmested's Judicature Act (Ontario) 1915 ed., at p. 1148, a number of authorities are collected, and the result of them appears to be that the practice in granting new trials, as the note on the cases states,

> on applications to open proceedings by way of review on the ground of newly discovered evidence is such that if it had been brought forward at the proper time it might probably have changed the result; (2) that at the time he might have so used it, neither he nor his agents had knowledge of it; (3) that it would not with reasonable diligence have been discovered in time to have been so used; (4) the applicant must have used reasonable diligence after the discovery of the new evidence.

As to the first limitation, I am unable to conclude that the new evidence offered might probably have changed the result. It is unfortunate that the application for a new trial could not have been made to the trial Judge who heard the evidence at

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the trial and would therefore be in a better position to decide whether the new evidence, if put in at the trial, would have changed the result. More especially is this so in the present application, as it was stated on the argument by counsel that the notes of evidence or the transcription thereof was most incomplete, and after a careful perusal of this evidence I would not go so far as to say that if the evidence of Cowling, which he deposes that he is capable of giving and discovered since the entry of judgment had been put in at the trial, that it would necessarily have changed the result.

As to the second and fourth limitations, there is no doubt that the applicants on the material filed on their behalf disclose that they did not know of the existence of the evidence and that reasonable diligence was used after the discovery of the new evidence.

As to the third limitation, which to my mind presents a further difficulty, to decide whether or not this evidence could with reasonable diligence have been discovered in time for the trial. The material filed upon which the applicants base their reasons for a new trial does not go into the efforts made to find the evidence with sufficient particularity to justify me in holding that a new trial should be ordered. What might satisfy the plaintiff that reasonable diligence has been used to secure the evidence might not necessarily satisfy the Court that such was the case. In *Young* v. *Kershaw*, 81 L.T. 531, Collins, L.J., at 532, says:—

> It is obviously in the public interests that parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence. That is a rule of great importance. It is true that in exceptional and special circumstances a new trial has been granted because new evidence has been discovered, but the rule which permits that to be done is fenced around with many limitations.

The time which has elapsed since the commencement of the action, namely March 8, 1915, until the commencement of the trial, November 4, 1915, has not been sufficiently accounted for as so diligently employed in examining as to the evidence in my opinion as should be required upon an application of this nature and which it was incumbent upon the plaintiff to shew. The place where the witness, whose evidence is sought to be given, was employed, suggested inquiry and there is nothing before us to show that active diligence in making inquiries.

The result of the authorities to my mind is that a new trial never ought lightly to be granted on account of an oversight on the part of the parties in the preparation for trial.

The object of the application is to strengthen the plaintiff's case upon a point on which both sides have given evidence and which evidence is known to the party applying; there should be some safeguard against the patching up of the weak points of a case by evidence collected after the testimony for the opposite party is closed.

The case of *Robinson* v. *Smith*, [1915] 1 K.B. 711, relied on by the plaintiffs, is easily distinguished. In that case it was argued that the verdict was obtained by fraud and one of the grounds upon which a new trial is sometimes directed is that the verdict was obtained by fraud. No such question arises in the present case. It was not suggested that there had been any fraud or surprise or any evidence discovered that could not have been discovered before.

For the reasons above stated, the rule that there should be an end to litigation should be applied and the application for a new trial on the ground of the discovery of new evidence or that this Court should hear the new evidence should be refused with costs of the application to the defendants. The time for filing the appeal books can be spoken to again during the present sittings if the plaintiffs desire to proceed with their appeal.

Application dismissed.

CHESLEY v. COUNCIL OF THE TOWN OF LUNENBURG.

Nova Scotia Supreme Court, Graham, C.J., Longley, J., Ritchie, E.J., Harris and Chisholm, JJ. April 22, 1916.

1. OFFICERS (§ I E 3—57)—DISMISSAL OF TOWN SOLICITOR—"DUE CAUSE"—REVIEW.

Secs. 118 and 120 of the Towns Incorporation Act (R.S.N.S. 1900, ch. 71, as amended by Acts 1910, ch. 26) must be read together, and a town solicitor holding office during good behaviour cannot be dismissed by the council unless due cause is alleged and shewn; by secs. 122-123 his dismissal is subject to review by a Judge in a summary manner. [*The Queen ex rel. Lawrence* v. *Patterson*, 33 N.S.R. 425, referred to.]

Statement.

SPECIAL case stated to determine the power of the town council under the provisions of the Towns Incorporation Act to remove from office for other than "due cause" the town solicitor, an officer appointed to hold office during good behaviour.

H. Mellish, K.C., for plaintiff.

V. J. Paton, K.C., for defendant.

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Harris, J.

GRAHAM, C.J., concurred with HARRIS, J.

LONGLEY, J., and RITCHIE, E.J., concurred with CHISHOLM, J.

HARRIS, J.:—A case has been stated for the opinion of the Court as to whether a resolution passed by the town council of the town of Lunenburg reciting that it is advisable to separate the two offices of town solicitor and stipendiary magistrate and therefore dismissing the plaintiff from the office of town solicitor could or could not be legally passed.

The plaintiff had been appointed town solicitor under sec. 118 of the Towns Incorporation Act (ch. 71 of the R.S.N.S. 1900) and that section provides that he "shall hold office during good behaviour."

Sec. 120 of the Act as amended (ch. 26, Acts of 1910), provides as follows:—

> Every town may at any time, by a vote of two-thirds of the whole council, at a meeting called for that purpose, and upon the approval of the Governor-in-Council thereafter had, abolish the office of town solicitor, or may by majority vote of the members present at any regular meeting of the council restore such office, or may by such vote of two-thirds of the council and with the like approval of the Governor-in-Council, dismiss any town solicitor.

It is well settled that the grant of an office during good behaviour creates an office for life determinable upon breach of the condition, and behaviour means behaviour in matters concerning the office, or conviction for an infamous offence of such a nature as to render the person unfit to exercise the office, which has been held to amount to legal misbehaviour though not committed in connection with the office. Misbehaviour as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance or neglect of or refusal to perform the duties of the office. See 7 Hals.' Laws of England, pp. 22 and 23.

Apart from the statute a person holding the office of a town solicitor during good behaviour could not be removed except for cause, nor could he be removed except by a majority vote of all the inhabitants. *The Queen ex rel. Lawrence* v. *Patterson*, 33 N.S.R. 425; 2 Dillon on Corporations, p. 463.

It was of course advisable to have power of removal for cause vested in the town council and obviate the necessity of taking a vote of the corporation at large, and shortly after the decision in *The Queen* v. *Patterson* (obviously to get over the difficulty of calling a meeting of the inhabitants in such a case), the original of the present sec. 120 was passed. See ch. 44 of the Acts of 1899.

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We must read secs. 118 and 120 together and so reading them sec. 120 obviously applies only to removal of a town solicitor for cause, *i.e.*, for misbehaviour.

To read it as giving power of dismissal without cause would be to absolutely abolish the right which sec. 118 gives to the town solicitor of holding his office during good behaviour. It would not be reading the two sections together; it would be repealing sec. 118 by sec. 120. That sec. 120 is to be read as applying only to dismissal for cause is clearly apparent when secs. 121, 122, and 123 are referred to.

These sections provide that any officer the tenure of whose office is during good behaviour who is removed from office may apply to a Judge to be reinstated to his office and "if the Judge decides that the removal was without due cause he shall make an order that the officer shall be reinstated and such officer shall forthwith thereafter be the officer *de jure* of the town and the council shall admit him to all the rights, privileges, franchises and duties thereof."

Apart from these sections I think the meaning of sec. 120 is obvious, but with this plain legislative declaration as to what is meant by dismissal in sec. 120 all doubt (if any could exist), is absolutely removed.

There is not the slightest suggestion of misbehaviour on the part of the plaintiff and his dismissal without hearing and for the reason given in the resolution, which, under the circumstances, is no reason at all, is unwarranted.

The question will be answered in the negative and the plaintiff is entitled to the relief asked for.

CHISHOLM, J.:—The questions of law arising in this action are presented for the opinion of the Court in the form of a special case.

Chisholm, J.

The plaintiff is town solicitor for the town of Lunenburg and under the terms of sec. 118 of the Towns Incorporation Act (R.S. N.S. 1900, ch. 71) holds the office during good behaviour. The defendant are the town council and the mayor and four councillors who voted for the resolutions hereinafter set forth.

At a regular meeting of the said town council, held on February 24, 1916, a resolution was passed in the following terms:—

Whereas the offices of town solicitor and stipendiary magistrate for the town of Lunenburg are now held by one person, S. A. Chesley;

And whereas in the opinion of this council the fusion of said offices in one

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person is inexpedient and not in the best interests of the administration of justice in the town of Lunenburg;

And whereas many cases arise in the town police court before said S. A. Chesley as such stipendiary in which he is incapable of acting as solicitor;

And whereas in consequence thereof it is necessary to engage other solicitors to act for the town in such cases at great expense to the town;

And whereas it is the opinion of this council that it would result in a saving to the ratepayers if a permanent town solicitor be appointed other than said S. A. Chesley;

Therefore be it resolved:—

(1) That said S. A. Chesley be asked by this council to resign his said office as town solicitor;

(2) That upon the refusal of said S. A. Chesley to place his resignation with this council forthwith that a special meeting of the council be called for the purpose of dismissing said S. A. Chesley.

(3) That no salary be voted to said S. A. Chesley as such town solicitor for the time being.

(4) That all proper proceedings be had and taken to carry out the true intent and meaning of the Towns Incorporation Act, ch. 71, of R.S.N.S. 1900, and amending Acts, regarding the dismissal of town solicitors.

(5) That this resolution and the result of the vote thereon and of the vote and proceedings of the special meeting be submitted and certified to the Governor-in-Council for approval.

(6) That all resolutions previously passed and inconsistent herewith be rescinded.

The town clerk sent to Mr. Chesley through the post a copy of this resolution enclosed in a letter dated February 25, 1916, which said letter was as follows:—

S. A. Chesley Esq., K.C., Lunenburg, N.S., Feb. 25, 1916.
Lunenburg, N.S.

Dear Sir,—At a regular meeting of the town council of the town of Lunenburg, held on February 24, 1916, a resolution was duly passed asking for your resignation as town solicitor, and I have been directed to communicate the result of the vote on the resolution.

The result was that by a vote of four councillors and the mayor, whose vote was recorded by the clerk, that you be asked to tender your resignation forthwith. If I do not receive the resignation as contained in the resolution the alternative is: that a special meeting of the council be called for the purpose of dismissing you under the Towns Incorporation Act, and amendments thereto.

I enclose you herewith a copy of the resolution as passed.

The special meeting to be called for the purpose of dismissing you as such town solicitor will likely be called within a week and I would like to have an immediate answer to this notice so that I can lay it before the council.

Mr. Chesley appears to have paid no attention to the letter or the accompanying resolution; and the town clerk, some time later, posted up in his own office a notice calling a special meeting as follows:—

Office of Town Clerk and Treasurer,
Court House, Lunenburg, N.S.

Sir,—I am directed to notify you that a special meeting of the town council will be held at the town office, on February 28th, 1916, next, at 7.30 p.m.

Business: Re dismissal of S. A. Chesley as town solicitor.

By order, GEO. H. LOVE, *Town Clerk.*

To the Public.

On February 28, 1916, the special meeting mentioned was held, and a further resolution was passed in the terms following:—

Whereas at a regular meeting of the town council of the town of Lunenburg, held on February 24, 1916, it was duly moved, seconded and passed that S. A. Chesley be asked for his resignation as town solicitor of and for the town of Lunenburg;

And whereas a request for such resignation in writing was presented to said S. A. Chesley, accompanied by a copy of the said resolution;

And whereas it was further resolved that in the event of the refusal of the said S. A. Chesley to hand his resignation forthwith in to the said town council that a special meeting be called for the purpose of dismissing the said S. A. Chesley as such town solicitor;

And whereas said S. A. Chesley has refused and neglected to place his resignation with the town council or with the clerk of the council or the town clerk;

And whereas a meeting was legally called, after notice was published to that effect by the town clerk for said meeting, and a special meeting was properly called for the purpose of dismissing said S. A. Chesley;

Therefore be it resolved:—

(1) That said S. A. Chesley be and he is forthwith dismissed as town solicitor for the town of Lunenburg in accordance with the provisions of sec. 120 of the Towns Incorporation Act, 1900, and Acts in amendment thereof, and subject to the approval of the Governor-in-Council;

(2) That this resolution and all previous resolutions connected herewith or relating thereto be submitted and certified to the Governor-in-Council;

(3) That this resolution is passed and voted upon by at least two-thirds of the whole council of the town of Lunenburg at a special meeting called for the purpose of dismissing said S. A. Chesley.

Moved by L. E. Wamboult, seconded by Joseph N. Smith.

Vote: 4 councillors for the resolution and the mayor and 2 councillors against.

The question submitted for our opinion is whether the resolution of February 28, above quoted, is valid, and in the event of the question being answered in the negative, the plaintiff is to be entitled to the relief which he claims in the writ of summons in the action, and if answered in the affirmative the action is to be dismissed with costs.

All the statutory provisions dealing with the office of town solicitor are contained in the Towns Incorporation Act, secs. 118 to 125 inclusive. The section upon which the defendants rely is sec. 120 which enacts that:—

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Every town may at any time, by a vote of two-thirds of the whole council at a meeting called for that purpose, and upon the approval of the Governor in-Council thereafter had—dismiss any town solicitor.*

The defendants have not given any reasons for Mr. Chesley's dismissal beyond what is contained in the above resolutions and it is not claimed that there was "due cause" in the legal sense for their action.

When the Towns Incorporation Act was first passed (ch. 1 of the Acts of 1888, sec. 184) it was enacted that the town solicitor should hold office during good behaviour, and this provision has been continued without change and is now found, as already stated, in sec. 118 of the present Act.

The original Act did not contain any provisions for the removal of a town solicitor.

In the year 1893, probably in consequence of the dismissal, or rather attempted dismissal, in the previous year of the town solicitor of the town of Truro by the town council, chs. 21 and 22 of the Acts of that year were passed; and these are now embodied in secs. 121 to 125 of the present Act.

When these remedial statutes were passed it had not been decided as yet how a town officer,whose tenure of office was during good behaviour, could, under the new system of municipal government, be dismissed, and the obvious purpose of these statutes was, if such an official were removed for cause, to give him the right to have the reasons for such removal reviewed in a summary manner by a Judge, who, if he should be of opinion that the removal was without due cause, could order his reinstatement.

In the case of *The Queen ex rel. Lawrence* v. *Patterson*, 33 N.S.R. 425, decided in 1894, the question of the validity of the action of the town council of Truro in relation to the attempted dismissal of the town solicitor, to which I have already made reference, came before this Court for decision, and it was held that the town council had not the power to dismiss the town solicitor. The Court followed the decision of Lord Denman in the leading case of *Rex* v. *Richardson*, 1 Burr. 517, and held that the power of a motion lay with the corporation at large, that is to say, the inhabitants of the town who constitute the corporation, and not with the town council who form only a part of the corporation.

The result was that a town which might desire to remove an official of the class of town solicitor for due cause had only one

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way of doing so, that is, by a vote of the inhabitants of the town. This mode of putting the power into execution was cumbersome and expensive, and would be apt to lead to complications in its operation. We can then see a reason for the enactment of ch. 44 of the Acts of 1899, now sec. 120 of the Towns Incorporation Act, whereby the power to dismiss is given to the town council.

It was argued that this section gave power to dismiss without alleging or showing due cause for such action, but we must read the section in connection with sec. 118 which creates an office tenable during good behaviour. The nature of that tenure would be absolutely destroyed if such an interpretation were given to sec. 120; the town solicitor instead of holding an office during his own good behaviour would be liable to dismissal by the mere whim of two-thirds of the town council. It seems to me that a reasonable and sensible meaning can be given to all the sections which we are considering by holding that the provisions of sec. 120 can only be invoked when due cause for dismissal is alleged and shewn; and that the policy of the statute is to safeguard the position of an officer who holds office during good behaviour so long as the office exists and no due cause is shewn. If he be dismissed under sec. 120, due cause having been established and all proper steps taken in that regard, he has the right to have the action of the council reviewed by a Judge in a summary manner; and if the Judge should be of opinion that what the council alleged as due cause was not in reality due cause, the officer can be reinstated. To hold otherwise would mean that the official who holds office during good behaviour might first be dismissed without cause under sec. 120, and then tried under the following sections to determine whether he deserved the dismissal with which he had already been visited. I prefer to take the more reasonable view that as to such an officer due cause must be alleged in the first instance, and must exist before the town council passes a resolution to dismiss him.

For these reasons I have come to the conclusion that the plaintiff is entitled to the relief which he claims in his writ of summons.

Relief granted.

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REX v. MARTIN.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. February 19, 1916.

1. INTOXICATING LIQUORS (§ III A—59)—UNLAWFUL SALES—SINGLE PENALTY —LIABILITY OF OCCUPANTS FOR ACTS OF EMPLOYEES.

The summary conviction of the occupant for the illegal sale of liquors made by the employee in contravention of the Liquor License Ordinance, Alta. 1915, ch. 89, because of the statutory liabilities of the occupant under sec. 95 of that Act, is a bar to the subsequent prosecution of the employee in respect of such sale; it is open to the prosecution to proceed with one charge against all responsible for the sale, or against any of them, for the one penalty, but not against each for a separate penalty.

[*R.* v. *Williams*, 42 U. C. Q. B. 462 and *Ex parte Kelly*, 32 N. B. R. 271, applied.]

Statement.

STATED CASE on defendant's acquittal upon a charge of unlawfully selling intoxicating liquor in contravention of the Liquor License Ordinance (Alta.).

J. W. Heffernan, for the prosecutor, appellant.

J. C. McDonald, for defendant, respondent.

Scott, J.
Beck, J.

SCOTT AND BECK, JJ., concurred with McCarthy, J.

Stuart, J.

STUART, J. (dissenting):—This is a case stated for the opinion of the Court by a magistrate who had refused to convict the accused for the offence of selling intoxicating liquor without a license contrary to the provisions of the Liquor License Ordinance.

Section 118 (*b*) sub-sec. (6) gives an appeal to the District Judge against a dismissal by the magistrate and sub-sec. (9) gives afurther appeal to the Appellate Division on the part of the prosecutor if the Attorney-General certifies that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal. These provisions seem to furnish a sufficient method of bringing such a case as this before the Appellate Division. In the case of an appeal from a conviction given by sub-sec. 2 the right of appeal seems to be given to the person convicted only where he is a licensee or the alleged offence was committed on licensed premises. But sub-sec. (6) contains no such limitations in giving an appeal to the prosecution against a dismissal of the complaint.

However, no doubt on account of the delay which would be involved in following this course, the magistrate stated a case directly for the opinion of this Court pursuant to Part XV. of the Code made applicable by sec. 8 of ch. 13, 1906. (Alberta.).

Section 85 of the ordinance enacts that *any person* who sells liquor without a license shall be guilty of an offence and liable to certain penalties.

Section 94 provides that any contravention of any of the

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provisions of the ordinance by any servant, agent or employee *of a licensee* shall be presumed to be the act of such licensee but the presumption may be rebutted by proof of explicit instructions to the contrary.

Then section 95 enacts that except as provided in section 94 the occupant of a house, shop, etc., (not confining it to *licensed* premises, it will be observed) in which any sale, barter or traffic in liquors or *any matter or act* in contravention of the ordinance has taken place shall be *personally* liable to the penalty notwithstanding such sale, etc., be done by some other person who cannot be proved to have so acted under or by the direction of such occupant.

In the case before us the facts are that the defendant, an employee of one Mrs. E. L. Lewis in a certain restaurant in Edmonton, for which no license existed, had sold liquor to some one in contravention of the Act. A charge was laid against Mrs. Lewis and also a separate charge against the defendant. Mrs. Lewis was convicted and fined $500 under sections 85 and 95. Then when the present case against Martin was called, it was objected that, Mrs. Lewis having been convicted for the same act of sale, therefore Martin was no longer liable to be convicted for what he had done. The magistrate took this view of the matter and acquitted the accused but on the application of the prosecution stated the present case.

I am quite unable to discern any validity whatever in the objection taken on behalf of Martin. Just why two persons cannot be convicted for the same offence I entirely fail to see. It is done every day in the criminal courts where both are guilty and concerned in the act. The ordinance undoubtedly makes Martin liable to the penalty. Then how can it be said that merely because, obviously for the sake of stringency in the enforcement of a prohibition law, another person, *i.e.*, the occupant of the premises in which the act is committed, is made *personally* liable and is convicted, the person who actually committed the illegal act is to go free? It seems to me to be plain that the ordinance merely imposed an additional responsibility upon the occupants of premises to see that no infraction of the law was committed there.

Observe the words of section 94. There, where the premises

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are licensed, the *act* of the *servant, agent* or *employee, e.g.*, selling in prohibited hours, is to be presumed to be the act of the employee subject to rebuttal. But section 95 says nothing about servants or employees. Even if the act is done on his premises by any person, *e.g.*, a roomer or visitor not in his employ at all, the occupant is made personally liable. Could it be said that if the occupant is first convicted in such a case, therefore the roomer or visitor must go scot free?

Upon any contrary view it is left quite open to an occupant and employees upon premises where they all know there is no license at all to agree to sell liquors knowingly in contravention of the Act, and to have only one of themselves, *i.e.*, the occupant, fined when the employees have wilfully broken the law. Why they also should not be punished for their illegal act committed with full consciousness of its illegality I am, I confess, utterly unable to comprehend.

With regard to the argument as to raising the maximum penalty it appears to me to be entirely illogical. The penalty is imposed on the individual who commits the illegal act. How can it be said that the maximum penalty is exceeded because another guilty person has also been fined?

I think therefore the magistrate should be advised that Martin is liable to the penalty.

McCarthy J.

McCARTHY, J.:—By section 85 of the Liquor License Ordinance 1915, ch. 89, it is enacted "any person who sells or barters . . . liquor of any kind without the license therefor by law required, shall be guilty of an offence and on a summary conviction thereof shall be liable for the first offence . . . for a second offence to a penalty of not less than $250, nor more than $500."

By section 95 of the same ordinance it is enacted "except as provided in the preceding section the occupant of any house, shop, room, or other place in which any sale, barter or traffic of liquors . . . has taken place shall be personally liable to the penalty prescribed for such offence as the case may be notwithstanding such sale, barter or traffic be made or other matter, act or thing be done by some other person who cannot be proved to have so acted under or by the directions of such occupant . . ."

Under section 95 Mrs. E. L. Lewis was on the 9th day of August, 1915, convicted for a second offence and fined $500.00 which fine has been paid.

On the same day a charge was brought against Arthur (Shorty) Martin under section 85, the accused being an employee of Mrs. E. L. Lewis, and admittedly the person who sold the liquor. He was acquitted by the magistrate. The above sections provide for the punishment of the person unlawfully selling liquor or otherwise contravening the provisions of the ordinance as well as the occupant of the premises in which the unlawful sale or contravention of the Act took place.

The question for the Court to determine on the case stated by the Magistrate is "Can both be convicted for the same offence?"

It was pointed out by counsel for the Crown that the sections in the Ontario Liquor License Act were practically similar to those in the ordinance except that the Legislature of Ontario had seen fit to amend the sections relating to persons selling as well as "the occupant" being liable, specifically providing that the conviction of one should be a bar to the conviction of the other, and that no such provision appeared in our ordinance.

I find that the amendment to the section in the Ontario Act was passed in 1881, *vide* 44 Vic., ch. 27, s. 8.

The question, can both be convicted for the same offence came before Gwynne, J., in Ontario in 1878, before the Ontario statute was amended in 1881. In the case of *Regina* v. *Williams*, 42 U.C.Q.B. 462, he was of opinion that there should be but one person convicted for the act of selling, although in cases tried subsequently in Ontario some doubts are expressed as to the correctness of that decision, it is followed and the Legislature of that Province, apparently to put the matter beyond any doubt, passed the amendment of 1881 declaring the law to be as laid down by Mr. Justice Gwynne.

The effect of holding otherwise is pointed out by Palmer, J., in *Ex parte Kelly*, 32 N.B.R. at p. 271; it would be to increase the penalty for a single sale from $500.00 to an amount which would be dependent upon the number of persons who were engaged in such sale, and he further says each may be guilty of such sale or all may be jointly guilty, and it is at the option of the prosecution to proceed against any or all who made the sale by the authority of another or against the principal, but they cannot proceed against the two separately.

I think it is plain that the statute intends to inflict one penalty and that the magistrate in this case was right in acquitting the accused. *Acquittal affirmed.*

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JACOBSEN v. INTERNATIONAL HARVESTER CO.

Alberta Supreme Court, Appellate Division, Scott, Beck and McCarthy, JJ. June 20, 1916.

1. ASSIGNMENT (§ I—2)—FARM CROP TO BE GROWN THEREAFTER—EXECUTIONS—VALIDITY.

An assignment may be validly made to third persons of an interest in a farm crop to be grown thereafter, notwithstanding the existence of executions against the assignor at the time of the assignment.

[*Jacobsen* v. *International Harvester Co.*, 24 D.L.R. 632, affirmed.]

Statement.

APPEAL from a judgment of Stuart, J. (24 D.L.R. 632).

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the judgment of Stuart, J. I think the judgment should be affirmed on the grounds expressed by the Judge; but in view of the argument presented before us it is perhaps well to deal expressly with the question why the execution against the goods of Jacobsen, the execution debtor, did not attach to the share in the crop to which Weitzer, the claimant, became entitled under the agreement between Jacobsen and Weitzer made before the crop was sown, and notwithstanding that agreement.

There were a number of execution creditors. The execution of the International Harvester Co. was issued and placed in the sheriff's hands on August 1, 1913; that of the Bank of Nova Scotia on February 6, 1914. Executions remain in force without renewal for two years. The seizure was made on August 15, 1915. Probably, although it does not appear to have been proved, the company's execution was renewed. In any case the bank's execution was in force; and one execution is sufficient inasmuch as all creditors who can obtain executions within a limited time can share in the proceeds of a seizure by reason of the provisions of the Creditors Relief Act.

It was in the beginning of April, 1915, that the agreement was made between Jacobsen and Weitzer, *i.e.*, after the execution against the goods of Jacobsen had been placed in the sheriff's hands for execution.

That agreement was in substance that if Weitzer would pay Jacobsen $400 Weitzer should be entitled to a one-third of the gross produce of the crop which Jacobsen would thereupon proceed to put in on the cultivated portion—about 100 acres—of his farm. The $400 was paid and the crop was put in. There is probably no perfectly legitimate method of dealing which could

not be made a cloak for fraud or be used as a method of perpetrating a fraud or bringing a result which is contrary to the policy of the law; but in the present case there is no question of fraud; and excluding fraud, there can be no reason why a farmer in straitened circumstances, who cannot afford to buy the necessary seed and supply the necessary animals, implements and labour to cultivate and crop his farm, should not make an agreement with a third person whereby the latter for a money consideration should have a specific interest in the farmer's crop, or why that interest should be taken from him by an execution creditor of the farmer. If *bonâ fide* it no doubt would be financially advantageous to the farmer and therefore ultimately to his creditors and, as tending to the increase of agriculture, in accordance with the public policy. The law undoubtedly protects the third person making the advance in such a case.

The agreement was in effect a present assignment of one-third of a crop to be put in seed and grow during the ensuing year.

The whole question of the present assignment of property to be acquired in the future both at common law and in equity was discussed in the House of Lords in 1862 in *Holroyd* v. *Marshall*, 10 H.L.C. 191, 11 E.R. 999. The principles there laid down have been explained and developed in numerous subsequent cases as may be seen by reference to such works as Benjamin on Sales, Blackburn on Sales, Barron & O'Brien on Chattel Mortgages.

The most important of the subsequent cases is *Tailby* v. *The Official Receiver*, 13 App. Cas. 523, in which Lord Macnaghten, at p. 543, said:—

> It has long since been settled that future property possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value present and immediate has already been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence if it is of such a nature and so described as to be capable of being ascertained and identified.

Coyne v. *Lee*, 14 A.R. (Ont.) 503, is an Ontario case in which the same principle is applied.

The effect of an assignment of goods to be subsequently acquired by the assignor, whether the goods are then in existence or are to be brought into existence by growth or manufacture,

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is that they are acquired or come into existence as the case may be subject to the right created by the precedent assignment.

This is quite clear from the cases to which I have already referred (see *e.g. Holroyd* v. *Marshall*, p. 211), but is well expressed and explained in *Dominion Bank* v. *Davidson*, 12 A.R. (Ont.) 90.

The right to seize only the beneficial interest of the debtor is past argument: *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282.

I therefore would dismiss the appeal with costs.

Appeal dismissed.

MAN.

C. A.

JEWISON v. HASSARD.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. June 19, 1916.

1. PHYSICIANS AND SURGEONS (§ II—39)—SKILL—NEGLIGENCE OF HOSPITAL NURSE—LIABILITY.

A delay in the healing of a wound, caused by a pus sponge which had been left in it by a hospital nurse, whose duty it was to remove it and account for it, is not negligence attributable to the lack of skill of the surgeon, even though in closing the wound, he, acting on the nurse's report, made no further personal examination.

[See also *Lavere* v. *Smith's Falls Hospital* (Ont.), 26 D.L.R. 346; *Brandeis* v. *Weldon* (Can.), 27 D.L.R. 235.]

Statement.

APPEAL from the judgment of Ryan, J., on a jury's verdict for the defendant, in an action for negligence against a surgeon. Affirmed.

H. V. Hudson, for plaintiff, appellant.

W. H. Sexsmith, for defendant, respondent.

Richards, J.A.

RICHARDS, J. A.:—The plaintiff is a married woman. The defendant, who is a surgeon, removed a tube of pus from her abdomen by a surgical operation at a hospital. The tube broke and the pus began to flow so fast that there was danger of it reaching the bowels and causing peritonitis.

The defendant and another surgeon, to avoid that danger, were compelled to swab out the cavity very rapidly with gauze sponges, and, in so doing, to use, in a very short time, an unusually large number of sponges. They removed, as they thought, all such sponges as fast as they used them.

There was a nurse present whose duty it was to keep count of the number of sponges brought into the room and to see and ascertain by count before the incision was sewed up, that between the used sponges, which were thrown on the floor as fast as used, and the unused ones, the total number of those brought into the operating room was accounted for. The object of keeping

such count was to prevent the danger of a sponge being left in the wound.

When the swabbing was finished the defendant asked the nurse if all the sponges were accounted for and she told him they were. He then sewed up the wound.

The wound did not heal as rapidly as had been expected, but continued, for an unusually long time, to discharge pus. The plaintiff suffered a great deal of pain during that time. One day a gauze sponge came to the surface of the wound. She pulled it out, and soon after that the flow of pus ended and the wound began to heal.

The plaintiff sued the defendant for damages in the County Court of Portage la Prairie, alleging that by unskilful and negligent conduct on his part the sponge had been left in the wound.

The trial was with a jury, who found a verdict for the defendant, and the plaintiff appealed.

The whole question before the jury was whether the defendant was guilty of negligence. After a careful examination of the evidence, I cannot see that he was. On the contrary, the facts seem to me to plainly indicate that he was not. There was uncontradicted evidence that a surgeon in such cases is necessarily too busy with his other work to keep count of the sponges, and that the duty of doing so is properly delegated to the nurse, in order to enable him to give his whole attention to his work. It may be here pointed out that the nurse was provided by the hospital and not by the defendant—so that, if she was negligent, he is not responsible for that.

It is argued that, in addition to ascertaining from the nurse that the sponges were all accounted for, it was his duty to personally examine the place of the operation before closing up the incision. The uncontradicted evidence of all the doctors who testified was that, unless told that the sponge count shewed one missing, he would not be justified in doing more than looking into the opening to see if anything remained there, and that to put his hand in and search, while not likely to help, would probably cause serious injury by bringing contagion to the bowels. The evidence also shewed that a sponge, when saturated with the fluid in the abdomen, could not be distinguished by sight from the intestines. The defendant stated that he did look, and there is no contradiction of that.

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It may also be pointed out that the surgeon who assisted the defendant was not engaged or employed by him, but by the plaintiff's husband, and the evidence leaves it equally as likely that the sponge in question was put in by that surgeon as that it was by the defendant.

I cannot see how the jury could have reasonably come to any other conclusion than that no negligence on the part of the defendant was shewn.

I would dismiss the appeal with costs.

Howell, C.J.M.
Perdue, J.A.
Cameron, J.A.
Haggart, J.A.

HOWELL, C.J.M., PERDUE and CAMERON, JJ.A., concurred excepting as to costs.

HAGGART, J.A.:—The surgeon undertakes *to bring a fair*, reasonable and competent degree of skill, and there is a presumption that he knows his work and does it properly. He has no need to produce evidence of general skill and fitness. He is considered *prim facie* competent and on the plaintiff lies the onus of proof to the contrary, and the patient has a right to expect the usual and ordinary amount of skill, care and attention which it was only reasonable to suppose he would possess, and if in the discharge of his duty he applied his professional skill and knowledge to the best of his ability and then there happens an unfortunate termination of the case, he is not to be visited with an action to mulct him for damages. Such is the substance of the observations of the text writer in Taylor's Principles and Practice of Medical Jurisprudence, 6th ed., when discussing the question of medical responsibility on pp. 86 and 87.

The same subject is discussed in 20 Hals., on pp. 330, 331 and 332, who cites the same authorities as the former text writer.

Tyndall, C. J., in *Lanphier* v. *Phipos* (1838), 8 C. & P. 475, at p. 479, says:—

> Every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable degree of care and skill. He does not, if he is a surgeon, undertake to cure the patient, nor even to use the highest degree of skill, as there may be persons of higher education and greater advantages than himself, but he undertakes to bring a fair, reasonable and competent degree of skill; and in an action against him by a patient, the question for the jury is whether the injury complained of must be referred to the want of a proper degree of skill in the defendant or not.

The same subject is discussed in Beven on Negligence, 3rd ed., at pp. 1155, 1156 and 1161.

See *Rich* v. *Pierpont*, 3 F. & F. 35; *Seare* v. *Prentice* (1807), 8 East 348; *R.* v. *Spencer*, 10 Cox C.C. 525.

The question raised upon this appeal is, was there evidence sufficient to warrant the finding of the jury who "find Dr. Hassard not guilty regarding the negligence," which is in substance that the doctor brought a fair, reasonable and competent degree of skill and that in the performance of the operation there was no negligence on his part. This duty was peculiarly the function of the jury.

There is evidence absolving the defendant. It was a serious case and its seriousness was not developed until after the operation commenced It was performed in accordance with up-to-date clinical surgery. There were two assistants helping. There was the physician whose sole duty was to administer the anaesthetic. There was the sponge nurse whose sole duty was to keep track of the sponges. Such was necessary in order that the operating surgeon might direct his sole energies to the work before him. If there was any delinquency it was that of the sponge nurse, an employee of the hospital. The reply of the nurse that the sponges were accounted for is sworn to, and experts say that this is sufficient to warrant the operator in closing the incision. As to the suggestion that a search should have been made by the operator before sewing up the incision, Dr. Ponton says that it would not be proper for a surgeon after he has completed the removal of the pus and is ready to sew up to put his hand round in the abdomen. Such would be criminal because it would be almost certain to spread the contagion to the rest of the bowels and that "he might better let his patient die in peace." And Dr. Montgomery, a witness for the plaintiff, speaks in this way:—

"The Court. Q. Assuming the defendant had used all necessary skill he might or might not have discovered that sponge in the abdomen? A. That is right, your Honour."

The evidence as to the surrounding circumstances and as to all that took place during the operation was very full. The Judge's direction to the jury was proper and the questions they were to decide were clearly before them. They have found no negligence. Even if this Court came to a different conclusion from that of the jury, it would not be right to substitute our conclusion for theirs. Negligence or its absence is a fact for the jury to find. I would dismiss the appeal without costs.

Appeal dismissed.

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ALDERSON v. WATSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. February 7, 1916.

1. LANDLORD AND TENANT (§ III D 2—105)—PREFERENTIAL LIEN FOR RENT—ACCELERATION CLAUSE—DISTRESS.

In case of an assignment for the general benefit of creditors, a landlord is only entitled, under sec. 38 (1) of the Land lordand Tenant Act, (R.S.O. 1914, ch. 155) to a preferential lien for arrears of rent "for" the period of one year next preceding and for the three months following the assignment, despite an acceleration clause in a lease providing that in case of events which happened rent for a longer period should become due and payable. The landlord's right to distrain is not taken away.

[*Langley* v. *Meir*, 25 A.R. (Ont.) 372, considered.]

2. ASSIGNMENT FOR CREDITORS (§ VII A—55)—FRAUDULENT PREFERENCES —ACCELERATION CLAUSE IN LEASE.

An acceleration clause in a lease, providing that rent due for a future period shall become due and payable upon the making of an assignment for the general benefit of creditors, is not necessarily fraudulent and void as against creditors.

Statement.

APPEAL and cross-appeal from the judgment of Britton, J., on a motion by the plaintiff, an assignee for creditors, to make perpetual or continue until the trial an interim injunction from proceeding with a landlord's distress. Affirmed with a variation.

Editorial Note:—

This case raises two points for decision:

(1) Does the preferential lien of a landlord include all rent falling due during the year next preceding an assignment, by reason of an acceleration clause in a lease, or merely any unpaid part of the rent for that year, and for three months thereafter?

(2) Is a provision in a lease providing that future rent shall fall due upon the making of an assignment for the benefit of creditors a fraud upon the creditors, rendering the provision and other connected provisions void?

The lease contained a provision that if the lessee made (a) a chattel mortgage, or (b) an assignment for creditors, the rent for the whole term should thereupon fall due. He made both, first the mortgage, later the assignment. Clearly, therefore, the rent for the entire term fell "due *during* the period of one year next preceding . . . the execution of the assignment." (R.S.O. 1914, ch. 155, sec. 38 (1)).

Garrow, J.A., thought that "during" meant "for" and Maclaren, J.A., agreed with him. Hodgins, J.A., thought that the object of the section is to prevent priority for accelerated rent beyond three months after an assignment. Meredith, C.J.O., and Magee, J.A., held that the rent became due during the year

before the assignment, and that the preferential lien was, therefore, for the whole term.

Upon the second point Meredith, C.J.O., was alone in regarding the provision of the lease for acceleration as *ipso facto* a fraud upon creditors, disentitling the landlord to any preference for future rent. Garrow, J.A., thought fraud or not fraud a question of fact, not a presumption of law. Hodgins, J.A., thought that as the statute limited the preference, a provision fruitlessly aimed to extend it could not be a fraud. Magee, J.A., said that the clause in the lease made acceleration conditional upon (a) the making of a chattel mortgage, or (b) an assignment for creditors, and as the former had first happened, the rent for the whole term thereupon came due, and the second event had no effect upon the right to rent; in his opinion the proviso, as the conditions were severable, the first was good even although the second was bad, which he did not admit. Meredith, C.J.O., dissented from the distinction, holding the provision void *in toto*.

Statement.

The result is unsatisfactory. The points are important, and the last word has not been said upon them. The opinions of the Judges convey the impression that they were declaring the law what perhaps it ought to be, rather than what the Legislature has provided it shall be.

G. T. Walsh, for the defendant.

Hughes Cleaver, for the plaintiff.

GARROW, J.A.:—The action was brought by the plaintiff, as assignee for the benefit of creditors, under an assignment dated the 7th September, 1915, of one James Goodbrand, for an injunction to restrain the defendant from selling certain goods and chattels, the property of the assignor, under distress proceedings instituted by the defendant against the assignor two days after the date of the assignment.

Garrow, J.A.

The assignor was the tenant of the defendant under an indenture of lease dated the 16th January, 1915, for a term of three years from the 1st January, 1914, at the rent of $500 for the year 1914, and $600 for the year 1915, and $600 for the year 1916; the first of such payments to become due on the 1st October then next, that is to say, $250 on the 1st October, 1914, $250 on the 31st December, 1914, $300 on the 1st October, 1915 and 1916, and $300 on the 31st December, 1915 and 1916.

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The lease contained a covenant that if (among other things) the tenant made a chattel mortgage, the then current year's as well as the next ensuing year's rent should immediately become due and payable, and the term thereby granted, at the option of the lessor, immediately become forfeited and void, and that such accelerated rent might be recovered in the same manner as the rent thereby reserved.

On the 11th January, 1915, some days before the date of the lease, but during the term therein mentioned, the debtor gave a chattel mortgage, and on the 1st May, 1915, he gave another; with the result that the defendant, claiming that, by reason of the acceleration clause before referred to, the rent for the last two years of the term (the first having been paid) had become due, distrained for the whole.

Britton, J., held that the defendant was entitled to a preferential lien only in respect of one year's rent, and from that conclusion the defendant now appeals, and the plaintiff cross-appeals upon the ground that the allowance should be reduced to six months.

The statutory provision on the subject is contained in R.S.O. 1914, ch. 155, sec. 38 (1), and is as follows: "In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises."

The clause in question has been frequently under consideration in the Courts, but I have been unable to find that the exact point now raised has ever been determined.

In *Linton* v. *Imperial Hotel Co.*, 16 A.R. 337—upon which counsel for the defendant relied—it was held that a landlord might distrain for rent thus by agreement accelerated, but the only rent there in question was rent for the then current year. It is true that in the course of his judgment Osler, J.A., refers to the earlier case of *In re Hoskins and Hawkey*, 1 A.R. 379, as having determined that the somewhat similar clause in the Insolvent Act permitted a recovery for more than one year's rent, if it became due within the year. That case, however, on a careful perusal, will be found not to be an authority that more than one year's

rent can be claimed as a preferential lien, but rather the reverse; because it is clear that what was claimed was not a preferential lien for two years' rent, but for one—with a right to prove against the insolvent estate for the other; and it was the latter only which was disallowed.

Osler, J.A., in *Langley* v. *Meir*, 25 A.R. 372, at p. 381, again refers to the *Hoskins* case, but this time in terms more nearly agreeing with the view which I have endeavoured to express, namely, that the *Hoskins* case is not an authority for the proposition that more than one year's rent can, under any circumstances, be claimed as a preferential lien.

In *Langley* v. *Meir*, the question chiefly discussed is one with which we are not in this case concerned, namely, the meaning and scope of the three months' period after the assignment during or for which the landlord is given a preferential lien. The rent there in question was rent which fell due, if at all, only within that period of three months, and that only by virtue of the acceleration clause.

In the *Hoskins* case it was held that an accelerating clause, not unlike the one now in question, was fraudulent and void against creditors. And an argument to that effect was addressed to us here by the learned counsel for the respondent. The same argument, however, would have been an effectual answer in the subsequent cases in the Court of Appeal of *Linton* v. *Imperial Hotel Co.* and *Langley* v. *Meir*, to which I have referred, in both of which the *Hoskins* case was cited, but evidently not followed, nor even mentioned in the judgments upon the point in support of which it is now cited.

In *Baker* v. *Atkinson*, 11 O.R. 735, the *Hoskins* case was apparently neither cited nor referred to in the Divisional Court, although Armour, J., expressed an opinion in apparent agreement with that of Patterson, J.A., in the *Hoskins* case. Wilson, C.J., however, declined to express any opinion upon the point, and the judgment itself was afterwards reversed in the Court of Appeal (see (1887) 14 A.R. 409), again without a single reference to the *Hoskins* case. Under these circumstances, it seems to me that I am not bound to follow *In re Hoskins and Hawkey*, in so far as it can be deduced from it that an acceleration clause such as the one now before us is *ipso facto* void as against creditors. That is,

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in my opinion erroneously, to treat that which is properly a presumption of fact as a presumption of law. And, on the other hand, if it is to be regarded as a presumption of fact, the presumption fails because there is no evidence before us as to the financial condition of the lessee when the lease was executed. For all we know he may have been perfectly solvent then, or he may have since discharged all his then obligations.

The real difficulty in the way of an easy construction of the statutory provision arises, it seems to me, largely from placing too much stress upon the word "during," as if the right of distress existed in respect of any and all rent which was due and owing "during" the year next preceding the assignment. But for the statute, the landlord might distrain for up to six years' arrears. The right to distrain is not taken away; but the lien, as it is called, is, in my opinion, reduced to one year's rent if so much or more is owing, that is, that not more than one year's arrears prior to the assignment, whether actual, or accelerated as in this case, can now be claimed.

It is, I think, quite clear that if two or more years were actually due and in arrear "during" the year next preceding the assignment, for only one of them would the lien exist, and yet both would have been due "during" the year. In other words, "during" in my opinion has here very much the meaning of "for." If the section read, "the preferential lien of the landlord for rent shall be restricted to the arrears of rent due *for* the period of one year next preceding," etc., there could not be much doubt about its meaning. And such a reading is, in my opinion, not only permissible—see Murray's English Dictionary "For," vol. 4, p. 412, X.—but correctly interprets what, looking at the course of legislation and at all the circumstances, is the manifest intention of the Legislature.

It would have been a wise precaution to have had the owners of the chattel mortgage before the Court as parties. The assignee may find that he has really been fighting a battle for their benefit rather than for that of the creditors whom he represents.

In the meantime, I think, the money realised from the sale, less the expenses of the sale, should be paid into Court to abide the further order of the Court.

With this variation, I would dismiss the appeal and cross-appeal, both with costs.

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MACLAREN, J.A., agreed with GARROW, J.A.

HODGINS, J.A.:—The rent for the years 1915 and 1916 became due by virtue of the acceleration clause on the giving of the chattel mortgage in May, 1915. The assignment was made on the 7th September, 1915, so that the rent for which the preferential lien is asserted covers nearly a year and four months thereafter.

I see no escape from the conclusion that the rent for 1915 and 1916 was in arrear "during the period of one year next preceding . . . the assignment;" but the question is, can the landlord claim priority for it all, if it extends beyond three months after the assignment or beyond the time that the assignee retains possession?

There are expressions in the cases referred to by my learned brothers which would require the words in sec. 38 (1) "during the period of one year next preceding, and for three months following, the execution of the assignment," to be treated as indicating a continuous period of fifteen months during which rent may become in arrear, and for which therefore the landlord might distrain.

I prefer what I think is the view of the majority of the Court in *Langley* v. *Meir*, 25 A.R. 372, namely, that the section in question is intended to prevent priority for accelerated rent beyond three months from the execution of the assignment. The section is intended to restrict and not to enlarge or accumulate rights of distress.

The interpolation by 58 Vict. ch. 26, sec. 3 (1), of the words "for three months following" must have been intended to terminate the period for which a preference can be claimed where the assignee does not by remaining in possession extend it. The language is not happily chosen, but it is capable of this construction without doing much violence to grammar.

In *Langley* v. *Meir*, Burton, C.J.O., at p. 377, speaking of 58 Vict. ch. 26, says that is an Act "by which the preferential lien is again restricted as far as the amount payable under an acceleration clause in case of an assignment is concerned, and there is the prohibition of an agreement to accelerate the rent becoming due for a longer period than three months." And again: "Very few leases in modern times are without an express agreement that in the event of insolvency the rent shall be accelerated for

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a longer or shorter period, and the Legislature has now interfered by limiting the period to three months."

Maclennan, J.A., at p. 386, says: "If by the terms of the lease, three months or more of the future rent was payable in advance, or was accelerated by the execution of the assignment, then the defendant would have had a preferential lien for future rent to the extent of three months, but no more, because she could have distrained for it."

Osler, J.A., took a different view, considering that the landlord was entitled to rent becoming due during the three months. But, as I read his judgment, he did not intend to hold that, if the rent which became due during the previous year extended beyond the three months, the landlord could yet claim a preferential lien for it; because, in dealing with what rent is covered by the earlier words of the section, he describes it (p. 382) as "rent then" (i.e., during the year) "in arrear and capable of being distrained for, though not necessarily covering the whole period up to that time" (i.e., the execution of the assignment), "and in ninety-nine cases out of a hundred not doing so," and then he adds, as his comment on the three months' proviso: "Thus the gale of rent accruing, but not yet due at the date of the assignment, would be recoverable if it became due and in arrear within three months thereafter, as well as any other gale which might become due and in arrear within that time."

The majority of the Court considered that the right to this three months' rent was contingent upon the assignee remaining in possession for that time; a point which it is unnecessary to consider in this case, in view of the circumstances, as the distress here was made while the assignee was in possession, and for the rent which by the acceleration clause became due before the assignment.

The decision in *Langley* v. *Meir* is, I presume, a decision of the Court of Appeal, although pronounced by a majority in a Court consisting of only three of its members. But, if not, it assists the view which I have ventured to express.

I do not see how the acceleration clause can be considered as a fraud on the Assignments and Preferences Act.

In the case of *In re Murphy* (1803), 1 Sch. & Lef. 44, the clause was held to be fraudulent because the right to the accel-

erated rent did not exist before insolvency, and the contingency on which it became payable was the insolvency itself.

In *Ex p. Mackay*, L.R. 8 Ch. 643, Mellish, L.J., says (p. 648): "A person cannot make it part of his contract that, in the event of bankruptcy, he is to get some additional advantage which prevents the property being distributed under the bankruptcy laws."

Here the rent became accelerated not by the making of the assignment but the giving of a chattel mortgage, and the stipulated advantage is only that which is preserved to the landlord by the Assignments and Preferences Act, as now construed.

If that Act recognises and limits the preferential lien or right of distress, a provision in a lease which is a fraud upon that Act must, it seems to me, be one which attempts to override its provisions, and not one to which the Act applies, and in applying cuts it down to that which by the Act is considered reasonable.

On the facts of this case, and on the assumption that the assignee gave up possession, as I understand is the case, the landlord should be held entitled to a preferential lien for so much of the accelerated rent as does not extend beyond three months after the date of the assignment. This would give him the rent from the 1st January, 1915, to the 9th September, 1915, and for three months thereafter, or exactly eleven months and nine days. As this is very nearly the amount to which my brother Garrow thinks the landlord is entitled, and covers practically the same period, I would agree in the dismissal of the appeal. The money should be paid into Court as suggested.

Meredith, C.J.O.

MEREDITH, C.J.O. (dissenting):—This is an appeal by the defendant from the judgment dated the 15th October, 1915, which was directed to be entered by Britton, J., on a motion for an injunction which was turned into a motion for judgment, and there is a cross-appeal of the plaintiff from the same judgment.

The respondent is the assignee for the benefit of creditors of James Lawrence Goodbrand, and the assignment is dated the 7th September, 1915.

Goodbrand was tenant of the appellant of a farm in the township of Nelson, in the county of Halton. The lease bears date the 16th January, 1915, and is made under the provisions of the Short Forms of Leases Act. The term is three years from

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the 1st January, 1914. The rent for the first year is $500, payable one half on the 1st October, 1914, and the other half on the 31st December of the same year. The rent for the other two years is $600 per annum, payable one half on the 1st October and the other half on the 31st December in each of the years (1915 and 1916), and the rent for 1914 was paid.

On the 11th January, 1915, the tenant made a chattel mortgage to Eber Ericcson Thornton for $600, on all his goods and chattels, which were then or might thereafter be upon the farm, and on the 1st May, 1915, the tenant made another chattel mortgage on the same goods and chattels to George H. Horning for $1,737.80, and these mortgages are still subsisting, though it is said that the first mortgage was paid off by Horning, and the amount of it is included in his mortgage.

On the 9th September, 1915, the appellant distrained the goods and chattels on the farm for $1,200 which he claimed to be due and in arrear, being the rent for the years 1915 and 1916.

The claim that this rent was due and in arrear is based upon a provision of the lease which reads as follows: "Provided also, and it is hereby further expressly agreed and understood by and between the parties hereto, that if the term hereby granted, or any of the goods and chattels of the said lessee, shall be at any time during the said term seized or taken in execution or attachment by any creditor of the said lessee, or if any writ of summons for a money claim or any execution or attachment shall issue out of any Court of law against the said lessee or goods and chattels, or if the said lessee shall make any chattel mortgage or bill of sale of any crops or other goods and chattels, or any assignment for the benefit of creditors, or if such crops, goods or chattels, shall or may be at any time liable to seizure by any chattel mortgagee thereof, or if said lessee becoming bankrupt or insolvent shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or so act that the occupation of said premises is or would be no longer a personal occupation by said lessee, shall attempt to abandon said premises, or to sell or dispose of farm stock or implements, by public auction or private sale or in any other manner, or to remove the same from the demised premises, so that there would not, in the event of such sale, removal, or disposal being completed, be a sufficient distress on said premises

for the rent then due or accruing due, then and in every such case the then current as well as the next ensuing year's rent and taxes for the then current year (to be reckoned upon the rate of the previous year in case the rate shall not have been fixed for the then current year) shall immediately become due and payable, and the term hereby granted shall, at the option of the said lessor, immediately become forfeited and void, and in every of the above mentioned cases such accelerated rent and taxes shall be recoverable by the said lessor in the same manner as the rent hereby reserved, and as if the same were rent in arrear."

It does not appear that the appellant elected to forfeit the term, but apparently the contrary is the fact.

By sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, it is provided that: "In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises."

The parties appear to have misapprehended the effect of this provision, and to have been under the erroneous impression that it prevents a landlord from distraining upon the property of the tenant which has passed to the assignee by the assignment, and that the right of the landlord is to prove as a preferential creditor for the arrears of rent due to him, and the judgment is based upon the same view as to the effect of the sub-section.

The sub-section does not interfere with the common law right of the landlord to distrain, but only limits the extent of the arrears for which he may distrain: *Linton* v. *Imperial Hotel Co.*, 16 A.R. 337.

Unless the provision for the acceleration of the rent is open to the objection with which I shall afterwards deal, the effect of it is that, upon the happening of any of the events mentioned in it, the rent for the current year and the year following became due and payable, and the appellant was entitled to distrain for the two years' rent, just as he would have been entitled to distrain if by the terms of the lease the rent for those years had been made payable in advance on the day on which the event happened.

The effect of sec. 38 (1) is, that he may distrain only for the arrears of rent due "during the period of one year next preceding

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. . . the execution of the assignment;" and if, upon the happening of any of the events mentioned in the accelerating clause, the rent for the two years became payable, it was arrears of rent due during the period of one year next preceding the execution of the assignment.

The learned Judge treated the sub-section as limiting the amount for which distress might be made to rent for one year which became due during the year preceding the execution of the assignment; but that, in my opinion, is not its meaning. If it had been intended so to restrict the landlord's right, the provision would have been like that of sec. 55, which forbids the taking under execution of goods or chattels upon leased land unless before the removal of them from the land the landlord is paid "all money due for rent of the premises at the time of the taking of such goods or chattels by virtue of such execution if the arrears of rent do not amount to more than one year's rent," or, if the arrears exceed one year's rent, "one year's rent."

It is clear, I think—and that, as I understand, is my brother Garrow's view—that, had the assignment not been made, the appellant would have been entitled to distrain for the unpaid rent for the year 1915 and the rent for the year 1916, for, by the terms of the lease, when the chattel mortgage was made that rent became immediately due and payable.

The appellant had the right to distrain for it, because it was rent in arrear, and it became rent in arrear in, and therefore "during," the year next preceding the execution of the assignment. I am unable to understand how it was, for the purposes of sec. 38 (1), any the less rent in arrear during one year next preceding the execution of the assignment because an assignment had been made.

Where it is intended to restrict the landlord's right to distrain as my brother Garrow thinks it is restricted by sec. 38, very different language is used. In addition to what I have said as to sec. 55, it may be pointed out that the section of the English Bankruptcy Act which corresponds with sec. 38 preserves the right of the landlord to distrain "with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication"—46 & 47 Vict. ch. 52, sec. 42 (1)—language very different from that of sec. 38.

The case which the draftsman of sec. 38 had in mind was, I think, that of a landlord who had allowed several years' rent to fall into arrear, and the purpose was to restrict the common law right which the landlord has to distrain for six years' arrears—and the case of future rent the payment of which is accelerated was not present to his mind.

However that may be, I cannot construe the section as meaning that the landlord's right is restricted to the recovery of rent for "not more than one year's arrears prior to the assignment, whether actual or accelerated," as my brother Garrow thinks it is.

I am of opinion that the acceleration clause is void, at all events as against the respondent, as a fraud upon the Assignments and Preferences Act. That Act (R.S.O. 1914, ch. 134), though not an insolvent or bankruptcy Act, is "an Act respecting Assignments and Preferences by Insolvent Persons," and its purpose is to provide, in case of an assignment for the general benefit of creditors, for an equal distribution of the property of the assignor among his creditors without preference or priority.

With such an Act upon the statute-book, in my opinion, the acceleration clause in question cannot be treated as anything but a device to defeat the objects of it. The clause not only provides for accelerating the payments of the rent, but gives the respondent the right, if he chooses to do so, also to forfeit the term. If such a clause is valid against an assignee, I know of no reason why, if the term had been ten years, the provision might not have been that the rent of the whole term should become payable upon the making of the assignment, although no rent had yet become otherwise payable, and the first year of the term had not elapsed.

If the same rule is to be applied, as I think it should be, as is applied where the assignment is made under the provisions of an insolvency or bankruptcy Act, the case of *In re Hoskins and Hawkey*, 1 A.R. 379, is conclusive against the respondent, and there is also in favour of the view I take the opinion of a former Chief Justice of the Court of Appeal, then Armour, J., in *Baker* v. *Atkinson*, 11 O.R. 735, 752, though Wilson, C.J., doubted the correctness of it, and said he gave "no opinion on that part of the case."

The principle of the decision in the two cases which were followed in the *Hoskins* case—*In re Murphy* (1803), 1 Sch. & Lef.

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44, and *Ex p. Mackay*, L.R. 8 Ch. 643—is, that "a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy than that which the law provides:" *per* James, L.J. (p. 647); and that the stipulation, being made with the express object of taking the case out of reach of the bankruptcy laws, is a direct fraud upon those laws. And, as put by Mellish, L.J. (p. 648): "A person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws."

That principle is, in my opinion, equally applicable where the event is the making of an assignment for the general benefit of creditors, for the object is to get some additional advantage which prevents the property being distributed under the Assignments and Preferences Act. The fact that in the case at bar the making of an assignment for the benefit of creditors was not the only event upon the happening of which the payment of the rent was to be accelerated, and that it was upon the occurrence of one of the other events provided for, and not by reason of the assignment, that the payment of the rent was accelerated, is, in my opinion, immaterial. There is but one proviso, and, if it is void by reason of the provision for the acceleration in the event of an assignment being made, it is, in my opinion, vitiated *in toto*, and the whole proviso is void.

I have not found any case in which this point was decided It was taken by counsel for the trustee in *Ex p. Barter* (1884) 26 Ch.D. 510, 516, but was not passed upon by the Court.

I would, for these reasons, dismiss the defendant's appeal and allow the appeal of the plaintiff with costs, and substitute for the judgment in appeal a judgment declaring that the acceleration clause is void as against the plaintiff, and restraining the defendant from proceeding further with the distress. The costs throughout should be paid by the defendant.

Magee, J.A.

MAGEE, J.A. (dissenting):—This case is, I think, to be governed in this Court by the decision in *Linton* v. *Imperial Hotel Co.*, 16 A.R. 337. There the acceleration clause made the current year's rent immediately payable and the term forfeited and void in case of the lessee making an assignment for creditors, and the landlord on the 24th July, 1888, distrained for $270, balance of the current

year's rent up to the 1st February, 1888, which had originally been payable $85 on the 1st May, 1888, $92.50 on the 1st August, and $92.50 on the 1st November, 1888. The assignment had been made on the 16th July, 1888—and on the 1st September, 1888, the assignee had given up possession to the landlord. The parties submitted a special case asking whether and for what amount the landlord was entitled to distrain, and, if entitled to distrain for $270, the landlord was to have judgment—but, if he was not so entitled to distrain, the assignee should have judgment for the difference up to $185. The Judge of the County Court held that the landlord was entitled to distrain for $270, but was liable to refund $154.17 for the period between the 1st September, 1888, and the 1st February, 1889. On appeal it was held that as to this refund he had gone outside the special case; but that he was right as to the legality of the distress for $270. It was argued for the assignee that only $85 was in arrear; that the goods were *in custodiâ legis;* that by distraining the landlord elected to declare the term forfeited; that the distress was made outside the term; and that the acceleration clause was void as an evasion of the Bills of Sale and Chattel Mortgage Act, and also as being a fraud upon creditors. But these objections were all overruled. The result, therefore, was, that the landlord was held entitled to distrain for rent covering more than seven months after the assignment, including $92.50 which would only have been payable more than three months after it.

In the present case, the landlord claims rent for nearly sixteen months after the assignment, including $900 which would not have been payable within three months.

In the *Linton* case, however, clear effect was given to the clause accelerating the time for payment of the rent and making it as much in arrear for purposes of distress after the assignment as if it had been made originally payable on the 16th July, 1888. So here, under the express terms of the acceleration clause, the defendant was entitled, at any time after the chattel mortgage, to have distrained, as clearly as if the whole $1,200 had been made originally payable on the 1st May, 1915. As in the *Linton* case, he did not distrain till after the assignment, though he says without knowledge of it, and the distress was upon goods of which the assignee had taken possession.

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It was declared in that case that the Apportionment Act had no application; and, the Court having once concluded that the acceleration clause was valid and took effect, it is manifest that, on the limited terms of the special case, that Act could not apply.

It is said that the landlord's claim is a fraud upon creditors. In this particular case—leaving out of sight the fact of the mortgagee's claim—the landlord lost the season of 1915, and the benefit, worth $500, of certain acreages of crop and ploughing and certain produce and poultry which the tenant covenanted to leave, and which would have replaced their equivalents received by the tenant when he was let into possession of the farm—and he would have to take his chances of obtaining a new tenant for 1916 at the like rent, even if he did not, by distraining after the assignment, deprive himself of the right to dispossess the assignee. But, in addition, the assignee became personally liable for the rent not payable before the assignment which would become payable while he continued to hold the term. His affidavit states that, in pursuance of the assignment, he took possession of the farm. He therefore was like any ordinary assignee of a term: *Linton* v. *Imperial Hotel Co., supra; Magee* v. *Rankin* (1869), 29 U.C.R. 257; Lewin on Trusts, 12th ed., p. 265. He might be entitled to indemnity out of the trust estate if not negligent, but that would be as much at the expense of the creditors as the landlord's distress. It may be doubted whether the landlord gained much, even if entitled to hold the $1,200. It is open to question whether the Legislature has not acknowledged the validity of a distress which does not go beyond the assignee's possession.

But we have not here to do with the validity of an acceleration by reason of an assignment for creditors. The landlord in effect says he has nothing to do with that. He does not claim land or rent on that account. He claims the rent as overdue by reason of the chattel mortgage, just as effectually as if it had been by the lease made payable on the 1st May, 1915. It is not suggested that acceleration by the mortgage would by itself be invalid or ineffectual.

It is true that the acceleration by the mortgage is contained in the same clause as the acceleration by the assignment; but, in my opinion, they are severable quite as readily as the cove-

nants in *Mallan* v. *May* (1843), 11 M. & W. 653, and *Green* v. *Price* (1845), 13 M. & W. 695, against doing business in London or places outside. The clause provides that "in every such case" the acceleration shall ensue, and I see no reason for holding that such acceleration taking effect on the 1st May could be in any way affected by the rights of creditors or an assignee for creditors looming up four months later.

If the principle of *McFadden* v. *Brandon* (1904), 8 O.L.R. 610, be applied, it would seem that it would take effect even against the landlord's will, and that he could not have sued the assignee for the instalments due on the 1st October and the 31st December, 1915, because they did not become payable after the assignment —nor can the acceleration be looked on in the light of a penalty.

I see no ground, therefore, for holding that the distress for $1,200 was not justifiable. Then comes the question, can the landlord hold the money, having once obtained it? And here we have to deal with sec. 38 of the Landlord and Tenant Act, and, as I venture to think, the Apportionment Act. Section 38, in sub-sec. 1, restricts—and therefore recognises—the "preferential lien of the landlord for rent" to certain "arrears," and therefore rent which has become payable. But what arrears? Those "of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises." By sub-sec. 2, notwithstanding any stipulation in any lease, the assignee may, within one month, by notice in writing to the landlord, elect to retain the premises occupied by the assignor for the unexpired term or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent. Whatever may be the effect of this sub-sec. 2 as entitling an assignee to shorten, and not merely to lengthen, his right of occupation, no such notice was given in this case, and there is no intimation that the assignee does not intend to "retain possession" for the whole term. If he does so, then sub-sec. 1 of sec. 38 does not deprive the landlord of his "preferential lien" for the whole term. But how or when is he to enforce it, if not when the rent is payable? The rent being all payable, he must distrain for all at the one time if there are goods enough, or not at all. He cannot split up his demand and distrain a second time upon the assignee or any one else in possession: Woodfall's

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Landlord and Tenant, 19th ed., p. 580. As this rent, $1,200, became payable on the 1st May, 1915, the landlord could not say: "I will only distrain for the proportion for one year or one year and three months afterwards, and afterwards, if the assignee holds possession, I will distrain for more, either all at once or from time to time." Then, if he was entitled to distrain for $1,200, and if he could not safely distrain for less, and if nothing has happened to shew that he will not be entitled to the full amount, on what principle can any part of the money in Court be taken from him? I fail to see any.

It may be necessary in some future case to decide whether an assignee may not become entitled to repayment of part of rent so distrained for. Section 38 began in Ontario legislation in 1887, by 50 Vict. ch. 23, sec. 2, which was amended in 1895 by 58 Vict. ch. 26, sec. 3, and in 1911 by 1 Geo. V. ch. 37, sec. 38. The Act of 1887 followed the wording of the Insolvent Acts, which began in 1865, 29 Vict. ch. 18, sec. 14—whereby the "preferential lien" was restricted to the arrears of rent due during the period of one year last previous to the assignment and so long as the assignee should retain possession.

Although expressly limited to Upper Canada, the phraseology was doubtless to be credited to a Lower Canadian source, as suggested by Patterson, J.A., in *In re Hoskins and Hawkey*, 1 A.R. 379. But, though the same words were used, I agree with Street, J., in *Lazier* v. *Henderson*, 29 O.R. 673, that they are not necessarily to be given the same interpretation. In *In re West Lorne Scrutiny* (1913), 47 S.C.R. 451, the interpretation of the word "scrutiny" in an Ontario Act differed from that put upon it in a Dominion Act in *Chapman* v. *Rand* (1885), 11 S.C.R. 312; and see *In re Saltfleet Local Option By-law* (1908), 16 O.L.R. 293, at p. 309. There is here the very important fact that between 1865 and 1887 a radical change had been made in the character of rent itself, by declaring that "all rents . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."* Previously rent could in no sense be considered due until it was payable and (except as to cases of apportionment on death under 11 Geo. II. ch. 19, sec. 15, and later statutes) there was never an apportion-

*See the Apportionment Act, R.S.O. 1914, ch. 156, sec. 4.

ment in respect of part of the time: *Clun's Case* (1913), 10 Rep. 127 (*b*). The effect of the corresponding English Apportionment Act (33 & 34 Vict. ch. 35) was considered in *Re Lucas* (1885), 54 L.T.R. 30, by Fry, L.J., who held that rent accrued but not payable was included in a bequest of rent due. Lord Esher and Bowen, L.J., owing to other expressions in the will, held the contrary, but expressed no opinion as to the Act, though the latter was not inclined to agree with Fry, L.J. In *In re Howell*, [1895] 1 Q.B. 844, the apportionment was held to be accrued due. The word "due" has more than one signification, and may mean a debt existing though not yet payable: see Bouvier's Law Dictionary, ed. of 1897, and Black's Law Dictionary, ed. of 1891. I am inclined to think that the Ontario Legislature used the word "due" in the sense of the Apportionment Act, and I suspect that it was carelessly so used in the Insolvent Act of 1865 without consideration of the fact that in Upper Canada rent was not apportionable. If the word "due" is read as "accrued," difficulties which necessarily arose in the construction of the enactment would, I think, largely disappear, and the evils of rent in arrear and rent in advance, against which the Legislature may be supposed to have wished to guard, would be prevented. Under the statute of 8 Anne ch. 14, sec. 1, the execution creditor need only pay one year's rent if more were in arrear, or less if less. Under the English Bankruptcy Acts the distress only avails for six months—formerly one year's rent accrued due, and, as the period counts from the act of bankruptcy, and not from the actual proceedings, the landlord, after distraining for more, may have to repay part to the trustee. Such are precedents in policy which the Legislature may be assumed to have had in mind. But I can see no ground here for basing a claim for a return of any of the money.

It does not appear how much is owing to the mortgagee, but probably much more than the amount in Court, and it is probable that the assignee has no real beneficial interest in the goods. The statute for the creditors' benefit should not be extended in favour of the mortgagee: see *Railton* v. *Wood*, 15 App. Cas. 363.

I would give judgment for the landlord for the moneys in Court to the extent of $1,200—and his expenses and costs of the action and appeal.

Appeals dismissed.

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REX v. CARTER.

Alberta Supreme Court, Harvey, C.J. April 27, 1916.

1. CERTIORARI (§ I A—9)—LIMITATIONS OF REVIEW—EVIDENCE OF THE OFFENCE—CONVICTION VALID ON ITS FACE.

The absence of any evidence of the offence is not a sufficient ground for quashing a summary conviction on certiorari, nor does it raise any question of jurisdiction of the magistrate; and a Court hearing a certiorari application in respect of a summary conviction valid on its face should not look at the depositions in furtherance of an enquiry as to whether there is any evidence of the offence.

[*Reg.* v. *Bolton* (1841), 1 Q.B. 66 and *Colonial Bank* v. *Willan* (1874), L.R. 5 P.C. 417, applied; *R.* v. *Hoare*, 24 Can. Cr. Cas. 279, referred to; *R.* v. *Coulson*, 27 Ont. R. 59 and *R.* v. *McPherson*, 25 Can. Cr. Cas. 62, dissented from; *R.* v. *C.P.R.* (1907), 7 Terr. L.R. 443, and *R.* v. *Pudwell*, 26 Can. Cr. Cas. 47, followed.]

Statement. MOTION to quash a summary conviction as on certiorari, the actual issue of a writ of certiorari not being required under the practice rules.

J. M. Macdonald, for the motion.

J. W. Heffernan, for the Crown, contra.

Harvey, C.J. HARVEY, C.J.:—This is an application to quash a conviction as on certiorari. It is not suggested that there is any irregularity in the conviction or in the proceedings, the only ground upon which the application is based being that there is no evidence to support the finding of the magistrate.

I have not read the evidence to see whether this objection can be supported, and perhaps the easiest way to dispose of the case would be to read the evidence when it might be found to be ample. But as this objection is one which is becoming more common every day, and as it is one of which for several years I have doubted the sufficiency, I have preferred to examine carefully the authorities to settle the point definitely in my own mind as being of value for future cases.

On March 23rd last, my brother Hyndman in *R.* v. *Pudwell*, 26 Can. Cr. Cas. 47, decided that it was not a valid objection to a conviction. In *R.* v. *C.P.R.* (1907), 7 Terr. L.R. 443, I expressed tentatively the same view in writing reasons for a judgment of the Court *en banc* of the Territories, which reasons were concurred in by Sifton, C.J., Prendergast, Newlands, and Stuart, JJ.

A careful examination of the authorities to which I then referred, and of a multitude of others, satisfies me that the absence of any evidence of the offence is not a sufficient ground for quashing a conviction on certiorari, and therefore under our practice upon an application to quash, which omits the step of certiorari.

It is equally clear, however, that in a very large number of cases in our Courts the evidence has been examined for the purpose of ascertaining whether there was any legal evidence to sustain the conviction, and in some the conviction has been quashed by reason of the absence of such evidence. As far as our own Courts are concerned, however, I have not been referred to any case in which the point was raised and it was held that the right to quash on that ground existed. In *R.* v. *Weiss and Williams*, 13 D.L.R. 632, 22 Can. Cr. Cas. 42, 6 A.L.R. 264, my brother Stuart did incidentally express the opinion that it was a good ground for quashing, relying on *R.* v. *Smith* (1800), 8 T.R. 588 (101 E. R. 1562), and 10 Halsbury 199. A part of the headnote of that case is:—

[6 A.L R. 264.]

"If no evidence appears in the conviction to support a material part of the information the Court will quash the conviction."

The report does not shew how the conviction came before the Court, and consequently whether the Court was exercising the jurisdiction when a conviction is brought up on certiorari. Moreover, it is to be observed that this defect appeared "in the conviction" which would make it inapplicable as an authority under the present practice when the evidence does not appear in the conviction and there is no other defect in the conviction.

At the page of Halsbury referred to, it is stated:—

"It is not now necessary for magistrates to set out the evidence in a conviction before them . . . . But when the evidence is set out in the conviction or order and the superior Court are of opinion that there was no evidence proper to be considered by the magistrates in support of some point material to the conviction or order, certiorari will be granted," for which proposition *R.* v. *Smith, supra*, is given as authority.

It seems apparent, therefore, that it is no authority when the evidence is not set out in the conviction.

In Paley on Convictions, p. 451, it is stated:—

"The Court will not grant a certiorari to bring up a conviction by justices in a matter over which they have jurisdiction, even though it be alleged that they convicted without any evidence whatever."

This is the headnote of *ex parte Blewitt* (1866), 14 L.T.N.S. 598. Lush, J., said:—

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"The justices had jurisdiction to enter upon the enquiry and therefore the case was not one for certiorari. The proper course was by appeal."

It may be noted that it appears from the report that counsel stated that certiorari had been taken away except when justices had acted without jurisdiction, but there is nothing in the judgment, or in Paley, to indicate that that is considered of any importance.

In any event, *Reg.* v. *Bolton* (1841), 1 Q.B. 66, which appears to be the leading case on this point and which was subsequently declared by the Privy Council in *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417, to be a correct exposition of the law, was not a case in which certiorari had been taken away by statute.

In the *Colonial Bank* case it had, but it was pointed out in the judgment that that did not deprive the Superior Court of its power to issue the writ, but merely limited its action on such writ. No distinction is indicated between the action in the two cases and it is hard to see why there should be any. The writ of certiorari was simply for the purpose of getting the conviction before the Superior Court. If and when it could not be got before the Court, no action could be taken on it, but when it could be got before the Superior Court, I have been able to find nothing to shew why in all cases the Court should not, in the words of the writ, "cause to be done thereon what of right and according to the law and custom of England we shall see fit to be done."

As I have already indicated, under our present practice, one application answers the purpose for which there were four in the *Bolton* case, one each for the rule nisi and rule absolute for certiorari and the rule nisi to quash and the final order.

In Seager's Magistrates' Manual, at p. 31, it is stated:—

"The result of the cases is that when there is no appeal, even if the conviction is valid on its face, the Court will, without weighing the evidence, see that there is some evidence such as would justify a case going to a jury, and upon which the conclusion of guilt may fairly be drawn; and in any case a conviction not based upon any proper proof of guilt whatever is void as against natural right, and in excess of jurisdiction, and will be quashed, even if valid on its face."

Several authorities are quoted for these propositions, all of which I have examined, but without satisfying myself that they support the propositions. The headnote of one, *ex parte Daley* (1888), 27 N.B.R. 129, being, "Certiorari having been taken away in proceedings for violation of the Canada Temperance Act, a conviction for selling liquor will not be interfered with, though there is no evidence of the offence charged, the magistrate having jurisdiction by the Act over the subject-matter of the offence, and by the information over the offence charged."

There are, however, authorities for some of the propositions which I will consider later.

In the *Bolton* case [*R.* v. *Bolton*, 1 Q.B. 66], the conviction had been brought before the Court on certiorari and the evidence supporting the conviction was brought in by affidavits of the magistrates and the evidence on which the defendant relied by affidavits on his behalf, which also included other evidence not before the magistrates. Lord Denman, C.J., at p. 72, said:—

"All that we can then do when their decision is complained of, is to see that the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it."

He points out that affidavits may be used to shew that the magistrates had no jurisdiction to commence an enquiry, not to shew that they had come to a wrong conclusion, but that they never ought to have begun the enquiry, and continues:—

"But when a charge has been laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be, the irresistible conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrates' decision was wrong if he affirms the charge, and not to shew that he acted without jurisdiction. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend upon the truth or falsehood of the charge,

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but upon its nature; it is determinable at the commencement, not at the conclusion, of the enquiry; and affidavits, to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the enquiry."

Although he is referring to affidavits, they are, as I have stated, affidavits to shew what the evidence was, that apparently being the manner in which the evidence was sought to be put before the Court; and the conclusion therefore is that that evidence cannot be looked at to shew that the magistrate came to a wrong conclusion when he had jurisdiction and the conviction and proceedings were regular, and he adds on p. 75:—

"We conclude, therefore, that the inquiry before us must be limited to this—whether the magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true; for it has not been contended that there was any irregularity on the face of these proceedings."

He also adds, on p. 76:—

"It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

This principle appears to me to be a most important one for the Courts to keep in mind and the overlooking of it must tend to confusion. It does appear most unjust that a person should be convicted of an offence without any evidence, and that fact naturally induces the Court on certiorari proceedings to a disposition to quash such a conviction, and in carrying out its view, it may make itself a Court of appeal, which it ought not to do. The Court should keep in mind that its primary duty is to see that the law is properly administered. It may be supposed that law and justice are the same, but the responsibility that the administration of the law will do justice is not on the Courts but on the legislatures, and the Courts should not assume the functions of the legislatures for any reason, not even to prevent what appears to them to be hardship or injustice.

In many cases an appeal from a conviction is authorised, and, when it is not, it must be assumed that it is because the legislature deems it wise that there should be no appeal, and the Courts have

no right to permit by indirect means what the legislature has declined to allow directly.

As regards the law at present, the Code also by sec. 761 provides for a stated case by a magistrate on any summary conviction on the ground that it is erroneous in point of law or is in excess of jurisdiction.

These provisions make it unnecessary now in order to prevent injustice for the Court to overstep its proper limits.

In *Colonial Bank* v. *Willan*, L.R. 5 P.C. 417, Sir James W. Colville, delivering the judgment of the Board, said at p. 443:—

"An objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the enquiry but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide. Accordingly the authorities, of which *Reg.* v. *Bolton*, 1 Q.B. 66, and *Reg.* v. *St. Olave* (1857), 8 El. & Bl. 529, may be taken as examples, establish that an adjudication by a Judge, having jurisdiction over the subject-matter, is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found.

In cases which fall within the principles of the last mentioned decisions, the question is, whether the inferior Court had jurisdiction to enter upon the enquiry, and not whether there has been miscarriage in the course of the enquiry."

In *Reg.* v. *St. Olave*, 8 El. & Bl. 529, Lord Campbell, C.J., said at p. 533:—

"It is clear that the decision of the inferior tribunal, if on a point which they had jurisdiction to decide, is final."

It is pointed out, however, in *Colonial Bank* v. *Willan*, that there is a class of cases in which the evidence may be looked at when the inferior tribunal having commenced the inquiry is met by some fact which may oust the jurisdiction; and *Thomson* v. *Ingham* (1850), 14 Q.B. 710 and *Reg.* v. *Stimpson* (1863), 4 B. &

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S. 301, are cited as instances. In both of these cases by the defence a bonâ fide claim of title to land was made which ousted the justices' jurisdiction. The *Willan* judgment, after considering these cases, continues on p. 445:—

"All these cases, however, leave untouched the authority of *Reg.* v. *Bolton* and that class of cases."

In *Reg.* v. *Grant* (1849), 14 Q.B. 43, at p. 61, Lord Denman, C.J., in delivering the judgment of the Court, said:—

"It is clear that the decision of a tribunal lawfully constituted upon a question properly brought before it, respecting a matter within its jurisdiction, is not open to review on certiorari, *Reg.* v. *Bolton*, 1 Q.B. 66; but the decision of persons, assuming to be a tribunal, that they are lawfully constituted, is open to review."

It is, no doubt, this latter principle which the Court of Appeal of Ontario had in view in *Reg.* v. *Davy* (1900), 4 Can. Cr. Cas. 28, one of the cases cited by Seager for the proposition I have quoted, when Lister, J.A., in giving the judgment of the Court (at p. 33), said:—

"I do not agree with the contention that a magistrate's finding of fact in favour of his jurisdiction is in no case subject to review. The rule is laid down by Cockburn, C.J., in *Waite* v. *Feast* (1872), L.R. 7 Q.B. 353, in these words:—

"I quite agree that magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way."

This last mentioned case was one of a bonâ fide claim of title raised to oust the magistrates' jurisdiction. The Courts agreed with the justices that the claim was not based on reasonable grounds, and therefore did not oust the justices' jurisdiction, though Cockburn, C.J., intimated as above quoted.

In the case of *R.* v. *Chandler* (1811), 14 East 267, the evidence which, as in *Reg.* v. *Grant*, 14 Q.B. 43, was contained in the conviction, did not shew that the locus in quo was within the justices' territorial jurisdiction, and the conviction was quashed, it not appearing that they had any jurisdiction to commence the inquiry.

In *ex parte Hopwood* (1850), 15 Q.B. 120, the Court refused a writ of certiorari, certiorari being taken away and therefore being available for want of jurisdiction only. Patteson, J., said:—

"As to the want of evidence on matters of fact, that cannot

possibly take away jurisdiction; no case can be cited where that has ever been said,"

and Wightman, J.:—

"Then as to the want of evidence, if the magistrates had any jurisdiction to proceed, we cannot ask whether they heard evidence at all, or whether the evidence they heard ought to have led them to an opposite conclusion."

These cases appear fully to establish that the absence of all evidence does not raise a question of jurisdiction, and that likewise it is not a ground for quashing a conviction on certiorari. I have not found any English decision that in any way questions the authority of *Reg.* v. *Bolton*, or even that differs from it. It is indeed referred to as authoritative in *R.* v. *Farmer*, [1891] 1 Q.B. 637, and even as late as *R.* v. *Woodhouse*, [1906] 2 K.B. 501.

I have not, however, found the Canadian cases as uniform as those in England.

In Nova Scotia in *Reg.* v. *McDonald* (1886), 19 N.S.R. 336, though *Colonial Bank* v. *Willan* was cited, the full Court by a majority quashed the conviction on the ground of want of evidence, which was treated as a question of jurisdiction. That decision was, however, expressly over-ruled by *Reg.* v. *Walsh* (1897), 29 N.S.R. 521, in which the Court was asked to quash the conviction on the ground that there was no evidence to warrant the conviction. The Court was unanimously of the opinion that, on the authority of *Reg.* v. *Bolton* and *Colonial Bank* v. *Willan*, this was not a good ground for quashing.

This decision was followed by the same Court in *Rex* v. *Hoare* (1915), 24 Can. Cr. Cas. 279, where, at p. 280, Russell, J., says:—

"The first objection to the conviction is that there was no proof that the liquor was kept at Stellarton for sale and the stipendiary magistrate had therefore no jurisdiction. The cases of *Colonial Bank* v. *Willan*, L.R. 5 P.C. 417, and *The Queen* v. *Walsh*, 29 N.S.R. 521, seem to establish conclusively that this Court cannot review the decision of the magistrate if he had jurisdiction to enter upon the inquiry as to the defendant's guilt or innocence. It used to be thought that if there was no evidence at all to support the conviction, the Court could on certiorari quash it. But the case of *The Queen* v. *Walsh*, 29 N.S.R. 521, based on the case in the Privy Council already mentioned, has negatived this view."

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It may be noted that in *R.* v. *Walsh*, certiorari had, and in *R.* v. *Hoare*, it had not, been taken away.

In New Brunswick, the full Court in the case of *ex parte Daley* (1888), 27 N.B.R. 129, to which I have already referred, followed *Reg.* v. *Bolton* and refused to consider, as a ground for certiorari, the absence of any evidence of guilt. This case was affirmed and followed in *R.* v. *Holyoke, ex parte McIntyre* (1913), 21 Can. Cr. Cas. 422, 13 D.L.R. 225, 42 N.B.R. 135.

In Ontario, a considerable difference of opinion has been expressed by the Judges, but I shall refer to only a few of the cases on the point.

In *Reg.* v. *Wallace* (1883), 4 O.R., the Court, by a majority, consisting of Hagarty, C.J., and Armour, J., followed *Reg.* v. *Bolton* and *Colonial Bank* v. *Willan*, and refused to quash, while Cameron, J., was of opinion that the language used in those cases should not be given its full effect. He says, at p. 141:—

"I am unable to agree in the opinion just pronounced on the ground that there was no evidence whatever before the police magistrate of the commission by the defendant of the offence charged; and in the absence of any evidence in support of the charge, the magistrate acted wholly without jurisdiction. The offence is one within his jurisdiction and he had undeniably a right to enquire as to whether it had been committed by the defendant, and if there had been any evidence whatever, even of the very slightest description, he would have been the sole judge of the weight to be attached to it, and this Court could not review his decision, though the evidence might be, in the opinion of its members, too slight to justly warrant a conviction. But this does not prohibit the wholesome exercise of the power of the Superior Courts to interfere to prevent the injustice of allowing a person accused of an offence to be convicted without any evidence."

This expresses very clearly the view upon which the Court's jurisdiction is deemed to rest, and it is, of course, quite apparent that there is a difference in principle, which is well recognised in civil appeals, between the absence of any legal evidence and the weight of evidence, but with all respect it seems to me perfectly clear that the view is directly opposed to the principle laid down in *Reg.* v. *Bolton* and *Colonial Bank* v. *Willan*.

In an earlier case of *Reg.* v. *Grainger* (1881), 46 U.C.R. 382,

a Court consisting of the same Judges had refused to quash, Cameron, J., concurring, and at p. 385 Armour, J., says:—

"It seems to be well established that upon an application to quash a conviction removed into this Court by certiorari, the Court will not notice any facts not appearing in the conviction, although returned with it under the certiorari, for the purpose of impeaching the conviction on any ground, except only on the ground that the convicting tribunal had no jurisdiction over the subject-matter."

In *Reg.* v. *Coulson* (1893), 1 Can. Cr. Cas. 114, 24 O.R. 246, the Queen's Bench Division, consisting of Armour, C.J., and Falconbridge and Street, JJ., quashed the conviction which was bad on its face, but Armour, C.J., in delivering the judgment of the Court, said:—

"When the conviction is valid on its face, we are not to look at the evidence for the purpose of determining whether an offence is established by it. That is a matter for the magistrate and for the appellate Court, when there is an appeal. See *Reg.* v. *Wallace*, 4 O.R. 127."

However, in *Reg.* v. *Coulson* (1895), 27 O.R. 59, the Common Pleas Division, consisting of Meredith, C.J., and Rose, J., while refusing to quash the conviction before it, expressed itself as diametrically opposed to the foregoing, Rose, J., in delivering the judgment, saying:—

"The Court in that case (referring to the foregoing case), contrary to the opinion held by this Court, did not look at the evidence until it appeared that the conviction was bad on its face. . . . . We think it our duty to look at the evidence taken by the magistrate to see if there was any whatever shewing an offence; if none, then it is our duty (in our opinion), to quash the conviction as made without jurisdiction, but if there was any, then not to interfere, as it is not our province to review the evidence as on an appeal."

No reference is made in this case to *Reg.* v. *Bolton* or *Colonial Bank* v. *Willan*.

In *R.* v. *Cunerty* (1894), 26 O.R. 51, a case before Armour, C.J., and Street, J., on appeal from Rose, J., who dismissed the motion for certiorari, the appeal was dismissed on the ground that on the authority of *Colonial Bank* v. *Willan*, the matter being within the

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magistrate's jurisdiction, his decision could not be reviewed, the ground being that the evidence did not establish the commission of the offence.

Except the recent case in Saskatchewan, *Rex* v. *McPherson* (1915), 25 Can. Cr. Cas. 62, 8 S.L.R. 412, I have not been referred to any later Ontario cases or any cases in the other provinces, nor in the time at my disposal have I been able to find any such cases in which the point has been considered, although, as I have already stated, there are many cases in which the evidence has been considered without the right to adopt that course being raised.

In *Rex* v. *McPherson*, which was a decision of the full Court of Saskatchewan, Lamont, J., in delivering the judgment of the Court, [25 Can. Cr. Cas., at page 65], says:—

"I agree that, when there is evidence upon which a summary conviction can be based, an appellate Court will not consider the weight of conflicting evidence; but when there is no legal evidence at all to support the finding, the conviction cannot be upheld. *In re Trepanier*, 12 Can. S.C.R. 129; *Rex* v. *McArthur*, 14 Can. Cr. Cas. 343; *Rex* v. *Allingham*, 12 D.L.R. 9, 21 Can. Cr. Cas. 268; *Rex* v. *McElroy*, 14 D.L.R. 520, 22 Can. Cr. Cas. 123;"

and further on:—

"I am of opinion that an appellate Court may look at the depositions to ascertain whether or not there is any evidence at all to support the magistrate's finding. If there is no evidence, the conviction must be quashed."

It is to be noted that the learned Judge speaks of the power of an appellate Court, and I see no ground for taking exception to the principle declared. The fact was, however, that the Court rendering the decision, while a Court of appeal from the Judge who had heard and refused an application by way of certiorari, was, as far as the magistrate's decision was concerned, not properly an appellate Court at all, as pointed out in *Colonial Bank* v. *Willan*. The Court did, however, quash the conviction, and this decision therefore is a direct authority for the contention that a conviction may be quashed for want of evidence, and is, therefore, in my opinion, directly at variance with *Reg.* v. *Bolton* and *Colonial Bank* v. *Willan*, neither of which cases, however, appears to have been considered.

In *In re Trepanier* (1885), 12 Can. S.C.R. 111, the general question is discussed at some length and without entire unanimity,

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but as the question under consideration was the statutory jurisdiction of the Supreme Court of Canada, the decision is not quite in point, but the opinion of the Chief Justice, which is concurred in by two of the other Judges, refers to the English cases, which I have mentioned, as declaring the law. Strong, J., however, expresses views somewhat similar to those of Cameron, J., in *R.* v. *Wallace*, 4 O.R. 127.

In the other three cases referred to by Lamont, J., the convictions were confirmed, and the only dicta I find in them supporting the view that the Court may quash if there is no evidence is the statement in them, that if there is any evidence the Court will not weigh it.

In the result there is no decision, except those of *Reg.* v. *Coulson* (No. 2), 27 Ont. R. 59, and *Rex* v. *McPherson*, 25 Can. Cr. Cas. 62, which I have seen which holds that the evidence may be looked at for the purpose of seeing whether there is any evidence, and the opinion in the former of these was unnecessary for the decision since the Court held there was such evidence. For that reason, and because *Reg.* v. *Bolton* and *Colonial Bank* v. *Willan* are not considered, with much respect, I do not consider that they can be taken as in any way affecting the authority of the last mentioned case, which, as a decision of the Privy Council, is of the highest authority, and which I am therefore bound to follow.

The application will therefore be dismissed with costs.

Motion dismissed.

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Nova Scotia Supreme Court, Graham, C.J., Russell and Longley, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. April 22, 1916.

1. MUNICIPAL CORPORATIONS (§ II G 3—236)—LIABILITY FOR FLOODING FROM SEWERS—PROXIMATE CAUSE.

Where, after an unusual fall of rain a sewer overflows into a cellar, causing injury, and it appears to the trial Judge that although there was some obstruction in the sewer by a stand-pipe, the quantity of water was abnormal, and would not in the absence of such obstruction have been carried off by the sewer, a municipality cannot be held liable; the burden of proof is upon the plaintiff.

Per GRAHAM, C.J. (dissentiente):—The defendant placed a stand-pipe in the drain; owing to this obstruction, articles jammed in the drain, causing the water to overflow. A defendant who seeks to interpose between an adequate cause and its effect another independent agency, severing that cause from its effect, has the burden of proof cast upon him.

Per HARRIS, J. (dissentiente):—The stand-pipe was the cause of the trouble. There is no evidence of a cloudburst or sudden downpour. A defendant cannot set up the act of God where he himself has been negligent. The defendant has not satisfied the burden incumbent upon it

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under the circumstances of proving that any portion of the damage was not due to its negligence.

[**Faulkner v. City of Ottawa, 41 Can. S.C.R. 190; Nitro-Phosphate Co. v. London & St. Katherine's Docks, 9 Ch. D. 503, distinguished. Municipal liability for damages resulting from its drains and sewers: see Darragh v. Cote, 48 Que. S.C. 478; Thorsteinson v. Rur. Mun. of North Norfolk (Man.), 22 D.L.R. 34; James v. Town of Bridgewater (N.S.), 24 D.L.R. 634; Kenny v. Rur. Mun. of St. Clemens (Man.), 15 D.L.R. 229; Portage Fruit Co. v. Portage La Prairie (Man.), 14 D.L.R. 21; Davidson v. City of Lethbridge (Alta.), 4 D.L.R. 523; Woodware v. City of Vancouver, 16 B.C.R. 457; Lamontagne v. Woodlands (Man.), 5 D.L.R. 524; Moore v. Town of Cornwall (Ont.), 7 D.L.R. 413; McGuire v. Tp. of Brighton (Ont.), 7 D.L.R. 314; Gatto v. City of Toronto, 4 O.W.N. 356, 23 O.W.R. 350; Mondor v. Mun. of Tache (Man.), 11 D.L.R. 620; Ruddy v. Town of Milton (Ont.), 16 D.L.R. 879, affirming 5 O.W.N. 525; Brown v. City of Regina (Sask.), 20 D.L.R. 470; Hemphill v. McKinney (B.C.), 27 D.L.R. 345.**]

Statement.

APPEAL from the judgment of Meagher, J., in favour of defendant, in an action claiming damages from a municipality, suffered as the result of the flooding of the cellar of plaintiff's house through the overflowing of a sewer.

H. Mellish, K.C., and *V. J. Paton*, K.C., for appellant.

W. L. Hall, K.C., for respondent.

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GRAHAM, C.J. (dissenting):—There is at Liverpool in this province a brook or stream of considerable size which flows down transversely through the town, and empties into the Mersey River or harbour. At Main St., along the river, it has been diverted along the upper sidewalk for a short distance, then across that street, then along Main St. for a distance of upwards of 130 ft., then at right angles, underneath a building, to the harbour. It is carried across and along Main St. and to the outlet by an artificial shortage called a French drain, about 4 feet wide and 4 feet in depth withour floor. The town authorities in installing their waterworks a few years ago placed the water main on Main St. across this drain and running along in it for some distance, but mostly beneath the floor of the drain, reducing, however, its size and offering obstruction to the current. They also introduced into the water main at this crossing a stand-pipe about 6 inches in diameter passing down vertically through this drain. It was put unnecessarily in the worst possible place. Already the velocity of the flow had in this locality been reduced by being carried almost at right angles to its former course by more than one turning. Right in the angle formed by its course crossing Main St. and its course running along that street, and where the current would be thereby reduced, this pipe was placed, reducing the capacity of the French drain, and offering an obstruction to

solids carried along by the current. No one—neither witness nor counsel nor trial Judge—not even the mayor—attempts to defend the placing of that stand-pipe where it was. The trial Judge says in his judgment:—

> It may have been an imprudent thing to have placed them in the drain, but such a view is not necessary to my decision.

One would have thought it was. Owing to this obstruction, articles did accumulate in that locality. In April, 1914, it rained for 7 days, and articles jammed at this stand-pipe, causing the water in the drain and brook to overflow, and a good deal of water entered into the cellar of the plaintiff, whose house on Main St. adjoins the building under which the drain is carried. He brings his action, and the defence appears to be the usual and comprehensive one, namely, the act of God, and that from the limited capacity of the drain the injury would have happened anyway.

The defendant who seeks to interpose between an adequate cause and its effect another independent agency severing that cause from its effect has the burden of proof cast upon him, and in this case I apprehend it was a real burden. To my mind that burden has not been satisfied. The case of *Nitro-Phosphate Co.* v. *London & St. Katherine's Dock Co.*, 9 Ch.D. 503, and other cases indicate just what use can be made of it when there is really an act of God concurring with the negligence of human agency. In this case there is in my opinion a lamentable lack of evidence to shew either that what happened was the act of God or that owing to the incapacity of the French drain to carry it off the overflowing would have happened anyway. To have 4 days' rain in this country is not, I think, a very unusual thing, and there was a spring freshet. No evidence was given as to the actual rainfall and it is well known that the Government has agents all over the country keeping records among other things of rainfall. After this French drain had been jammed up, and the brook, deprived of an outlet, had overflowed, water shewed in the streets of Liverpool more than usual, no doubt. I admit, that—according to the mayor—there was an overflow from other sources. But the cases shew what would be considered the act of God, and I do not feel satisfied that this could be characterised as such. Without any freshet there had been a recent previous overflowing. But when one comes to the capacity of the French drain there is

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on the part of the defendant a great lack of evidence. No expert evidence of any kind is given, and without it I do not see how it was possible to draw an inference that the overflowing would have happened anyway. It was mainly left to the imagination of the mayor, and by his merely looking at it, and he thought no doubt that it would not have sufficient vent. The capacity of a drain or pipe to carry off surface water depends on the velocity with which the water will pass, which depends on the slope of the pipes and other things as well as the quantity of water to be carried, and there are no data for any of these things whatever, and all could have been ascertained. An engineer's evidence would be necessary. None were called, or at least those connected with the town who were called were not asked about these matters.

This is not, with deference, a case where it can be said the Judge has believed certain witnesses; it is a case without evidence; a case in which the circumstances speak louder than merely oral testimony. And I am very far from being satisfied that this overflowing would have happened anyway, even if the articles mentioned in the schedule had not jammed above this stand-pipe and stopped up the drain. I could as well infer that the stopping up of the drain from the jamming of the articles in the drain would have caused overflow into the cellar without any unprecedented rainfall.

In my opinion the appeal should be allowed, and judgment given for the plaintiff for the amount of damages fixed by the Judge, viz., $50, with all costs.

Russell, J.

RUSSELL, J.:—The plaintiff built his house on a low piece of ground with his cellar wall only 5 inches from a covered drain. This drain seems to be merely the continuation of a natural brook which has been walled up in the neighbourhood of the plaintiff's house, and covered in at the street on which the house fronts. The soil at that place is partly made soil, and the Judge has believed the witnesses who speak of it as being of a porous and spongy character. The floor of the cellar is below the bed of the drain, and I think the trial Judge is right in saying that under any possible conditions it was inevitable that the plaintiff's cellar must at times suffer from water leaking in from the drain or from the ground around and under the building. The plaintiff himself describes it as breaking through the concrete flooring and thus overflowing the cellar. That is what I should have expected to

happen from the conditions described, no matter whether the water of the brook were flowing unobstructed through the drain or saturating the soil by flowing over its surface in consequence of obstructions in the drain.

I do not think there is any clear proof that any damage was caused by any obstructions in the drain. There had been a claim for damage caused to the plaintiff in the summer of 1913. At that time the drain was opened up, and the foot of an old fence post was removed at the point opposite the plaintiff's house. A grating was then put over the drain to prevent rubbish from getting into it. I can conceive the possibility of such an expedient causing an overflow by preventing the water from getting into the covered portion of the drain, but this is not what is claimed to have happened. On the contrary, the theory must be that too much rubbish went through the grating, and lodged behind and across the stand-pipe which was put there in 1900 when the water system was introduced. It is claimed that this structure caught the rubbish that entered the drain, which thus accumulated at that point, and made a sort of subterranean dam which held the water back and caused it to overflow the street, and thus enter the plaintiff's cellar.

I agree that if there was proof that this had occurred and that the water thus held back had entered the plaintiff's cellar, it would be no defence to urge that the cellar would have been flooded in any case because of the unusual rain, or that the damage caused to the plaintiff was the result of the combined operation of the defendant's negligence and the act of God. I do not find it necessary to discuss the legal questions that would have to be considered under the conditions imagined because I find no evidence—not even circumstantial evidence—of the condition of things suggested having been produced by any negligent act or omission of the defendant town. Indeed, I find no evidence of any congestion at the point where the stand-pipe is placed, such as would have caused, or did cause the water of the brook to overflow its banks. On the other hand, there is evidence of an accumulation of rubbish of various sorts that could not possibly have gone through the grating, and which must have entered the drain because of the disturbance caused by the unusual rain storm which tore away the plank covering at the sidewalk. There is

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evidence that notwithstanding these obstructions the drain was venting all the water that it could carry, but I do not find it necessary to consider the reasons that have been given for questioning the force or effect of that evidence because I am not satisfied that there is any evidence of any damage done to the plaintiff by any act or omission on the part of the defendant. The appeal should I think be dismissed.

Longley, J.

LONGLEY, J.:—I am compelled to think that the conclusion reached by the trial Judge was right and sound. The only reason given for over-ruling his judgment was that the defendant had put a vent pipe 6 inches in diameter into the regular drain pipe, and that this had been the means of causing an obstruction to the general flow of the brook. But it was clearly proved that a year before this accident occurred, the town had put a grating over the end of the drain pipe above where this vent pipe went into the drain, to prevent all obstructions from reaching the vent pipe. I have no reason to suppose, from reading the evidence, that it failed in this purpose in the slightest. The obstructions found in the drain and about it immediately after the accident were due to the unusual and exceptional rainstorm in Liverpool, which lasted 4 days, the effect of which was to leave all the streets in a desperate condition, and the flood had so far raised the level and affected the drain pipe that the rubbish which was found in the drain pipe caused it to overflow, and it would not have been there but for the exceptional character of the rain.

The trial Judge found for the defendant on all the points at issue, and I think his judgment is entitled to every possible consideration.

The appeal should in my judgment be dismissed.

Ritchie, E.J.

RITCHIE, E.J.:—In this case the trial Judge has made distinct and definite findings of fact, and there is in my opinion, evidence to support the findings.

The crucial question is, was the overflow of water into the plaintiff's cellar caused by obstruction by the stand-pipe, or by the unprecedented flood which according to the evidence existed at the time, or by leakage from the stone drain, the plaintiff's cellar wall being within 5 inches of the side of the drain? I quote from the decision:—

> I am wholly unable to conclude that the main and stand-pipe were the proximate cause of the flow into or upon the plaintiff's premises, and I feel

quite confident that if the drain had been more than twice its size and entirely free from obstruction, it would not have carried off the waters of that extraordinary rainfall of April. . . . It is obvious to me that the volume of water thus described, and which carried sidewalks off their foundations on Main street and Church street, high above it, never could have passed through the drain even had it been wholly free from pipes and all other material. The plaintiff's cellar wall was within 5 inches of the north side of this stone drain. He built that close to it, and I have a pretty strong conviction that with the latter full of water and the strong pressure of water down the fall behind it, a considerable quantity must have escaped from its sides and filled in the intervening space of five inches, and thence escaped into his cellar in more or less quantity. The defendants cannot be held blameable for that, and it is impossible to make any apportionment.

As I have indicated, the overflow into the plaintiff's cellar may have been caused in one of three ways. I propose to be perfectly frank about it, and say what is the fact, namely, that I do not know which was the cause of the overflow into the plaintiff's cellar. I think that I ought not to set aside the findings, because in my view there is support for them in the evidence. In many cases the question of where the burden of proof rests is of little consequence. In this case, in view of the findings and the evidence, it is in my opinion, of great importance. It cannot be successfully contended that the burden of proof does not rest upon the plaintiff. The burden is upon him to satisfy the Court that the stand-pipe was the proximate cause of the injury sustained by him.

It is of course elementary that, to entitle a plaintiff to succeed in an action for negligence, he has to prove two things, viz., the negligence, and that he is damnified thereby.

So far as I am concerned, the plaintiff has not sustained the burden of proof in regard to the stand-pipe being the cause of the damage. On the contrary, I think the evidence is the other way, and there are findings of fact on the evidence. It also may be, as contended by Mr. Hall, K.C., that the blocking at the stand-pipe did not occur until after the flood had subsided. This view is more consistent with the evidence than the view that the blocking was the cause of the injury.

Two cases were cited on behalf of the plaintiff. *Nitro-phosphate Co.* v. *London and St. Katherine's Docks*, 9 Ch.D. 503, and *Faulkner* v. *City of Ottawa*, 41 Can. S.C.R. 190.

In the view which I take of the facts of this case, namely, that it has not been proved that the negligence caused the injury,

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or any part of it, the first case cited, I think, does not apply. There it was held that the defendants had been guilty of negligence, that the negligence had caused injury as a matter of fact, but the defendants were given an opportunity of shewing that the damage which they had done through their negligence and the damage done by the act of God ought to be apportioned.

In the case at bar I think the question of apportionment does not arise, as it is in my opinion simply a case where the plaintiff has not proved that the stand-pipe caused the injury.

I must confess my inability to see how the case of *Faulkner* v. *Ottawa*, *supra*, is in point. I think I need not discuss the cases.

I am of opinion that this appeal should be dismissed with costs.

Harris, J.

HARRIS, J. (After reciting the facts set forth in the judgment of Graham, C.J.):—It is I think a fair inference from the evidence that the obstruction formed by the collection of material at the angle where the stand-pipe was located, cut off not less than one-half of the water course, and this on the outer edge of the bend, where it would most seriously interfere with the flow of the stream.

In my opinion the erection of the stand-pipe was the cause of the trouble, and once it was erected at the point where it was, the trouble was bound to come sooner or later. Of course the evil day might possibly have been postponed or averted if proper precautions had been taken from time to time to remove any obstructions caught at the stand-pipe, but none were taken.

On the argument, defendant's counsel very properly admitted that the stand-pipe should not have been placed in the drain, and it cannot be denied that placing it there constituted negligence on the part of the defendants. The evidence shews that the stand-pipe was erected in 1899 or 1900. In 1913 the water course became obstructed near plaintiff's house about 100 ft. below the stand-pipe, and then iron bars were placed in the stream two inches apart on the upper side of Main St. This arrangement (referred to as a trash rack) would no doubt catch large objects, but the evidence shews that until this contrivance was installed in 1913 there was nothing to prevent any substance, large or small, from going into the covered drain. It also appears that the water course was not opened and cleared at the stand-pipe in 1913, and so far as appears, the water course was never examined at this point from the time the stand-pipe was installed

until after the flooding of plaintiff's premises in 1914. There was therefore undoubted negligence in the maintenance as well as the construction.

But it is said that the flood was so great that it could not reasonably have been anticipated—that it was greater than any flood that had ever been or that might be expected to occur and for this reason the defendants are not liable and *Nichols* v. *Marsland*, 2 Ex. Div. 1, was referred to, but in that case the jury found that there was no negligence in the construction or the maintenance of the reservoirs in question. It is evident that the decision in that case would have been different if there had been negligence both in the construction and maintenance such as we find in this case.

There is no doubt that there was a considerable flood at this time, but it was a 4 days' rain. There is no evidence of a cloudburst or a sudden downpour which is what usually causes flooding. In the absence of such evidence I think, notwithstanding the phrases used by the witnesses, that the flood was probably far from being such a flood as was referred to in *Nichols* v. *Marsland*, *supra*. One cannot read the evidence without thinking that the views of the witnesses were somewhat influenced by the flooding of Main St. which we now know was due largely, if not solely, to the obstruction in the water course.

There is much authority for saying that a defendant cannot set up the act of God where he himself has been guilty of want of care, or as it is sometimes put, the act of God is not applied to occurrences which to some extent have their origin in the agency of man, and are not wholly dependent on the agency of natural forces. See *Thomas* v. *Birmingham Canal Co.*, 49 L.J.Q.B. 851, *per* Cockburn, C.J., at pp. 855, 856; *Keighley's* case, 10 Co. Rep. 139a; *Nitro-Phosphate Co.* v. *London and St. Katherine's Dock Co.*, 9 Ch.D. 503, *per* Fry, J., pp. 518, 519; *Burt* v. *Victoria Graving Dock Co.*, 47 L.T. (N.S.) 378; *per* Field, J.; 21 Hals. 468, 469.

If the rule is absolute, as Field, J., stated it, after *Nitro-Phosphate Co.* v. *London & St. Katherine's Dock Co.* had been cited before him, and as it is stated in Halsbury's Laws of England, which cites the *Nitro-Phosphate Company* case, then the act of God cannot avail defendants.

But if the rule is to be understood as qualified by the decision

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of the Court of Appeal in *Nitro-Phosphate Co.* v. *London & St. Katherine's Dock Co.*, the defendants must still fail, but they may escape liability for a part of the damage done if the Court reaches the conclusion that the defendants have shewn that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the act of God and which would have happened even if the defendants had not been guilty of negligence.

In the view which I take of the facts it is unnecessary for me to decide whether the rule is absolute or qualified.

In *Nitro-Phosphate Co.* v. *London & St. Katherine's Dock Co.*, the plaintiffs owned a manufactory for chemical manures, and the defendants owned the Victoria Docks, which nearly adjoined the plaintiff's premises. The docks communicated with the river Thames by an artificial channel through which the water was admitted. The plaintiff's premises and the defendant's dock were some 7 or 8 feet below Trinity high water mark, and the water of the river was kept from overflowing the whole district by means of a river wall which was kept at a height of 4 feet 2 inches above Trinity high water mark.

The retaining wall kept by the defendant company was supposed to be kept at a uniform height of 4 feet above Trinity high water mark, but it was as a matter of fact for some distance from 6 to 10 inches below this level. An unusually high tide came which was 4 feet 5 inches above Trinity high water mark at the Victoria Docks, and a large quantity of water found its way into plaintiff's property and caused damage.

It was argued that while the failure to keep the retaining wall up to 4 ft. was negligence, yet if the wall had been 4 ft. high the water came up 4 ft. 5 inches, and therefore, for aught that appeared, that 5 inches would have done as much damage to the plaintiffs as the 8 or 10 inches which flowed over by reason of the bank being below the level of 4 ft.

Fry, J., after discussing the question as to whether a person who has a duty cast upon him and who does not perform that duty can rely upon the act of God as a defence, at p. 519, said:—

> However, it does not appear to me necessary to decide this point because I am clear that a defendant cannot avail himself of the act of God as an excuse when he has not done his duty except in cases in which he can make it apparent and plain to the Court that if he had done his duty damage would still have followed to the plaintiff. . . . I cannot say that the defendants have convinced me that if they had done their duty any damage whatever would have accrued to the plaintiffs.

He accordingly gave judgment for the plaintiffs for the whole of the damage.

The case went to the Court of Appeal and the judgment of that Court was delivered by James, L.J. At p. 527 he said:—

No doubt if the Court can see on the whole evidence that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of the tide above the proper height which it was the duty of the defendants to maintain, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a deduction in that respect. And after referring to the facts, he says: I say, having regard to all those things, the defendants have a very difficult task to shew that any portion of the damage was not due to their neglect.

The decision of Fry, J., except on the above point, was affirmed.

After a careful perusal of the evidence I am absolutely unable to find that the defendant has satisfied the burden thrown upon it of shewing that any portion of the damage done to the plaintiff's property was not due to its negligence. I find it impossible to say from the evidence that the water course would not have carried off all the water on the occasion in question but for the negligence of the defendant in placing the stand-pipe where it was and failing to properly maintain it after it was so placed there.

It is impossible to say that there was a substantial or any ascertainable portion of the damage attributable solely to the freshet.

It follows that the appeal must be allowed, and judgment entered for the plaintiff for damages, which I would fix at $50. The plaintiff should have the costs of the trial and of this appeal.

CHISHOLM, J.:—In this case the trial Judge has found that the negligence complained of was not the proximate cause of the damage, and that if the drain mentioned in the evidence had been more than twice its size and entirely free from obstructions it would not have carried off the waters of that extraordinary rainfall of April. He expresses, besides, his strong convictions that with the drain full of water and the strong pressure down the fall behind it, a considerable quantity must have escaped from it through its sides and into the plaintiff's cellar, the wall of which was within 5 inches of the drain. I see no reason for taking a different view of the facts.

If it was an act of negligence to put the stand-pipe in the drain the damage resulting from that act, if any at all, was in the

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view of the trial Judge negligible; and the primary cause, the overwhelming cause, of the damage was the extraordinary rainfall.

Under such a state of things I take the law as expressed in Beven on Negligence (3rd ed.) p. 81, to be applicable to this case:—

> Where an extraordinary cause is the primary means of setting in motion an injurious agency, and by co-operating with the negligence of a person, produces injury to some other person. . . . the negligent person is not liable; for not only would his negligence alone fail to produce the injurious effect, . . . but the exciting cause being an "extraordinary occurrence" or an "act of God," was not reasonably to be anticipated, nor guarded against. The negligent act was not followed by injurious results in natural and probable sequence, but only by the occurrence of something abnormal and not to be anticipated.

I think the appeal should be dismissed with costs.

Appeal dismissed.

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RHINARD v. GINTHER.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. March 24, 1916.

1. PLEADING (§ I I—65)—RIGHT TO PARTICULARS IN CRIM. CON. ACTION—NECESSITY OF SWORN DENIAL.

A defendant to an action for criminal conversation has the right to demand particulars of the time and place of the alleged acts, without first being required to file a sworn denial of the charges.

[*Keenan* v. *Birkley*, 28 L.R. Ir. 135, followed; *Thomson* v. *Binkley*, 47 L.T. 700; *Kelly* v. *Briggs* (1888), 4 Times L.R. 566; *Knight* v. *Engle*, 61 L.T. 780, considered.]

Statement.

APPEAL by the defendant from an order of Ives, J., upon an application for particulars of plaintiff's claim.

I. C. Rand, for defendant, appellant.

S. Short, for plaintiff, respondent.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The plaintiff in his statement of claim alleges that he is the husband of Grace Rhinard, that the defendant during the years 1909, 1910, 1911, 1912, 1913 and 1914 induced the said Grace Rhinard to commit adultery with him, that he committed adultery with her on many occasions during each of said years, and that by reason thereof, the plaintiff has suffered great loss and damages and has been put to great pain and mental suffering.

The defendant demanded particulars of the times and places during the years referred to at which the acts complained of were committed. The demand not having been complied with, he applied to the local Judge of the Supreme Court for an order

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for delivery of same. The local Judge by his order directed that upon the defendant filing an affidavit stating that the facts alleged in the statement of claim are untrue, the plaintiff should furnish him with the particulars demanded. The defendant appealed from this order to Ives, J., who dismissed the appeal with costs.

In *Thomson* v. *Birkley*, 47 L.T. 700, which was an action for seduction, it was held by a Divisional Court (Hawkins and Watkin Williams, C.J.), that defendant was entitled to an order for particulars only upon his filing an affidavit denying the alleged seduction. In that case Hawkins, J., says, at p. 701:—

> The acts of indecency took place during the service of the plaintiff's daughter and it would be difficult in this case for the plaintiff to give such particulars as are asked for. No one knows better than the defendant the truth of those matters, and if he wants particulars he must make the necessary affidavit. If he denies the seduction upon oath he will be furnished with the particulars he desires.

In *Kelly* v. *Briggs* (1888), 4 Times L.R. 566, a similar case, the same Divisional Court, then composed of Field and Wills, JJ., upheld an order for particulars which was appealed against on the ground that the defendant had not filed an affidavit denying the alleged seduction, Field, J., expressing the view that *Thomson* v. *Birkley*, *supra*, had not laid down as a fixed and inflexible rule that such an affidavit should be filed and that it was a matter of discretion.

In *Knight* v. *Engle*, 61 L.T. 780, the same Divisional Court, then composed of Lord Coleridge, C.J., and Mathews, J., held that in such an action particulars should not be ordered until after the defendant had delivered his defence unless he supported his application by an affidavit that he intended to deny the alleged seduction.

The only case I can find in which it is even suggested that such an affidavit was necessary upon an application for particulars in an action for criminal conversation is *Keenan* v. *Birkley*, 28 L.R. Ir. 135. In that case the defendant had already filed an affidavit in which, besides denying the acts alleged, he alleged that he was ignorant of the times and places where the alleged acts were charged to have been committed, and that he had not had the smallest idea as to what occasions might be selected by the plaintiff in attempting to establish the charges against him. The main question involved in that case was whether,

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under the practice, existing at that time in Ireland, a defendant in such an action was entitled to particulars under any circumstances. Lord Ashbourne, C., says, at p. 138-9:—

> I cannot see any reason why, if a man is brought into Court in an action where his character, his fortune, and his future, may depend upon a date, he must be refused (particulars) in an action like the present although he can get information as to such dates in actions for slander or trespass. I am unable to follow the argument or to find any principle or reason upon which the practice is based . . . The action for criminal conversation is abolished in England. In the Divorce Court, for the mere asking, a man is compelled at once to give particulars. I cannot see any reason why it should not be done here in an analogous case. Every ground of fair play and of convenience requires that the defendant should have the particulars where, as in this case, he grounds his claim upon an affidavit before us, stating that he is unable to find out the dates to which the charges refer and is thus unable to ascertain where he may have been at the time.

Thomson v. *Birkley* appears to be the only English case in which it has been held that a defendant in an action for seduction must file an affidavit denying guilt in order to become entitled to particulars. It does not suggest nor can I find any suggestion elsewhere why such a practice, which is contrary to the usual practice in other actions for torts, should be followed in seduction cases. The same Court in the two subsequent cases I have referred to did not follow it. It is true that in *Knight* v. *Engle*, Coleridge, C.J., states that the points seem to have been rightly decided in *Thomson* v. *Birkley*, yet he upholds a practice which is entirely at variance with that laid down in that case.

Even if the practice laid down in *Thomson* v. *Birkley* were the proper practice in seduction cases, it does not follow that it should apply to actions for criminal conversation as is pointed out in *Keenan* v. *Pringle*. Such actions are abolished in England, but, in divorce proceedings there, where criminal conversation is charged, the person charged is entitled to particulars as a matter of course, and this supports the view that even if such an affidavit was required in application for particulars when such actions were authorized there, it should not be required here where they are still authorized.

I would allow the appeal with costs, and direct that the order appealed against be amended by striking out the words "upon filing by the defendant in the office of the clerk of this honourable Court of an affidavit stating that the facts alleged in the statement of claim are untrue" appearing therein. *Appeal allowed.*

ELVES v. McCALLUM AND CITY OF EDMONTON.

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Alberta Supreme Court, Appellate Division, Scott, Stuart and McCarthy, JJ. May 10, 1916.

1. LICENSE (§ II C—25)—SHOOTING GALLERY—MORAL CHARACTER—MANDAMUS.

Sec. 233 of the Edmonton (Alta.) Charter is wide enough to authorize the requirement of good moral character as a condition precedent to the issuing of a license for a shooting gallery, which may be made to depend upon a report certified by the chief of police; and the Court will not, by mandamus, interfere with the action of the license authorities refusing a license because of an unfavourable report.

[*Rex* v. *Sparks*, 10 D.L.R. 616, 18 B.C.R. 116; *Hall* v. *Moose Jaw*, 3 S.L.R. 22, distinguished.]

2. MANDAMUS (§ I H—71)—TO LICENSE OFFICERS—DISCRETIONARY DUTIES.

By mandamus the Court can compel a functionary to perform his duties; but it cannot direct license officers, in discharge of their legal power, to come to a particular decision as to granting or refusing licenses. The licensing power granted to such representative bodies should not be narrowly scrutinized by the Courts; very wide scope should be allowed them in their endeavours toward the welfare of the community.

[See also *R.* v. *License Commissioners* (B.C.), 26 D.L.R. 75.]

Statement.

APPEAL by the applicant from an order of the Chief Justice in Chambers dismissing his application for an order in the nature of a mandamus to compel Thomas M. McCallum, the license inspector of the City of Edmonton and the City of Edmonton to issue to him a license for a shooting gallery and for the sale of cigars and cigarettes.

G. E. Winkler, for applicants.

J. C. F. Bown, K.C., for respondents.

Stuart, J.

STUART, J.:—The application was supported by an affidavit of the applicant wherein he states that he is the owner of a certain building and contents within the city valued at $1,000; that the building is fitted up as a shooting gallery and cigar stand; that prior to January 1, 1916, he had made an application to McCallum for a license which was refused; that the profits from his shooting gallery and cigar stand are his only means of support and that he is a taxpayer of the city; and also by an affidavit from each of five neighbouring shopkeepers in which each testifies that he knows the applicant and that to the best of his information, knowledge and belief the applicant's shooting gallery is operated in a proper and efficient manner and that he had no complaint to make whatsoever as to the manner in which said shooting gallery has been conducted.

The affidavit of the applicant refers to a letter from McCallum as an exhibit, wherein the reasons for refusal were given, but this letter is not in the appeal book. In answer to the applica-

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tion, however, an affidavit from McCallum was filed in which he states that pursuant to by-law No. 553, sec. 8 he had referred the application to the Chief of Police who had reported to him in writing that the applicant was not of good character, that he had therefore refused the license, that the applicant had appealed to the commissioners of the city against his refusal, that the appeal was heard by the commissioners on February 5, 1916, in presence of the applicant and his counsel, that evidence had there been produced of a record of conviction of the applicant for keeping a bawdy house on the premises on November 9, 1914, and of a further conviction of the same date for selling liquor without a license; and that the commissioners had confirmed the refusal of a license.

The by-laws of the City of Edmonton were not formally proven, but were produced on the argument on the appeal to this Court apparently by consent

Sec. 221 of the Edmonton Charter enacts that the council may make by-laws and regulations

for the peace, order and good government of the city, and for the issue of licenses and payment of license fees in respect of any business.

Sec. 233 enacts that

the power to license shall include power to fix the fees to be paid and to specify the qualifications of the persons to whom and the conditions upon which such licenses shall be granted.

By-law No. 253, sec. 8, provides that:

All applications for licenses for the following businesses, trades or occupations, viz., bath-house keepers, keepers of billiard or pool tables, drivers of vehicles for hire, public boarding or lodging house keepers, bowling alley keepers, chimney sweeps, *cigar or cigarette dealers*, detective agencies or private detectives, keepers of employment or intelligence agencies, pawnbrokers, restaurant keepers, second-hand or junk dealers, *keepers of shooting galleries*, and solicitors for periodicals shall be referred to the Chief of Police who shall ascertain if the applicant is of good character or not, and report to the Inspector of Licenses, who, if the report is favourable and upon the other conditions of this by-law being complied with, shall issue the license; but if he ascertains that the applicant is not of good character, the license shall not be issued. Provided, however, that if the applicant be dissatisfied with the action of the inspector he may apply to the said commissioners who, after hearing the applicant and the inspector, and such evidence as they may adduce, may confirm or may reverse the decision of the inspector and order the license to issue.

No reasons in writing were given by the Chief Justice for refusing the order of mandamus.

The contention of the appellant is that he, being a citizen

of Edmonton and a taxpayer, is entitled to a license and that the city cannot by by-law make it a condition precedent to the issue of such license that the applicant be certified to be of good moral character by the Chief of Police. He also contends that the refusal of a license to carry on his business constituted an additional penalty imposed merely by the city for the offences against Dominion and Provincial laws for which he had already suffered punishment and was therefore invalid and unlawful.

There seems to me to be nothing in the latter contention. The refusal of a license is clearly not a penalty added for the commission of the offences The commission of those offences was obviously treated by the commissioners merely as evidence of the moral character of the applicant which was the point in question before them The weight to be given to the commission of those offences and the extent to which they should be remembered against the applicant were entirely matters for the commissioners to consider. Furthermore this is not an appeal to the Court from a decision of the commissioners as to the applicant's good character. Assuming that there was legal power in the commissioners to judge of that question and to refuse or grant the license accordingly, I do not think it is open to the Court upon such an application as this to review their decision. By mandamus the Court can only compel a functionary to perform his duties. We cannot direct that he shall come to a particular decision.

The real grounds of the appeal are that there was no power in the council to impose the condition of good character, and that, even if there was, there was no power to delegate the decision on that point to the Chief of Police.

As to the matter of delegation it seems to me to be clear that there was no real delegation in any case. What sec. 8 of the by-law provided was merely a means of obtaining evidence in the first place and as a matter of routine. It would be absurd to require either the council or the commissioners as a board to conduct an investigation in every case in the first instance into the character of an applicant. Therefore a procedure was provided which would suffice for ordinary cases and for the usual routine of business. But the proviso to sec. 8 clearly retains the right of ultimate decision in the commissioners by permitting the applicant to take his case before them if he has been refused in the usual routine of the business of the license officer.

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It is true that the proviso may not be very happily worded because while by the foregoing provisions the inspector is given no discretion whatever but must give the license if the report as to character is favourable (other conditions being complied with) and must refuse it if the report is unfavourable, yet it is against the *decision* of the inspector that the appeal is given. But taking the whole of the section and proviso together, particularly the words about adducing evidence, it is apparent that the real appeal is intended to be against the report of the Chief of Police. This was the way in which the commissioners evidently dealt with the matter.

In *Rex* v. *Sparks*, 10 D.L.R. 616, 18 B.C R. 116, the Chief of Police had been given absolute discretion to refuse the license and there was no right of reviewing his decision.

In the next place, neither in *Rex* v. *Sparks*, nor in *Hall* v. *City of Moose Jaw*, 3 S.L.R. 22, did the statute empower the council to "specify the qualifications of persons to whom licenses shall be granted" as is done by sec. 233 of the Edmonton Charter.

In my opinion the words of sec. 233 are clearly wide enough to authorize the requirement of good character as a condition precedent to the issue of a license. And it is to be observed that all the occupations specified in sec. 8 of the by-law are of such a kind that the good character of the persons licensed to engage in them is of special importance to the peace, order and good government of the city, because they are all occupations which furnish unusual opportunities for the assistance and protection of vice and crime.

There are many recent cases to which I need not refer which show that the licensing power granted to representative bodies governing cities and towns should not be narrowly scrutinized by the Courts, but that very wide scope should be allowed to them in their endeavours to provide for the peace and welfare of the community.

There can be no doubt that the legislature had power to delegate to the city council authority to make such a regulation as is contained in the by-law. (*Hodge* v. *The Queen*, 9 App. Cas. 117, 132.) There was clearly such a delegation, both in sec. 221 itself and more specifically in sec. 233. Indeed it seems to me to be more probable that the legislature had moral qualifications

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in view than intellectual, business, or financial qualifications. The result is that the matter stands in the same position as if the legislature had spoken of "good character" directly as was done by the Ontario Legislature. See Biggar, Municipal Manual, 11th ed., pp. 730-732.

The power granted to the council by the charter was not directly to license but to pass by-laws and regulations *for* the issue of licenses and it was clearly the intention of the legislature to authorise the council, if indeed sec. 41 did not itself do so, to place the executive work of issuing licenses in accordance with these regulations in the hands of the executive body, the commissioners.

I think, therefore, the appeal should be dismissed with costs.

Scott, J.

McCarthy, J.

SCOTT and MCCARTHY, JJ., concurred. *Appeal dismissed.*

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CONCRETE APPLIANCES CO. v. ROURKE, McDONALD & MONCRIEFF AND MUSSENS, LTD.

British Columbia Supreme Court, Macdonald, J. February 19, 1915.

PATENTS (§ II B-15)—NEW AND USEFUL COMBINATIONS OF WELL-KNOWN MATERIALS—PUBLIC USE OR SALE BEFORE APPLICATION FOR PATENT—PURPOSES OF SIMILAR DEVICES IN DETERMINING QUESTION OF INFRINGEMENT.

[See annotation following.]

Statement.

THE plaintiff company is the registered proprietor of Canadian patent No. 144246, known as the "Lee Callahan" patent, issued in November, 1912. The invention as its general object provides an apparatus calculated to be used to advantage in transferring concrete or other plastic material from a suitable source of supply to points desired on a concrete building in course of construction.

The mode of operation is as follows, a hoisting tower is erected with a skip and receiving hopper for concrete and then a gate is attached to the hopper which allows material to run into a pan, and thence be transferred by pipes to the point of deposit.

After several tests had been made which shewed the advantage and practicability of the invention, especially in the erection of large reinforced concrete buildings, a patent was applied for in the United States, and after examination was issued in January, 1909.

One of the defendant's contentions was that the plant installed and operated by it was not an infringement, because in its plant when the concrete had reached the point desired in the hoisting

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tower, it was conveyed by a stationary pipe or spout to a central or distributing tower from which it was distributed, while in the Callahan patent the distribution took place directly from the hoisting tower.

It was held that there was sufficient similarity to constitute an infringement.

A further argument was that the Canadian patent should not have been issued and was invalid, on the ground that the invention had been in public use or on sale with the consent or allowance of the inventor for more than a year previous to his application for patent in Canada. [R.S.C. (1906) ch. 69, sec. 7.]

It was held that the invention was one necessarily requiring considerable use before the inventor could be satisfied that it was practicable, and that the work to determine the practicability had to be on a large scale and in a public manner, and while the extent of the user was not clearly shewn, it appeared from the evidence that it was merely experimental and that the inventor was warranted in protecting his invention by patent.

It was also argued that the alleged invention was not patentable as it did not possess novelty and had been anticipated. The nearest approach however to the ideas covered by the Callahan patent related to the storing of grain in an elevator and it was held that the storing of grain was so widely different from the construction of a concrete building that the invention could not be attacked on that ground.

[*Smith* v. *Goldie*, 9 Can. S.C.R. 46; *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (1910), 13 Ex. C.R. 186; *Lombard* v. *Alex. Dunbar & Sons Co.*, 8 E.L.R. 261; *Milner* v. *Kay* (1902), 10 L.R. 200; *Carpenter* v. *Smith* (1841), 1 Webb. Pat. Cas. 530 (1842), 9 M. & W. 304; *Smith Mfg. Co.* v. *Sprague*, 123 U.S.R. 249; *Elizabeth* v. *Pavement Co.*, 97 U.S.R. 126; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Pacific Cable R. Co.* v. *Butte City Street R. Co.*, 55 Fed. 764; *Bicknell* v. *Peterson* (1897), 24 App. R. 427; *Harwood* v. *Great Northern R. Co.*, 2 B. & S. 194, referred to.]

Annotation

Annotation—Patents—New and useful combinations—Public use or sale before application for patent.

BY RUSSELL S. SMART, B.A., M.E., OTTAWA.

The Canadian Patent Act of 1869 required that the invention should not be in public use or on sale at the time of the application: *Bonathon* v. *Bowmanville Furniture Mfg. Co.*, 31 U.C.Q.B. 413. The Act of 1872 was amended

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Annotation (continued)—**Patents— New and useful combinations—Public use or sale before application for patent.**

and in sec. 6 a clause only slightly different from sec. 7 of the present Act appeared.

The effect of the provision of sec. 7 is that there will be a constructive or statutory abandonment of the invention if it has been in public use or on sale with the consent or allowance of the inventor for more than a year previous to his application in Canada.

In *Smith* v. *Goldie* (1882), 9 S.C.R. 46, it was held that the words used in the 6th section of the Patent Act, 1872, "not being in public use or on sale in Canada for more than one year previous to his application in Canada," were to be read as meaning "not being in public use or on sale in Canada for more than one year previous to his application." In the revision of the statute in 1886, however, the wording of the section was changed, and in *The Barnett McQueen Co.* v. *The Canadian Stewart Co.* (1910), 13 Ex. C.R. 186, it was held that the words "in Canada" in the section as it now stands do not refer to "public use or on sale," but to the application for the patent, and therefore that the inventor is disentitled to a patent if the invention has been in use or on sale anywhere for more than one year previous to the application for a patent in Canada. See also *Lombard Dunbar & Sons Co.* (1910), 8 L.R. 261.

An invention may be abandoned by express declaration of the inventor within one year prior to his application, but the evidence must be clear: *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 24 Ed. 1000; *Egbert* v. *Lippman*, 104 U.S. 333, 26 L.Ed. 755. Public use or sale of the invention either by the inventor or others within one year before his application is no evidence of abandonment: *Parks* v. *Booth*, 102 U.S. 96, 26 L.Ed. 54; *Haines* v. *McLaughlin*, 135 U.S. 584, 34 L.Ed. 290; *Bates* v. *Coe*, 98 U.S. 31, 25 L.Ed. 68; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U.S. 92, 24 L.Ed. 68. Public use or sale pending an application cannot evidence an abandonment: *Goodyear Dental Vulcanite Co.* v. *Smith*, 5 O.G. 585, Holmes 354; *Smith* v. *O'Connor*, 4 O.G. 633, 2 Sawyer 461, 6 Fish. 469.

The use referred to in the statute must be public.

In *Hessin* v. *Coppin*, (1873), 19 Gr. 629 it was held that the words quoted above, now found in sec. 54, amount to a definition of public use. They were said to declare an invention to be "in public use" if for a longer period than one year before the application for a patent therefor, it has been purchased, constructed, acquired or used. The decision in this case cannot be questioned. The language is, however, too broad if read as applied only to the facts before the Court. Sec. 54 deals only with the rights of intervening parties, and the public use therein referred to is confined to the use by others than the inventor. Even confined to such language used in this cannot amount to little more than a general rule, subject to explanation and qualification. About all that can be got out of sec. 54 is a suggestion that "construction" by someone other than the inventor may amount to use within the meaning of the Act.

It was suggested in *Hessin* v. *Coppin* (1873), *supra*, that the Patent Act contemplates an immediate disclosure of the invention, and that the right to a patent may be prejudiced by a failure to disclose and secret use for a considerable length of time. The same suggestion was made by Lord Campbell, C.J., in *Heath* v. *Smith*, 2 W.P.C. 278. The point has not been decided in Great Britain and Canada. It is submitted, however, that an inventor

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Annotation (continued) —**Patents—New and useful combinations—Public use or sale before application for patent.**

may, if he can, keep his invention secret, and that secret use will not prejudice his right to a patent: *Bates* v. *Coe*, 98 U.S. 31 L.Ed. 68; *Parks* v. *Booth*, 102 U.S. 96, 26 L.Ed. 54; *Miller Patent*, 15 R.P.C. 213; *Woods* v. *Zimmer*, 1 W.P.C. 44, 82; Frost, Patent Law and Practice, 4th Ed., Vol. 1, p. 129.

Whether a use is public or private does not depend upon the number of persons to whom its use is known. "Public use does not mean a use or exercise by the public, but a use or exercise in a public manner." (*Per* Abinger, C.B.), *Carpenter* v. *Smith* (1842), 1 W.P.C. 530, 9 M. & W. 304. A single use may be sufficient. If an inventor having made his device, gives it or sells it to another, to be used by the donee or vendee without limitation or restriction, or injunction or secrecy, and it is used, such use is public, within the meaning of the statute even though the use and knowledge of the use may be confined to one person: *Egbert* v. *Lippman*, 104 U.S. 333, 26 L.Ed. 755; *Root* v. *Third Avenue R. Co.*, 146 U.S. 210, 36 L.Ed. 946; *International Tooth Crown Co.* v. *Gaylord*, 140 U.S. 55, 35 L.Ed. 347; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U.S. 340, 26 L.Ed. 821; *Taylor's Patent* (1896), 13 R.P.C. 481; *Betts* v. *Neilson* (1868), L.R. 3 Ch. 429.

Some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye. Nevertheless, if an inventor sells a machine of which his invention forms a part, and allows it to be used without restriction of any kind, the use is public. The fact that after the construction of a mechanical device, the mechanism is hidden from view, does not make the use of the device a private one: *Egbert* v. *Lippman*, 104 U.S. 333, 26 L.Ed. 755; *Hall* v. *MacNeale*, 107 U.S. 90, 27 L.Ed. 367; *Root* v. *Third Avenue R. Co.* 146 U.S. 210, 36 L.Ed. 946; *Brush* v. *Condit*, 132 U.S. 39, 33 L.Ed. 251; *Smith Etc., Mfg. Co.* v. *Sprague*, 123 U.S. 249, 31 L.Ed. 141.

The use of an invention by way of experiment in testing and working the invention and for no other purpose not incidental thereto is not public use within the Act: *Conway* v. *Ottawa Electric Ry. Co.* (1904), 8 Ex. C.R. 432; *Barnett McQueen Co.* v. *Canadian Stewart Co.* (1910), 13 Ex. C.R. 186; *Summers* v. *Abell* (1869), 15 Gr. 532; *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 24 L.Ed. 1000. The experiment must, however, be clearly experimental: *Bonathan* v. *Bowmanville* (1871), 31 U.C.Q.B. 413; *Smith Etc., Mfg. Co.* v. *Sprague*, 123 U.S. 249, 31 L.Ed. 141, and must be an inventor's experiment for the purpose of discovering defects and perfecting the invention, and not a trader's experiment to test the market: *Smith & Davis* v. *Millon*, 58 Fed. 705, 7 C.C.A. 439. The use if experimental is not public within the statute, though made in public: *Conway* v. *Ottawa Electric Ry. Co.* (1904), 8 Ex. C.R. 432; *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 24 L.Ed. 1000; *Egbert* v. *Lippman*, 104 U.S. 333, 26 L.Ed. 755; *Shaw* v. *Cooper*, 7 Peters 292, 8 L.Ed. 689. The fact that the inventor derived a profit from the use so long as the profit is incidental does not prevent the use from being experimental: *Smith Etc., Mfg. Co.* v. *Sprague*, 123 U.S. 249, 30 L.Ed. 141; *International Tooth Crown Co.* v. *Gaylord*, 140 U.S. 55, 35 L.Ed. 347; *Root* v. *Third Avenue Ry. Co.*, 146 U.S. 210, 36 L.Ed. 946. Nor is the nature of the use affected by the fact that the public derives a benefit: *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 24 L.Ed. 1000.

The leading Canadian case of *Smith* v. *Goldie* (1883), 9 S.C.R. 46, deals specially with combination. The headnote reads:—

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"An invention consisted of the combination of a machine in three parts, or elements A, B and C, each of which was old, and of which A had been previously combined with B in one machine, and B and C in another machine, but the united action of which, in the patented machine, produced new and useful results. Held, Strong, C.J., dissenting, to be a patentable invention."

For other Canadian authorities on combinations see: *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Ex.C.R. 495; *Robert Mitchell* v. *The Handcock Inspirator Co.* (1886), 2 Ex. C.R. 539; *Griffin* v. *Toronto Ry.* (1902), 7 Ex. C.R. 411; *Mattic* v. *Brandon Machine Works* (1907), 17 M.L.R. 105; *Danserau* v. *Bellmare* (1889), 16 S.C.R. 180; *Barnett McQueen* v. *Canadian Stewart* (1910), 13 Ex. C.R. 186.

If any of the elements of a combination are new, they may themselves be claimed as subordinate integers: *Barnett McQueen* v. *Canadian Stewart* (1910), 13 Ex. C.R. 186.

A new combination may be formed by the omission of an element from, or by the addition of an element to, the elements of an old combination, provided there is a new result produced by a different interaction of the elements: *Pneumatic Tire Co.* v. *Tubeless Tyre Co., et al* (1898), 15 R.P.C. 74; *Wallington* v. *Dale* (1852), 7 Ex.Ch.888; *Russell* v. *Cowley* (1835), 1 W.P.C. 459; *Morris* v. *Branson* (1776), 1 W.P.C. 51; *Vickers* v. *Sidell* (1890), L.R. 15, App. Cas. 496. The substitution of an new element in an old combination, if the element substituted is not obviously and demonstrably an equivalent of the one for which it was substituted, may involve invention: *Unwin* v. *Heath* (1885), 5 H.L. Cases 508, 522, 1 W.P.C. 551; *Badishce Analin and Soda Fabrik* v. *Levinstein* (1885), 2 R.P.C. 73.

For American cases on combination see: *San Francisco* v. *Keating*, 68 Fed. 357, 15 C.C.A. 476; *Von Schmidt* v. *Bowers*, 80 Fed. 140, 25 C.C.A. 323; *American* v. *Helmstetter*, 142 Fed. 978, 74 C.C.A. 240; *National* v. *Aiken*, 163 Fed. 254; *Hoffman* v. *Young*, 2 Fed. 74; *National* v. *America*, 53 Fed. 369; *Green* v. *American*, 78 Fed. 119, 24 C.C.A. 41; *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, 41 U.S. 336; *McCormick* v. *Talcott*, 61 U.S. 402; *Vance* v. *Campbell*, 16 Fed. Cas 837.; *Dunabar* v. *Myers*, 94 U.S. 187.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 18, 1916.

1. CONTRACTS (§ I E 5—106)—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—LAND OPTION.

A written option to purchase land at a named price, signed by the vendors, though their names do not appear in the body of the writing and no time is fixed for the exercise of the option, is a sufficient memorandum under the Statute of Frauds, and enforceable if accepted.

2. VENDOR AND PURCHASER (§ III—35)—FAILURE TO REGISTER AGREEMENT—DEFINITENESS—RIGHTS AND REMEDIES—BONA FIDE PURCHASERS.

A purchaser, who fails to register the agreement of sale, may be debarred from the equitable relief of specific performance, after a subsequent purchaser has *bona fide* acquired the property; but he still has a remedy against the vendor in an action for damages for breach of contract. He cannot, however, join as a party defendant the subsequent purchaser who was not instrumental in inducing the breach. An agreement

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for a mortgage is not unenforceable by reason of indefiniteness because it provides for "one half cash, balance on suitable mortgage."

3. DAMAGES (§ III A 3—62)—BREACH OF CONTRACT TO CONVEY LAND.
The measure of damages for breach of contract to convey land is the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made.

4. CONTRACTS (§ I C—12)—OPTION TO PURCHASE LAND—CONSIDERATION.
When a right to purchase is part of a demise of lands, there is consideration; when the option is exercised before revocation mutual obligations are created.

5. PERPETUITIES (§ I—1)—INDEFINITE OPTION TO PURCHASE LAND.
An option to purchase land, at any time during the term of a three-year lease, does not create a perpetual right; the rule against perpetuities has no application to an agreement of that kind.

Statement.

APPEAL from the judgment of SUTHERLAND, J., in an action by a purchaser against his vendors for specific performance of an alleged agreement for the sale and purchase of land. Varied.

E. D. Armour, K.C., for appellants.

J. H. Rodd, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plaintiff and the defendant Stodgell entered into a very plain agreement for the sale by that defendant to the plaintiff of the residential property in question for $7,500; an agreement which might, and which ought to, have been carried out promptly without the cost of a farthing in litigation. Instead of that, the simple bargain, so made in May, 1910, has not yet been carried out, nor have the rights of the parties to it been finally settled; instead, the parties have been engaged, since August, 1913, and still are engaged, in litigation over it: the litigation has now come to the Appellate Division twice; and in the High Court Division the case came on for trial four times, and was twice tried.

Really none of this wasteful conduct has arisen out of any doubt about the bargain, or that which, between business men, should have been done under it; but, beginning with the annoyances arising from the buying of valuable property by a man without the means of paying for it, unless he could borrow a large part of them upon the security of the property bought, a feud has arisen between buyer and seller, in which each party is willing to do almost anything rather than let the other have his way regarding the sale, and the residential property in question affords them a ready battle-field; and so too we have points of law, of all sorts and kinds, supported by great fortifications of cases and law-books, raised at every stage of the conflict; points of law some of which, I am sure, would not be thought of, much less earnestly pressed, ordinarily.

The first point made is: that there was no contract sufficient to satisfy the provisions of the Statute of Frauds; next, that there was no consideration for any agreement to sell; next, that, if any such agreement, it is invalid under the rule against perpetuities: and, after all that, that the offer to sell was validly retracted; and, yet again, that the contract is too indefinite to be enforceable: and, yet again, that the plaintiff has not sustained any legal damages by reason of breach of the agreement.

The questions of revocation, uncertainty as to parties, and as to the rule against perpetuity, were considered at the first trial, and an opinion given by the trial Judge upon them altogether adverse to the seller's contention; and as, upon the first appeal, a new trial was directed, it would seem that these questions must have been considered of no weight, for, if an answer to the action, why direct a new trial? But the formal order made upon that appeal does not preclude the seller from again raising these questions, and the opinion of the trial Judge was extra-judicial, having been given after he had dismissed the action on other grounds. So we must now deal with all the questions presented for our consideration.

The first point is based upon the fact that the sellers' names do not appear in the writing evidencing the sale, that the sellers have merely signed these names to it as the persons referred to in it by the personal pronoun "we." But how can there be any uncertainty vitiating the document in that respect? If so, the vast majority of all the mercantile instruments by which the whole business of the country is carried on ought to be deemed worthless because uncertain. No case does or could give any encouragement to the point. The Ontario case, mainly relied upon, was a case in which the buyer's name did not appear in any way in the body of the writing; but, if the writing had begun with the words "we, seller and buyer," and was signed by two persons, can it be imagined that the result would have been the same; and, if the writing had been an open one, such as is not uncommon in advertisements and otherwise, could it be contended that, after acceptance in writing, it was invalid for uncertainty? There is more feud than law in this point, and indeed in all these points of law arising out of that feud.

The right to purchase was part of the terms of the demise of

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the lands, and so it is futile to contend that there was no consideration. And, if that were not so, the "option," as it was called, was "taken up" before it was recalled, and so there were mutual obligations constituting consideration on each side.

As the plaintiff is now seeking only common law rights for breach of a common law contract, what has the rule against perpetuities to do with the case? The contract gave at law no kind of interest in the land, equity did; but, if the plaintiff wants none of your equity, what has equity to do with the case? Besides this, the contract is limited by the term demised, the right is to buy within that three-year term; however stated, the case is one of a demise with a right to purchase, that is, to purchase during the demise. And, if that were not so, it would be too absurd even for the law or equity to say that the writing gave a perpetual right to buy the land. That would be quite too easy a means of discovering perpetual motion. The cases relied upon to support this point are again so plain against it, that there can be only one reason for urging it. In one the agreement was to convey whenever the land might be required by a railway company; so the Court was hedged in, it could not say the parties meant a reasonable time, because they had said they did not, they had said they meant whenever required for the railway, and it might not be required within the rule's limit of time; railway companies may be very long-lived. Another case was one of a lease with right of purchase, just like this case, except that the lease in that case was one for 99 years, and in this it is one for 3 years, and so the right was one covering a period that might easily exceed the rule's limit; and the other case was one of the same kind, the term being 30 years, and so also objectionable to the rule.

The findings of fact at the trial are against the contention that there was a valid revocation of the "options", and the evidence supports that finding. There were mutterings and notices, but these were waived by the conduct of the parties in continuing to act on the basis of the agreement being in full force, and with a view to completing the purchase. And, apart from this, the alleged revocation took place during the currency of the term demised; and so the notice of revocation was put on the grounds of forfeiture for non-payment of rent "and for breach of other conditions" not named. But there is something to be said against that: there was no provision for forfeiture, and so no forfeiture; if

there had been, it would have been relieved against; and the trial Judge has found that there was no non-payment or other breach that would have operated as a forfeiture, if there had been a forfeiture-provision in the agreement between the parties.

And, lastly, the indefiniteness relied upon is that the agreement provides for a mortgage without more particularity than "one half cash, balance on suitable mortgage:" but it also provides for paying the whole price in cash, and the purchaser, having the "option," has made it all quite certain by electing to pay in cash.

So much for wasted energy, and at last we come to the real points of the case.

Upon the direction for a new trial, and the trial had accordingly, to assess the damages of the plaintiff, sustained in consequence of the seller's breach of his contract to sell, two subsequent purchasers have been added as defendants, and it seems to have been taken for granted that they are equally liable, with the contractor, for the breach of his contract, to which they were in no sense parties or privies. As there is no pretence that they were proceeded against for damages for inducing the contractor to break his contract, or otherwise than upon the written contract in question, I am at a loss to understand how it can have been, or how it can be now, contended that the judgment against them can stand.

The right to damages was the right at law; equity interfered only to give other rights where damages would not afford adequate relief: I am speaking of course only of equitable relief when there is also a remedy at law. At first a plaintiff had to go to the court which could grant the relief he sought; each maintained its separate jurisdiction: that was found inconvenient, and the right to give, in a court of equity, the relief which could before be had only in a court of law, was, in cases where equitable relief was sought, but could or would not be awarded, conferred by statute on courts of equity, and so a party was not driven back to a court of law for relief in damages for breach of the contract; and now, since the fusion of law and equity, any relief may be given in the now one Court which could formerly have been given in either. All of which means that in this action, although the plaintiff cannot have the equitable relief of specific performance, because he failed to register his agreement, and so permitted, it is said, a *bonâ fide* purchaser, for valuable consideration without notice of his rights,

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to acquire the property, yet he can have the common law relief, damages for breach of contract; but how can any one but the parties to that contract be liable upon it?

No case has been cited in support of the judgment against the defendants who were not parties to the contract: and, as it seems to me, it would be imposing an entirely new liability, either at law or in equity, to impose any such obligation, except in the way I have mentioned, which, if it gave any right of action, would give one at law, not in equity. The property may be followed so long as it is in the hands of a taker with notice of the contract of sale, but a right of action for damages for breach of the contract against one who is in no sense a party to it seems to me to be out of the question. There is a case, *McIntyre* v. *Stockdale*, 9 D.L.R. 293, 27 O.L.R. 460, in which that which seems to me to have been a long step in advance of any known legal or equitable award of damages was taken by a trial Judge in this Province. It was decided by him that in a case, for specific performance of a contract of sale of land, in which there could be no right to damages at law, there was a right to damages in equity, a subsequent sale of the land, by the vendor to a third person, having defeated the right to specific performance sought on the ground of part performance only. As I understand that judgment, it admits that no such relief could be given in equity before the fusion of law and equity into one Court, no such relief under the ordinary jurisdiction of the Court of Chancery, nor under the enactment known as Lord Cairns' Act, but that, as in the fusion, the right at law to award damages, added to the rights in equity, that fusion gave the right which he exercised in that case; but, as the case before him was one over which the common law courts had no power, it was impossible that the addition of common law rights to equity rights, which admittedly did not cover such power, could confer any such right, any more than one added to two could make four. The learned Judge dissented from two judgments of Chitty, J., which were quite in point, *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, and *Lavery* v. *Pursell* (1888), 39 Ch. D. 508; seeming to think that Chitty, J., had overlooked the Judicature Act, by which common law rights could be enforced as well as equitable rights; but there were the best of reasons for not referring to common law rights, because the case was one in which common law courts never could

have had any jurisdiction—a case for specific performance on the ground of part performance. He relied upon the case of *Elmore* v. *Pirrie* (1887), 57 L.T.R. 333, in which the fact that the fusion of law and equity had added much to the power of courts of equity in cases such as this was mentioned; but I cannot see how that helps this ruling; what it added was the common law right of action for breach of a contract binding at law for the sale of lands, a right which a court of equity had not, until the fusion; unless it was coupled with a claim for specific performance, and then had it only by virtue of Lord Cairns' Act.

I am therefore unable to follow the learned Judge in this step he has taken: as well as unable to follow the learned Judge whose judgment is now in appeal in this case, in awarding damages for breach of a contract against persons who were in no manner parties to it: and I should point out that, in the owner of the land selling it to his co-defendants, he and they were quite within their legal and equitable right and doing no wrong to any one, provided it was done subject to the rights of the plaintiff, if he had any, and whether he had or not.

It follows, therefore, that the appeal of the added defendants should be allowed, and the action dismissed as to them with such costs of both as they have incurred in their own defence, and which are separable from the costs of their co-defendant.

As to the defendant Stodgell, one question remains to be considered; the question of damages. The damages for breach of the contract have been assessed at $2,500; that is to say, the man who bought the land for the price of $7,500 now says that the man who sold it to him for that price should pay damages as if the land were really worth $10,000 at the time the transaction should have been closed.

The measure of damages is the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made. There is some evidence that that difference is $2,500: but that rests upon the testimony of land agents speaking of inflated speculative value, and is not the kind of evidence to be too much relied upon. Land agents' interests nearly always are served by enhancement of value—"booming" or "boosting," as it is sometimes called. The "proof of the pudding" is always much more dependable; and the actual sale

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made in good faith to Morton shews that $1,200 was the enhanced price. That is something substantial, and actual, to go upon. There would be also some other items of inconsiderable amount in the way of damages which, with some reasonable advance over the $1,200, would make $1,500; and that amount seems to me to be ample compensation to the plaintiff as reasonable damages for the defendant Stodgell's breach of his agreement in question.

I would therefore allow the appeal to that extent; that is, to the extent of reducing the amount of the damages assessed from $2,500 to $1,500, and would make no order as to the costs of the appeal as between these two parties to it.

Since the foregoing opinion was written, my attention has been directed to the case *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, which seems to me to be direct authority for the views I have expressed on the question of liability, in this action, of the added defendants. Vaughan Williams, L.J., there used these very pertinent words (p. 157): "If the judgments in *Werderman* v. *Société Générale d'Electricité* (1881), 19 Ch. D. 246, are looked at carefully, I think it will be seen that all that is decided by that case is this, that if you had notice of a contract between the person under whom you claim property, real or personal, and a former owner of the property, whereby a charge or incumbrance was imposed upon the property of which you thus take possession and have the enjoyment, you take the property subject to that charge or incumbrance, and can only hold it subject thereto. But that proposition does not, as it seems to me, involve the consequence that the assignee of the property is liable to be sued for non-performance of the terms contained in the contract to which he was not a party."

Riddell, J. RIDDELL, J.:—I agree.

Lennox, J. LENNOX, J.:—I agree.

Masten, J. MASTEN, J.:—This is an appeal by the defendant from the judgment of Sutherland, J., delivered on the 8th November, 1915. The case was tried before Sutherland, J., without a jury, and he awarded to the plaintiff, against all the defendants, damages in the sum of $2,500 in lieu of specific performance.

The first question raised by the appellant is "that, there being no time-limit, the option is too remote and therefore void." In order to determine this question it is necessary to construe the instrument on which the action is founded. If the option is coter-

minous with the lease, then the objection does not hold. If the option is independent of the lease, and prescribes no period within which it is to be exercised, then, upon the cases cited on behalf of the appellant, the option appears to be void.

While the agreement is informal, and on its face not easy of construction, yet it seems to me that, upon a consideration of the elementary rules relating to the interpretation of documents, it is not insoluble. On the one hand, we have the rule that the sense and meaning of an instrument should be collected from the terms used. "You must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used:" *Ex p. Chick, In re Meredith* (1879), 11 Ch. D. 731, 739. Here the parties have not, in the clause giving the option, mentioned any period within which the option is to be exercised. Are we at liberty to import such a term into the agreement because it may be presumed that the intention of the parties was to prescribe such a limit?

On the other hand, and in conflict with this argument, we have two elementary rules or principles of construction: (a) to look at the whole document, and not to a part of it, and to give effect, if possible, to every word or at all events to every provision: *Hayne* v. *Cummings* (1864), 16 C.B.N.S. 421, at p. 427; *In re Jodrell* (1890), 44 Ch. D. 590, at p. 605; (b) that where there are two modes of reading an instrument the Court should lean towards that construction which preserves rather than towards that which destroys —*ut res magis valeat quam pereat: Langston* v. *Langston* (1834), 2 Cl. & F. 194, at p. 234; *In re Florence Land and Public Works Co.* (1878), 10 Ch. D. 530, at p. 544.

Having regard to the facts that in the present case the agreement for the lease and the agreement for sale are embraced in the one document and made at the one time, that the acceptance of the lease was the consideration for the option, that both the lease and the option relate to the same lands, I think the option was an integral part of the lease, and that a reasonable time during which the option ran was to be during the relationship of landlord and tenant between the parties. In other words, that the term and the option were coterminous.

Any other conclusion would have the effect of nullifying that portion of the instrument relating to the option, because, if the

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option is indefinite in duration, it is clearly bad, as pointed out by Mr. Armour.

There is no clause in the agreement preventing us limiting the time during which the option was to be exercised, as there was in *Trevelyan* v. *Trevelyan* (1885), 53 L.T.R. 853, or in *London and South Western R.W. Co.* v. *Gomm*, 20 Ch. D. 562, see at p. 580. The reasonable time within which the option to purchase must be exercised is, it seems to me, the three years during which the term is to run, or such time thereafter as the relationship of landlord and tenant on the terms of the lease should exist: *Moss* v. *Barton* (1866), L.R. 1 Eq. 474; *Buckland* v. *Papillon* (1866), L.R. 1 Eq. 477, L.R. 2 Ch. 67, see especially p. 70, *per* Lord Chelmsford, L.C. In other words, when the relation of landlord and tenant comes to an end, the option, *ipso facto*, also ends. It is an integral part of the lease: *In re Adams and Kensington Vestry* (1884), 27 Ch. D. 394; *Matthewson* v. *Burns*, 12 D.L.R. 236, 18 D.L.R. 287, 30 O.L.R. 186; not entirely distinct as in *Davis* v. *Shaw* (1910), 21 O.L.R. 474.

The second point raised in support of the appeal is, that there is not a sufficient memorandum within the Statute of Frauds. The words of the option are: "We hereby agree to give to W. M. Bennett an option to purchase said property for $7,300 cash, or $7,500 one half cash, balance on suitable mortgage. . . . F. W. Stodgell, Ellen J. Stodgell." This identifies the vendors as described in the option by the term "we," and makes it perfectly plain both who are the vendors and who is the purchaser. In the cases referred to in support of this contention, the terms of the instrument in question were in every case such as made one of the parties quite uncertain, and the conclusion to be deduced from those cases is that, where the agreement itself does not identify the parties, evidence cannot be supplied extraneously. It does not appear to me, therefore, that this ground of appeal can be maintained.

With respect to the other questions raised by the appeal, I agree with the judgment which has been prepared by the Chief Justice, and have nothing to add to it, and I also agree in the conclusion at which he has arrived.

Appeal allowed in part.

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Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. April 22, 1916.

1. EVIDENCE (§ XI C—771)—THEFT—BAD CHARACTER—OTHER OFFENCES—IRRELEVANCY.

Upon a charge of theft it is not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of a theft subsequent to that for which he is being tried, where no evidence as to character has been offered by the prisoner. The introduction of such evidence, even though not objected to by counsel for the accused, will invalidate the conviction.

Statement.

RESERVED case as to whether the cross-examination of a witness by counsel for the prosecution in relation to another offence alleged to have been committed by the accused invalidated the conviction.

A. G. Morrison, K.C., for the Crown.

Jas. Terrell, for the prisoner.

Harris, J.

HARRIS, J.:—The accused was indicted and tried for stealing money. After the jury had retired to consider their verdict, they came back and asked whether they could demand to have the evidence of two witnesses who had not been previously examined. There was some discussion and counsel for the prisoner agreed to call these two witnesses, and did so, and on the cross-examination of one of them by the Crown prosecutor she was asked direct questions as to the guilt of the accused for another theft subsequently committed, and which was in no way connected with the offence for which she was being tried. These questions elicited answers which left a very strong suspicion, if they did not actually shew, that the accused was guilty of the other crime, and the prisoner's counsel re-examined the witness and made it clearer perhaps than it was before that the accused had committed the subsequent theft.

The prisoner's counsel did not object to the questions put by the Crown counsel, and when the cross-examination was finished, the damage had been done, and he no doubt felt bound to re-examine in the hope that something might come out to prove the innocence of the accused of this other crime. He could not by examining be in any worse position so far as the jury was concerned.

Before this witness was asked these questions by the prosecution, no evidence as to the character of the accused had been given on the trial. After the introduction of this evidence the

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trial Judge gave no further instructions to the jury. He merely said: "I won't say anything more to you about this evidence. You have heard it." The jury convicted the prisoner, and the trial Judge has reserved two questions for the opinion of the Court:

1. Does the cross-examination of McKenna and the evidence brought out thereby invalidate the conviction under the circumstances set out in this case, and having regard to the election of the prisoner's counsel to take his chance of proving by the witness that Doyle did not take the money?

2. If the question should be answered in the affirmative what relief is the prisoner entitled to?

The questions asked by the Crown counsel were clearly improper and the evidence inadmissible. In the case of *Rex* v. *Fisher*, [1910] 1 K.B. 149, at 152, Channell, J., in delivering the judgment of the Court stated the principle upon which such evidence is held to be inadmissible. He said:—

> The principle is that the prosecution is not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried.

In *Makin* v. *Atty.-Gen. of New South Wales*, [1894] A.C. 57, at 65, Lord Herschell, L.C., lays down the rule thus:—

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

See also *Rex* v. *Rodley*, [1913] 3 K.B. 468.

There are of course certain well known exceptions to this rule, but there is no suggestion that any other than the general rule applies in this case.

The only point argued by the prosecution on the hearing before this Court was that the prisoner's counsel, not having objected to the evidence on the trial, was precluded from taking advantage of the objection after conviction. I think the failure to object to the admissibility of the evidence does not cure the trouble, nor does the re-examination of the witness by counsel for the prisoner.

In *The Atty.-Gen. for New South Wales* v. *Bertrand*, L.R. 1 P.C. 520, a prisoner was tried for felony, and the jury disagreed,

and there was a fresh trial at the same sittings before another jury. On this second trial some of the witnesses were re-sworn, and their evidence given at the first trial was read over to them from the Judge's notes, liberty being given to the prosecution and to the prisoner to examine and cross-examine. No objection was made by the prisoner or his counsel, and they were considered by the Court to have assented to the course proposed. The Supreme Court of New South Wales set aside the conviction and granted a new trial, and the Privy Council held that the course adopted by the Judge on the second trial was irregular and could not be cured by the consent of the prisoner.

In *The Queen* v. *Gibson*, 18 Q.B.D. 537, the prisoner was convicted on evidence not legally admissible against the prisoner. The report shews that the evidence was not objected to until after the jury had retired, and then the trial Judge refused to recall the jury and instruct them further. Lord Coleridge, C.J., said, p. 542:—

I am of opinion that the true principle which governs the present case is that it is the duty of the Judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows.

Matthew, J., said, p. 543:—

We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not. In either case it is the duty of the Judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner. Here the chairman of the Quarter Sessions did leave such evidence to the jury, and I am of opinion that their verdict ought not to stand.

Wills, J., said, p. 543:—

I agree that the course taken by the counsel has no bearing upon the question before us. If a mistake had been made by counsel, that would not relieve the Judge from the duty to see that proper evidence only was before the jury. It is sometimes said—erroneously, as I think—that the Judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence.

To the same effect also is the decision of the Court in *Rex* v. *Bridgewater*, 74 L.J.K.B. 35 at 37, per Lord Alverstone, C.J.

In *The King* v. *Long*, 5 Can. Cr. Cas. 493, where evidence was wrongly admitted against the prisoner, a new trial was ordered by the Court of King's Bench in Quebec, consisting of six Judges, although no objection was made to the admission of the evidence by the prisoner's counsel.

In *The King* v. *Law*, 15 Can. Cr. Cas. 382, a similar question was before the Court of Appeal for Manitoba. There had been

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no objection to the admissibility of the evidence. Richards, J., said, p. 387:—

I am of opinion that the evidence above referred to, under the first heading, should not have been admitted, and that, after it had been given, the jury should have been charged that they should give no weight to it.

Harris, J.

Perdue, J.A., said, p. 393:—

The evidence in question was let in without objection, but that does not preclude the accused from raising the objection before this Court, if the trial Judge failed to direct them that it was not legal evidence and that they were not to act upon it.

Cameron, J.A., said, p. 395:—

The fact that this evidence was not objected to at the trial and that in part it came out on cross-examination, seems immaterial. The prisoner cannot be convicted upon any but legal evidence.

In my opinion the conviction must be set aside and a new trial ordered.

Russell, J.
Longley, J.

RUSSELL and LONGLEY, JJ., concurred.

Graham, C.J.

GRAHAM, C.J.:—I agree with the opinion of Harris, J., but I wish to add a saving clause, namely that it must not be supposed that now in no case can a defendant's counsel waive an irregularity at a trial. For instance, the Criminal Code now provides that prisoner's counsel may consent to certain things and I think that differentiates the law from *Atty.-Gen.* v. *Bertrand*, L.R. 1 P.C. 520, a case in which there was in force no such provision.

But I think that this distinction does not fairly cover this irregularity. The defendant has, I think, been prejudiced through having this irregular evidence pressed upon the attention of the jury, and the mistake was not rectified by the Judge in his summing up.

Chisholm, J.

CHISHOLM, J.:—In this matter the trial Judge has stated a case for the opinion of the Court under sec. 1014 of the Criminal Code. The prisoner who was indicted for theft was tried at the March criminal sittings of the Supreme Court at Halifax. The jury returned a verdict of guilty.

After the Judge had charged the jury and they had retired, they came into Court and asked if they might demand the evidence of two persons who were in the company of the prisoner when the theft was alleged to have been committed. The Judge told the jury that he did not know that they could demand that these witnesses should be called, but that the prisoner's counsel might call them if he thought proper to do so. The counsel then ex-

pressed his desire to call them, and they were accordingly examined.

The counsel for the Crown cross-examined one of these with respect to another alleged theft by the prisoner, subsequent in date to the one for which she was tried, and having no relation to it; and he elicited from this witness statements directly connecting the prisoner with the later alleged offence.

The counsel for the prisoner made no objection to the questions of the counsel for the Crown, but re-examined the witness in regard to the later alleged theft. Neither did he ask the trial Judge to inform the jury that they must entirely disregard the evidence so brought out. No evidence as to character had been given by the witnesses for the prisoner except the evidence now complained of.

We are asked whether this evidence invalidates the conviction and if it does what relief the prisoner is entitled to.

On the argument the counsel for the Crown conceded that the evidence should not have been admitted, and the authorities strongly support that view. The rule of law is thus stated in Phipson on Evidence (5th ed.) p. 172:—

> In criminal cases, to prove that the defendant committed the crime charged, evidence may not be given either that he (1) had a bad reputation in the community: *R.* v. *Rowton*, 34 L.J.M.C. 57; or (2), had a disposition to commit crimes of that kind (Id., *R.* v. *Cole*, 1, cited Phill. & Arn. Ev., 10th ed., 508); or (3), had on other occasions committed particular acts of the same class evincing such a disposition.

In *The King* v. *Fisher*, [1910] 1 K.B. 149, where evidence of an offence other than the one charged was admitted, Channell, J., said:—

> The principle is that the prosecution are not allowed to prove that the prisoner had committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other crimes, he must therefore be guilty of the particular offence for which he is being tried.

See also *The King* v. *Ellis*, [1910] 2 K.B. 746; *The King* v. *Long*, 5 Can. Cr. Cas. 493.

In *The King* v. *Atlas*, 16 Can. Cr. Cas. 35, counsel for the accused objected to a question as to character put to a witness for the accused where the accused had offered no evidence as to character, and although the question was neither admitted nor denied the trial Judge felt obliged to discharge the jury.

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On the argument in this Court the counsel for the Crown, while conceding that the evidence as to the other alleged offence was improperly admitted, contended that because the counsel for the prisoner made no objection to it at the time, it was not now open to the prisoner to complain of it. That contention cannot be sustained. The omission to object will not be permitted to prejudice the prisoner.

In *The King* v. *Brooks*, 11 Can. Cr. Cas. 188, Osler, J.A., dealing with depositions which were improperly admitted, observed, p. 192:—

It was urged that no objection was taken by counsel, and that is true; but if a mistake is made by counsel, that does not relieve the Judge in a criminal case from the duty to see that proper evidence only is before the jury: *The Queen* v. *Gibson*, 18 Q.B.D. 537; *The Queen* v. *Saunders*, [1899] 1 Q.B. 490; *Reg.* v. *Petrie*, 20 O.R. 317.

And, speaking of the section in the Code which permits an accused person on his trial for any indictable offence, or his counsel or solicitor, to admit any fact alleged against the accused so as to dispose of proof thereof, the same Judge further observes:—

This, it need hardly be said, does not warrant the admission of improper evidence, nor prevent the prisoner from objecting to it, though his counsel may, by oversight or otherwise, have omitted to do so at the proper time.

In the case of *The King* v. *Walker*, 16 Can. Cr. Cas. 77, it was urged by the Crown that the counsel for the accused could not stand by at the trial, taking his chances of acquittal, and afterwards be heard to complain of non-direction. Dealing with this point, Galliher, J.A., said:—

I am of opinion that counsel for the accused is not estopped from raising the point before us now, even though he made no reference to it or requested any direction thereon at the trial. The rule is not so strictly applied in criminal as in civil cases.

And, again, in *The King* v. *Daley*, 16 Can. Cr. Cas. 168, it was held, where there was a prejudicial misdirection by the trial Judge, the accused was not deprived of his right to a new trial because of his failure to complain of the misdirection at the time.

In *The Queen* v. *Gibson*, already referred to, Matthew, J., said:—

We have to lay down a rule which will apply equally where the prisoner is defended by counsel and where he is not. In either case it is the duty of the Judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner.

By sec. 1019 of the Code it is provided that:—

No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned by the trial.

The scope of this rule was considered by the Supreme Court of Canada in the case of *Allen* v. *The King*, 44 Can. S.C.R. 331, and it was held by a majority of the Judges that where evidence was improperly admitted which might have operated prejudicially to the accused upon a material issue, although it had not been and could not have been shewn that it did in fact so operate, and although the evidence which was properly admitted at the trial warranted the conviction, that the conviction should be set aside and a new trial directed.

The evidence complained of in the case before us was of such a character as not only might, but in all probability did, prejudicially influence the jury and the conviction should be set aside and a new trial directed. *New trial ordered.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 18, 1916.

1. MUNICIPAL CORPORATIONS (§ II G 5—260) — DEFECTIVE SIDEWALK — NOTICE OF INJURY—DELAY—"REASONABLE EXCUSE."

Failure to give notice to the municipality of injuries sustained, by reason of a defective sidewalk, as required by sec. 460 (4) of the Municipal Act, R.S.O. 1914, ch. 192, within the time specified by the Act, is fatal to the plaintiff's action, unless there was reasonable excuse for the delay. It is not a reasonable excuse to say that plaintiff failed to apprehend the seriousness of the injury. (Court equally divided.)

Statement.

APPEAL from the judgment of Middleton, J., dismissing an action to recover damages for injuries sustained by the plaintiff by a fall upon a sidewalk in the city of Windsor. Affirmed, Court equally divided.

The judgment appealed from is as follows:—On February 13, 1915, the plaintiff fell on the sidewalk upon Ouellette Avenue, one of the main streets of Windsor, and sustained serious injury. The fall was undoubtedly caused by the defective condition of the sidewalk, and I think that the lack of repair of the sidewalk was the result of actionable negligence on the part of the municipality.

The walk was constructed of concrete, but a hole had formed in it as the result of natural decay. This hole had been in existence for a long time; and, although it was upon a main thorough-

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fare of the city, and daily passed by thousands, it was permitted to remain.

It may well be that the attention of those charged with the repair of the road was not drawn to it until after the accident, but the negligence was the lack of any kind of system to secure information as to the condition of the municipal pavements.

The difficulty in the plaintiff's way is that, although the accident took place on the 13th February, no notice was given to the municipality until the 12th March; the statute, sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, providing (sub-sec.(4)) that no action shall be brought in the case of an urban municipality unless notice of the claim and of the injury complained of is given within seven days after the happening of the injury. The Court has power, under sub-sec. (5), to disregard the failure to give notice if of opinion that there is reasonable excuse for the lack of notice and that the corporation was not thereby prejudiced in its defence.

I do not think that the corporation was in any way prejudiced in its defence in this action, but I cannot find on the evidence that there was a reasonable excuse for the lack of notice. The case is entirely governed by *Anderson* v. *City of Toronto* (1908), 15 O.L.R. 643. I do not think it can be said that the plaintiff was in any such condition as to be incapable of considering her situation except as a sufferer. She undoubtedly was in pain from the time of the accident, but was in no such condition as that of the plaintiff in *Morrison* v. *City of Toronto* (1906), 12 O.L.R. 333.

What happened was that the plaintiff's foot was undoubtedly seriously injured. The fibula was cracked or broken, but not so that the pieces separated. On the opposite side a very small portion of the cartilaginous substance was broken. The plaintiff went home unaided. She ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then the limb was much inflamed and very painful.

I cannot at all credit the daughter's evidence as to unconsciousness and delirium and hysteria during the whole of this month. Everything points to the fact that that young lady was too much saturated with what was said in *Morrison* v. *City of Toronto*. The plaintiff's own version impressed me much more. She says she did not realise that she was seriously injured; she did not

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know the statute nor the necessity of giving notice. Had she realised that she was seriously injured and known of the statute, there was nothing to prevent the notice being given.

If any such condition existed as portrayed by Mr. Kerby, it is inconceivable that medical assistance would not have been earlier sought. As it was, on the 12th March the plaintiff went unaided to the doctor's office.

It is perhaps proper that I should express my views as to the amount of the damages which the plaintiff is entitled to, if any other Court can find a way of relieving her. I think that a very large amount of the suffering the plaintiff has undoubtedly borne is attributable to her own negligent treatment of her injury and its consequent aggravation. The fracture has now healed satisfactorily, and with proper attention there is no reason why there should not be an entirely satisfactory recovery. Dr. Gow's testimony may be accepted without hesitation. I would allow $600 if the plaintiff can recover.

The action should be dismissed without costs.

A. C. McMaster, for appellant.

F. D. Davis, for defendants, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This appeal arises out of a preliminary question: whether the plaintiff has lost any right of action she might have had, by failing to give notice of her claim and of the injury complained of, in accordance with the provisions of the Municipal Act, sec. 460 (4): and in nearly all of these cases the defendants are put at a disadvantage, because that preliminary question is seldom, if ever, considered until the whole case has been heard: and then, if it be plain that a plaintiff has a good claim, that, through the defendants' fault, she has sustained serious bodily injury, for which she ought to be compensated, she is not likely to be turned away empty-handed, because of what sympathy may call a wretched technicality. Here, far removed from the scene of action, we ought to be free from such influences, but human nature is human nature everywhere, and so it may be that defendants in such a case are somewhat handicapped wherever they may go.

Perhaps the best preventive of such influences is to begin by reading just what the Legislature has said to us upon the subject: "No action shall be brought for the recovery of . . . dam-

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ages," such as the plaintiff claims in this action, "unless notice in writing of the claim and of the injury complained of has been served . . . within seven days after the happening of the injury;" but "failure to give. . . . the notice shall not be a bar to the action, if the Court or Judge before whom the action is tried is of opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence."

And, besides that, there is this imperative injunction: "Every Act shall be deemed remedial . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof:" The Interpretation Act, R.S.O. 1914, ch. 1, sec. 10.

What then was the intent of the enactment in question? To prevent false claims? Undoubtedly, in part; but undoubtedly also, and mainly, to give to the corporations a fair chance to investigate and settle true, as well as contest false, claims. True claims are sometimes, indeed frequently, the basis of demands for extravagant damages.

Such claims must now be prosecuted within three months, but, even with that limitation, in many, indeed in nearly all, cases, the corporation must be at a great, and very unfair, disadvantage, if the first intimation of claim or injury come with a writ issued at the last moment. The fairness and importance of prompt notice of an accident, out of which a claim for damages will probably come, is obvious, statute or no statute requiring it.

It was not given in this case in time, and so the claim must fail, unless the plaintiff has reasonable excuse for failing to comply with the terms of the enactment, and unless it is proved that the defendants were not prejudiced in their defence by such failure.

It may be hard upon the plaintiff if she have a good claim which cannot be enforced, but it would be much harder, coupled with injustice, if the Judges and Courts should altogether, or largely, deprive corporations of the needed protection the enactment affords.

Then is there reasonable excuse for the want of notice? Excuse from whose point of view? Not from a plaintiff's; that would be easily satisfied, but necessarily from the defendants'; they have

been deprived of their statutable right, the excuse must be for that deprivation. The excuse is that the plaintiff did not know, in time to give the notice, that she had suffered anything but a trivial injury, in respect of which she had no intention of making any claim, and that the defendants were not in any way prejudiced by her default. If that be so, and if it be the whole story, her default might very well be excused; indeed one might reasonably expect that the defendants' council would be willing to accept it themselves; especially as the cost of the acceptance would not come out of their private purses, but would be paid by the whole body of the ratepayers of the municipality, of whom the plaintiff may be one. The question of prejudice to the defendants must often necessarily be involved in the question whether there was or was not reasonable excuse, notwithstanding, and quite apart from the fact, that it is also a separate and vital question. Then is that the whole story? No one has asserted, and no one could assert, that it is.

The plaintiff's leg was broken, the fibula, or shin-bone, fractured, and she asserts that that injury was caused by an accident, the accident in respect of which this action is brought.

The rest of the story, as far as it is material, might be told in a few words, but it may be better to give it, uncondensed, in her own words and in the words of her physician:—

Letta Wallace, sworn, examined by Mr. Kerby:—

"Q. Mrs. Wallace, you are the plaintiff in this action? A. Yes, sir.

"Q. And you are suing the city for damages for an accident? A. Yes.

"Q. When did this fall occur? A. On the 13th of February.

"Q. What year? A. This year, 1915.

"Q. The 13th of February, 1915—what time of day did it occur? A. A quarter to nine in the evening.

"Q. Do you know what day of the week that was? A. Saturday evening.

"Q. Where did the fall happen? A. On Ouellette avenue, right near Mr. Harvey's butcher-shop.

"Q. Where were you going at the time this occurred to you? A. I was going to Mr. Harvey's butcher-shop.

"Q. And what happened? A. I was going along the street, and my heel went into a hole in the sidewalk, and I fell.

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"His Lordship: How deep was the hole? A. Well, I cannot tell you that.

"His Lordship: I suppose you do not know. The first thing you knew, you were down? A. I was down, yes, sir, and I was dazed for quite a little while afterwards, so I did not think of the hole.

"Mr. Kerby. Q. Then, you say, you stepped into this hole, and you fell? A. Yes, sir.

"Q. As you fell, what happened to you, were you injured? A. Yes, sir, I was badly injured.

"Q. What were your injuries? A. I was injured in my back, and my ankle was badly injured.

"Q. Now then, as you fell, this ankle was crushed? A. Yes, sir.

"Q. And did you suffer any pain? A. Yes, sir, a great deal of pain.

"His Lordship: There is no use to ask that, of course.

"Mr. Kerby: Then immediately after that, and this ankle was crushed—what was your mental condition? A. I was bad for three or four weeks, could not attend to anything—I was crazy with pain.

"Q. Did any one assist you? A. After, when I came to myself I was standing up against the building. I do not know if it was Mr. Harvey's or Mr. Allice's, but it was there some place.

"Q. You found yourself standing up against the building? A. Yes, and it was some time before I could move away from there and try to make it to my home.

"Q. You say you found yourself up against the building? A. Yes, sir.

"Q. Do you know when you staggered against the building? A. No, sir.

"Q. Then you did find your way home that night? A. I did, after quite a while. I had the help of the post office fence. I got hold of it, and put my hands on the buildings all along the street, and hobbled home as best I could.

"His Lordship: Had you far to go to get home? A. Not very far, about a block and a half.

"Mr. Kerby: Q. Did you know at that time your ankle was broken? A. No, sir.

"Q. When did you first find out your ankle was broken? A. I doctored myself for two or three weeks, thinking it was a bad sprain, and when my ankle swelled up so badly, and became dreadfully painful, I went to the doctor, and he told me he was quite certain there was a bone broken, and, by the appearence, it was going to be a long time before I would be able to have any use of my foot.

"Q. What was the name of the doctor? A. Dr. Campbell.

"Q. That is Dr. J. F. Campbell? A. Yes, sir.

"Q. And when did you go to see the doctor? A. Well, I doctored myself for a couple of weeks after the fall.

"Q. Yes? A. Because my husband was out of work, and I had a house full of roomers and boarders, and I felt I could not really afford to go to a doctor, and, when I went to him, my condition was very serious.

"Q. Do you know what date you went to the doctor? A. No, he will know that.

"Q. Is there any way of fixing that date?

"His Lordship: He will have the date.

"Mr. Kerby: Possibly the lady can fix that date? A. Really I was so dazed all the time with pain, I did not give any thought to the date, but it was between two and three weeks that I tried to fix up myself.

"His Lordship: Were you in bed during this time? A. Yes, sir, I was on the couch all the time.

"Mr. Kerby: Q. And during that three weeks, or until you went to see Dr. Campbell, were you able to attend to business? A. No, sir, my daughters attended to matters altogether.

"Q. What was your mental condition, the condition of your mind? A. I was half the time crazy with pain, and, in fact, I did not attend to anything because I was not able to, I could not.

"Q. And what was the pain from? A. From my ankle, from the fall, of course, starting from the night I was hurt; I was delirious at times with pain, I could not rest night nor day.

"Q. You know when your daughter came down to see me? A. Yes, sir.

"Q. When you got home, you sent your daughter right back to do what? A. To get my meat, that I was not able to go into the butcher-shop and get—I was in such pain and agony.

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"Q. Did you tell her anything about the hole? A. I did.

"Q. What was it you told her to do? A. I told her to look and see where I had fallen. I had stepped into a hole.

"Q. Did'nt you tell her to take a measurement of the hole? A. Not that night.

"Q. You did later, how long? A. When I sent down to notify my solicitor, it was after the doctor told me I had a broken bone.

"Q. Anyway when you got home, you told your daughter to go down and see the hole? A. Yes, sir.

"Q. Now, what was your idea in having her look at the hole? A. Because, I wanted to know what I fell on.

"Q. Had you any idea then of making any claim for damages? A. No, sir, I did not feel that way, not until the doctor told me I had a broken bone, and I would be a long time laid up.

"Q. As a matter of fact, you did not intend to make any claim against the city? A. No, I did not.

"Q. Until the doctor told you you had a broken bone? A. Yes.

"Q. And how long was that after the accident? A. About three weeks.

"Q. Now there is no doubt you could have given notice, but you say you did not intend to make any claim against the city until the doctor told you that your ankle was broken? A. Yes, sir.

"Q. Your ankle had been fractured, and, if you had intended to make a claim against the city, you could have had your daughter notify the city for you? A. Yes, sir.

"Q. There was not anything to prevent your doing that? A. No, sir.

"His Lordship: Any further questions, Mr. Kerby? Let me see if I understand really. You had a very bad accident that evening that you hoped would not turn out to be anything serious? A. Yes, sir.

"Q. And you just doctored yourself, expecting to get better? A. Yes, sir.

"Q. When the doctor came, you found it was a totally different matter? A. Yes, sir.

"Q. And then, of course, you thought you ought to see what your rights were against the city? A. Yes, sir.

"Q. Now, if you had known the serious nature of the accident in the beginning, you could have consulted the solicitor at once? A. I could have, but I wanted to wait until I saw the doctor when I was getting worse.

"Q. I suppose you did not know anything about the necessity of giving immediate notice to the city or anything of that kind? A. No, sir, I did not.

"Mr. Davis: I submit, my Lord, clearly, there should have been notice on that statement.

"His Lordship: It is a pretty cruel statute, and I want to get around it if I can. It is very strange the city does not see its way clear to treat these people with some degree of generosity. Apparently there was a real accident.

"Mr. Davis: "Yes, my Lord, but *O'Connor* v. *Hamilton*.

"His Lordship: I know the cases. I have been through the mill. Sometimes the city is generous.

"Mr. Davis: We say the city is not at fault in this case. We did not know about this. We fixed it as soon as we found it out.

"His Lordship: They would allow it to be tried on its merits without notice?

"Mr. Davis: I have no authority to waive.

"His Lordship: Perhaps, later on, the city might consent to that, because the statute is one that does not commend itself to many people."

Dr. John F. Campbell, sworn, examined by Mr. Kerby:—

"Q. Dr. Campbell, you were called in attendance upon Mrs. Wallace? A. Yes, sir.

"Q. The plaintiff in this action? A. Yes, sir.

"Q. Where do you practise, Doctor? A. In Windsor. . . . I had to get that swelling out and find out what was the trouble there.

"Q. Now, what was the cause of that swelling? A. The swelling was caused—there was a severe inflammation in the joint, an arthritis very much marked—arthritis in the joint.

"Q. Was it not from walking upon her foot in the condition in which it had been? A. Well, it possibly could do it.

"Q. Now, suppose she had seen a physician, suppose a physician had been called on the day of the accident and had set the ankle, what would have been the result? A. She probably would

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not have been so long in making a recovery, and there would not have been the swelling that ensued.

"Q. Not so much as has ensued? A. Probably not so much.

"Q. And this swelling and her pain and suffering, to a large extent, were caused by reason of her not having called a physician at the time of her accident? A. Part of it was, and part of it was from injury.

"Q. A great deal from the neglect? A. It is possible considerable of it would be.

"Q. If you had been called on the day of the accident and had attended to the injury and set the ankle, it would have been well long ago? A. Possibly it would.

"Q. And there would not have been any bad effects from it? A. What do you mean—with the ankle?

"Q. Yes? A. Possibly there would be some, it just depends.

"Q. But not as much as there is now? A. Probably not."

How is it possible upon this testimony, leaving out of consideration for the moment the evidence for the defence, to say that there is reasonable excuse for the failure to comply with the statute-imposed duty the plaintiff owed to the defendants; or, indeed, to find anything else, from the evidence, than that the notice was not given because the plaintiff did not know it was necessary? It is impossible for me to believe that, in the circumstances detailed, a woman 47 years of age, weighing nearly 180 pounds, and the keeper of a boarding and lodging house, would submit to be put, by the defendants' wrong, to great pain, incapacity, and to a considerable money loss, without hitting back, or thinking of hitting back. Such meekness is not consistent with her manner of prosecuting this action, or of men or women in these days. She knew she had sustained a severe injury; she thought it was a bad sprain, and every one knows the common saying, and the truth of it, that "a sprain is often worse than a break." But, in any case, what right had she to take chances, and, losing, to put the consequences on the defendants, instead of giving them the notice the law requires, or taking the consequences herself?

Out of the score or so of cases upon the subject of reasonable cause for want of notice digested in the Current Index of last year and the year before, cases arising under the Imperial Workmen's Compensation for Injuries Act of 1906, Mr. McMaster

seems to have been able to find four only that he considered helpful to the plaintiff; and the most heplful thing he could find, in the most important of them, was a statement of the Master of the Rolls in these words: "Speaking for myself, I think the safer ground is to say that unless you can come within either of these two classes of cases, namely, that you can make out that the injury from the accident is latent—not at first apparent . . . or that the accident is apparently so trivial that it would be absurd to expect the workman to give notice of it, I think it is not 'reasonable cause' for not giving notice." That was said in the case *Potter* v. *John Welch & Sons Limited*, [1914] 3 K.B. 1020, see p. 1031. In falling through a door the workman had fallen on his head and bit his tongue. Immediately after the accident, he reported the matter to his foreman, and his fellow-workman reported it to one of the directors of the defendant company. The accident happened on the 7th January, and the man continued at his work until the 14th July, and died on the 22nd day of that month. He seems to me to have acted reasonably, he made no claim, but kept at his work, expecting to get well, without losing a day's work, as probably 99 men out of 100 would, but he chanced to be the hundredth—the cut in the tongue set up abnormal cell activity, and the man died quickly of cancer. It was held at the trial that the defendants were prejudiced by the want of notice, but that the man had reasonable cause for not giving notice; and, under the enactment there in question, the claim was not barred. Upon appeal it was held that there was not reasonable cause, and that the defendants were prejudiced, and so the claim was barred.

If questions of fact were to be tried here according to the findings of fact in cases in Great Britain, that case ought to determine this case against the plaintiff; and I may say that in probably three-fourths of the cases collected in the Current Index, to which cases no reference was made, the claims failed because it was not proved that the defendants were not prejudiced.

Perhaps the strongest case that could be cited for the plaintiff is *Hayward* v. *Westleigh Colliery Co. Limited*, [1915] A.C. 540: but in that case, as put by Lord Parmoor, the only question before the House of Lords was, whether there was "any error in law on which the learned County Court Judge can be put right in the Court of Appeal or in this House. In my opinion there is no

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error in law of that kind." So that the question there was not whether prejudiced or not or excused or not, but was whether there was any evidence upon which reasonable men could find as the arbitrator found. The first observation that this case calls for is, that it was not contended in it that there was reasonable cause for the want of notice, so it must be taken that there was not, else why go to the House of Lords on the other question, when either found in the plaintiff's favour would have been enough? And so the case is one of the highest authority against the plaintiff, for here, if she fail on either question, she fails altogether. Then the facts of that case were very different from the facts of this case; the injury to the man was a slight abrasion—skin-deep scratch—on his knee; the next day he did not work, the next two following days he did, then called in a doctor: a week after the injury, his wife verbally informed the foreman of the colliery of the reason for the man's absence, and two days afterward he died from blood-poisoning, through the scratch on his knee; there was no evidence of any kind of actual prejudice to the defendants: but it seems to have been admitted or taken for granted, as I have said, that there was no reasonable cause for the want of notice. As I have also said, if that case could be held to govern this, then this action was rightly dismissed for failure to give the notice.

But, not only is no case decided upon its facts only an authority binding in any other case, but also the enactment in question here and the enactment in question there are widely different in purpose and in words: the enactment there in question was passed for the benefit of workmen, to give them a right of action and a remedy for injuries sustained in the course of their employment, and no one can say, with any approach to the truth, that the House of Lords is not fully obeying the injunction, the law's injunction, to give to the enactment such a liberal construction as will best attain its object—the benefit of workmen physically injured, as I have mentioned.

The enactment here in question was passed, as I have said, for the protection of municipal corporations from actions connected with their statute-imposed duty to keep the highways in repair; and was separately passed long after the duty to repair the highways was imposed; and perhaps a fair indication of the difference between the enactments is afforded in the fact that the

plaintiff in the one is relieved from the effect of his default for either reasonable cause or absence of prejudice; whilst under the other only for reasonable excuse and absence of prejudice. So too it is essential to bear in mind that under the Imperial enactment the notice is to be given as soon as practicable after the accident, whilst here there is the hard and fast rule of seven days after the happening of the injury, in urban municipalities, and thirty days in townships and counties; so that the important element of practicability involved there is excluded here, making a very wide difference upon the questions here involved.

Here, I can find no excuse, and the trial Judge, notwithstanding all his sympathy openly expressed, could find none: and upon the other ground the city's engineer testified to actual prejudice, and to a regular and reasonable way of dealing with all such cases, which was impossible in this case for want of notice. Then the evidence of the actual condition of the sidewalk at and about the time when it is said the accident happened is meagre and unsatisfactory; it might, and indeed must, under the defendants' method of dealing with such claims, have been made plain had notice been given, as it ought in fairness to have been given, the next day. The law allowing a claimant seven days does not prevent an immediate notice. The result might have been that the plaintiff would have been settled with at once or the discovery of a good defence to the action; at the least, the failure to give it may have caused all this litigation.

And in regard to the injury, how is it possible to say that the defendants are not prejudiced in their defence? They might and should have had, with the plaintiff's consent, a careful surgical examination of her injury, and at the very least have saved the woman and themselves from much that they are now asked to pay for.

If it be a true claim, if the plaintiff were really injured at the time she says she was, an immediate notice would have prevented litigation to have that point determined, and the then condition of the sidewalk would alone have gone a long way towards sustaining her assertion that there she was hurt.

To say that the injury seemed trivial is to say that the plaintiff and her daughter and physician have all testified to that which is untrue: to say that an accident which caused the im-

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mediate and continuous, for nearly a month before notice given, effects these witnesses tell of—agony of pain causing delirium, complete inability to work, and all the other distressful conditions related by them—could have seemed trivial to any one, is assuredly trifling with the facts; the very facts upon which the plaintiff's damages have been assessed—though irregularly assessed if not by consent, at $600—shew the entire absence of anything like triviality.

So too the suggestion of Mr. McMaster that her injury was "latent." Her assertion, supported by the testimony I have referred to, is that all that agony and incapacity was caused by the accident, and began immediately and were continuous day and night up to and long after the notice was given. It would be difficult to imagine any injury less undiscovered, more patent.

The fallacy of Mr. McMaster's suggestion is very obvious: it confuses the cause of the suffering with the injury. The law is not absurd enough to require that notice shall be given technically of the effect of the injury; all that is required is notice that an injury has been sustained—in this case, that the plaintiff's leg was injured in being thrown down by stepping in a hole in the sidewalk. If one had to tell the effect, one would need to have more knowledge than any physician, for no one is always free from error in this respect. Can it be said that a man's illness is latent because he supposes it to be bronchitis and in truth it is laryngitis? Why any more so when the agony is supposed to come from a sprain, though it really comes from a fracture not preventing locomotion; a sprain, the consequences of which may be worse than those of a fracture, and, perhaps, or likely to be when it causes such immediate and continuous great pain and suffering?

If one could wait until he knew accurately the effect of the injury, notice need seldom be given. The plaintiff knew of her *injury*, and, for the purposes of the Act, could just as well have given the notice it requires immediately after the accident as at any other time.

I decline to be a party to any decision that tends to wipe out the protection the Legislature has given municipal corporations, even though that protection may sometimes defeat a claim which but for it would have been a just one. It will be time enough to settle these questions according to our several ideas of "natural

justice" when the Legislature puts that burden upon us: a thing extremely unlikely, and a thing which would be as unwise as unlikely, in view of the great variety of "natural justice" which such a law would discover.

I would dismiss the appeal, and affirm the direction for dismissal of the action, basing it on both grounds; and so, to some extent, differ from the trial Judge.

RIDDELL, J.:—The plaintiff, a woman of mature years, fell on the streets of Windsor, on the evening of Saturday the 13th February, 1915, and suffered severe injury—a fracture of the fibula or small bone of the leg and a "corner off" the lower end of the tibia or shin-bone.

She brought her action against the city; it was tried by and before Mr. Justice Middleton without a jury, at Sandwich, on the 8th and 9th October, 1915. The learned Judge found that she would be entitled to damages to the amount of $600 had it not been for her failure to deliver the statutory notice required by sec. 460 (4) of the Municipal Act: and dismissed the action. The plaintiff now appeals.

The learned Judge holds, and correctly, that the plaintiff was not "in any such condition as to be incapable of considering her situation except as a sufferer," and goes on to say: "What happened was that the plaintiff's foot was undoubtedly seriously injured. The fibula was cracked or broken, but not so that the pieces separated. On the opposite side a very small portion of the cartilaginous substance was broken. The plaintiff went home unaided. She ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then the limb was much inflamed and very painful."

After discrediting the daughter, the learned Judge continues: "She did not realise that she was seriously injured; she did not know the statute nor the necessity of giving notice. Had she realised that she was seriously injured and known of the statute, there was nothing to prevent the notice being given."

This, I think, is a fair statement of the plaintiff's condition. I would add to that, however, that the plaintiff did not know that she had anything but a bad sprain until she consulted Dr. Campbell on the 11th March; that she supposed her domestic treatment

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with vinegar, etc., would bring about a cure; and that until she found that the bone was implicated, she had no intention or thought of looking to the city for damages. When she found how serious her injuries were, she thought of a claim on the city, saw her solicitor, and a notice was served on the 12th March.

In order to avoid the effect of non-service of notice within seven days, the Court or Judge must be of the opinion that (1) there is reasonable excuse for the want of the notice and (2) the corporation was not thereby prejudiced in its defence: sec. 460 (5). My learned brother holds that the corporation was not prejudiced, but that there was no reasonable excuse for not giving notice in time.

Assuming, as on this evidence we must assume, that, during all the time before the expiration of the statutory period, the plaintiff believed herself to have received but a comparatively trifling injury which would yield to fireside remedies, and for which she would not think of claiming damages from the city—I am of opinion that there was a reasonable excuse for the want of notice.

Not much if any assistance can be had from the cases in our own Courts such as *Armstrong* v. *Canada Atlantic R.W. Co.* (1901-2), 2 O.L.R. 219, 4 O.L.R. 560; *O'Connor* v. *City of Hamilton*, 8 O.L.R. 401, 10 O.L.R. 529; *Morrison v. City of Toronto*, 12 O.L.R. 333; *Anderson* v. *City of Toronto*, 15 O.L.R. 643; *City of Kingston* v. *Drennan*, 27 S.C.R. 46—each case must be decided on its own facts, and what is a reasonable excuse in one instance will not necessarily be such in another. It is not contended that any of the circumstances which have been held in our Courts to give a reasonable excuse exist here.

We are referred to some of the many cases in which what was a "reasonable cause" for omitting to give the statutory notice required by the Employers' Liability Acts was considered.

In *Tibbs* v. *Watts etc. Limited* (1909), 2 B.W.C.C. 164, a bargeman strained himself lifting coal—nothing was apparent at the time, but an aneurism had in fact been caused, which was discovered by the doctor three months after. Cozens-Hardy, M.R., says (p. 165): "It is impossible to think that every workman must give notice of every strain received, the effects of which are not apparent"—and the default in giving notice was excused.

But there, "nothing was apparent at the time," and the injured man continued to work till he was medically examined.

In *Eke* v. *Dyke* (1910), 3 B.W.C.C. 482 (C.A.), the workman was said to have died from some form of poisoning caused by the condition of the drain he was working in. No notice was given or application made, but that was excused, as "neither of the doctors, and I think nobody, was at all prepared to say at that time that there had been an accident within the meaning of the Act."

In *Moore* v. *Naval Colliery Co. Limited* (1911), 5 B.W.C.C. 87, a miner, suffering with a disease of the eye, believed that a rest above ground would cure him: it did not, but the disease became worse. The County Court Judge held this no excuse: but the Court of Appeal reversed this finding (Farwell, L.J., holding that whether a particular set of facts constitutes reasonable cause within the Act is a matter of law). Cozens-Hardy, M.R., says (p. 92): "In the case of a man . . . whose good faith is not impugned, who is told, 'A few days above ground . . . will probably make you all right,' who does not immediately make a claim against his employers . . . but believes the change, . . . will set him right, and, when he finds it does not, . . . goes to the certifying surgeon . . . and then immediately makes his application, I should be very sorry indeed to hold that that was not a reasonable cause for not having entered his application sooner." These two cases are not of much assistance.

Then comes *Hoare* v. *Arding & Hobbs* (1911), 5 B.W.C.C. 36 (C.A.)—a saleswoman in a shop received a shock from a fire which burnt part of the shop. Thinking she was suffering from temporary nervous derangement only, she gave no notice of the accident, and made no claim for compensation. She was attended by medical men during the whole time, but they thought there was nothing seriously the matter with her, and that she was suffering only from hysteria. Six months after, it was found that she really had disseminated sclerosis, an incurable disease, which permanantly incapacitated her for work: and two months thereafter she gave notice and made a claim. The County Court Judge held this reasonable cause, and his decision was affirmed by the Court of Appeal. Fletcher Moulton, L.J., at p. 38, says: "This lady, not wishing to make a claim for trifling things, imagined that for practical purposes she had not received an injury

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from the shock that was a proper subject for a claim. Then in August, she, for the first time, found out it was a serious disease. That is more than six months from the date of the accident. The neglect to make a claim was due to a reasonable cause." Cozens-Hardy, M.R., and Farwell, L.J., agreed.

In *Breakwell* v. *Clee Hill Granite Co. Limited* (1911), 5 B.W.C.C. 133, an elderly cripple met with an accident—when trying to lift a heavy stone, he "hurt himself." He did no more work that day, but walked home without assistance. He remained in bed a few days, and was so ill he could not go to see his club doctor; but he saw the doctor five days after the accident; the doctor did not tell him he was in such a state that he could not work again—nor did the man think he was in such a condition. Afterwards he went to Liverpool and entered a hospital, but got no better and came home, making a claim six months after the accident. He had been suffering from heart disease, and this was accelerated by the accident so that he never could work again, as he learned for the first time in Liverpool. He was afraid, if he made a claim, that the insurance company would prevent his re-employment—and "he put off giving notice of the accident until he found that he was so injured by the accident that he would never work again." This was held a reasonable cause by the County Court Judge and the Court of Appeal.

In *Fry* v. *Cheltenham Corporation* (1911), 5 B.W.C.C. 162, 105 L.T.R. 495, a workman, on the 15th February, fell and hurt his knee; he continued to work till the 24th November, when, having a pain in his knee, he saw a doctor. The doctor found that an operation was necessary, and on the 18th December he went to the hospital and was operated on—notice being given the previous day. "From February to November he had suffered no inconvenience at all" (*per* Buckley, L.J., in *Webster* v. *Cohen Brothers* (1913), 6 B.W.C.C. 92, at p. 98). This was held reasonable cause.

In *Egerton* v. *Moore* (1912), 5 B.W.C.C. 284, [1912] W.C. & I.R. 250, [1912] 2 K.B. 308, a navvy in July fell and struck his breast on the top of his pick: he was helped up by his mate and shortly after resumed work. He told his employer that he could not go to work; but, expecting to be all right in a few days, he gave no formal notice. Five days afterwards he started working

for another employer and worked steadily till February, when he noticed a tubercular abscess which he attributed to the fall on the end of his pick: this got worse and obliged him to stop work, and go to the hospital in May. No notice was given for almost a year after the accident: the County Court Judge and the Court of Appeal thought that there was no reasonable cause for this default.

In *Refuge Assurance Co. Limited* v. *Millar* (1911), 49 Sc. L.R. 67, 5 B.W.C.C. 522, an insurance agent fell on his rounds and injured his left side, shoulder, and arm—this was on the 9th May. Within two days he told the manager, and again on the 8th June, when he asked for a week's rest, and was told he had better resign. He did resign, his service terminating on the 29th June; from that time he was totally incapacitated with paralysis of the left side of his face and pain on the left side of his body, but still he thought his injuries only slight; on the 6th September, he consulted a doctor and found his real condition; he gave notice on the 12th September. The Sheriff-Substitute found that there was reasonable cause for the delay in notice, and the Court of Session affirmed this judgment. The Lord President, with whom the other two Judges concurred, says: "It seems to me . . . that there was a reasonable excuse, because I think it was quite probable that the workman was not aware of the seriousness of his injury, and that, when he did come to know of the seriousness, he did give notice."

In *Webster* v. *Cohen Brothers*, 6 B.W.C.C. 92, [1913] W.C. & I.R. 268, a workman met with an accident on the 3rd April, his right leg getting twisted under him. He was in great pain, but kept on working, expecting every day that it would be better; it did not get better, but on the 1st June he became incapacitated from working altogether. He gave formal notice on the 3rd June. The County Court Judge held that, as till the 14th June the injury did not prevent the workman from working, and as he reasonably believed that it would not, and that no occasion for making a claim for compensation would arise, there was a reasonable cause for the omission—but the Court of Appeal did not agree in this conclusion. Cozens-Hardy, M.R., says (p. 96): "If a man abstains from giving notice of an accident which is daily causing him pain and which is well known to him

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. . . because he does not intend to make a claim, that is not a reasonable cause for the failure to give notice." Buckley, L.J., during the argument (p. 94) says: "There appear to be two classes of cases: those where the workman says: 'If I do not get worse I shall not have to give notice:' and those where he says: 'If I do not get better I shall have to give notice, but I expect I will get better and so I do not give notice.'" And in giving judgment (p. 97) he says: "We must distinguish between two different sets of facts: in the one the workman says, 'If things continue as they are, I shall never require to give notice of any claim for compensation;' that might be reasonable cause for not giving notice. The other state of facts is this: the workman says to himself, 'I have had an accident, the results of which are serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for compensation at all.' That is not reasonable cause for the failure to give notice of the accident." Hamilton, L.J. (p. 101), says: "It is not reasonable cause for a workman failing to give notice of his accident if he says, 'I do not think I shall want to make a claim; I am sanguine about my recovery, and therefore I will not give notice of my accident.'"

In *Ellis* v. *Fairfield Shipbuilding Co. Limited* (1912), 6 B.W.C.C. 308, [1913] W.C. & I.R. 88, 50 Sc. L.R. 137, a workman was injured by accident on the 1st June; he continued at work till the 5th August, though he suffered pain in his neck and shoulder, which he attributed to the accident; he then saw a doctor, who diagnosed the complaint as muscular rheumatism; the workman kept at work till the 11th November, and then left and consulted another doctor, who diagnosed a severe strain of the neck ("much the same" says the Lord President "as muscular rheumatism"). This doctor treated him for strain of the neck till the 3rd December, when another doctor was consulted, who made out partial dislocation of the spine, and recommended removal to an infirmary. The workman gave formal notice on the 30th January—the Sheriff-Substitute held no reasonable cause proved for the delay: but this decision was reversed by the Court of Session. The Lord President (6 B.W.C.C. at p. 316) points out that, while the workman believed his condition due to the accident, he did not know his true condition, "because he was suffering

from something he did not know anything about . . . until he was told on the subsequent December 13:" then (p. 317) he finds as the result of the cases, "if a man has an accident, and honestly believes at the time that nothing serious has happened to him, and therefore, not conceiving that he has a good claim against his employer, makes no claim, but it afterwards turns out that he has made a mistake in fact and really had been injured, that may be . . . reasonable cause for his not making the claim . . . or not giving notice of the accident . . ." The other three Judges concurred.

In *Sanderson* v. *Parkinson & Sons Limited* (1913), 6 B.W.C.C. 648, a painter lad fell ill on the 15th July, and left off work; on the 13th August, he consulted a doctor, who sent him to bed, from which he did not get up till December—then the doctor told him to leave everything alone; he then made an oral claim, saying that the doctor thought this lead poisoning—on the 11th February, formal claim was made, and on the 13th February a certificate obtained that he was suffering from lead-poisoning, the disablement commencing in July. The County Court Judge held no prejudice and delay in notice, &c., occasioned by reasonable cause: the Court of Appeal gave no judgment on the last point, but held that the employers were not prejudiced—this is not of value upon the present inquiry.

In *Clapp* v. *Carter*, 7 B.W.C.C. 28, [1914] W.C. & I.R. 80, [1914] 3 K.B. 1020, a workman met with an accident, falling on his head: he remained away from work three days and then returned and continued his work for about six months, continually suffering from headaches during the time and being compelled at times to quit work because he felt so ill—then for three months his mind became actually unbalanced, and, after two months more, formal notice was given. The County Court Judge found that the reason no claim was made was that "he hoped and believed that the headaches would soon pass away and that he would recover." The County Court Judge found reasonable cause: but the Court of Appeal reversed this finding. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 33): "I think the safer ground is to say that unless you can come within either of these two classes of cases, namely, that you can make out that the injury from the accident is latent, not at first apparent . . . or that the accident is apparently so trivial that it would be absurd to expect

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the workman to give notice of it, I think it is not 'reasonable cause' for not giving notice." Evans, P., and Eve, J., adopt as their rule *Webster* v. *Cohen Brothers*, 6 B.W.C.C. 92, *ut supra*.

In *Thompson* v. *North-Eastern Marine Engineering Co.* (1914), 7 B.W.C.C. 49, [1914] W.C. & I.R. 13, a workman fell on his elbow, causing some temporary pain, which he himself relieved by topical applications. He was in no way incapacitated and continued on his old work. Three months later, he found increasing loss of power and wastage of flesh in his arm: a surgeon examined with the Xrays and found a fracture in the elbow of long standing, and this he attributed to the accident. The workman gave notice a few days later: the County Court Judge held a reasonable cause shewn, and the Court of Appeal sustained the decision. Cozens-Hardy, M.R. (7 B.W.C.C. at p. 51), considered the case one of latent injury, and Evans, P., and Eve, J., agreed.

In *Zillwood* v. *Winch* (1914), 7 B.W.C.C. 60, [1914] W.C. & I.R. 87, a bricklayer, on the 17th October, went to lift an unusually heavy bucket, and felt a "rick" on his side in the abdomen—the pain passed away, but a lump appeared in the place he had felt the pain. He continued to work every day and bathed the lump every night—it seemed to get better, but early in January he felt the pain and lump again at work, and once he all of a sudden collapsed. The pain and lump disappeared and reappeared, and the doctor advised a truss. He got one, but he could not do his work so well because of the continual stooping required: about the middle of January he gave notice: the County Court Judge held that there was reasonable cause, and this was sustained by the Court of Appeal. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 64): "The learned Judge, who has seen the witnesses . . . said, 'that when the accident happened the applicant, as a reasonably minded man, did not know that he was suffering from any injury which could lead to incapacity, total or partial. Not having surgical, medical, or anatomical knowledge, he was not aware, and had no reason to believe, that he was suffering from rupture' . . . He knew that this lump which he felt was due to the accident, but thinking that it was a mere rick, and thinking that the fomentations which he applied would produce a good result, he did not take further

notice." Evans, P., and Eve, J., concurred in the decision that this was reasonable cause.

Ing v. *Higgs* (1914), 7 B.W.C.C. 65, [1914] W.C. & I.R. 84, is a decision on prejudice by delay, and I do not set out its facts here.

In *Haward* v. *Rowsell & Matthews* (1914), 7 B.W.C.C. 552, [1914] W.C. & I.R. 314, a butcher's canvasser, one morning in September, made a slip on his wheel and was hurt—he went home and rested two days, when he returned to work, though still suffering slightly from the results of the fall—and the pain and swelling continued. By the 26th December, the pain had increased, and he consulted a surgeon, who found cancer and removed a cancerous gland—a second operation became necessary about three weeks thereafter, and another on the 3rd February. By that time the disease had spread and the case had become hopeless—the man died. The County Court Judge held that there was reasonable cause for not giving a notice till the 26th December, in that the injury was latent. Cozens-Hardy, M.R., says (7 B.W.C.C. at p. 557): "It was not until December 26 . . . Boxing Day, that the man or anybody else was aware of the serious state of things from which he was suffering. . . . It is quite right to say . . . that there is reasonable cause for not giving notice before Boxing Day." Swinfen-Eady, L.J. (p. 559): "There was reasonable excuse for not giving it until December 26." Pickford, L.J., concurred.

In *Potter* v. *John Welch & Sons Limited*, 7 B.W.C.C. 738, [1914] W.C. & I.R. 607, [1914] 3 K.B. 1020, a sliding door fell on a workman's head, causing a jagged tooth to bite through his tongue. The wound bled a good deal and there was considerable pain, but the man did not quit work. The wound on the head soon healed, but, a fortnight or so after the accident, he experienced trouble with his tongue so that he could hardly eat. This continued for some time, and at length, some six months after the accident, he became totally incapacitated; his doctor found "that the mischief caused by this jagged tooth going through the tongue had so irritated the tongue and produced such inflammation that he developed cancer, from which he died." No notice was given; the trial Judge, Channell, J., held this omission excused, but the Court of Appeal did not agree. Cozens-Hardy,

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M.R., says (7 B.W.C.C. at p. 751) that the injury from the accident was not latent "because there was not only a wound in the head but also an actual hole through the man's tongue, caused by a jagged tooth." Swinfen-Eady, L.J., and Pickford, L.J., concurred. In this case the whole of the injury was apparent and known to the sufferer—what he was ignorant of was the result which was to follow.

In *Snelling* v. *Norton Hill Colliery Co.*, [1913] W.C. & I.R. 497, a workman in a colliery injured his hand, he thought a mere scratch, and went to work the following two days. The next day, Sunday, the hand became painful and began to swell, but on Monday he went to work again—on Tuesday he saw a doctor and found he had septic poisoning; an operation did good, and six days after this he gave written notice—the County Court Judge found that there was no reasonable cause for not giving notice as soon as he found the real condition of his hand: and the Court of Appeal agreed with him.

In *Grime* v. *Fletcher*, [1915] 1 K.B. 734, a workman injured his eye, and suffered great pain. It was alleged that this injury produced a state of insanity which caused the workman to commit suicide. The County Court Judge held that there was no reasonable cause for not giving notice, and this decision was affirmed by the Court of Appeal. Here, as in some other cases, the sufferer knew the full extent of his injury; he probably did not know that the injury might have such serious results (if in fact the insanity was the result of the injury and the suicide the result of the insanity, which was more than doubtful).

It may be well to examine the other cases in England and Scotland so far reported in reports which have reached us.

In *Nichols* v. *Briton Ferry Urban District Council*, [1915] W.C. & I.R. 14, a stoker, in attempting to prevent a barrow from falling, was ruptured; he felt the lump within two hours of the strain, but no notice was given for three days—the County Court Judge and the Court of Appeal held that there was no reasonable cause for the omission to give notice as soon as practicable after the accident.

In *Wassall* v. *James Russell & Sons Limited*, [1915] W.C. & I.R. 88, the workman, on the 24th September, hurt his finger—but kept on working till the 27th September at 10 a.m., when he

had to quit, as he could not hold the hammer. On the 29th September, he saw a doctor, who found the finger in a septic condition, and the workman then gave notice. It was held by the County Court Judge and the Court of Appeal that from and after the 27th September at 10 a.m. there was no reasonable cause for omission to give notice.

In *Taylor* v. *Nicholson & Son (Leeds) Limited*, [1915] W.C. & I.R. 42, a workman cut his finger on the 27th February; on the 10th March, when the cut was healed over, he met another accident and broke it open. On the 12th March it looked bad, and on the 19th March the doctor found an open sore and conditions indicating blood-poisoning—the man died of blood-poisoning on the 27th March, and notice was given on the 1st April. It was held by the County Court Judge and the Court of Appeal that at least from the 19th March there was no reasonable cause for delay.

In *Fox* v. *Barrow Hematite Steel Co. Limited*, [1915] W.C. & I.R. 321, a miner was struck on the eye by a piece of coal—he stopped work, washed his eye, and remained away from work—on the fourth day, he saw a doctor, who hoped to save the eye. Three days thereafter, notice was given; the doctor's hope was disappointed, in two more days the eye became septic, and the workman lost the use of it. The County Court Judge thought this "an injury to the eye which may result in the loss of it," and that there was no reasonable cause for not giving notice the day following the accident, when the workman made up his mind to stay away from work—the Court of Appeal agreed. Warrington, L.J. (p. 325), considers the case to come within the second of Lord Justice Buckley's cases in *Webster* v. *Cohen Brothers*, the case in which the workman says to himself, "I have had an accident which is serious, but I expect it will alter for the better."

In *Plumley* v. *Ewart*, [1915] 4 W.C. & I.R. 317, there was no appeal on the question of reasonable cause, and I do not extract the facts.

In *Flood* v. *Smith & Leishman*, [1915] W.C. & I.R. 212, a workman injured his finger, making a small wound near the nail of the middle finger of his left hand: nine weeks thereafter, it began to swell; he went to an infirmary and received treatment for some four weeks, and three weeks thereafter gave notice. The

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finger had been treated as a septic finger, but the man had an obscure constitutional complaint which might be dormant for some time and be awakened to activity by such an accident. The arbitrator and the Court of Session considered that he did not realise the seriousness of his injuries at the time, and that that was a reasonable cause for failing to give notice. Lord Mackenzie (p. 218) says: "It is found that he was afflicted with a constitutional complaint which may lie dormant for a time and be awakened into activity by such an accident . . . an obscure constitutional disease. . . . One is not surprised that the workman should not realise the nature of the injury . . . I take as a crucial finding in fact that the serious nature of the injury did not fully appear until the month of March. . . . He went into the infirmary, and . . . it was not until the last week of March that he became convinced that his injury was of a serious nature."

It seems to me that the fair result of the English and Scottish cases is that, where an accident turns out to have more serious results than were at first anticipated, and notice is deferred until the seriousness of the results has become apparent, the want of notice is not to be excused if the full extent of the injury—of the lesion—is apparent or known, although the results of such injury or lesion may not be known. Such is the case in *Moore* v. *Naval Colliery Co. Limited; Fry* v. *Cheltenham Corporation; Webster* v. *Cohen Brothers; Egerton* v. *Moore; Clapp* v. *Carter; Potter* v. *John Welch & Sons Limited; Grime* v. *Fletcher*, &c.

But, if the full extent of the injury or lesion be not apparent, a failure to give notice is excused until it is discovered—or at least until it should have been discovered—till that time the injury is "latent." Such is the case in *Tibbs* v. *Watts etc. Limited; Hoare* v. *Arding & Hobbs; Breakwell* v. *Clee Hill Granite Co. Limited; Refuge Assurance Co. Limited* v. *Millar; Ellis* v. *Fairfield Shipbuilding Co. Limited; Thompson* v. *North-Eastern Marine Engineering Co.; Zillwood* v. *Winch; Haward* v. *Rowsell & Matthews*, &c.

The present case falls within the latter class—if it be a matter of law, as is said in some of the English cases, I think the law gives the plaintiff a reasonable excuse: if it be a matter rather of fact or of mixed law and fact, as I prefer to think, the same result should follow.

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I have had some trouble with the other branch of the case, the absence of prejudice to the defendants from the notice not being served. The learned trial Judge has found this in favour of the plaintiff, and a perusal of the evidence does not satisfy me that he is wrong.

I would reverse the judgment and direct judgment for the plaintiff for the amount found by the trial Judge, with costs here and below.

Lennox, J.

LENNOX, J.:—Taking up the main point to be considered upon this appeal—that is, was there reasonable excuse within the meaning of sub-sec. (5) of sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, for non-compliance with sub-sec. (4), requiring notice of the claim to be given to the corporation within seven days of the happening of the injury?—I can, for the most part, confine myself to the facts found by the learned trial Judge (setting out portions of the judgment of MIDDLETON, J., *supra*.)

The learned Judge assessed the damages, contingently, at $600, and by doing this, and stating his conclusions of fact and law with characteristic clearness, has greatly facilitated this Court in dealing with the questions argued upon this appeal.

With very great respect, I am of opinion that the learned Judge erred in concluding that "the case is entirely governed by *Anderson* v. *City of Toronto*, 15 O.L.R. 643." On the contrary, it does not appear to me that the decision in the *Anderson* case in any way touches the question to be decided here, except possibly as a matter of reasoning, by the process of exclusion. In the *Anderson* case the judgment of the learned Chancellor upon the question of excuse, after finding that the defendant was not prejudiced, is contained in three sentences: "A sufficient excuse arises if the nature of the injury is such as to cause the plaintiff to become for the time being incapable of considering his situation except as a sufferer. On that ground proceeds *Morrison* v. *City of Toronto* (1906), 12 O.L.R. 333. The injury here was a sprain to the foot, which, no doubt, occasioned great bodily suffering; but there is nothing to shew that the patient was so affected and prostrated that he was physically or mentally incapacitated from giving notice, or directing that it should be given."

In a manner which I cannot hope to emulate, the Chancellor epitomises the principle of the decision in *Morrison* v. *City of*

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Toronto, and gives effect to it in a case governed by the same principle. Facts and conditions may differ as blades of grass or in marked degree, but the principle determining the inquiry must always be: does the evidence disclose a reasonable excuse? It matters not what its character is, so that it is a reasonable excuse. A plaintiff may have one valid excuse or many or none. In *Morrison* v. *City of Toronto* and *Anderson* v. *City of Toronto*, there was only one possible excuse and of the same character in each case—mental and physical inability to give the notice, good cause if established, and the evidence established its existence in the one and non-existence in the other. Neither case, of course, is authority for saying that physical or mental incapacity is the only excuse, or that a plaintiff failing to shew an excuse of this character may not have a valid excuse of another character. The tacit assumption of the contrary of this, if I may say so, with great respect, is the fundamental error in the judgment in appeal. The excuse here, if any the plaintiff has, is not that she was mentally or physically incapable of giving notice, but an excuse of an entirely different character, and which does not appear to have been considered, and possibly was not urged, at the trial. The plaintiff was certainly in bad condition mentally and physically, but I unhesitatingly accept the conclusion of the learned trial Judge that it was not of such an extreme character as (in itself) to relieve the plaintiff from the obligation of giving notice. He finds, and it was open to him to to so upon the evidence, that "the plaintiff was not in any such condition as to be incapable of considering her situation except as a sufferer;" and, if this were all, then, although the circumstances are different, as they must always differ, yet the principle of the decisions in the two cases referred to must be applied, and the plaintiff would be without remedy. It was upon a consideration of this character of excuse, and on this alone, that the learned Judge came to the conclusion that the plaintiff's action is barred by the statute.

But this is not all, and this is not the excuse available to the plaintiff, if any she has. Her excuse is that she did not know the nature of the injury, or, to be more specific, did not know that the ankle was fractured, or that she had sustained an injury of a serious and permanent character, and consequently did not contemplate making any claim for damages until the 11th March, when she first consulted a doctor. The trial Judge says: "The plaintiff

went home unaided. She ought to have laid herself up and had the injury properly taken care of. Instead of that, she did not seek medical aid until the 11th March, and then the limb was much inflamed and very painful;" and, after referring to the daughter's evidence, and the impression it created as not favourable, continues: "The plaintiff's own version impressed me much more. She says she did not realise that she was seriously injured; she did not know the statute nor the necessity of giving notice. Had she realised that she was seriously injured and known of the statute, there was nothing to prevent the notice being given." I think this is entirely correct as a statement of fact as far as it goes. In view of the basis upon which the learned Judge was disposing of the question of excuse, it was only necessary to refer to this circumstance in general terms. Ignorance of the statute is, of course, no excuse.

But the real excuse, and the only one open to the plaintiff in the circumstances of this case, is that she sustained a latent injury, and could not be expected to give notice earlier than she did. This has not been considered, or at all events is not dealt with, in the judgment. Mrs. Wallace was not longing for a lawsuit. In this respect she appears in commendable contrast with many litigants. She was able to walk home without anybody assisting her. Had she been the joyful recipient of an accident and a hunter for damages, so well and *un*favourably known to the Courts, she would have saved this Court and herself a lot of trouble; she would have called upon a lawyer on her way home. But she was only an honest, hard-working woman, and preferred "to bear the ills she had," or thought she had, and doctor herself into health again. She had no reason to believe at the time that it was anything more than a temporary, though painful, injury; and, as she says, she did not feel that she could afford to have a doctor, and set to work to make the best of her misfortune. Instead of getting better, she gradually became worse. If the law bars her right of action, it is in a sense to be regretted; but, still, it is for the Courts to administer the law rigidly, as they understand it, without hesitation.

A few paragraphs from the plaintiff's evidence will help to make clear how much she knew of her injury, and her attitude until the doctor enlightened her. [Quotations from the evidence of the plaintiff: see the judgment of MEREDITH, C.J.C.P., *supra*.]

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The plaintiff knew she was injured in a way to cause her inconvenience and pain, but still did not know what had happened to her; she knew only of a temporary, trivial injury, and lived in this belief. But, as she says, "When the doctor came, I found it was all different;" she realised what the wrench had done and what she was in for, and acted without delay. How could she know? Dr. Campbell immediately discovered that there was something very serious, a broken bone, and that it would be a long time before she would have the use of her foot, but it was only with the aid of an expert and the Xrays that the specific latent injury was revealed. If the injury is obvious, if the plaintiff knows what the injury is, time runs from the date of the accident, and that the sufferer cherishes an unfounded expectation of speedy recovery is no excuse for delay: *Webster* v. *Cohen Brothers*, [1913] W.C. & I.R. 268. But both in accident and industrial disease cases, latent injury is necessarily an excuse.

I am clearly of opinion, both on reason and authority, that the plaintiff has shewn a reasonable excuse for delay in giving the statutory notice: *Tibbs* v. *Watts etc. Limited*, 2 B.W.C.C. 164; *Moore* v. *Naval Colliery Co.*, [1912] W.C. & I.R. 81; *Hoare* v. *Arding & Hobbs*, 5 B.W.C.C. 36; *Stinton* v. *Brandon Gas Co.*, [1912] W.C. & I.R. 132. These cases are decided under the English Workmen's Compensation Act, 1906, ch. 58, sec. 2. The wording is very much the same as the provision of our Municipal Act above referred to. The notable difference is that notice of the injury or accident and the making of a claim for compensation are clearly separate matters, and there is no definite time for giving the notice; it is to be given "as soon as practicable" after the happening of the injury; and for our "reasonable excuse" the Imperial Act has "reasonable cause." There is also this significant difference, that under our Act it must be shewn that there was reasonable excuse "*and* that the corporation was not thereby prejudiced in its defence," but in the Imperial Act it is disjunctive and alternative. These differences, important in some respects, cannot affect the principle recognised in the long line of cases shewing that latent injury is a reasonable cause or excuse for delay. I shall only refer to two or three other cases.

The most recent that I have any knowledge of is *Flood* v. *Smith & Leishman*, [1915] W.C. & I.R. 212, a judgment of the Scottish Court of Session. On the 2nd December, 1913, the

plaintiff, a stableman in the defendants' service, slightly injured one of his fingers while acting in the course of his employment. He mentioned it to his wife, but continued at his work until the 22nd February, 1914, when his finger began to swell, and he was in an infirmary for about four weeks and up to the 1st April. Verbal notice of the accident was given to the foreman on the 4th December. This was not communicated to the employer. The plaintiff did not regard the injury as serious at that time. On that day, however, he consulted a doctor, who treated him for septic poisoning. He went to another doctor in March, and it was he who sent him to the infirmary. The serious nature of the injury was not known until then. The notice of claim was lodged on the 22nd April. The Sheriff-Substitute found that the notice was not given "as soon as practicable," and the defendants were prejudiced by the delay. These findings of fact were not disturbed. It was also found that the plaintiff was the victim of an obscure constitutional complaint, and supposed that this was wakened into activity by the accident. In concluding his judgment the Lord President said (p. 216): "That a man who is labouring under an error as to the seriousness of the injury he has suffered has reasonable cause for not giving the notice enjoined by the statute is a proposition I am prepared to affirm." The other Lords of the Court of Session concurred, two of them also giving written judgments.

In *Thompson* v. *North-Eastern Marine Engineering Co.*, [1914] W.C. & I.R. 13, the injury caused the workman pain in his elbow, but he was able to work. Some months afterwards he suffered from loss of power in his arm, and consulted a doctor. He was not attributing this to the accident, but the doctor found the arm fractured, and that this was the cause of loss of power. The fracture was the result of the accident, but the plaintiff did not know of its existence until informed by the doctor. Held, that the injury being latent, the notice was given as soon as practicable and there was reasonable cause for the delay.

This decision suggests, as does the present case, that what is a reasonable excuse for one plaintiff may not be for another. If the plaintiff in the *Flood* case had been a distinguished physician, instead of an illiterate labourer, he might have been presumed to know and appreciate his condition.

In *Egerton* v. *Moore*, [1912] W.C. & I.R. 256, in the English

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Court of Appeal, the workman failed, but the doctrine that latent injury excuses the want of notice until the sufferer has knowledge of his condition is clearly recognised. The accident occurred on the 21st July, 1910. In the opinion of the Court, the plaintiff understood his condition in February, 1911. He gave notice on the 18th July, 1911. This was held to be too late. Fletcher Moulton, L.J. (p. 254), said: "If he had given notice then" (in February), "I think he would have had a strong case for saying that up to that time he had not any idea that he was suffering from anything more than a bump which would soon pass away; but I cannot think it was reasonable for him to withhold notice from his master then, and therefore I am quite satisfied in my own mind that there was evidence which justified the learned Judge in coming to the conclusion he did. Beyond that I do not go. I think the appeal ought to be dismissed." Buckley, L.J., immediately following, said: "I am of the same opinion and for the same reasons."

In *Potter* v. *John Welch & Sons Limited*, [1914] 3 K.B. 1020, the representatives of the workman failed upon the ground that the injury was not latent. The principle I have been discussing is recognised. I find it difficult to think that the injury to the man was not latent.

It may some time become important, but not now, to study carefully the wording of sec. 460, which gives the right of action, and the sub-sections I have been referring to, in conjunction. By the main section the corporation is compelled to keep the highway in repair, and in case of default is "liable for *all* damages sustained by any person by reason of such default." The notice under sub-sec. (4) is not notice of an accident but "of the claim and of the injury complained of." It may be, but I express no opinion as to this at present, that this will be found to place a plaintiff who has sustained latent injuries in a somewhat more favourable position than he would be under Acts worded as the Imperial Act is.

There remains the question of prejudice to the corporation, which did not appear to be pressed, but was referred to by counsel for the appellant. The learned Judge has found that "the corporation was not in any way prejudiced in its defence of this action" by the delay in giving notice. The provision of the Act is for the

protection of the municipality; and, no matter what the reasonable excuse is, or how clear the proof of it, the affirmative of this negative must co-exist, or the plaintiff fails. Like any other fact, it is to be established by direct evidence (a thing conceivably possible) or by reasonable inference from the whole circumstances and evidence in the case.

This is a class of action in which a plaintiff was formerly entitled to trial by jury, and the law was changed because, presumably, such cases can better be tried by a Judge alone. I have read the evidence, and I am entirely satisfied with the finding of the learned Judge upon this point. I do not see how he could come to any other conclusion. He was favourably impressed throughout with the good faith and honesty of the plaintiff's claim. It was not and could not be suggested that the plaintiff concocted the story of the accident; and the existence of the hole in the concrete was notorious and of long continuance.

The trial Judge finds that "the fall was undoubtedly caused by the defective condition of the sidewalk, and I think that the lack of repair of the sidewalk was the result of actionable negligence on the part of the municipality."

But, resuming, how could the corporation be prejudiced in its defence? By shewing that the hole was not there? The evidence they called went to prove its existence, and emphasised its dangerous character, and the failure of the corporation to execute any adequate repair until the day after notice of the accident. No experienced Judge would be likely to believe that it was warm enough in March, but too cold in February, to put in a bucket of cement, or that a sidewalk four inches thick, of properly blended material, would break away under pressure of a man's foot. It would not be disturbed by drays of coal passing over it, and there are no giants in these days. The more evidence of this class is produced the worse is the defence. I think the evidence of Brian, foot of p. 75 and top of 76, shews that the notice from Harvey, and consequent so-called repair, immediately followed the accident, and was not a week or two later, as the corporation endeavoured to shew. One would think they would have a record if they cared to produce it.

Was it that, if they had known, they would have procured a doctor, and recovery would have been more speedy? This is

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not defence, but reduction of damages, and was taken into account, as is shewn by the judgment.

Or was it, as sometimes happens, that there is conflict as to just how the accident happened, or doubt as to whether it happened at all? The cross-examination of the plaintiff shewed that there was no witness of the occurrence, and was directed to shew that the street was well lighted—a condition that did not change. Even with the assistance of counsel for the defence, and it was very marked, the echo of Mr. Brian, when questioned as to prejudice, goes to shew that they did not want more evidence. (See pp. 75 and 76, already referred to). I presume that the plaintiff was examined for discovery, and that it was easy in this way to obtain the basis of any investigation desired.

I do not know what weight, if any, the learned Judge gave to the evidence of Brian. I would not give any. However, honours were easy between counsel in the matter of leading questions. The coporation was absolutely without defence upon the merits—relied solely upon the absence of notice as a defence *per se*, and upon nothing else. If notice had been given, the corporation would have been without even an ostensible defence.

The appeal should be allowed, and judgment entered for the plaintiff for $600, with costs here and below.

Masten, J.

MASTEN, J.:—I have had the opportunity of perusing the judgments of the Chief Justice and of my brother Riddell.

I agree in the propositions of law as deduced by my brother Riddell from the numerous cases digested by him; but, upon consideration of the facts disclosed in evidence, I think that this case falls within the first rule deduced by him from the cases.

I think the plaintiff, on her own evidence, was aware that she had suffered a serious injury. Whether she knew its exact character is immaterial. The injury was so serious and so manifest that, in my opinion, there was in law no reasonable excuse for not giving the notice called for by the statute. On the point urged before the trial Judge, that she was so grievously affected by the accident that she could not give notice of claim to the defendants, I agree with his finding that she was quite competent mentally and physically to give the notice.

On the other branch, namely, as to whether the defendant corporation was in any way prejudiced in its defence, I agree

with the finding of the trial Judge that the defendant corporation was not prejudiced by the want of notice. His finding is, in my view, adequately supported by the evidence of the witnesses Hillman and Brian.

But, as pointed out by my Lord the Chief Justice of this Court, sec. 460, sub-sec.(5), of the Municipal Act, requires not only that the defendant corporation be not prejudiced in its defence by the lateness of the notice, but also that there be reasonable excuse on the part of the plaintiff for the want of the notice; and I find no such excuse.

It is not the duty of the Court to approbate or reprobate the enactments of the Legislature, and the lack of reasonable excuse as above defeats the plaintiff's action, notwithstanding the fact that the defence of the defendant corporation was not prejudiced by the failure to serve notice within seven days.

I would affirm the judgment of the Court below.

Court being divided, appeal dismissed.

CANADA FOOD CO. v. STANFORD.

Nova Scotia Supreme Court, Graham, C.J., and Drysdale, and Longley, JJ. and Ritchie, E.J. April 22, 1916.

1. CORPORATIONS AND COMPANIES (§ V B 1—175)—SUBSCRIPTION—FAILURE OF CONSIDERATION—MISREPRESENTATION—MATERIALITY.

An underwriting subscriber for company shares which were not to be allotted until bills of exchange given by him for the shares were fully paid, cannot plead non-allotment as a defence to an action by the liquidator of the company on the bills of exchange; neither can he plead misrepresentation in inducing the subscription, where the misrepresentation did not play a material part.

[See also *Graver Tank Works* v. *Morris* (Man.), 28 D.L.R. 696.]

2. PARTIES (§ I A 3—41)—ACTION ON BILLS OF EXCHANGE—ORIGINAL INDORSEES.

Where, at the time of an action on bills of exchange the plaintiff is not holder or indorsee of the bills, which are in fact held by a bank as the original indorsee, the latter must be added as a party plaintiff.

Statement.

APPEAL from the judgment of Meagher, J., in plaintiff's favour, in an action by a liquidator on bills of exchange given for company shares.

T. W. Murphy, K.C., for appellant.

W. A. Henry, K.C., for Wetherbe & Co.

J. B. Kenny, for the Canada Food Co., respondent.

Graham, C.J.

GRAHAM, C.J.:—The action is brought on two bills dated October 22, 1913, one for $213.25 payable two months after date; the other for $1,156.25, payable three months after date, drawn by W. H. Wetherbe & Co., on the defendant and accepted by him.

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It appeared at the trial that the plaintiff company was not at the time of action the indorsee or holder of these bills. They were in fact held by a bank. The Judge sought to get rid of this difficulty by allowing the plaintiff to amend its reply by adding this paragraph, viz: "The action is brought by the plaintiff at the request of and for the benefit of the Merchants Bank of Canada, indorsees of the said bills of exchange." Judgment was accordingly given for the plaintiff on the bills. It was finally conceded on the hearing of the appeal that the difficulty could not be remedied in that way. But in the meantime there were other issues on the record which could be profitably disposed of and the hearing proceeded.

The defendant Stanford is sought to be made liable on these bills, because they were given by him for shares in the Canada Food Co., underwritten by him.

The application admitted of the shares being "taken firm" or "for public issue," and he underwrote for 25 shares.

The bills of which these were originals were, it was said at the hearing, given in July, 1913.

The trial Judge has dealt fully with the circumstances under which the bills were given. It cannot be contended that they were given by way of accommodation or for other than liability incurred by subscribing for the shares. It was urged, that at that time, the liability of Stanford as an underwriter had not become fixed under the terms of the instrument of subscription, but it is quite clear that a reasonable time had then elapsed for subscription and the underwriters' liability had become fixed.

It is contended by counsel for defendant that there was a failure of consideration for these bills.

The defendant complains that no shares have been given to him and the company is now being wound-up.

This minute appears on p. 68 of the minute book:—

Moved by J. H. Winfield, seconded by A. H. Burgess, that stock certificates be issued to those who have paid for their stock in full in cash.

The defendant Stanford has not alleged or shewn a willingness on his part to pay for the shares; rather otherwise. It is no fault of Wetherbe & Co. that the company is being wound-up. But in any case there is no total failure of consideration as the shares are still worth something.

This brings me to the important point at the hearing, and it

is the contention of Stanford that there was a false representation in a letter by which he was induced to take the shares. It is raised in the defence and also in the counterclaim, in which Wetherbe & Co., as well as the company, are joined as defendants. Stanford is claiming relief not only in this case but is asking to have included in his damages for the alleged misrepresentation a liability for which he was held bound in another action, namely, in an action on another bill given under the same circumstances but which was discounted by a third party in the ordinary course and which he was held liable for.

The alleged misrepresentation contained in the letter is as follows:—

> $200,000 of this issue has already been subscribed; so that only $100,000 or a limited number of shares are available for distribution in Nova Scotia, and applications will be filled in order as received.
>
> Yours, WM. H. WETHERBE & CO.

The trial Judge has dealt fully with this representation in his judgment, and has held, in effect, that while it is untrue in fact, the representation did not play a material part in inducing him to subscribe; that there were other things which did. Now this is a question of fact and I do not propose to disturb the finding of the Judge. It seems to me that an underwriting shareholder stands in a somewhat different position from the ordinary subscriber for shares, when he attempts to invoke something in a prospectus or circular, as is pointed out by Farwell, J., in *Baty* v. *Keswick*, 85 L.T.N.S. 18 at 20, but I simply rely upon the finding of fact. I entirely agree with the trial Judge in respect to the alleged misrepresentation in the prospectus.

Of course I assent to the amendment asked for of the notes of the evidence taken by the stenographer.

The trial Judge who apparently relied on his own view of what was said confirms, I think, in his judgment the affidavit used on the application. I can understand a stenographer not learned in the law being mistaken as to the recital by counsel of words from written documents in that counsel's hand, and I can hardly understand counsel who was there just to prove that particular fact and conscious of its importance missing it. A dispute like that could not possibly be settled in the Supreme Court of Canada and I think it should be disposed of once for all now.

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In the result the judgment will be varied and the plaintiff will have leave to add as a plaintiff the Merchants Bank of Canada, and it will have judgment on the bills with interest as against Stanford but without costs. The defendant Stanford will have the costs of his defence to the action, namely, that the original plaintiffs were not the holders of the said bills, but against these will be set off any costs in the action on issues in respect to which Stanford has not succeeded.

The appeal of Stanford from the judgment on the counterclaim against Wetherbe & Co. will be dismissed with costs.

Drysdale, J.

DRYSDALE, J.:—The grounds put forth at the trial, as stated in the judgment, for getting rid of his agreement were: 1st, that the undertaking described in the prospectus of the Food Co., and upon which he was invited to subscribe, was substantially different from that of the Food Co.; and, 2ndly, that he signed the subscription agreement on the faith of representations in a prospectus and in a letter of Wetherbe & Co. to him which stated that $200,000 out of an issue of $300,000 had already been subscribed which Stanford alleges was a false statement to the knowledge of Wetherbe & Co. On the issues raised respecting these allegations, the trial Judge has found against Stanford and dismissed the counterclaim. I agree with the conclusions of the trial Judge and am of opinion that Stanford failed in making good his assertions upon which relief is sought by him herein.

It will be noticed that the agreement under which Stanford agreed with Wetherbe & Co. to take 2,500 shares of the preferred stock is dated February 14, 1913, and much was made of a letter of Wetherbe & Co. dated a month and ten days later in point of time, viz., on March 25, 1913, in which letter an alleged misrepresentation of fact is made respecting the outstanding subscriptions. Stanford's new allegation that the alleged false statement in this letter caused him to subscribe or enter into the agreement in question I think obviously must be wrong. The prospectus and application form referred to in this letter very plainly refer to a different offering, and to the issue or placing of stock on very different terms from that contained in the agreement signed by Stanford. It is on its face an offering of stock in point of time a month and more later and on a basis of preferred stock with a bonus of 40% of the common stock of the

company. This must surely refer to some offering of Wetherbe & Co. to the public in pursuance of his contract with Stanford and others dated February 14, 1913, and is no doubt the offering Stanford is referring to in his letter of September 24, quoted by the trial Judge in his reasons for judgment.

I cannot be convinced that this letter of March 25, 1913, has anything to do with the agreement of February 14, 1913, under which Stanford undertook his liability.

It seems reasonably clear from a perusal of all the facts disclosed that when Stanford signed the agreement February 14, 1913, he was out to make 2½% on the preferred shares he subscribed for and to pocket all of the common or bonus shares that had not to be given away on a resale to the public as stipulated for in the agreement. I am convinced he is now catching at a misstatement of fact in a letter put out by Wetherbe & Co. later, that never entered into or formed the basis of his subscription. I am of opinion Stanford failed in the burden cast upon him under his counterclaim and conclude that the trial Judge was right in dismissing it.

A motion was made to have the minutes of that trial amended, which I think ought to fail. If there were anything in fact in the allegations made in support of such a motion there was ample time and opportunity to go to the trial Judge before he resigned. This motion, I am convinced, is an afterthought and ought not to prevail. If it were allowed it could not I think affect the situation in the view I am bound to take respecting the letter of March 25, having no bearing.

LONGLEY, J.:—This action should have been brought in the name of the Merchants Bank of Canada, and the point was raised accordingly, but evidently the parties had agreed to allow the action to remain under the same heading and between the same parties for the purpose of making the counterclaim available, and we need not be further concerned on this point.

The Judge before whom the original application was made and who took the evidence has given an emphatic judgment on this point in which he maintains that the defendant has no counterclaim whatever and I follow him fully and carefully in the various steps that he takes in bringing about this judgment. He evidently feels that the defendant in his counterclaim has given full meaning in a previous trial to his understanding of the pros-

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pectus and his failure in regard to certain inaccuracies in respect of it being available.

To one point only do I desire to refer and it formed the only reasonable ground for asking the defendant's set-off to be considered, and it has also been a matter of motion by the solicitor for the defendant for leave to amend the minutes. It is that both the prospectus and the letter issued by Wetherbe & Co. to the public at large were in the hands of the plaintiff at the same time and even before he subscribed for stock. If this were so, as the letter of Wetherbe states:—

> $200,000 of this issue has already been subscribed so that only $100,000 or a limited number of shares are available for distribution in Nova Scotia and applications will be filled in order as received.

It would amount to a distinct misrepresentation. But it is well for us to consider two things: One is that a memorandum of agreement was entered into February 14, 1913, and the defendant's and a large number of other names were inserted in that, either as underwriters or as takers of stock. In this memorandum of agreement it was provided that:—

> On May 11, 1913, the subscribers hereto who do not take their subscription form agree to sell to party of the first part at 95 per cent. of the par value preferred shares with a bonus of 60 per cent. of ordinary shares.

And therefore it is that many who subscribed as underwriters, as the defendant did in this case, were most anxious that Wetherbe should pull them out and leave them 2½% profit on the preferred and 40% profit on the common stock of the company. Therefore when, on May 24, Mr. Wetherbe issued the notice or letter which subscribed this, he undoubtedly shewed it to the defendant and the other shareholders, and we can easily imagine the defendant in this case stating that it was excellent and would probably get the money in no time. The purpose of the two documents is so completely distinct and so distinctly in the interest of the shareholders who had then subscribed, that no representation which that contained would have been considered at all as influencing the subscription of the defendant.

In my opinion the appeal should be dismissed with costs.

Ritchie, E.J.

RITCHIE, E.J. (dissenting in part):—I am of opinion that there was a perfectly good consideration for the note and I think I need not go past the agreement to find a consideration. As provided by pars. 5 and 6 of the agreement the stock was either to be taken "firm" or "for the public issue." The defendant

took his subscription for public issue, which meant that he would take shares up to the number subscribed for, if not taken by the public. In other words, he was an underwriter, and the agreement was, so far as he was concerned, an underwriting agreement, and there were others who signed as underwriters. It was a common undertaking from which the defendant was not at liberty to retire. Support for this proposition is to be found in Lindley on Companies, at p. 33.

I am also of opinion that there was no failure of consideration. It is true that the shares were not allotted, but under the agreement the defendant was not entitled to them until he paid for them. It was provided as follows:—

"The subscribers to this agreement will receive *on payment* of 92½ of par value fully paid preferred shares."

Upon the true construction of the paragraph which I have quoted I am of opinion that the two acts, namely, the delivery of the stock on the one hand and the paying for it on the other, are concurrent acts, and that the defendant was not entitled to receive the stock unless he was then ready and willing to hand over his money and this he never was ready and willing to do. *Paynter* v. *James*, L.R. 2 C.P. 348, is authority for the view which I have expressed. In that case freight was payable "on right delivery of the cargo." It was held that the delivery of the cargo and payment of the freight were concurrent acts and that the master was not bound to deliver the cargo unless the consignee paid, or was ready and willing at the same time to pay, the freight.

I cannot see how the defendant can escape from his liability on the ground of failure of consideration by a failure on his own part to do, or to be ready and willing to do the act, which he undertook to perform simultaneously with the performance of the act which was to be done by the company, namely, the delivery of the stock.

Two cases, *Beaven* v. *Stevens*, 1 T.L.R. 587, and *Kaulbach* v. *Begin*, 21 D.L.R. 77, 49 N.S.R. 66, were cited on behalf of defendant on the point of failure of consideration. Neither of them, in my opinion, has any application.

In respect to the claim, I agree with the conclusion arrived at by the Chief Justice, but in respect to the counterclaim as against Wetherbe, I am of opinion that the appeal should be allowed with costs. *Appeal dismissed.*

MAN.

C. A.

GRAVER TANK WORKS v. MORRIS.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. May 29, 1916.

1. CORPORATIONS AND COMPANIES (§ V B1—175)—SUBSCRIPTION NOTE—FAILURE OF CONSIDERATION—REPRESENTATION AND WARRANTY.
Liability on a promissory note, given for company shares, cannot be evaded on the ground that the note had been obtained on a representation which was never fulfilled; the remedy in such case, if any, is by an action or counterclaim for damages for breach of warranty.
[See also *Canada Food Co.* v. *Stanford* (N.S.), 28 D.L.R. 689.]

Statement.

APPEAL from a judgment for defendant in an action on a promissory note.

H. J. Symington, and *W. D. Card*, for appellant, plaintiff.

C. P. Fullerton, K.C., for respondent, defendant.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—The plaintiffs sued the defendant in the County Court on a promissory note payable to the order of the Manitoba Independent Oil Co. Ltd. and endorsed by the latter to the plaintiffs.

The defendant pleaded that the plaintiffs were not the holders in due course, and that the note was obtained by false and fraudulent representations of agents of the payees.

It was admitted at the trial that the plaintiffs were not holders in due course.

The evidence shews that the note was given to buy stock in the payee company and that the defendant was induced to subscribe for the stock, and give the note, by one Rosser, who represented himself to be a director of the payees and promised that, if the defendant would subscribe for the stock and give the note, the payees would, by June or July, 1914, erect certain tanks and keep for sale at Macdonald station, gasoline, greases and oils, suitable for use in handling farm machinery, and would sell them there at prices lower than the ordinary prices for such articles.

Macdonald station is several miles nearer to the defendant's farm than the then nearest place at which such supplies could be had; and the sale of such goods at Macdonald, and at lower prices, would probably have been of value to the defendant. The company did not, within the time promised, have supplies for sale there.

The defendant would not say that he had not received the certificate for the stock, and I think it should, therefore, be held that he had received and kept it. He gave no evidence to

shew what, if any, damage he had suffered from not being able to get supplies at Macdonald.

The trial Judge found that Rosser, in order to induce Morris to sign the note, did make the representations complained of and warrant that they would be carried out, that the defendant made the note in consideration of such representations and warranty, and that these representations were not fulfilled.

He also held that there was no evidence that it was not really the intention of the company that the representations would be carried out. I assume that he thereby referred to the company's intentions at the time when the representations were made. He found, therefore, that there was no evidence of fraud and that, if there was breach of warranty set up, he could not tell what the damages would be.

The Judge held himself bound by what he understood to be the unreported decision of this Court in *Moffatt* v. *Grain Growers Grain Co.*, and gave judgment for the defendant.

With deference, I do not think that decision is in point here. Moffatt had been induced to give a written subscription for stock in the Grain Growers Grain Co. under circumstances which were held by this Court to make the subscription not binding upon him. The company sold, for him, grain which he had consigned to them to sell, and, in accounting to him for the proceeds, kept back the amount he had agreed to pay for the stock, claiming that they had applied it on his subscription. But no stock was issued to, or accepted by him, and he did not give a note for the amount of the subscription. If my memory of the case is correct, he repudiated the subscription before he consigned the grain to the company. He sued the company for the balance held back, and this Court, on appeal, held that the company could not compel him to pay for the stock.

In the case before us the defendant gave his note and received and kept the stock. There was, therefore, no complete failure of consideration. A partial one (if there was such) could not be set up against the note, and the Judge found that no fraud was proved.

The defendant's remedy, if he had any, as to which I express no opinion, would be by action, or counterclaim, for damages for breach of warranty.

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As there was no evidence of what damages, if any, he had suffered, he could not, therefore, obtain relief in this action, even if allowed to amend his dispute note so as to claim it.

With deference, I think the appeal should be allowed with costs, and the judgment for the defendant set aside and judgment entered for the plaintiffs with costs for the amount of the note with interest at the rate of eight per cent. per annum.

Appeal allowed.

ALTA.

S. C.

REX v. WONG TUN.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Simmons, JJ. February 19, 1916.

1. MANDAMUS (§ I B—9)—TO AID APPEAL—CR. CODE, SEC. 750.

Mandamus will not lie to a district court judge because of his allowance of an appeal taken under Cr. Code, sec. 750, on the failure of the prosecutor or of the Attorney-General to appear in opposition thereto, the writ not being intended to direct in what manner the trial below shall be conducted, but merely that the inferior court shall exercise its jurisdiction in the event of its erroneously declining so to do.

[*R.* v. *Kingston Justices*, 86 L.T.N.S. 591, referred to.]

Statement.

MOTION for an mandamus referred to the Appellate Division, by Simmons, J.

J. W. Heffernan, for the Attorney-General, applicant.

G. E. Winkler, for defendant, respondent.

The judgment of the Court was delivered by

Simmons, J.

SIMMONS, J.:—The defendant was convicted by Magistrate Primrose, Police Magistrate of the City of Edmonton, on the charge of having opium in his possession, contrary to the Opium and Drug Act, and fined $350 and costs and to imprisonment for six months in default of payment of said fine.

The defendant caused notice of appeal to be served upon the convicting magistrate and upon Herbert Petheran, informant, who was a detective in the police force of the City of Edmonton. The application to enter the appeal came up before His Honour Judge Crawford, at the sittings of the District Court at Edmonton on January 18th, 1916.

In addition to this appeal, there were three applications to enter appeals from convictions and, in each of these three, counsel appeared for the Department of the Attorney-General.

No one appeared for the Attorney-General in this case, and the application to enter the appeal was adjourned till 2 p.m., of the same day. No one appeared for the Attorney-General at 2

p.m. and the appeal was entered and the hearing set for January 20th, 1916.

When the appeal came up for hearing on that date, no one appeared on behalf of the prosecution and His Honour Judge Crawford quashed the conviction.

It appears that neither the informant nor the department of the Attorney-General was aware of what happened, till after the disposal of appeal. Application was made subsequently to Judge Crawford on behalf of the Attorney-General to have the quashing order set aside and for a re-hearing of the appeal. This application was refused by Judge Crawford and an application was made to me in Chambers for a mandamus to compel His Honour Judge Crawford to re-hear the appeal and by agreement of counsel it was referred by me to the Appellate Division of this Court in the form of a stated case.

It appears that the informant spoke of Mr. Broadribb, who usually serves subpœnas in the city for the Crown in criminal cases, and was told by Mr Broadribb that he would receive a subpœna to attend at the hearing of the appeal, and as he received no subpœna he did not attend and did not know that the appeal came up for entry and hearing till after the disposition of the appeal.

Sub-sec. (*b*) of sec. 750 of the Code requires notice of intention to appeal to be served upon the respondent and upon the magistrate within ten days after the conviction or order complained of. No service was made upon the Attorney-General, although he intervened and employed counsel to prosecute at the hearing before the magistrate.

Counsel for the Attorney-General at the argument before this Court, took no objection to the entry of the appeal, and, while I express no opinion upon the question of whether the Attorney-General was the respondent who should be served, pursuant to sub-sec. (*b*) of sec. 751, I am of the opinion that he could waive such service and that counsel for the Attorney-General has specifically waived any such objection in so far as this application is concerned. The ground upon which this Court is asked to interfere is that there was no hearing upon the merits and that this arose through a misadventure, and that an opportunity should be given to prosecute the appeal.

The principle upon which a superior Court acts when an appli-

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cation for mandamus or prohibition is made is that the remedy is confined to cases where the inferior Court has jurisdiction, but has declined to act, or where the inferior Court is without jurisdiction and has illegally assumed jurisdiction.

The prerogative writ of mandamus does not issue of course, but is granted by a superior Court upon a proper case made out, and is directed to any person, corporation or inferior Court, requiring them to do some particular thing therein specified. Vol. VIII, Encyclopædia, Laws of England, 523 and 524.

Legislation in England in recent years has resulted in a marked increase in the number and character of local governing bodies of various kinds, with the result that the purposes to which the extraordinary remedy has been applied are of great diversity and have been widely extended. While the granting of the writ by the superior Court is discretionary, it is in no sense an arbitrary discretion, but is in every case based upon certain determinate principles.

Whether a judgment or verdict is properly or improperly entered on the record, is a matter for the Court at which the hearing took place; and the Court will not grant a mandamus to justices at sessions to review an appeal against an order of removal after judgment is given by them and entered by the clerk of the peace, for quashing the order upon the ground that the justices at sessions were divided in opinion and that the judgment was entered by mistake, instead of adjourning the appeal.

But the justices at sessions may alter their verdict during the continuance of the sessions. *R.* v. *Leicestershire Justices* (1813), 1 M. & S. 442.

The Court will not interfere when the inferior Court has exercised a discretion in the matter within the jurisdiction of the inferior Court: *In re Dyson* (1860), 29 L.J.Q.B. 68.

This rule holds good even though the inferior Court is wrong, not only as to facts, but also as to law.

Reg. v. *Adamson*, L.R. 1 Q.B.D. 205, approved in *Reg.* v. *Evans* (1890), 62 L.T.N.S. 576.

Nothing can be clearer than that this Court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of a magistrate who has once heard a case and decided it, in a matter within his jurisdiction. *Reg* v. *Adamson*, *supra*.

"I think it is quite unusual to direct an inferior Court to act in a particular way unless it is plain that what they have to do is

purely ministerial and not judicial," per Lord Alverstone. *R.* v. *Justices of Kingston* (1902), 86 L.T.N.S. 591.

This Court does not by mandamus direct either justices or any public body or anybody else upon whom a duty is cast how and in what manner they are to perform their duty. They simply direct them to perform their duty. Channel J. in *R.* v. *Kingston Justices, supra.*

The Court will not interfere with the discretion of the justices in adjourning a hearing. *R.* v. *Southampton Justices*, 96 L.T. N.S. 697.

Conversely, where a County Court Judge erroneously declines to hear the case on the grounds of want of jurisdiction, an order of mandamus will lie to compel him to hear it. *R.* v. *The Judge of the Southampton County Court*, 62 L.T.N.S. 321.

A mandamus goes where persons having a jurisdiction to exercise decline to exercise it, upon some matter preliminary to the hearing of the merits of the appeal as regards facts or law. Mellor, J., in *R.* v. *Justices of Middlesex*, 2 Q.B.D. 519.

In sec. 749 of the Code, Parliament has designated the District Court in the Province of Alberta a Court of Appeal from convictions or orders under Part XV. of the Code.

Sec. 752 provides that when an appeal is lodged in due form the Court appealed to shall try, and shall be the absolute judge as well of the facts as of the law in respect to such conviction or order and the parties may call witnesses and adduce evidence, whether such witnesses were called or evidence adduced at the hearing before the justice or not.

The Judge of the District Court finally determines both the questions of law and of fact, and if the appeal is properly lodged and judgment rendered, it is clear that the judgment cannot be reviewed by way of appeal.

We are asked to say that he has not heard the case upon the merits because no case was presented by the prosecution. This would, in effect, be a direction as to the manner or particular method in which he should conduct the trial, and the authorities cited clearly indicate that this Court should not by mandamus make an order concerning the manner in which a District Court Judge shall conduct the trial of a matter within his jurisdiction.

I would therefore dismiss the application with costs.

Mandamus refused.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. February 18, 1916.

1. NUISANCE (§ II C — 43) — BLACKSMITH SHOP — ODOURS AND NOISE — INJUNCTION.

Permission by the municipal authority to erect a blacksmith shop does not authorise the owner to commit a nuisance therewith. He may be enjoined from operating it in such a manner as to cause a nuisance, by reason of noise and offensive odours, to the occupant of an adjoining dwelling-house.

[Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2), considered.]

Statement.

APPEAL from the judgment of Sutherland, J., in an action for damages and an injunction in respect of what the plaintiff alleged to be a nuisance—the carrying on by the defendant of the trade of a blacksmith upon premises adjoining the premises occupied by the plaintiff and his family as a dwelling-house, in Boston avenue, in the city of Toronto. Varied.

J. H. Barton, for the plaintiff.

H. A. Newman, for the defendant.

The judgment appealed from is as follows:—The plaintiff is the owner of lot No. 49 on the east side of Boston Ave., in the City of Toronto, plan No. 351 E., having derived title from the Dovercourt Land Building and Savings Co., Ltd., by indenture dated August 14, 1911. It contains the following restrictions: "And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said party of the first part, its successors and assigns, that he, the said party of the second part, will not erect or suffer to be erected any slaughter-house upon the said lands or any part thereof, and will not carry on or permit to be carried on upon the said lands, or any part thereof, any trade, business, or manufacture that shall be deemed a nuisance, and also that if any such trade, business, or manufacture be so carried on, or if the said lands and premises, or any part thereof, be put to any such use or purpose as aforesaid, he shall immediately discontinue and abate the same on being required so to do by the said party of the first part, its successors or assigns, and also that neither he nor they will remove any sand from the said property."

By deed dated the 14th November, 1911, the company conveyed lot No. 50, adjoining, to Mary and Grace Fox, a similar restriction being included therein.

By deed dated the 23rd April, 1915, Mary and Grace Fox

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conveyed lot No. 50 to Robert Glenn and Mary Eliza Glenn, without the said restrictive clause being included therein.

Glenn is a blacksmith. A proposed extension of Wilton avenue will have for its southerly limit the northerly limit of Glenn's lot. Lots 49 and 50 have their frontage on the east side of Boston avenue, which runs north and south. The easterly side of Boston avenue has dwelling-houses erected upon it, and along the westerly side are rear limits of factory and coal-chute sites, the factories and chutes fronting on Carlaw avenue, which is the next street west of Boston avenue. To the west of Glenn's lot, and to the north of the proposed extension of Wilton avenue, there are also factories. Pape avenue is the next street east of Boston avenue, and there are dwelling-houses upon both sides of it. There are some stores and shops not very far from lots 49 and 50.

The locality has been for years to some extent a factory locality, and is becoming increasingly so. When Glenn bought from the Foxes, they were aware that he wanted the site to erect a blacksmith-shop upon and ply that calling therein. Before selling, they required him to apply to the city authorities and secure a permit to erect a one-storey, solid brick, blacksmith-shop. Petitions for and against the granting of the permit were apparently filed with the committee on property of the city council, and persons interested pro and con were heard by its members.

On the 9th March, 1915, a permit was granted in these terms: "Acting upon the favourable report of the City Architect and the Chief of the Fire Department, it is recommended that the application of Mr. Glenn be granted, on condition that the building is erected in compliance with the provisions of by-law No. 6401, and that the forge is installed to the satisfaction of the Fire and Building Departments." Glenn thereupon erected his blacksmith-shop, which has doors opening east and west, those on the west side being not more than 12 or 15 feet away from the rear of the plaintiff's residence erected on lot 49. There can be no doubt that there is a great deal of noise in the locality from the factories situated therein, and considerable smoke as well.

Upon the evidence it appears that the blacksmith-shop is well constructed, that the defendant works at his occupation therein for reasonable hours, usually not after five or six o'clock, but at odd times as late as eight or nine in the evening, and that he per-

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forms his work, which is mainly shoeing horses, although occasionally he also sets tires on waggons and does other work of that kind, in a usual and reasonable fashion.

The plaintiff had erected his residence some time before the blacksmith-shop was built. He actively opposed the granting of a permit to erect it. He says that the defendant bought lot No. 50 with the knowledge of the existence of the restrictions hereinbefore referred to. He also says that in the operation of the blacksmith-shop the defendant is committing a nuisance, in that "large volumes of smoke and disagreeable odour and noise issue from the shop, and make it impossible for the plaintiff and his family to enjoy his property."

The specific complaints are, that the clanging of the hammer on the anvil is very loud and persistent throughout the day, and that the smoke from the premises and the odours from the singed hoofs of the horses and from tires being set, are so disagreeable and offensive as to compel the plaintiff to keep his doors and windows closed even in very warm weather. Evidence of neighbours living in houses on Boston avenue, to the south, and in houses on Pape avenue, to the east, was of a conflicting character.

If the defendant has caused a nuisance to the plaintiff, it is of course no defence to say that he is making a reasonable use of his premises in the carrying on of a lawful occupation. The permit from the city authorities to erect the blacksmith-shop in the manner indicated would not carry with it the authority to commit a nuisance in the exercise of the right thereby granted. The duty of the defendant to his neighbour was to abstain from causing any nuisance to him. Mere smoke or offensive odour may be a sufficient ground for the interference of the Court; but it will not, as a rule, interfere by injunction if the damage is slight or the nuisance is merely of a temporary or occasional character.

In the present case of course it is the intention of the defendant, unless restrained, to continue carrying on his business as heretofore.

In *Attorney-General* v. *Cole & Son*, [1901] 1 Ch. 205, at p. 206, Kekewich, J., discusses the principle to be applied: "Really and truly it all comes to this, that the defendant is carrying on a lawful trade; reasonably carrying it on in a place which may fairly be devoted to that particular class of trade; and carrying

it on in such a way that no man can say that he is guilty of extravagance in the manner in which he is conducting his business. That point has been raised again and again in different forms, and we have in many of the cases the contrast pointed out between Belgrave Square and Bermondsey, and other contrasts of a like character, and statements have been made again and again to the effect that what is a nuisance in one place is not necessarily a nuisance in another. But the truth is that that does not carry us far, because you are brought back after all to the question, Is what is complained of a nuisance? And if it really is a nuisance, then it seems almost to follow as a matter of course that it is a nuisance which ought to be restrained, assuming that it is not of a trifling or a passing character."

And in *Appleby* v. *Erie Tobacco Co.* (1910), 22 O.L.R. 533, at p. 536, Middleton, J., in delivering the judgment of the Divisional Court, said: "It is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances." And again (p. 538): "The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood."

Upon the evidence in this case, I am obliged to come to the conclusion that the noise, smoke, and odours from the premises of the defendant, which are complained of by the plaintiff, "do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood."

Reference to Kerr on Injunctions, 5th ed. (1914), pp. 154, 155, 200, 203, and 207; *Ball* v. *Ray* (1873), L.R. 8 Ch. 467; *Pwllbach Colliery Co. Limited* v. *Woodman*, [1915] A.C. 634, at pp. 638 and 641.

An injunction will therefore go restraining the defendant from so operating his blacksmith-shop as to cause a nuisance to

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the plaintiff by reason of the offensive odours, smoke, and noise complained of. I do not think that the damages thus far sustained can be said to be of a very substantial character, and I allow the sum of $25 in that connection, as also the costs of the suit, to the plaintiff.

The defendant has a counterclaim for damages alleged to have been suffered by him in connection with his business owing to boycotting on the part of the plaintiff. I am not able to see that any claim for damages in this respect has been successfully made out or can be allowed. The counterclaim is, therefore, dismissed without costs.

H. A. Newman, for appellant.

T. H. Barton, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The learned trial Judge has found that the carrying on of the defendant's business of a blacksmith is a nuisance to the plaintiff, as owner and occupier of an adjoining lot and of his house upon it: and he has also found that the defendant's business is carried on by him in the usual, and in a proper, manner: the logical result of these two findings is, that the defendant cannot carry on his business where it is carried on: but the inconsequential form of the judgment is, that the defendant be enjoined from carrying on his business, where it is carried on, only so as to be a nuisance to the plaintiff; the formal result being substantially only "as you were." What is to happen if the business be carried on and there should be an application to commit for contempt of the injunction? Is there any escape from a trial over again of the question whether the defendant is in fact, at the time of such application, carrying on the business so as to be a nuisance to his neighbour, the plaintiff?

What then should be done? Clearly something to define more clearly the rights and position of the parties.

The evidence sustains the findings in both respects; they cannot be disturbed here. The result then is, that the carrying on of the defendant's business, even in an ordinary, careful and proper manner, cannot be continued there. The business ought to go elsewhere, in the defendant's own interests.

Nor is there anything very harsh in that. The plaintiff and others had long contrived and worked to make the block of land on which the plaintiff's house, and the defendant's smithy, stand,

a residential block, with the repose and comfort incident to a home in such a locality. Recently the defendant, against the will and opposition of the plaintiff and others like-minded, forced himself and his forge into this block; and there with the smell and the smoke and the noise has made his business a nuisance to those he came amongst against their will: although there seem to be other places and in the near neighbourhood where the forge might work at full blast without offence to any man.

The contention that because the shop is not upon a place forbidden by by-law of the municipality, the defendant cannot be enjoined from committing a nuisance as long as his business is carried on carefully, is quite without weight. The power of cities to regulate and control the location, erection, and use of buildings such as, among many others, blacksmith-shops and forges, is a restrictive power, not one under which the right can be given to any one man to injure the property of another, or so to deprive another of any of his property or other rights.

Then what should be done?

The defendant is not bound to remove his shop; he may carry his business on there if he chooses and does not in carrying it on create a nuisance; which would mean, doubtless, carrying it on at a loss.

So all that can be done against his will is to put the judgment of the Court in proper form, and leave it to the defendant to consider whether a removal of his shop is not the best ending of this rather bitter litigation at much cost, which neither party can afford.

The form of the judgment will be changed, as was done in *Shotts Iron Co.* v. *Inglis* (1882), 7 App. Cas. 518, and *Fleming* v. *Hislop* (1886), 11 App. Cas. 686, so as to enjoin the defendant from carrying on the business of a blacksmith in the manner hitherto pursued by him or in any other manner so as to cause material discomfort and annoyance to the plaintiff; but the operation of the injunction may be stayed, at the defendant's request, for one month, to enable him to comply with it; and, if the defendant choose to remove his business to some other locality where it will not be a nuisance, the stay may be extended for six months more to enable him to do so, upon his request for such extension and his undertaking so to remove, within that time.

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Riddell, J.

With this variation in form, the appeal will be dismissed with costs.

RIDDELL, J.:—An appeal from the judgment of Mr. Justice Sutherland at the trial whereby the defendants were restrained from operating their blacksmith-shop so as "to cause a nuisance by reason of the offensive odours, smoke, or noise." There was no clause in the order declaring that the business had been carried on in such a way as to cause a nuisance, etc.; but that finding is clearly implied, and, if the facts warrant, such a declaration may be inserted.

The evidence fairly read and weighed fully justifies the finding of fact by the trial Judge, "that the noise, smoke, and odours from the premises of the defendant, which are complained of by the plaintiff, do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, making all possible allowances for the local standard of the neighbourhood," and that the business as it is carried on is a nuisance.

In that view, it is of no importance that the blacksmith "performs his work, which is mainly shoeing horses, although occasionally he also sets tires on waggons and does other work of that kind, in a usual and reasonable fashion." *i.e.*, what would be reasonable at another place under other circumstances.

Nor is the permit effective to justify the defendant in committing a nuisance. R.S.O. 1914, ch. 192, sec. 409 (2), seems to me to contemplate a decision by the council formulated in a by-law as to "the location, erection and use of buildings . . . for . . . blacksmith-shops . . ."—and not a by-law requiring the obtaining of a permit for a particular spot, the right to the permit to be determined by the council without a by-law on application of any one desiring to start such an establishment. The council is to act and determine in a general way and by by-law, not in a particular instance and by permit.

The fact that the council directed a permit for this particular place is of no importance—except possibly as a shield against the city—and the defendant receives thereby no rights as against the plaintiff.

I would dismiss the appeal with costs, amending the judgment as indicated.

Lennox, J.

LENNOX, J., agreed with MEREDITH, C.J.C.P.

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Masten, J.

MASTEN, J.:—My brethren are, I believe, of opinion that the evidence in this case is not of such a character as to justify the conclusion that the learned trial Judge failed properly to apply the law as laid down in the decided cases. I should not—as it appears to me from reading the evidence—have come to the same conclusion upon the facts, but I do not think that in a case of this kind we ought to differ from the conclusion or inference of fact drawn by the trial Judge—nor review the decision in fact of the Judge who tried the case and saw and heard the witnesses. This being so, I think that the appeal fails.

Some question has been raised as to the form of the judgment. I think the judgment is in the usual form—but there can be no objection to supplementing it by a declaration that the business as heretofore carried on by the defendant is a nuisance—I think, however, that a reasonable time should be afforded to the defendant in which to adopt such methods as will obviate the nuisance, and would direct a stay of the issue of our judgment till say next October.

I should add that, in my opinion, the Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2), empowers the city council to pass a general by-law for limiting the location of blacksmith-shops, and for regulating and controlling their use, but does not empower the council to bestow on a blacksmith any powers or privileges which he does not possess by general law.

Judgment below varied.

[The judgment of the Court, as settled and issued, restrained the defendant from operating his blacksmith-shop "in the manner hitherto pursued by him or in any other manner so as to cause a nuisance to the plaintiff by reason of the offensive odours, smoke, or noise."]

LAROCHE v. LAROCHE.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. February, 1, 1916.

1. HUSBAND AND WIFE (§ II C—65)—COMMUNITY PROPERTY—CONTINUATION—FAILURE TO MAKE INVENTORY—INSOLVENCY.

A husband's failure to make inventory of community property, which has been in a state of insolvency at the time of the wife's death, does not, by virtue of arts. 1323, etc., have the effect of causing a continuation of the community.

[*King* v. *McHendry*, 30 Can. S.C.R. 450, followed: *Laroche* v. *Laroche*, 24 D.L.R. 909, 24 Que. K.B. 138, affirmed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 24 D.L.R. 909, 24 Que. K.B. 138, reversing the judgment of Dorion, J., in the Superior Court, District of Quebec, and dismissing the plaintiff's action with costs.

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Community as to property existed between the plaintiff's father and mother, who were married in 1872, and were residents of the City of Quebec. The plaintiff's mother died intestate, in 1877, leaving, her surviving, her husband and the plaintiff and his sister, children, issue of the marriage. At the time of the death of his wife, the husband's estate (which consisted of a drug business in Quebec) was insolvent and he did not make an inventory under the provisions of the Civil Code, arts. 1323 *et seq.*, as then in force, relating to continuation of community. In 1883, the plaintiff's father contracted a second marriage, of which seven children were born and were still living at the time of his death, in 1912. He died intestate and was survived by the second wife, who was separate as to property under their marriage contract. The plaintiff, appellant, brought the action against his sister, his stepmother and the children of the second marriage, contending that there had been continuation of community of the first marriage and claiming, for himself and his sister, their proportionate share in the estate as it existed at the time of the death of his father. His action was maintained in the Superior Court, but the judgment of that Court was reversed by the judgment now appealed from.

St. Laurent, K.C., for appellant.

G. G. Stuart, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—I am of opinion that this appeal should be allowed for the reasons given by the trial Judge and by Carroll, J., in the Court of King's Bench.

Idington, J.

IDINGTON, J.:—Though entertaining much doubt as to the correctness of the inference of fact upon which the judgment of the Court below rests, I cannot see my way to reversing the same.

Duff, J.

DUFF, J. (dissenting):—The better view seems to be, on principle, that the failure of the husband to make an inventory within three months after the death of the wife has the effect of concluding him finally as against the minor children from saying whether the community was dissolved by the death of the wife. It is for the minor children to say whether they shall or shall not take advantage in this way of the default and until something has been done by them which precludes them from doing so they do not lose this right. It is difficult to say why the death of the father should deprive them of the right. The heirs claim through the father and I cannot understand why, in principle, their posi-

tion as against his minor children should be any better than his position at the moment of his death.

The respondent's construction leads to inconveniences and I have been unable to find any satisfactory ground upon which such rule can properly be rested.

It might throw some light upon the question to know whether the community is dissolved by the death of the infant heir leaving an heir. As the right is not a right personal to the infant heir and as it is given in substitution of the right to demand an account as at the expiration of the time for making an inventory it should seem on ordinary principles that it is a demand that could be made at any time unless it could be said that the failure to make it during the lifetime of the survivor operates as a renunciation.

Pothiers' treatment of the subject seems to be opposed to the respondent's hypothesis. (Reference to Lamignon, pages 288 and 289.)

Had the representatives from Quebec in this Court been unanimous I should not have ventured to differ from the view of the Court below.

In the existing circumstances, however, with great diffidence, I am constrained to say that, in my opinion, the appellant ought to succeed.

ANGLIN, J.:—In *King* v. *McHendry*, 30 Can. S.C.R. 450, Girouard, J., speaking for his colleagues says, at p. 456, that, in order that there should be continuation of community between a surviving spouse and the children of the marriage,

> It is therefore necessary that there be properties owned in common and it is for the parties invoking the continuation of the community to allege and prove that fact.

The Judge adds that the maxim, *de minimis non curat lex*, applies and that the possession of trifling articles of absolute necessity and exempt from seizure does not impose the obligation of inventory. This was the basis of the judgment of this Court, reversing that of the Court of King's Bench. This precedent binds us.

In the formal judgment of the Court of King's Bench in the present case we find this "*considérant*":—

> Considering that it appears from the record that at the time of his first wife's death, respondent's father and the community of property that existed between his father and mother were insolvent.

Anglin, J.

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Anglin, J.

Trenholme, J., speaking for the majority of the Court, says:—

The community was, beyond doubt, insolvent . . . The evidence and documents filed shew that the insolvency extended back to the first wife's death.

Speaking for the dissenting minority, Carroll, J., says:—

The evidence shows that the solvency of W. H. Laroche at the time his first wife died was very problematic.

It is, therefore, evident that the appellant failed to prove the existence at the time of his mother's death of such property of the community as would, under the authority of *King* v. *McHendry*, 30 Can. S.C.R. 450, subject his father to the obligation of inventory.

While by no means satisfied that if free from the constraint of authority I should not have reached the same conclusion as the trial Judge, in deference to the previous decision of this Court I concur in the dismissal of this appeal.

Brodeur, J.

BRODEUR, J.:—In this case, we have to determine whether or not there has been a continuation of community.

At the time of his wife's death, which happened in 1877, the assets of the community which had existed between her and her husband were rather small and it seems evident that the passive (liabilities) exceeded the active (assets). At all events, 2 or 3 years later, the husband, who was in business as a druggist, had to assign his properties under the Bankruptcy Act of 1875.

He had not thought advisable to make an inventory, evidently because the costs of inventorying and sharing would have caused expenses which would have further increased the passive liabilities of the community; and therefore that it was better to continue doing business.

He was relying upon better times when he would be able to improve the financial condition of the community. Unfortunately his trade was not prosperous and he had to assign. There was a liquidation of all the assets, even those of the community, and the husband was left with debts.

The husband afterwards did business in the name of a brother who, however, was obliged to assign about the year 1885. He still went on doing business as a druggist under the firm name of Laroche and Co, and at last, when he died, he had succeeded in amassing a fortune considerable enough.

The plaintiff became of age about 15 years ago and during

his father's lifetime he never thought of asking the continuation of the community.

I find that the Court of Appeal has declared that there had been no continuation of community because the absence of inventory had caused no prejudice to the plaintiff.

That question had come before this Court some years ago in a case of *King* v. *McHendry*, 30 Can. S.C.R. 450, and it had been decided in that case that there had been no necessity to inventory because the assets had an insignificant value and that in such a case there was no reason for a continuation of community.

Applying the principles of that decision to the present case, I am of opinion that the plaintiff was not entitled to a decision that there had been a continuation of community because if there had been no inventory it has caused no prejudice to him.

It seems clear to me that the community was insolvent when the wife died. The father, however, thought he was doing well in continuing to keep a drug store in the hope that he would succeed in getting out of the financial difficulties where he was. Unfortunately success did not crown his efforts; he had to assign and then an inventory took place, which is not, it is true, the notarial inventory required by law, but there has been a liquidation of the assets of the community and the right therefore to demand an inventory has disappeared, since nothing was left to inventory.

For those reasons, the judgment of the Court of Appeal which has declared that there had been no continuation of community should be maintained with costs. *Appeal dismissed.*

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LAROCHE v. LAROCHE.

Brodeur, J.

CITY OF MONTREAL v. O'FLAHERTY.

QUE.

C. R.

Quebec Court of Review, Charbonneau, Demers and Gucrin. February 29, 1916.

DEDICATION (§ II—20)—OF LAND TO WIDEN STREET—CONDITIONAL—ACCEPTANCE—DEATH OF DONOR—EFFECT.

A conditional offer by an owner to donate a strip of land to a corporation for the purpose of enabling a street to be widened must be accepted (with the condition attached) during the lifetime of the person making the offer; if not accepted before his death, the offer cannot be given effect to and the estate is under no obligation to the corporation.

[*Town of Westmount* v. *Warmington*, 9 Que. K.B. 101, referred to.]

APPEAL from the judgment of the Superior Court on a petition for payment upon indemnity. Statement.

The judgment of the Superior Court, which is affirmed, was rendered by Mercier, J., on May 31, 1915. On June 10, 1914, the

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report of the commissioners for the expropriation of Sherbrooke St., Notre-Dame de Grâce Ward, was homologated.

On May 18, 1915, Mrs. O'Flaherty, one of the parties to be expropriated, presented a petition to the Superior Court, praying for an order for the payment of a quarter of the sum of $6,720 granted as indemnity to the estate of Henry Mills, she being one of the four heirs.

The City of Montreal contested this petition and alleged that this indemnity belonged to it because the expropriated lands had been ceded to it, on October 20, 1905, by the late Henry Mills for the purposes of public streets. The facts of the case are set forth at length in the following remarks of the Judges of the Court of Review. The Superior Court had granted the prayer of the petition in general terms.

Laurendeau & Archambault, for the city petitioner.

Bissonnet & Cordeau, for party expropriated.

Charbonneau, J.

CHARBONNEAU, J. (dissenting):—The old Village of Notre-Dame de Grâce, wishing to widen Sherbrooke St., made a proposition to ratepayers that they should transfer the land for such enlargement. Among the adjacent proprietors who so transferred a strip of 7 feet in width on each side of the street was Henry Mills, the predecessor in title of the petitioner. By the document which constituted this transfer, the owners gave to the municipality of the Village of Notre-Dame de Grâce West, for the widening of Sherbrooke St., a strip of land 7 feet in width, etc. The special condition attached to this transfer by Mills was that the tramways company should set back the fences and grade the street. Later, as all the owners had not transferred the strip which was necessary for the required widening and, besides this enlargement, extending Sherbrooke St., the Town of Notre-Dame de Grâce, which replaced the Village of Notre-Dame de Grâce West, adopted a by-law for making the necessary expropriations and imposed a special tax for this enlargement and extension, a tax to be borne by the wards through which the street in question passed. The by-law (par. 6), exempts from this tax the owners who had transferred or would transfer their strips of land for the enlargement and extension. Later, the City of Montreal continued these expropriation proceedings, which had not been concluded before annexation, and submitted the lands of Mills to the expropriation commissioners without having knowledge of

these facts and when, in the examination of the records of the expropriation proceedings, it found the documents in question it deposited the amount in Court and claimed the indemnity in the place and stead of the parties expropriated. This demand was met by two objections.

It was said, first:—This is a donation which is not in the authentic form and which, in consequence, is null:—it was said, moreover, that there had not even been a contract, that it was merely a pollicitation which had never been accepted by the Village of Notre-Dame de Grâce West.

On the first point, I think that the question here is not one of a donation, but actually of a transfer for value. There are already several precedents to the effect that a simple dedication by the deposit of a plan indicating the streets, or the special user of certain portions of land as public streets, gives a title to the municipality, provided that this dedication be accepted, even tacitly. This, certainly, is not a deed in authentic form; and, moreover, it is evident that an owner of land who transfers a part of it for the opening or enlargement of a street, finds in such a transaction an advantage corresponding to that which he gives. It is also this which has been established in this case. The contract which was made between the parties, notwithstanding that it is a contract *innominatim*, is certainly not a donation subject to the inflexible rules of the Civil Code.

On the second point, I consider that there was not simply a pollicitation, but that there was a completed contract in the lifetime of Henry Mills. The town requested that he should transfer the land; Mills transferred it. The contract is complete; there was no necessity for acceptance afterwards by the town. The special condition which Mills imposed, at the time he signed the document, had been fulfilled by the tramways company and, moreover, the mere fact of the Village of Notre-Dame de Grâce receiving, accepting and keeping the document after it had been signed was an acceptance both of the transfer and of the condition. If a subsequent acceptance was absolutely necessary, I find it in the by-law exempting from the special tax, for this enlargement and extension, of the proprietors who had transferred their lands. This ends the municipal transaction commenced by the Village of Notre-Dame de Grâce West and this by-law, maintained in full vigour and effect up to the time of the annexation, establishes

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and legalizes the situation with regard to all adjoining owners and other ratepayers who may be called upon to pay the cost of this enlargement, also in regard to the City of Montreal, which is now vested with the rights of the old municipality.

It is said that this by-law was adopted after the death of Mills and that this tardy acceptance cannot bind his representatives. I know of no article of the Code which would authorize the heirs of Mills to avoid this obligation, even if it were merely one to execute a title deed, more than any other persons whomsoever, and, in such circumstances, I would suggest that the judgment should be reversed and that it should be ordered that the funds deposited should be paid over to the City of Montreal which, in my opinion, is proprietor of the strip of land in question.

Demers, J.

DEMERS, J.:—The town of Notre-Dame de Grâce did not make any offer and even if it had made one, in order that there might be a contract, there was the necessity of acceptance without condition. It was the owners who made an offer to the town under certain conditions. The offer was not accepted during the lifetime of Mills and it could not be accepted after his death. (4 Aubry & Rau, 292). This offer, by itself does not constitute a dedication.

In the case of a dedication, it is necessary that there should be an acceptance or a taking of possession by the public or by the municipality. There is nothing of that kind in this case. *Vide Town of Westmount* v. *Warmington*, 9 Que. K.B. 101.

I am, therefore, of opinion that the judgment should be sustained.

Guerin, J.

GUERIN, J.:—On October 2, 1905, at a meeting of the council of the municipality of Notre-Dame de Grâce, the following resolution was adopted:—

That the secretary-treasurer should be authorized to prepare the caption of a petition asking every owner to be kind enough to sign it in favour of the municipality for the widening of Sherbrooke Street by 7 feet on each side.

The predecessor of the petitioner, Henry Mills, signed a declaration dated October 7, 1905, which reads as follows:—

"We, the undersigned owners of lands in Côteau St. Pierre, dedicate and give to the village of Notre-Dame de Grâce West, for the enlargement of Sherbrooke Street, a strip of land seven feet in width on each side of the said street, from the date when the tramways company shall establish their line there, Henry Mills

conditionally the street railway to move the fence and grade the street."

Neither the municipality of Notre-Dame de Grâce, nor the City of Montreal which is vested with the rights of the latter, have signified acquiescence in the declaration as well as the condition imposed by Henry Mills, prior to the death of the latter, which took place on February 28, 1907. The condition imposed by him not having been fulfilled during this lifetime, nor renewed by his heirs, there is no obligation binding in law between the City of Montreal and Henry Mills, and, consequently, the estate is in no way under any obligation.

The petitioner, Miss Hanna O'Flaherty, is the niece and one of the heirs of the late Henry Mills; the amount which she claims forms part of her inheritance.

The judgment rendered, in my opinion, is justified by the evidence and the documents produced and ought to be affirmed with costs of both Courts against the appellant.

Judgment affirmed.

FORGET v. CEMENT PRODUCTS CO. OF CANADA.

Judicial Committee of the Privy Council, The Lord Chancellor, Earl Loreburn, Lord Shaw and Sir Arthur Channell. May 30, 1916.

CORPORATIONS AND COMPANIES (§ V BI—175)—*Subscription for shares—Acceptance—Endorsement on application transferring —Liabilities of parties.*]—Appeal from the Court of King's Bench of the Province of Quebec, (Appeal side). (24 Que. K.B. 445, affirmed.)

The judgment of the Board was delivered by the LORD CHANCELLOR:—The facts upon which this case depends are to be found in the circumstances attending the formation of the respondent company and the issue of part of its preference capital. The letters patent, incorporating the company, the articles and memorandum of association, and the preliminary documents leading up to its incorporation, were not put in evidence at the trial, and neither the appellant nor any person having first-hand information of the material circumstances was called as a witness —an omission which, in their Lordships' opinion, has greatly embarrassed all the Courts by whom this case has been considered.

It appears that the company was incorporated in the early days of January, 1912, for the purpose of acquiring from a Mr.

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Slade, certain property in the Island of Orleans, and, from a syndicate composed of Mr. Slade and three other people, certain patents and machinery. The capital of the company was fixed at 5,000 7 per cent. cumulative preference shares of $100 each, and 5,000 common shares of the same nominal value; of these latter shares, 1,500 were allotted to Mr. Slade as a consideration for the transfer of his property and 2,000 to the syndicate for theirs. In order to obtain the necessary working capital, the company determined to issue $200,000 of its preference shares, and accordingly they prepared and placed before the public a prospectus dated January 15, 1912. The terms of this prospectus are unusual and difficult to construe. It states in a prominent form that it relates to the issue of the $200,000 7 per cent. preference shares, it sets out the amount of the capital stock of the company, and the classes of shares into which it is divided, the rights which the preferred shares will enjoy and the date from which their dividends will commence.

There then follows an important paragraph in these terms:—

The preferred shares will be sold at par with a bonus of 50% par value of common shares, and they will carry the same voting rights as the common shares. Preferred shares with the bonus of common shares will be delivered to subscribers on payment of subscriptions in full. The balance of the preferred shares ($300,000 par value) will remain in the treasury of the company for future requirements, together with $150,000 par value of common shares, available for 50% bonus with the issue of the preferred shares remaining in the treasury, if deemed advisable.

A table is set out shewing when the "subscriptions" for the shares will be payable, and, finally, it is provided that application for shares should be made upon the form accompanying the prospectus and sent to Edward Slade and Co., accompanied by a remittance of the amount of the deposit. The form referred to is in the following words:—

APPLICATION FORM.

Cement Products Company of Canada (Limited).

Issue of $200,000 par value of 7% cumulative preferred shares, consisting of 2,000 shares of $100 each. Offered at $100 per share, with a bonus of 50% in common shares.

We, the undersigned, severally subscribe for and agree to purchase from Edward Slade and Co. and to pay for the same under the terms of the prospectus of the company, dated January 15, 1912, the number of 7 per cent. cumulative preferred shares in the capital stock of the Cement Products

Co. of Canada (Limited) to the par value of the amounts set opposite our respective names.

(N.B.—Make all remittances payable at par of exchange in Quebec to the order of the Canadian Bank of Commerce.)

Name of Subscribers.	Address.	Par Value of Shares subscribed.	Date.	Witness.

The appellant signed one of these forms for shares of the value of $10,000 and his signature was witnessed by Mr. Slade. His application appears to have been placed before the company as early as February 16, 1912, for, at a meeting of the directors of that date, there is an entry to the effect that the stock book was then opened and certain subscriptions made, of which the appellant's is one. It is for the calls made against the appellant upon these shares that the company has brought the action which has given rise to this appeal.

The real defence raised at the hearing was that the whole transaction took place between the appellant and a Mr. Slade (referred to in the prospectus under his trade name of Edward Slade and Co.), who was the duly authorised agent of the company, and that all he did, in connection with obtaining the subscription, was the action of the plaintiffs. Upon this hypothesis the appellant sought to bind the company by a letter signed by Slade and addressed to himself, dated March 4, 1912, which is in the following terms:—

Dear Sir Rodolphe,

As promised, I am writing you in regard to your subscription to the Cement Products Company (Limited).

It is understood that you will not be obliged to take up this stock, and that I am at liberty to resell the 100 shares for which you have applied. Personally I am very anxious to have you keep it, as there is no question but that the company is going to be a huge success, and I would like to have you enrolled among the shareholders.

No calls will be made on you in connection with your subscription, and when you get back from Europe I will see that your subscription is taken off your hands if you might decide that you do not care to keep it yourself.

With my regards and best wishes, I remain,

Yours very truly, EDWARD SLADE.

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By virtue of this arrangement the appellant alleges that he took the shares on the terms that he should not be under any obligation to the company for their payment.

Upon the hearing of this appeal, however, this defence was scarcely urged. The appellant here has sought to resist liability on the ground that the prospectus and the application form which he signed together constituted a contract to buy the shares from Mr. Slade as vendor, that there was never any privity of contract between himself and the company, and that consequently, whatever might be the position between himself and Slade, the company has no right to maintain the suit. These defences are inconsistent and alternative, and in their Lordships' opinion neither can prevail. The true position of the parties could undoubtedly have been made more plain, if either the defendant or Slade had been called as witnesses. They, and they only, could have given the necessary evidence to shew what were the circumstances out of which the contract in question arose. But sufficient is shewn from the facts and documents that were disclosed to enable a clear and comprehensive view of the action to be formed.

Slade was, as has been stated, entitled to $150,000 of the common stock of the company, but he had no rights whatever over the preference shares. He was, however, entitled to a commission which, in a minute of the company of June 7, 1912, is stated to be a commission on stock (which clearly means the preferred shares) "sold." Now the only means by which a company sells its unissued capital to purchasers is by acceptance of applications from them to become shareholders, and, in the absence of evidence shewing that Slade had agreed himself to take up the issue of the shares in question and to sell them on his own behalf, this is the only meaning that can be attributed to the phrase. But with this interpretation the meaning of the prospectus becomes plain. The phrase that the preferred shares will be sold at par then means that they will be issued at par to the person who subscribed, and the form of application which states that the signatory subscribed for and agreed to purchase from Edward Slade and Co., must mean that he will subscribe for shares in the company, and that Edward Slade and Co. are the intermediaries through whom the transaction is carried out. The words "subscribe for" and "purchase from" Edward Slade and

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Co. would, if each word were given its true and ordinary meaning, result in a plain contradiction. Shares cannot at once be subscribed for in a company and bought from a third party, and if the transaction had been one by which Slade was selling shares to which he was entitled, the prospectus inviting intending purchasers to buy would not have been the prospectus of the company, but a prospectus of Slade and Co.

Their Lordships think that the appellant was right in his first contention that the application really was made to the company, and that he could only escape from the obligations, which he then offered to undertake, by establishing that, as part of the agreement, there was an arrangement made by the company's agent by which his obligation should be dissolved.

For this he is bound to rely upon the letter of March 4. This in form is no part of the original bargain, its terms are equally consistent with its being a record of some subsequent arrangement, and its date strongly confirms this view. But even if it were contemporaneous, it cannot be regarded as anything but a collateral agreement—an agreement which, if made with the agent of the company, was one which bears evidence upon its face that the agent had not, and never could have, possessed legal authority to make it. That a man should subscribe for shares in a company on the terms of a prospectus, which arranges for payment in full by certain instalments at certain dates, and at the same time agree that no call should be made upon him, and that he should not be obliged to take up the stock, is a contract that is little short of a fraud upon the creditors and shareholders of the company.

In truth, however, the document of March 4 is, in their Lordships' view, nothing but a personal arrangement between Slade and the appellant, and as their Lordships understand that it is the subject of proceedings now pending between these parties, it is undesirable to express any further opinion upon its legality and effect.

There is a further point upon the prospectus, upon which much emphasis has been placed by the appellant, which deserves attention. The offer to subscribe for shares was, by virtue of the prospectus, made conditional upon the subscriber receiving a bonus of 50% par value of the common shares. This,

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if it related to an issue of common shares by the company, would be clearly *ultra vires* and bad; but, in fact, by an arrangement with Mr. Slade, it was perfectly possible to carry this agreement out. He held $150,000 of the common stock issued as fully paid in return for property sold. These were more than sufficient to satisfy the obligation to provide $100,000 of such stock, the total amount involved in connection with the issue of the $200,000 preferred shares. That it was out of these shares, or out of the $200,000 allotted to the syndicate, that the 50% bonus was to come, is made clear by the statement that $150,000 of the common shares would remain in the treasury of the company for future requirements, this being the balance after the issue of the 150,000 to Slade and 200,000 to the syndicate. It is true that the prospectus states that these remaining shares would be available for a further 50% bonus if it was determined to issue the balance of the preference shares. But this is no more than a statement of intention on the part of the company to do something which, in the then position of the company, they would be unable to carry out, and there is no contract that such shares would be issued or that such bonus would be paid.

The result, therefore, in their Lordships' opinion, is that the documents constitute a valid application on the part of the appellant to take $10,000 of preferred shares in the company. This offer was accepted on February 16, and the fact of its acceptance was sufficiently called to the attention of the appellant by the letter of December 24, 1912, when he was asked for payment of the total subscription that was then due. To this letter he appears to have sent no answer to the company. On January 2, 1913, an endorsement on the application form is made in the words "Transferred to Cement Products Co. of Canada." This endorsement cannot on any hypothesis affect the rights of the parties: if the application were an application to the company for shares, it would have no meaning except as a record of when it had been delivered to the company, and in this respect the date is wrong, as the company had clearly received notice of it before February 16, 1912. If, on the other hand, it were an offer to buy shares from Slade, to transfer it to the company, could not enable them to sue.

On January 11, 1913, a further request for payment was made. To this the appellant replied on the 13th of the same month.

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requesting the company to apply to Mr. Slade, and stating that he had written to him on December 26; and on the same date he again wrote to Mr. Slade calling his attention to the effect of the letter of March 4, which, the appellant urged, had exonerated him from obligation to pay.

Nothing further of importance transpired until these proceedings were brought, but their Lordships think that the correspondence confirms the view that they have expressed as to the nature of the transaction, and shews that the real defence upon which the appellant sought to rely was, in fact, a personal arrangement between himself and Mr. Slade, and that there was no infirmity or ambiguity in the contract between the appellant and the company.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

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MAGRATH v. COLLINS.

Alberta Supreme Court, Walsh, J. February 29, 1916.

DISCOVERY AND INSPECTION (§ IV—31) — "*Persons*" *employed—Officer of corporation—Knowledge.*]—Appeal by plaintiff from Master's order.

J. E. Wallbridge, K.C., for plaintiff.

S. W. Field, for defendant.

WALSH, J.:—R. 234 authorises an order for the examination for discovery of "any person who is or has been employed by any party to an action and who appears to have some knowledge touching the questions in issue acquired by virtue of such employment." The Master at Edmonton has, upon the application of the defendant, ordered under this Rule that the manager of the Edmonton Real Estate Co. Ltd. be examined for discovery, and from this order the plaintiff appeals.

It is admitted that this company was employed by the plaintiff and that its manager has some knowledge touching the questions in issue acquired by virtue of such employment. If he had been employed as an individual by the plaintiff to do the work which he did as an officer and under the employment by the plaintiff of his company, he would clearly be examinable under this Rule. But it is argued that the Rule as it stands does not authorise the examination of an officer of a company which has been so em-

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ployed, and with that contention I am reluctantly compelled to agree, for the failure of the Rule to provide for such an examination is, I think, clearly an unintentional *casus omissus*.

The only argument which, in my opinion, is of weight in support of the contrary view is that under sub-sec. 11 of sec. 2 of the Judicature Ordinance, the word "person" in the Rules includes a body corporate or politic, unless there is anything in the subject or context repugnant to such meaning. There is something which, I think, is repugnant to the use of this word in this sense in the construction of this Rule, so that I cannot read it as including a corporation. To provide simply for the examination of a corporation would be futile. It is not possible to examine a corporation as such. It is only by the examination of some individual who is an officer of it that it can be done. A Rule authorising the examination of a corporation would in practice be inoperative, unless by the same or some other Rule the machinery is provided by which the examination of some one or more of its officers is authorised, and no such machinery is here provided. That this is so is, I think, made quite plain by the care with which the Rules relating to corporations are worded. Rule 250 provides for the examination for discovery of a corporation which is a party to an action or issue by an examination of any officer selected for that purpose and deals with the mode of selection of the officer so to be examined. Rule 417 provides that any affidavit required by the Rules shall in the case of a corporation be made by an officer, servant, or agent of the corporation having knowledge of the facts required to be deposed to. While Rule 634 deals generally with the examination of a judgment debtor for discovery in aid of execution, Rule 635 provides that when the judgment debtor is a corporation such examination may be of any of its officers. Rule 636 authorises the examination of "any person or the officer or officers of any corporation to whom the debtor has made a transfer of his property or effects." The word "person" by itself in this Rule was evidently thought not sufficient to authorise the examination of the officer of a corporation as such, and this lends strength to the argument that the same word in Rule 234 limits the right of examination to an individual who is or has been employed by a party. I must therefore give the Rule the narrower construction for which the plaintiff contends.

Rule 243 imposes a penalty upon anyone refusing or neglecting

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to attend for examination. The second clause of the Rule deals with the case of a person so refusing or neglecting, who "is an officer of a corporation, a party to action, or one who is employed by a party." This phrase is not happily worded. In its strict grammatical construction, having regard particularly to its punctuation, I think it covers three distinct classes, (*a*) an officer of a corporation, (*b*) a party to an action, and (*c*) one who is employed by a party. That obviously is not its meaning, though, for the case of a party to the action is expressly provided for by the first clause of the Rule. The Master thinks that it means, "an officer of a corporation a party, or a corporation an employee of a party." It may perhaps be open to that construction but I do not think that that is what it means. If it is, it leaves absolutely unprovided for the refusal or neglect of an individual who is employed by a party to the action and for whose examination provision is expressly made by Rule 234. I think the proper reading of it is—an officer of a corporation which is a party to the action, or one, that is to say, a person who is employed by a party to the action, and that reading strengthens the view that I take of the meaning of Rule 234.

The appeal is allowed and the costs of it will be to the plaintiff in the cause. *Appeal allowed.*

ELART v. SHAFER & DUNSMORE.

District Court of Edmonton, Crawford, J. March 13, 1916.

D. C.

TAXES (§ III BI — 113) — *Land transfers — Persons liable — Vendor and purchaser.*]—Action to recover taxes paid.

S. S. Cormack, for plaintiff.

D. W. Mackay, for defendant.

CRAWFORD, J.:—The facts in this case are admitted, and the dispute is one entirely of law and on the construction of the secs. of ch. 10 of the Statutes of Alberta, 1913, 2nd session.

The defendants agreed to sell to one Richardson, who agreed to purchase the land in question from them by an agreement in writing dated March 20, 1912. Richardson, by agreement in writing dated September 15, 1912, assigned to the plaintiffs all his right, title and interest in the said lands and in the said agreement.

The defendants procured a transfer of the said lands from the registered owners by a transfer dated January 24, 1914,

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registered on January 27, 1914. The plaintiffs procured a transfer from the defendants of the lands less than two months later, namely on March 5, 1914, which they also registered on October 21, 1915. The affidavits of value on the first transfer state the property to be worth, without improvements, the sum of $2,800. The plaintiffs, on the other hand, made affidavits for the purpose of registering their transfer declaring the land to be worth $6,000 without improvements. The registrar thereupon charged them $160 under the Act, computed on the difference of $3,200 at 5%. The plaintiffs thereupon brought this action to recover this amount under the provisions of sec. 7, sub-sec. 2, which reads as follows:—

If any tax payable hereunder is paid by any person other than the person liable for the payment thereof, it should be recoverable from the person so liable in an action at the suit of the person by whom it was paid, in any Court of competent jurisdiction, as a debt due to such person.

Sec. 3 in the Act in effect enacts that a tax of 5% shall be payable on the registration of any transfer of land, to be computed on the increased value of the land over and above the value thereof according to the last preceding value for the purpose of this Act, excluding in all cases the costs of improvements, etc. Sec. 4 enacts:—

For the purpose of ascertaining the first taxable value for the purpose of this Act in respect of any interest in land accrued before the passing thereof, the last value for the purpose of this Act shall be deemed to be: (a) . . . (b) The assessed value of any land in any incorporated city, town or village according to the last revised assessment roll for the year 1913, if such land is assessed upon such roll, or if not, then such a value as may be made to appear to the Registrar of Land Titles to be just; (c) Provided that if it is made to appear to the satisfaction of the registrar that a person liable to pay any tax hereunder has before the passing of this Act bought or agreed to buy the land in respect of which such tax is payable, at a price greater than the last value as hereinbefore ascertained, the price paid or agreed to be paid shall be deemed to be the last value for the purpose of this subsection.

Sec. 7, says:—

Unless otherwise agreed upon between the parties, any tax payable hereunder shall be payable by the transferor, or in the case of the first transfer after the date of the passing hereof, shall be payable by the person beneficially entitled to the land at the said date.

There was no agreement between the parties as to who should pay these taxes in my view. In the agreement above mentioned the purchaser, who assigned to the plaintiffs, covenanted to pay "all such taxes, rates, special rates and assessments as may be rated, levied or imposed on the said lands or any improvements

thereon, either by legislative, municipal, school or other authority, from and after the date hereof."

It seems clear to me that this is a tax of a purely personal character, and not one rated, levied or imposed on the land, and for the same reason could not be classed as a lien, charge or encumbrance so as to come within the covenant by the vendor that the land shall be free and clear of all such.

Finding as I do, it would appear under sec. 7 that the plaintiffs in this action, being "the persons beneficially entitled to the land at the date of the passing of the Act," would be "the persons liable to pay any taxes payable under the Act" in the case of the first transfer after the date of the passing thereof.

The plaintiffs therefore would be the parties liable to pay the tax upon the registration by the defendants of the transfer to them, and the value fixed upon such registration would be the "first taxable value" which is defined in the Act, in effect, to be the excess of the last value, unless expressly exempted from the tax by some provision of this Act. The defendants, at the time they registered the transfer at a value of $2,800, well knew that the plaintiffs had agreed to purchase the land for $6,000 and the defendants could have invoked the provisions of paragraph "C" above mentioned, and so have obtained an exemption from the tax under the Act of $6,000, as being such last value. This however they failed to do, and by reason of their having so failed they have made themselves liable as transferors under sec. 7 for the payment of the tax upon the registration of the second transfer which was made to the plaintiffs. It would seem therefore that the plaintiffs were not liable to pay the tax and therefore are entitled under sub-sec. 2 of sec. 7 to bring this action.

Another reason for coming to the conclusion I do is that it is the apparent scheme of the Act to impose the burden of the tax upon the person who gets the benefit of a resale at an increased price.

Interpreting the section of the Act as I do, there will be judgment for the plaintiff for the sum of $160 with costs.

Judgment for plaintiff.

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NORTHERN CROWN BANK v. WOODCRAFTS, LTD.

Alberta Supreme Court, Walsh, J. May 26, 1916.

GUARANTY (§ II—12)—*Variation—Increase in rate of interest—Death of guarantor—Liability.*]—Action on a guaranty.

A. H. Clarke, K.C., and *J. M. Carson*, for plaintiff.

F. W. Griffiths, and *L. R. Miller*, for defendant company and guarantors other than the executors.

M. B. Peacock, for executors of the Breckenridge Estate.

WALSH, J.:—The guarantee on which it is sought to make the defendants liable is in writing dated on April 8, 1912, and signed by the defendants and the deceased guarantor and one Jones. These guarantors then were and still are shareholders in the defendant company and with the exception of one Hutton, a former manager of the plaintiffs' branch at Calgary, they are its only shareholders. The clause of the agreement which imposes liability upon the guarantors is in these words:—

In consideration of the Northern Crown Bank agreeing or continuing to deal with Woodcrafts Ltd., Calgary, Alta., herein referred to as the "customer" in the way of its business as a bank, the undersigned hereby jointly and severally guarantee payment to the bank of the liabilities which the customer has incurred or is under or may incur or be under to the bank whether arising from dealings between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer, including in such liabilities all interest computed with quarterly or other rests according to the bank's usual custom, charges for commission and other expenses and all costs, charges, and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint or several liability of the undersigned hereunder being limited to the sum of $75,000, with interest at the rate of 7% per annum from the date of demand for payment of the same, which it is agreed the same shall bear).

A later clause provides that:—

This shall be a continuing guarantee and shall cover all the liabilities which the customer may incur or come under until the undersigned or the executors or administrators of the undersigned shall have given the bank notice in writing to make no further advances on the security of this guarantee.

A demand for payment covering all of the sums now sued for was served upon the guarantors on March 13, 1915.

At the time this guarantee was given the defendant company had a line of credit with the plaintiff of $75,000 at 7%. On January 22, 1913, the plaintiff notified it that interest would for the future be charged at the rate of 8% and the subsequent transactions between them were upon that basis. The guaran-

tors, except those of them who as officers of the company signed the subsequent notes, were not notified of this increase in the rate of interest, and the evidence is that none of them except these officers knew, until some time after the last transaction had taken place between the bank and the company, that this increased rate of interest was being charged. And it is upon these facts that the guarantors principally rely to free them from their liability under the guarantee. There is no doubt but that:—

> Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed. When a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract, and if the creditor, without the consent of the surety, alter those terms to the prejudice of the surety the latter will be free: Hals., vol. 15, p. 546, and cases there referred to.

The contract of the defendant guarantors is not for the payment by the company of a certain definite sum of money at a specific rate of interest. If it was an increase in the rate of interest charged the company without their consent would undoubtedly discharge them from their liability. Their contract was in the broadest and most general language for the payment up to $75,000

> of the liabilities which the customer had incurred or is under or may incur or be under . . . including in such liabilities all interest

without limiting the rate. Nor was there between the plaintiff and the company anything that could be called a contract by which either of them was bound either to the lending or the borrowing of any money or as to the rate of interest which should be paid for such as was borrowed. With respect to such liability as was current at the date of the guarantee there was of course a contract as to the rate of interest to be paid under the notes evidencing it, but there was nothing binding the plaintiff to renew these notes or to carry them beyond the date of their maturity at the then current rate of interest or to make further advances at that or any other rate. Neither was there anything binding the company to continue the then existing liability or to incur any further indebtedness to the plaintiff. When the guarantee was given the company had been given a line of credit of $75,000 at 7%, which amounted to nothing more than an authority to the local manager to finance the company to that

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extent and at that rate of interest until further instructed. That bound neither of them to anything beyond the advances made from time to time under it. It was an arrangement which either could refuse to act upon further and could terminate at will.

The arrangements between the plaintiff and the company lacked, I think, as Hodgins, J., points in *K. & S. Auto Tire Co.* v. *Rutherford*, 34 O.L.R. 639, 27 D.L.R. 736, 28 D.L.R. 357, that definiteness and precision which characterised the principal contract in *Holme* v. *Brunskill*, 3 Q.B.D. 495, the case most often cited for the proposition with which I am now dealing and which made it so easy in that case to say that what afterwards took place between the creditor and the principal debtor amounted to a departure from it. I read the guarantee in this case as securing to the plaintiff the payment of all the company's liabilities both principal and interest up to $75,000 and as not incorporating or being limited by the terms to which the plaintiff at its date was willing to submit in the matter of interest. In other words, their guarantee does not cover simply the line of credit authorised at its date notwithstanding an expression of opinion to the contrary to be found in the evidence of Mr. Hutton, but all transactions between the bank and the company which are within the amount to which it is limited. I am unable therefore to free the guarantors from their liability upon this ground.

The guarantor, John Breckenridge, died on May 28, 1913. On August 7, 1913, notice of his death was given to the plaintiff by his executors which notice assumed to revoke the guarantee here in question and stated that the estate of the deceased would not be liable for any indebtedness or liabilities which might thereafter be incurred by Woodcrafts, Ltd. The guarantee provides that it shall not be affected by the death of the guarantors. No further advance was made by the plaintiff to the company after the receipt of this notice. On the contrary, the amount of the liability is considerably smaller now than it was then. The notes which were current at the date of the notice were renewed thereafter from time to time until eventually the company's note for $49,323.54 was given on October 13, 1914, in consolidation apparently of all of the company's outstanding notes and the note for that amount now sued upon is a renewal of it. It is contended that these various renewals extended the time for the payment of the liability represented by them and

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thereby released the sureties. The guarantee however expressly provides that the bank may grant extensions as it may see fit and in the face of that I am of the opinion that the executors are not released by the renewals of which they now complain.

When it is said that if all sums deposited to the credit of its current account by the company after the receipt of the notice from the executors had been applied in payment of its liability to the bank that liability would now have been wiped out and that it is the right of these defendants to now insist upon such application being made with a consequent satisfaction of the various items of liability upon which it is now sought to hold the defendants. The fact is that at this time the company was a going concern. The receipts of the business were deposited from time to time to the credit of its current account with the plaintiff and the running expenses were paid by cheques against that account. I have not troubled to ascertain the aggregate of the deposits to the credit of the current account during the period in question so that I do not know how it would work out if the defendants' contention was to be given effect to for I am of the opinion that it cannot be. I do not think that the plaintiff was under any obligation to retain and apply in reduction of its claim every sum deposited by the company in current account. The company's principal indebtedness was evidenced by its promissory notes. The plaintiff's highest right as against the current account would appear to me to have been to insist that the amount to its credit at the maturity of each note should be applied in reduction of it. Even if it was bound as against the guarantors to do that (and I do not think that it was) I have not been able to satisfy myself that any appreciable difference in the amount of their liability would have resulted.

Another ground of defence is that the arrangement was that the guarantee was to be signed by the remaining shareholder Hutton, who is as a matter of fact not a party to it. The evidence however not only fails to warrant this contention but proves conclusively to my mind the exact contrary of it, namely that it was understood that he was not to sign.

In my opinion the defendant guarantors are liable under their guarantee. I do not at all regret this conclusion. These men though in form and in law but guarantors are in substance principal debtors. They formed themselves into a company whose

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operations, if successful, would have been to their personal benefit and it seems to me most unfair upon their part that when their operations have through no fault of the plaintiff proved a failure they should attempt to impose upon it the serious resulting loss. It is a very obvious "heads I win, tails you lose" proposition on their part.

There will be judgment against the defendant guarantors including the executors for the amount owing by the defendant company to the plaintiff on March 13, 1915, in respect of the sums for which I have hereinbefore directed judgment against it with interest thereon from said date at the rate of 7% per annum being the rate stipulated for by the contract and costs.

Judgment for plaintiff.

CHANDLER v. EDMONTON PORTLAND CEMENT CO. LTD.

Alberta Supreme Court, Walsh, J. May 12, 1916.

BILLS AND NOTES (§ I D I—30)—*Words restricting negotiability—Assignability—Rights of assignee as against garnishor.*]—Issue to determine rights of parties to certain money attached in the hands of a garnishee by the defendant in this issue in an action brought by it against one A. E. Chandler.

G. H. Van Allen, for plaintiff.

S. W. Field, for defendant.

WALSH, J.:—The liability of the garnishee is under certain promissory notes made by him to the judgment debtor which had before the service of the garnishee summons been assigned by the judgment debtor to the plaintiff in the issue. She claims the money owing by the garnishee by virtue of these assignments of the notes and the defendant claims it under its garnishee summons.

By each of the promissory notes in question the garnishee promised to pay "A. E. Chandler only" the amount named in it. He assigned each of them to the plaintiff by writing which so far as form is concerned is admitted to be ample for that purpose. The whole objection urged to the plaintiff's right to this money is that inasmuch as the notes are payable to "A. E. Chandler only" they were not only not negotiable but not assignable by him, and the assignment of them made by him is therefore ineffective to divest him of his property in them or to vest any property in them or in the money payable under them in the

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plaintiff. It is admitted that if these notes are under the above wording capable of assignment by the judgment debtor the plaintiff is entitled to succeed in this issue.

Sec. 21 of the Bills of Exchange Act (R.S.C. 1906, ch. 119) enacts that:—

When a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable.

The words of these notes "I promise to pay A. E. Chandler only" with the erasure from the printed form of the words "or order" plainly indicate to my mind the intention that they should not be transferable. The consequence is that they are in the words of the section "not negotiable," which simply means, I think, that they could not be transferred by indorsement and delivery or by delivery alone so as to give to the holder of them the right to sue upon them in his own name. In my opinion the section does not make them not assignable. It simply makes them lose their character of negotiable instruments so that the plaintiff, as the assignee of them, did not thereby become a holder of them in due course and therefore got no better title to them than the payee had but took them subject to the equities, if any, attaching to them. I think that the same result follows as is by statute, sec. 174 of the Bills of Exchange Act, given to a crossed cheque bearing the words "not negotiable," namely, that a person who takes it—shall not have and shall not be capable of giving a better title to it than that which had the person from whom he took it. I do not mean, of course, that sec. 174 applies to such notes for it is in terms limited to a crossed cheque. I simply copy its language the better to express my meaning. Though by reason of their wording these notes are deprived of the quality of negotiability under the Bills of Exchange Act, they are choses in action and in my opinion are assignable as such.

I do not think that the intention manifested by the maker of these notes, that he should make payment to the payee and to no one else, is sufficient to deprive the payee of his right to assign them. This is but a contract for the payment of money and it can make no difference to the maker of the notes whom he pays. No objection is taken by him to the assignment, he being quite willing, I understand, to pay either of the parties as

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may be ordered. To say that he must pay the payee, and no one else, might mean that the notes would not pass to his executor or administrator or to an assignee for the benefit of his creditors. It might perhaps mean that the debt is not attachable and therefore that the defendants' garnishee process, even in the absence of the plaintiff's assignment, is ineffective to secure payment to it of the money by the garnishee. There is nothing before me to shew why the notes are made payable in this way, but I should assume that in such a contract as this nothing more than the non-negotiability of the notes was aimed at and that having been effectively secured there is no reason why the payee should not be at liberty to dispose of them as he has done.

Judgment for plaintiff.

VARSON v. TOWN OF VEGREVILLE.

Alberta Supreme Court, Harvey, C.J. May 6, 1916.

TAXES (§ III B I—116)—*Description of land—Validity—Lots and blocks—"Occupant"—"Owner"—Vendor and purchaser.*]—Action to annul a tax levy.

G. B. O'Connor, K.C., for plaintiff.

F. W. Russell, for defendant.

HARVEY, C.J.:—The plaintiff is and has been since prior to the year 1913, the registered owner of the N.E. ¼ of 17-52-14 west 4th m., which is within the boundaries of the defendant town. On August 15, 1912, she entered into an agreement with one Torrey for the sale to him of the said quarter section for the price of $5,600, to be paid as by the agreement provided. It is admitted that the said Torrey entered into an agreement to sell the said lands to the Commercial Investment Co. Ltd., of Saskatoon, but the terms of the agreement are not before me.

By the terms of the first mentioned agreement it is provided that should the purchaser at any time desire to subdivide the land the vendor will register such subdivision, but at the expense of the purchaser, and that if the purchaser desire to sell any portion of the said land the vendor will execute a conveyance to the purchaser upon receiving the sum of $75 per acre.

No survey or subdivision of the land has been made, but there was produced before me a plan of subdivision of the whole quarter section upon paper which is described as a

Plan of Villepont Park, being a subdivision of the N.E. quarter sec. 17, tp. 52, r. 14, w. 4th m. Scale 200 ft. equal one inch. Note—Portion

to be registered outlined in orange. Thomas B. Brown, Alberta Land Surveyor.

In the top right hand corner appear the words, "owner by agreement," and underneath, "registered owner," a blank preceding each not filled in. In the left top corner appear the words, "approved" followed by "mayor" and underneath "town clerk," which words are preceded by signatures which are admitted to be those of the mayor and town clerk of the defendant.

In the year 1913 all but 25 or 30 of the lots and blocks on the plan were entered on the assessment roll of the town in the name of the Commercial Investment Co. Ltd. The other 25 or 30 lots were assessed to other individuals. Each lot is separately described and is assessed at the value of $40, but the assessment roll shews that this amount was reduced by a Court of Revision to $30. The assessment notice which was sent to the Commercial Investment Co. Ltd., at Saskatoon, Sask., gives the description much more shortly than is given in the assessment roll, one entry only being made for each block or each set of contiguous lots assessed to the Commercial Investment Co. Ltd. The taxes charged against each lot in the tax roll amount to 90c. and the tax notice which was sent to the investment company is abbreviated in the same manner as the assessment notice. The total amount of taxes for each block or parcel of lots only being given together with its apportionment among the different funds. The total number of lots assessed to the Commercial Investment Co. Ltd., appears to be 1,120, which at a valuation of $30 per lot gives an assessed value of $33,600, and the total taxes amount to $1,008. In the year 1914 the assessment is made in the same way, for the same value of each lot, reduced to the same amount by the Court of Revision, the taxes however being shewn on the tax roll as $2 for each lot. This $2, apparently, is intended to represent the minimum tax under the Act, because the total of the three separate funds shewn on the tax roll is only $1.20. The assessment notice for 1914 follows the same form as that for 1913, while the tax notice, instead of following the tax roll, gives the total taxes on the basis of $1.20 per lot. In the forms provided both in the assessment roll and the forms of notice, under the heading provided for number or description of plan, a blank is left in all cases. On the first page, however,

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of the 48 pages of the assessment roll on which these lots are set out for 1913, there appears at the top the following: "N.E. quarter, sec. 17, tp. 52, r. 14." On the assessment roll for 1914, however, there is no reference whatever to the quarter section.

By the agreement from the plaintiff to Torrey it is provided that the purchaser will pay all taxes after the date of the agreement, and there is no suggestion that the plaintiff ever received any notice or had any knowledge of the manner in which the assessment was made.

The plaintiff's action is for a declaration that the assessment and tax levies are invalid so far as they affect this land. No evidence was given before me other than the documents and admissions of counsel. It was stated, however, that for the year 1915 the lands were assessed to the plaintiff by reference to the quarter section, and her counsel expressed her willingness to pay taxes to the defendant for the years 1913 and 1914 upon the basis of such assessment. I have reserved judgment until the present to see if this offer would be accepted, but am now informed that it will not be accepted, and it is therefore necessary to dispose of the action.

The defendant contends that by virtue of sec. 274 of the Towns Act (ch. 2, 1911-12) the plaintiff had the right to appeal in order to have her name inserted on the roll, and that it is not open to her now not having appealed to take any exception to her not having been assessed. It is apparent that this section affords a very inadequate measure of relief to a person in the position in which the plaintiff was, and in this regard the reasons given by Beck, J., for judgment in *Rural Mun. of Bow Valley* v. *Maclean*, 26 D.L.R. 716, with reference to the effect of provisions for appeal from assessment, with which I agree, appear to be in point.

There is, however, in my opinion a much more serious objection in the description of the land. The purpose of an assessment roll is, of course, to lay the foundation for the recovery of taxes. Three methods are provided by the Towns Act for the recovery of taxes. First, by personal action against the person liable to pay. Second, by distress of goods. Third, by resort to the lands. Sec. 269 provides that:

> The assessor shall assess every person having any interest in assessable land in the town, either as the owner or occupant, and shall prepare an assessment roll,

the form of which is set out in the following section. In the form given space is provided for "the names in full (if the same can be ascertained) of every person taxable in the town." A definition is found in sec. 2 of the words "owner" and "occupant." This definition was materially changed by ch. 8 of the statute of 1913, which came into force on March 25 of that year. Whether that amendment had been made before the assessment of 1913 or not does not appear, but it seems very probable that it was, since May 31 is the time fixed before which the assessment must be completed, and the assessment notice for 1914 is dated June 11. The amendment, however, undoubtedly applies to the assessment of 1914, because the further amendment made by ch. 7 of the statutes of 1914 which came into force on October 22 of that year, while retroactive in part appears to be only so for the purpose of an election. By the definition of 1913 the term "occupant" has application only to the case of lands exempt from taxation. An "owner" means the person who appears by the records of the Land Titles Office to have any interest in the land other than as mortgagee or encumbrancee. For the purpose of this case the definition in the original Act is not materially different, but it does not direct attention to the Land Titles Office as the place where the information is to be obtained, which latter fact appears to me to be of some importance in regard to the consideration of whether this assessment was a good assessment by reason of not having been in the name of the plaintiff. Counsel for the defendant contends that sec. 285 cures any defects in the assessment roll, because it provides that the roll as finally passed by the council and certified by the assessor shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any error in or any failure to send notice. I find myself quite unable to accept this view of the effect of this section. It would be a most surprising thing if the legislature after having required proceedings to be taken in a particular way should subsequently state that regardless of whether they have been taken in the way prescribed or not they shall be just as valid as if they had been so taken. It appears to me that the errors or defects referred to must be of some trivial character and not affect the substance of the proceedings, especially as the section is immediately followed by provisions for

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alterations in the roll by appeals to a Judge or otherwise. It is, however, not necessary to determine this point, because I think it is immaterial for the disposition of this case.

As I have indicated, the purpose of the assessment roll is to obtain the taxes, and the liability for taxes is prescribed by sec. 305, which provides that the taxes may be recovered with costs from any owner or tenant originally assessed, and from any subsequent owner. The section provides also that they shall be a lien upon the land, and subsequent sections provide for the manner in which this lien shall be enforced. As far as the remedy for the money by action is concerned it is quite clear from this section that there is no right given against an existing owner who is not assessed, and consequently there would be no right to recover these taxes from the plaintiff who is and has been the registered owner during and since the assessment. The defendant has counterclaimed for the amount of these taxes, and inasmuch as this section furnishes the only liability the counterclaim must necessarily fail. The remedy by distress is unimportant here. It is admitted that the lands are vacant, and there is therefore no opportunity of a resort to that method of obtaining the taxes. The provisions for recourse against the land are by way of confirmation of a tax return by a Judge and a forfeiture of the land in favour of the corporation. The machinery is provided by sec. 324 and the following sections. By sec. 329 it is provided that a notice of the time and place fixed for the confirmation of the return shall be sent

> to each person who appears by the records of the land registration district . . . or by the said return to have or claim any interest in the lands mentioned.

It is quite apparent that inasmuch as these lands have no description in the Land Titles Office it is impossible to ascertain from the Land Titles Office what persons have any interest in the lands, and it would therefore be impossible to comply with the provisions of that section. Sec. 331, sub-sec. 4, also appears to be inapplicable to a case such as this. By that section it is provided that a copy of adjudication shall be forwarded to the registrar of land titles who shall "register the same against the lands therein named." It is quite apparent that the registrar could not register any adjudication in respect of these lands because it is impossible from the description to ascertain who is

the registered owner. Sec. 333, which provides the final step by which the municipality obtains its recourse against the lands by securing a certificate of title from the registrar, likewise cannot be resorted to with respect to these lands for the same reasons.

The lands, therefore, it appears to me quite clearly are not so described in the assessment roll as to make any effective, I need not say valid, assessment of such lands.

There is no assessment of the plaintiff to make her liable for the taxes. There is no assessment of the lands which will render them liable for payment of the taxes, and in the result, whatever may be the effect of the assessment as regards the Commercial Investment Co. Ltd., it appears to be absolutely ineffective as regards the plaintiff and her lands, and she is entitled to a judgment to that effect, with costs. As already intimated, the counterclaim for the taxes as against her is also dismissed, with costs. *Judgment for plaintiff.*

KARR v. SOUTH SIDE LUMBER CO.

Alberta Supreme Court, Harvey, C.J. May 5, 1916.

CORPORATIONS AND COMPANIES (§ V E 4—230)—*Declaration of dividend in property—Notes—Non-compliance with formalities—Meetings.*]—Action on notes given in payment of company dividends.

J. E. Wallbridge, K.C., for plaintiff

H. H. Parlee, K.C., for defendant, official assignee.

HARVEY, C.J.:—The defendant company was formed in February, 1912, for the purpose of buying and selling lumber. The capital was $10,000 divided into one hundred shares of $100 each. The subscribers to the memorandum of association with their respective shares were plaintiff 15 shares, Reginald Sheppard 34 shares, and Amy Sheppard, his wife, 1 share. There were no articles of association.

In 1912 the plaintiff received $1,000 for profits out of the business, but in 1913 owing to his not getting on well with Sheppard, who was the active manager of the business, he wished to get out of the company. Sheppard made up a statement of the assets and liabilities of the company, which shewed a surplus of assets over liabilities of several thousand dollars, which, however, included only $54.30 in cash, the chief assets being merchandise and accounts receivable.

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In December, 1913, it was agreed between plaintiff and Sheppard that the former should receive for his interest in the company $1,500 for the par value of his shares, and notes for 75% of the share of the surplus which would be represented by his fifteen of the total fifty issued shares, there having been no change in the shares or shareholders since the incorporation of the company. The $1,500 was paid by Sheppard to the plaintiff, and nine notes of $379 each payable monthly after a period of several months were given to him, signed, for the company, by Sheppard as manager, to represent the share of surplus or profits plaintiff was to receive. The first note was paid but the other eight were not, and this action was brought to recover the amount of them. On October 8, last, after the commencement of the action, the company made an assignment for the benefit of its creditors to Jas. A. MacKinnon, official assignee, who is now defending this action.

It is sought to support the notes as being in payment of dividend or profits, but it is contended that there could be no dividend payable because by art. 72 of Table A which constitutes the articles of association no dividend is payable except with the sanction of a general meeting of the company, and that there was no such meeting, which, by art. 30, is a meeting held at a fixed or prescribed time.

Sheppard was examined by the plaintiff for discovery as an officer of the company, and gave the following evidence:

Q. And the notes represent, not stock, but profits? A. Certainly. Q. It is not a transaction in the stock of the company? A. No. Q. With reference to the dividends, do these notes represent dividends? A. Yes. Q. Had the dividends been declared? A. Yes. Q. At the time the notes were given? A. Yes.

The plaintiff, however, who gave evidence at the trial, stated that he knew of no meeting of the company at which the question of a dividend was considered. If the meeting of the plaintiff and Sheppard at which this arrangement was come to was the one by which the dividend was declared, and I cannot think there was any other, then it was not a general meeting and there is nothing to shew that the other shareholder waived the provision of art. 72 if it could be waived. It seems quite clear indeed that the company never held any general meeting, if indeed it ever held any meeting that could properly be called a meeting of the company. The plaintiff's dissatisfaction was that Sheppard

managed the company without any consultation with or consideration for him. However, it does not appear to me that it is within the power of a company to declare and pay a dividend in this manner. In Lindley on Companies (6th ed.) at 609 it is stated:

> Dividends must not be declared or paid unless they have been sanctioned in accordance with the company's regulations. The regulations also govern the mode of payment. *Primâ facie*, they must be paid in money, not in shares or bonds unless the company's regulations permit it, or all the shareholders so agree.

It is not improbable that Mrs. Sheppard would have agreed to anything that her husband and the plaintiff agreed to, but there is no evidence that she did agree to the arrangement which was made. In *Hoole* v. *G.W.R. Co.* (1867), 3 Ch. App. 262, the question was one of payment of dividend in shares. Lord Cairns, C.J., at p. 269-70, says:

> A dividend can only be declared upon the assumption that there is either money in hand to pay it, or that there is money which ought to be brought into the revenue account for the purpose of paying it (and again on pp. 271-2): either these shares are assets available for the purpose of paying the dividend or they are not. If they are not assets available for paying the dividend they cannot be issued for the purpose of such payment. If, on the other hand, they are assets for that purpose, and the whole of the shareholders are not willing to take them in specie, it appears to me that every shareholder in the company, who is so inclined, has the clearest right to have them turned into money and to have the money ratably divided among the shareholders.

There appears in this a suggestion that a dividend may be payable in specie instead of cash, and theoretically it is difficult to see why it should not be so. A "dividend," as its derivation indicates, is something to be divided, and that something might be cattle or lumber or many other things as well as money. If in the case of this company a general meeting had sanctioned a dividend of a portion of its stock of lumber and the shareholders had all been willing to accept it, it may be that that would have constituted a valid declaration of dividend, but it would have been payable in lumber and not in notes given for the value of such lumber.

The plaintiff says that as far as he is aware Sheppard did not take his share of the surplus when he did. The result of this transaction was that the company gave its notes for the value of something which it owned before and retained after.

The $3,411, the amount of the notes, represent $227.40 for each of the plaintiff's shares. In other words, his shares were worth

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$327.40 each, and the sale of the shares at any price would upon their transfer to the purchaser vest in him that value as he would be entitled to his share of the assets which would make them of that value.

The separation of the value into two parts does not make it any the less the value of the shares and the payment by the company of a part of the price would be a payment for something for which it would receive no consideration since the holder of the shares would be entitled to take out of the company the whole value including the portion paid by the company.

Whether the plaintiff's shares were transferred to Sheppard or to some nominee of his does not appear, but it does appear from a subsequent statement of the company that there is now another shareholder who holds fifteen shares. These shares, on their transfer by the plaintiff, carried the right of the holder to participate in the company's profits or surplus, and the company by giving these notes received no benefit or consideration whatever.

It is true that the plaintiff gave consideration, but the giving of the notes was not an act for the benefit of the company which would be within the scope of the manager's authority, and as it was not authorised or ratified by the shareholders, even if it could be thus rendered valid, it cannot bind the company.

It is unfortunate for the plaintiff who no doubt was entirely honest in the transaction, but when persons prefer to carry on their business in the form of a company for the benefits which arise therefrom, they must be prepared to comply with the requisite formalities, or they may find that they may reap disadvantages instead of benefits. *Action dismissed.*

GRAVELLE v. RUDOLPH.

Alberta Supreme Court, Simmons, J. April 29, 1916.

INSURANCE (§ VI D 2—375) — *Interest in proceeds—Mutual policies—Resulting trust—Insurable interest.*]—Interpleader as to proceeds of insurance policy.

A. deB. Winter, for plaintiff.

A. A. McGillivray, for defendant.

SIMMONS, J.:—This is an interpleader issue between the above claimants arising out of an insurance policy effected by Thomas W. Gravelle upon his own life with the Continental Life Ins. Co.,

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for the sum of $5,000, and in which his brother Joseph W. Gravelle was named as the person to whom said insurance money was payable in the event of the death of the insured during the term of the policy.

The policy was effected on May 11, 1914, and the company have paid into Court the moneys, the subject matter of this action.

On April 1, 1915, Thomas W. Gravelle made his will in which he bequeathed $2,000 of the said insurance money to Stella M. Rudolph, and he died on April 30, 1915. J. W. Gravelle has elected to take under said policy and against the will.

Stella M. Rudolph claims $2,000 of said insurance moneys under the will, either directly on her own behalf or as claimant through and on behalf of the executors of the estate of the deceased.

J. W. Gravelle supports his claim upon two grounds. The first ground rests upon a contract with the deceased whereby each took out a policy upon his own life for the sum of $5,000 and named the other as the beneficiary under a mutual agreement to that effect and in pursuance of said agreement he, J. W. Gravelle, insured his own life for $5,000 and named his brother as beneficiary and that he paid the premiums on his own policy.

He also supports his claim upon the ground that he had outside of this mutual agreement an insurable interest in the life of his deceased brother, because they were carrying on business together as wine merchants and although their business was carried on in the name of a company incorporated under the Companies Ordinance, his deceased brother was in effect a partner as there was only one other shareholder, whose interest was a nominal one.

Stella M. Rudolph supports her claim on two grounds. In the first place, the policy is alleged to come within the prohibition of sec. 3 of 14 Geo. III., ch. 48 (Imp.), against insurance contracts of a wagering nature; and J. W. Gravelle cannot invoke the assistance of the Court in maintaining his claim. In the second place, she claims that in any event there is a resulting trust in favour of the estate of the deceased and that, while under the insurance policy, although the company are required to pay the moneys to J. W. Gravelle, he is trustee for the same in favour of

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the estate of the deceased and liable to the executors for the same.

Dealing with the contention that the policy is within the prohibition of the above statute, it may be observed that while the statute prohibits a person from contracting for insurance, or paying the premiums on a policy upon the life of any one in whom the contractor has no insurable interest, it does not in any way prohibit a person *bonâ fide* insuring his own life and naming any one as the payee whether the latter has any insurable interest or none in the life insured.

It is only when a person insures *the life* of *another* that the question of interest in that life becomes important, and any one may lawfully *bonâ fide insure his own life* and make the insurance payable to one who is totally without an insurable interest in his policy. *Per* Taschereau, J., in *North American Life Assurance Co.* v. *Erophy*, 32 Can. S.C.R. 261, at 266. See also *North American Life* v. *Craigen*, 13 Can. S.C.R. 278.

The mutual agreement between the brothers formed no part of the contract of insurance made with the company and the claim that the mutual agreement was for the purpose of enabling each to effect an insurance upon the life of his brother does not affect the contract of insurance with the company as it formed no part of the insurance contract with the company. Each contracted separately with the insurance company and each paid his own premiums—the premium on J. W. Gravelle's policy amounting to $63.75, while that on Thomas W. Gravelle's policy was $74.75.

The second contention that there was in any case a resulting trust in favour of the estate of the deceased raises an important question and one upon which there has been a divergence of opinion. The extreme limit to which the doctrine has been carried is illustrated in *Re Scottish Equitable Life Assurance Co.*, 71 L.J. Ch. Div. 191, where W. S. effected a policy upon his own life "for behalf of H. S." and provided that the policy moneys should be payable to H. S., her executors, administrators and assigns. Subsequently W. S. went through a form of marriage with H. S., who was his deceased wife's sister. It was held that the relationship between the parties was not such as to raise any presumption of advancement in favour of H. S. whose administrator was in equity a trustee for the estate of H. S.

I am of the opinion that the present case does not come within the principle of the above case and that the presumption that it

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was the intention of the deceased that his brother should have a vested interest in the entire policy may be supported upon both of the grounds upon which he rests his claim.

In *Griffiths* v. *Fleming*, [1909] 1 K.B. 805, 808, a joint insurance policy of husband and wife in favour of the survivor, in which each paid a part of the premium, was the subject matter and Vaughan Williams, L.J., observed:—

> It is to be observed there is a practical reason for construing these joint insurances of husband and wife as an insurance by each of the other's life and not as an insurance by each of his or her own life, namely—that these joint insurances in practice are generally effected by partners so as to afford protection against loss to the surviving members of the firm likely to arise from the withdrawal of the capital of the deceased partner: and in such case, the nature of the loss provided against seems to negative the construction which would treat the policy as being on the life of each insuring partner.

although in the present case each took out a separate policy, there was a mutual intention that the survivor should receive the benefit of the policy upon decease of the other.

Bunnell v. *Shilling*, 28 O.R. 336, is an authority supporting the claim arising out of a contract with his brother, the consideration for which was the mutual covenants of each of the brothers. I find, therefore, in favour of the claimant J. W. Gravelle. *Judgment accordingly.*

CREIGHTON v. DUNKLEY.

Alberta Supreme Court, McCarthy, J. June 27, 1916.

VENDOR AND PURCHASER (§ I E—27)—*Rescission of agreement of sale of land—Fraud.*]—Trial of a counterclaim alleging misrepresentation and fraud in the sale of land.

H. P. O. Savary, for plaintiffs.

J. C. Brokovski, and *J. B. Roberts*, for defendant.

MCCARTHY, J.:—This action was brought to recover the amounts due under an agreement in writing for the sale of lands in the pleadings mentioned, made between the plaintiffs and the defendant, and for other relief mentioned in the statement of claim, the defendant counterclaiming for damages for misrepresentation.

An order *nisi* was issued out of this Court in favour of the plaintiffs on September 15, 1915, without prejudice to the right of the defendant, to proceed to trial on the counterclaim.

The trial came on for hearing before me on November 18, 1915, and after the hearing of the evidence produced on behalf

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of the defendant in support of the counterclaim the further hearing of evidence was postponed at the request of counsel for the defendant to enable him to obtain under commission the evidence of a witness resident outside the jurisdiction of this Court. The defendant subsequent to the said hearing delivered amended pleadings, and on June 18, 1916, the further trial of the counterclaim was resumed.

The pleadings as finally amended allege two grounds of action, firstly, that the plaintiffs by themselves or their agent induced the sale by false and fraudulent misrepresentation, and, secondly, that the agent who induced the sale occupied a fiduciary relation with respect to the defendant, and that there was not that complete and full disclosure on his part as the defendant was entitled to under the circumstances, or that there was a breach of duty arising from fiduciary relationship and that the defendant was entitled to relief on that footing.

The defendant's claim for the rescission of the contract had been previously struck out and the counterclaim on the part of the defendant now is for damages for deceit.

The defendant alleges that the plaintiffs' agent Kelly induced him to purchase by false and fraudulent misrepresentations the property in question in the action.

It is to be observed from the evidence that the defendant and Kelly at one time resided in Bermuda, that Kelly went from Calgary to Bermuda to sell western lands, that he succeeded in getting the defendant interested in Louise Park, a subdivision some distance east of the city of Calgary and close to the land in the pleadings mentioned, that the defendant subsequently and in the month of September, 1912, came to Calgary and while here gave Kelly a power of attorney to dispose of Louise Park for him. At this time Kelly shewed the defendant the lands mentioned in the pleadings which he subsequently purchased and that it was during the negotiations for the sale of these lands that the alleged misrepresentations were made.

The misrepresentations, if any, as far as can be gathered from the evidence were:—(1) That Kelly pointed out a portion of land on an adjoining property that was reserved for a station on a proposed electric railway line. (2) That he pointed out a neighbouring property and said it was being held for sale for $500 per acre. (3) That he pointed out a property known as Victoria

Square and said that the lots there had been sold for $200 apiece. (4) That new industries were in the course of construction south of Victoria Square. (5) That the defendant would double his money. (6) That $335 (the purchase price) per acre was a very low price for the lands in question.

The defendant claims $25,000 damages for misrepresentation. To enable the defendant to succeed on his counterclaim and obtain damages for deceit he must shew that the representations were *false in fact* and *fraudulent in intent;* that, I think, is the result of the decision in *Derry* v. *Peek*, 14 App. Cas. 337.

Referring to *Derry* v. *Peek*, Wetmore, C.J., said in *Davis* v. *Burt*, 3 S.L.R. 446 at 453:

> Although possibly that case is not theoretically binding on this Court, practically it is—at least, I consider it would be a very daring Judge who would venture to decide contrary to the unanimous judgment of a Court of such high authority in the Empire. That case, as it appears to me, merely decides that in an action for deceit, although a person may make a statement without reasonable ground for believing it to be true, if he makes it in the honest belief that it is true, it is not fraudulent and does not render such person liable in such an action.

From a perusal of the evidence I cannot find that any of the representations charged by the defendant were *false in fact* and *fraudulent in intent*.

The cases cited by counsel for the defendant do not overrule the doctrine laid down in *Derry* v. *Peek*, *supra;* true they may distinguish it but upon facts entirely dissimilar to those appearing in this case.

The case of *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, relied on by the defendant, discloses facts entirely dissimilar to the facts in the present case. Nor can I see the application of the principle laid down in *Lloyd* v. *Grace, Smith*, [1912] A.C. 716, to the facts in the present case which is also relied on by the defendant.

If I am justified in concluding that the principle laid down in *Derry* v. *Peek* is still good law, do any of the representations complained of fall within the requirements necessary to succeed in an action for deceit? To my mind they do not, but rather within the category to be found in the cases referred to in Hals., vol. 25, at pp. 300 and 301, and in vol. 20, under "Misrepresentations and Fraud," as expressions of opinions affecting the value as distinct from matters of fact or where a purchaser cannot avoid liability to perform his contract on the ground that he has

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been misled by statements which are mere puffing, or where exaggeration is not misrepresentation or matters of opinion or expectation which do not constitute in law a representation.

The misrepresentations relied on by the defendant were practically abandoned at the resumption of the trial and the ground urged upon which the defendant was entitled to succeed was practically confined to his claim for relief on the footing of breach of duty arising from a fiduciary relationship exsiting between the plaintiffs' agent Kellyand the defendant, and this brings me to the consideration of the defendant's second cause of action as disclosed in their pleadings filed before the resumption of the hearing.

To substantiate this claim the defendant puts in the correspondence had between Kelly and himself and the power of Attorney referred to. From a perusal of these documents I cannot find that any such relationship existed. The authorities cited from Spencer Bower on Actionable Misrepresentation do not meet this case; there is no evidence of fraudulent non-disclosure on the part of the plaintiffs.

The facts of this case seem to disclose that it is similar to many that come before us arising out of the real estate boom. The purchaser bought on a rising market and seeks to rescind on a declining one. He made payments under the agreement subsequent to the down payment. He held the property without attempting to repudiate the contract for upwards of two years. During that time the vendors could not sell as the purchaser was holding on to see if his speculation was good or bad and then when the financial market tightened up and another instalment fell due he seeks to repudiate the contract.

For the above reasons amongst others I am of opinion that the counterclaim should be dismissed with costs.

Counterclaim dismissed.

EDMONTON PORTLAND CEMENT CO. v. DUPLESSIS.

Alberta Supreme Court, Hyndman, J. April 3, 1916.

BILLS AND NOTES (§ V B 2—138)—*Rights of holder in due course—Acquiring note for shares from officer of corporation—Knowledge.*]—Action on a promissory note given by the defendant to the plaintiff for shares in the plaintiff company, which note was subsequently endorsed to the plaintiff company.

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O. M. Biggar, K.C., and *S. W. Field*, for plaintiff.

E. B. Edwards, K.C., for defendant.

HYNDMAN, J.:—The evidence convinces me that the defendant intended and believed he was purchasing shares direct from the company through the company's agent, and his whole evidence on this point is clear that he had no knowledge or notice that he was buying shares from Allen Haynes, Ltd. The agent's overtures to him did not reveal any other arrangement. He signed nothing except the promissory notes for $50 and $500 respectively in favour of Allen Haynes, Ltd., which by itself could not be imputed to him as knowledge under the circumstances, Haynes himself being the manager of both companies, and the plaintiff's office being both that of Allen Haynes, Ltd., and Allen Haynes himself. There is no evidence as to whether the agent who canvassed him was in fact the agent of the plaintiff company or Allen Haynes, Ltd. I do not think it matters that the sub-agent's name is unknown to the defendant, but the fact is that he took the defendant to the plaintiffs' registered office, which, as above stated, was also the office of Allen Haynes, Ltd. If such is the case the defendant did not, and on the facts with reference to the disposition of the shares of the plaintiff company, could not acquire what he intended to purchase, namely, an allotment of shares from the company direct. Buying treasury stock in my opinion is quite a distinct thing from buying assigned shares already allotted by the company.

On the other hand, however, there is nothing in the evidence to shew that Allen Haynes personally knew anything of what transpired between the agent and the defendant; if personal knowledge could be brought home to Allen Haynes, then I think that knowledge might well be imputed to the plaintiff company. Even allowing the defendant's motion for amendment to his statement of defence, I still think him liable. There is no evidence upon which I can find that fraud, conspiracy or collusion existed or was entered into between Haynes or Haynes, Ltd., and the plaintiff company. So far as the plaintiff is concerned they were not selling the shares in question; they had already been disposed of, formally, at least to Haynes and Allen Haynes, Ltd.; consequently there was no necessity for a prospectus, and the original notes having been endorsed to the plaintiff company before maturity, and for which shares were transferred, issued,

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and registered in the defendant's name, in the absence of notice of anything irregular in the transaction, I feel bound to conclude that the defendant is liable.

The only case I have found bearing on the question of a person acting in a dual capacity such as this one is *Re Fenwick, Stobart and Co.; Ex parte Deep Sea Fishery Co.*, [1902] 1 Ch. 507.

The knowledge therefore which Allen Haynes constructively at least had as manager of Allen Haynes, Ltd., on the authority of the case referred to should not be imputed to the plaintiff company of which he was also manager.

Judgment for plaintiff.

HENSHAW v. FEDERAL OIL AND GAS CORP., LTD.

Alberta Supreme Court, Simmons, J. March 29, 1916.

MECHANICS' LIENS (§ IV—15)—*For drilling oil—Promise to pay—Statute of Frauds.*]—Action under Mechanics' Lien Act (Alta.), 1906, ch. 21, sec. 4.

Duncan Stuart, and *W. H. Sellar*, for plaintiffs.

H. P. O. Savary, for defendants.

SIMMONS, J.:—The defendants are assignees of a lease from the Department of the Interior of Canada, of the oil and natural gas rights upon the north-east quarter of sec. 22, tp. 20, r. 28, w. of the 4th M., in the Province of Alberta.

The defendants, the Federal Oil and Gas Corporation Ltd., connected with the Alberta Drilling Co. Ltd. for the drilling of an oil well upon the said lands and plaintiffs are employees of the said Alberta Drilling Co., and their claim is for wages earned while in the employ of the Alberta Drilling Co. Ltd., carrying out the said operations of the boring on the said land and for a lien under the Mechanics' Lien Act, 1906, ch. 21. The plaintiffs also claim an undertaking by the defendants, the Federal Oil and Gas Corp. Ltd., to pay the plaintiffs for said work. The Alberta Drilling Co. Ltd. have gone into liquidation and are being wound-up and although made party to defendants in this action are not defending it. The defendants deny that the plaintiffs have performed the work which is the basis of their claim. In the alternative the defendants claim that the plaintiffs are not entitled to a mechanics' lien upon the interests of the defendants upon the said lands and alternatively plead the Statute of Frauds as a defence to the claim of the plaintiffs that they undertook to pay

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the plaintiffs' wages while employed on the said work. As to the first defence raised by the defendants I find that the defence is not sustained by them. The evidence of Henshaw, the head driller, is sufficient in my mind to establish the claim of the plaintiffs for the wages earned. I am not able to find, however, that the plaintiffs are entitled to a lien upon the interests of the defendants upon the said lands under sec. 4 of the Mechanics' Lien Act. The words relied upon are as follows:—

> Doing or causing work to be done upon or in connection with or the placing or furnishing of materials to be used in or for clearing, excavating, filling, grading, track laying, draining or irrigating of any lands in respect of a tramway, railway, mine, sewer, drain, bridge, flume, or other work.

The use of the word "mine" in this contract is explained by the terms "clearing, excavating, filling, grading, track-laying, draining, etc." I think it is quite clear then that if the word "mine" in this section was intended to include the drilling of an oil well that some apt term would have been inserted such as drilling, boring, or other such apt term. As to the other alternative defence I think the statute is a bar to the claim of the plaintiffs under the alleged promise of the defendant to pay for the work contracted for by the Alberta Drilling Co. Ltd. In the result then the plaintiff's claim against the Federal Oil and Gas Co. is dismissed. The defendants, however, have put the plaintiffs to the expense of proving that the work was actually performed and although they set up the alternative claims as a bar to their action, these alternative claims which I have found in their favour, raised questions of law only which could have been decided without the expense of a trial of the issues of fact as to the performance of the work, and in the result I think there should be no costs to the defendants. *Action dismissed.*

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CANADIAN NORTHERN PACIFIC R. CO. v. BYNG HALL.

British Columbia Supreme Court, Gregory, J. February 12, 1916.

WRIT AND PROCESS (§ II A—23)—*Originating summons—Return days—Filling in blanks—Jurisdiction of Court.*]—Preliminary objection to jurisdiction to hear originating summons.

E. C. Mayers, for plaintiff.

J. A. Aikman, for defendant.

GREGORY, J.:—In this matter Mr. Mayers raises the preliminary objection that there is no jurisdiction to hear an originating summons. He bases his objection on the amendment to the Supreme Court Rules made on September 26, 1912, whereby

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r. 4B. of O. 54, which provided for the return day of same, was struck out. If sustained, this objection would do away with originating summonses altogether, although the rules still provide for their issue; it would also upset the well established practice of this Court. I cannot believe that the amendment to the rules was ever intended to produce any such anomalous condition of affairs.

R. 4B provided that the day and hour for attendence under an originating summons should be *left* to be added after sealing when such day had been fixed at Chambers. The suppression of this rule by the amendment referred to simply wipes away the provision that such day and hour shall be *left blank* to be fixed by a Judge at Chambers. The natural inference is that thereafter such blank should no longer be left but should be filled in before sealing.

R. 4A. provides that the summons shall be in the form given in the appendix "with such variations as circumstances require."

R. 5, which has not been affected by the amendment, speaks of the return of the summons and provides that on any party to the summons failing to attend on such return day, the Judge may proceed to hear it *ex parte*. This necessarily imports that a return day has been fixed.

If there is no explicit authority to the registrar or a Judge under the rules (but see rule 40, where the registrar can do it in one case) to fix a return day, I think the Court has an inherent jurisdiction to do so, otherwise all the provisions in the rules with reference to the issue, etc., of such summonses would be rendered nugatory: See *Ex parte Games*, 3 H. & C. 294.

The new rule 440A, which is 16 (*a*) of order 36, provides that the Court or Judge may make such order as may seem meet as to the date of the trial of any action or *issue*, etc. In the circumstances it seems to me that this rule alone would, in the absence of any other provision of the rules, or inherent right of the Court, enable a return day to be fixed at Chambers.

The preliminary objection will be over ruled, and the hearing of the summons may be proceeded with before the Judge in Chambers—as I have not heard the merits at all it will be unnecessary to bring it on before me.

The costs of hearing this objection will be Mr. Hall's in any event. *Objection overruled.*

GRACE v. KUEBLER. ALTA.

Alberta Supreme Court, Harvey, C.J. June 27, 1916. S. C.

VENDOR AND PURCHASER (§ III—38)—*Agreement for sale of land—Payment in full—Subsequent assignment and transfer of property by vendor to third party as security for loan—Failure of assignee to give notice of assignment to purchaser or to register transfer—Fraud.*]—Action for deferred payments under an agreement for sale of land, and counterclaim for transfer.

A. H. Clarke, K.C., and *J. M. Carson*, for plaintiff.

O. M. Biggar, K.C., and *E. A. Dunbar*, for defendant.

HARVEY, C.J.:—On June 27, 1912, John Steinbrecker and Arthur Steinbrecker, the registered owners—the former alone conducting all negotiations, prior and subsequent—entered into an agreement in writing to sell to the two male defendants, Walter A. Kuebler and Carl Brunner, section 17, township 22, range 29, west of the 4th meridian, east of Bow River. The purchase price was $21,600, of which $4,600 was paid on the execution of the agreement, and the remaining $17,000 was payable in 6 practically equal annual instalments, the first falling due in 1 year and 3 months after the date of the agreement. The agreement contained a provision that the purchasers might pay off at any time. It also provided that the purchasers might occupy the land until default. The defendants at the same time purchased from Steinbrecker stock and other personal property for which they paid $3,400, and went into occupation of the land and have continued to occupy it since.

In March of the following year, 6 months before the first instalment was due, Steinbrecker approached the purchasers and offered if they would pay up the deferred payments to accept $12,000 in full satisfaction. There was an alternative proposition to loan Steinbrecker $10,000, which however is not material. The purchasers were German Swiss, neither speaking the English language at that time, and had been in Canada only a few weeks when the agreement was entered into. The negotiations were conducted in German and on behalf of the purchasers almost entirely by Kuebler. The latter said he would write home and see what could be done. He did communicate with his sister, wife of his co-purchaser, the other defendant in this action, and she raised $10,500 which was sent out and paid to Steinbrecker.

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She came out herself, arriving after the money, and after her arrival the three defendants gave a note to Steinbrecker for $1,500, to make up, with the $10,500 cash, the $12,000 which he was willing to accept in full, and he gave them a receipt for "$1,500 balance in full of the farm they bought from me." The note was given on July 5, and Steinbrecker then said he would give them the title in a few days. He had previously handed over some documents as security, and had later given an undertaking which is dated May 14, though the oral testimony raises doubt whether it was not given later, to exchange the title for the security in 30 days. The defendants had no solicitor and had no suspicion that they would not obtain title in due course. They had had the original agreement executed before a notary public which they supposed made everything secure. The explanation given for the delay in giving title was that someone else was concerned. The sister says that she understood that the documents were in the custody of someone who was away at the time. Kuebler says that Steinbrecker told him that somebody else was interested. From the imperfect knowledge of English possessed by Kuebler, who, however, gave his evidence in English, and from the evidence of his sister, the impression I formed was that he did not mean that someone else was interested in the sense of having a claim against the property but interested in the sense of being connected or concerned with the title papers.

In the meantime, subsequently apparently to the first negotiation with the purchasers to obtain payment in full, Steinbrecker had in April obtained a loan of $20,000 from the plaintiff, for which he had promised to pay him $27,000 and had given in addition to other securities an assignment of his agreement and a transfer of the land. With the assignment was handed over to the plaintiff the original agreement with the defendants. The plaintiff did not notify the defendants of the assignment until a year later, nor did he register his transfer, as he might have done, since, the property being encumbered, the duplicate certificate of title would necessarily be in the Land Titles Office, but he filed a caveat on April 8, the reason given for not registering the transfer being that as it was taken only as security it might never become necessary to register it. The defendants asked for their title from time to time, but were put off with some excuse, and it was not until the fall when a demand was made from the bank

for the first deferred instalment that they learned of the dishonesty of Steinbrecker.

Naturally Steinbrecker was not available as a witness at the trial but his evidence was taken on commission but only a small portion was read, but it corroborates the defendants. From the opportunity I had of hearing the evidence of the defendants I am entirely satisfied of their absolute honesty in the transaction and of their innocence of any knowledge of the interest of anyone other than the Steinbreckers in the property.

The plaintiff is now suing for the deferred payments which would be due according to the terms of the agreement and the defendants counterclaim for a transfer.

It is an unfortunate case where one of two innocent parties must suffer through the dishonesty of another who was dealt with as an honest person.

It is urged on behalf of the defendants that the plaintiff in order to succeed should have given notice of his assignment in accordance with the provisions of the Judicature Ordinance respecting assignments of choses in action. (S. 10 par. 14, as enacted in 1907). In reply it is contended that this assignment being of an interest in land the rule as to assignment of choses in action does not apply, and reference is made to *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch. 231. In that case, at p. 254, Sterling, L.J., with whom Rigby and Vaughan Williams, L.JJ., concur, says:—

> Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty. The reason is thus stated by Sir William Grant in *Jones* v. *Gibbons*, 9 Ves. 411; 7 R.R. 247, 250. "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment"—that is, of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt."

The same Judge had dealt with the subject in an earlier case, *Humber* v. *Richards* (1890), 45 Ch. D. 589, in which he gives a longer quotation from Sir William Grant's judgment in *Jones* v. *Gibbons*.

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It is true that the owner of land subject to an agreement of sale is in a position in some respects analogous to that of a mortgagee under the old system where the mortgage passed the legal estate, but there are some points of difference. The assignment of the mortgage passed both the estate in the land and the debt. In the present case the assignment of the agreement is in reality simply an assignment of the purchase moneys. The estate in the land is assigned by a transfer, which, however, effects a transfer of the title only when registered. There is no doubt room for argument that a vendor cannot without the consent of the purchaser divest himself of the burden of the agreement and vest it with the benefits in an assignee, for by the agreement the vendor undertakes to give a transfer, and by sec. 40 of the Land Titles Act any transfer contains an implied covenant. What right has a vendor to say to his purchaser, "You shall take some other person's covenant instead of mine"? But be that as it may, the transfer of the land does not necessarily carry the debt as it does in the case of the mortgage.

There is, however, a perhaps more serious objection to applying that rule in the present case. The question under consideration there was one of priorities between persons claiming from the assignor in the same form, and can clearly not have been intended as a rule applicable to all rights of all parties, for it seems clearly established that a mortgagor may effectually discharge his liability by paying to the mortgagee after assignment if he has no notice of the assignment. See Coote on Mortgages, 8th ed., p. 344. This principle was recognised by the same Court, only a year before the *Taylor* decision, in *Dixon* v. *Winch*, [1900] 1 Ch. 736, and is referred to by Vaughan Williams, L.J., as a "recognised rule in equity." It is apparent that this imposes a qualification upon the general terms expressed by Sir William Grant and adopted in the *Taylor* case, and it is the one point which is of importance here, and the principle seems as applicable to the present case as to the case of a mortgage under the English system. It may well be that the assignee becomes vested with all the legal rights of the assignor without notice so as to permit him to sue and collect the debt, but yet that a Court of Equity will not permit him to collect the moneys when he has been so neglectful of his rights and, perhaps it may be said, his duty to protect the debtor as not to notify the latter that he has acquired

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the rights of the assignor. On this ground I am of opinion that the plaintiff has lost his right to collect the money from the defendants by failing to give them notice of the assignment before they paid, unless the filing of the caveat will give him the benefit that the actual notice would have given him.

Much has been said in our Courts and in the Australian cases on the effect of a caveat as notice, and no doubt much more will be said before the principles are all settled, but for the present case I will deal with the plaintiff's rights as if he had registered his transfer instead of a caveat. I think the caveat can clearly give him no rights that the registration of the transfer, the rights under which it is intended to protect, would not give—they may be less, but they cannot be more—and the procedure by caveat is really intended to protect rights which can only be protected in that way. The caveat notifies the caveator's interest as "under and by virtue of a transfer.....from.....registered owners....." By sec. 87 no instrument can be registered unless expressed to be subject to the claims of the caveator. If the transfer had been registered no instrument whatever could be registered except one executed by the caveator, as his protection would be wider. The effect of registration of the transfer would be to make the plaintiff registered owner, or, in other words, to accomplish what under the system in force in England would be accomplished by the execution and delivery of a deed of transfer.

The Ontario Registry Act and Acts of similar character provide that the registration of instruments shall constitute notice to all persons claiming any interest subsequent to the registration, but our Act makes no such provision. The distinction in this regard between statutes, the machinery of which is to create titles or interests in land, and those for the purpose of protecting interests created or to be created is clearly indicated by Duff, J., in *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, and though he was a dissenting Judge, there is nothing in the view of the majority inconsistent with the general principle.

Even under the Ontario system it was held in *Pierce* v. *Canada Permanent Loan Co.* (1894), 25 O.R. 671 (affirmed on appeal 23 A.R. (Ont.) 516), that advances made by a mortgagee under a mortgage providing for future advances, without actual notice of

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a subsequent mortgage registered before the subsequent advances were made, were entitled to priority over the subsequent mortgage.

Peck v. *Sun Life Assurance Co.* (1904), 11 B.C.R. 215, is a case in principle very similar to the present one. A husband conveyed land to his wife, who entered into an agreement to sell it, the purchase money being payable in instalments. An action was brought by a creditor to set aside the transfer to the wife as fraudulent and a *lis pendens* filed. It was held by the full Court that the registration of the *lis pendens* was not notice to the purchaser of the adverse claim and he was protected in respect of the payments he made before actual notice.

I can find nothing in the terms of our Act or in its principle which would make the registration notice to the purchasers, and even if the Act were for the same purpose as the Ontario and British Columbia Acts, on the principle of the cases I have cited it would appear that the purchasers in this case would be protected.

It is to be observed, too, that the caveat gives notice of the transfer only, and neither of them gives any notice of the assignment, so that the only notice the purchasers could have had would be that the plaintiff had become the registered owner of the land or entitled to be such, and it would not follow that he was also entitled to the purchase moneys under the agreement. In *Carey* v. *Roots*, 17 D.L.R. 172, Carey had an option to buy from Roots, who conveyed the land before the option was exercised to one Brown of which conveyance Carey was notified. Idington, J., at p. 178, says:—

> The conveyance to Brown was subject to the rights of the respondent. A tender of acceptance of the option and of the cash payment ought to have been made to Roots, and, possibly, as a precaution, also to Brown as his assignee.

This involves of course that, notwithstanding the transfer to Brown and the purchaser's knowledge of it, he was at liberty and even bound to pay the party with whom he contracted.

To hold that registration under the circumstances of this case, even if it indicated the assignment of the purchase money, would be notice to the purchaser, would mean that no purchaser could with safety pay any instalment of principal or interest except at the Land Titles Office after search. It would involve that every mortgagor would be under the same handicap. The assignment to the plaintiff, if effective at all as against the purchasers, was

undoubtedly subject to the purchasers' rights. Then what were these rights? Surely one was to assume that the person entitled to receive the purchase money was the person to whom they had agreed to pay it until they received actual notice to the contrary.

The plaintiff failed to give the notice which the law, even if it did not demand, suggested, and which prudence would seem to demand. Indeed, it would seem to be an act of prudence to ascertain before advancing the money what the state of the account was, but in this case no loss was suffered by failure to do that.

The registration by the purchasers of a caveat to protect their interest under this agreement would have been immaterial here because the plaintiff had all the knowledge of it.

I am therefore of opinion that the plaintiff cannot succeed in his action for any part of the purchase money, and it must therefore be dismissed with costs.

In his evidence the plaintiff stated that some of the money advanced by him was to go to pay off some mortgages on the land. It appears from the certificate of title that two discharges were registered shortly after his money was advanced. If the title was cleared of these encumbrances by the money advanced by the plaintiff it may be that he is entitled to a lien for the amount. The point was not discussed and the evidence is not sufficient to determine the fact. I think it advisable, therefore, if the plaintiff desires it, that there should be a reference to the Master or clerk to determine the facts and upon consideration of his report the rights of the parties in this regard can be determined. If the plaintiff does not wish the reference there will be judgment for the defendants on the counterclaim with costs declaring them entitled to a transfer of the land which is now free from encumbrance. *Judgment for defendant.*

PIERSON v. EGBERT; BURNS v. EGBERT.

Alberta Supreme Court, Walsh, J. March 29, 1916.

CORPORATIONS AND COMPANIES (§ V B I—178)—*Cancellation of subscription—Allotment of shares unpaid—Irregularity—Costs.*]—Action under sec. 108 (4) of the Companies Ordinance (Alta.), N.W.T. Ord. 1911, ch. 61, for return of money paid on subscription and for judgment against directors.

Alex. Hannah, and *D. M. Stirton*, for plaintiffs.

F. W. Griffiths, and *L. H. Miller*, for defendants.

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WALSH, J.:—The plaintiff in each of these cases in the year 1913 subscribed for shares in the defendant company, the Crystal Ice Co. Ltd., of which the individual defendants are the directors. The shares for which they so subscribed were part of an issue of 6,000 shares offered for public subscription. No amount is fixed by the company's memorandum or articles of association or was named in the prospectus as a minimum subscription upon which the directors might proceed to allotment. Under sec. 108 of the Companies' Ordinance no allotment of these shares should therefore have been made to the plaintiffs until the whole amount so offered for subscription had been subscribed for. The applications for shares fell far short of this number, only 1,173 shares having been taken up to the end of the year 1914. The plaintiffs' claim is under sub-sec. 4 of sec. 108 of the Ordinance for a return by the company to them of the money paid in respect of their applications and for a personal judgment against the directors for the same with interest.

Unless the shares so applied for by the plaintiffs have been allotted to them they are clearly entitled to the relief which they claim, for the conditions imposed by the section were not complied with by the company within forty days after the issue of the prospectus or at all and the money paid by the plaintiffs was not repaid to them within forty-eight days after the issue of the prospectus or at all.

Sec. 108 standing by itself amounts to a statutory prohibition against the allotment of shares offered for public subscription except under the conditions imposed by it, which would I think but for sec. 109 make absolutely void an allotment made in contravention of it. That section must, however, be read with sec. 109.

Neville, J., in *Burton* v. *Bevan*, [1908] 2 Ch. 240, held that sec. 4 of the Companies' Act 1900, of which sec. 108 of the Companies' Ordinance is a copy, applies only before allotment and that after allotment is once made whether in contravention of the Act or not it is only voidable at the option of the shareholder and that the only liability of the directors after allotment is to make good the loss under sec. 5, sub-sec. 2 of the Act corresponding to sec. 109, sub-sec. 2 of the Ordinance.

This appears to me to be the only possible construction to place upon these sections. They mean, I think, that while shares

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must not be allotted until the prescribed conditions have been met, still an allotment of them in breach of sec. 108 is not void but voidable at the instance of the applicant within the period limited for that purpose. If the election to avoid the contract is not made it of course stands good and no cause of action arises against the company. If the election to avoid it is made within the prescribed period his right as against the company is to be relieved entirely of his contract and to get his money back and as against the directors who have knowingly contravened or permitted or authorised the contravention of the provisions of the Ordinance as to allotment his right is to compensation under sec. 109, sub-sec. 2, for any loss, damage or costs which he may have sustained or incurred thereby. The first question therefore that I must determine is whether or not the shares for which the plaintiffs applied were allotted to them before the commencement of this action.

I am of the opinion that these shares were so allotted. There is absolutely no evidence to shew when or how or by whom this allotment took place. It is more by the conduct of the parties than anything else that I am driven to the conclusion that the company accepted the plaintiffs' applications for these shares and that they knew that it had so accepted them. The application of the plaintiff Pierson for the first block of shares for which he subscribed was on August 20, 1913. He paid one-third of their par value, $833.33 on September 5, 1913, and gave his note at four months from the date of his application for the balance of $1,666.67, with interest. On December 26, 1913, he paid the interest on this note amounting to $39.96 and gave a renewal of it for sixty days which is still held by the company unpaid. His applications for the rest of the shares for which he subscribed were made on October 8, 1913, on which date he paid $1,000 on account and gave his two promissory notes for $1,500 and $2,500 respectively with interest payable in four months. January 14, 1914, he paid $500 on one of these notes and $250 on the other and paid the interest on both of them and gave renewals for the balance at two and three months upon which nothing has been paid. He says frankly that he made the payments following his initial payments and gave the renewal notes because he understood that his applications had been accepted though no formal notice of allotment was ever received by him. His name was

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entered in the company's stock book, and in this account he is debited with the value of his shares as of the dates of his respective applications and credited with the payments made and his name appears as the holder of all these shares in the return made by the company under sec. 31 of the Ordinance. The plaintiff Burns applied for his shares on October 18, 1913, paying $250 in cash and giving his two notes for $500 each for the balance payable in four and seven months respectively. He paid the first note on February 25, 1914, a few days after maturity, and the remaining note is still unpaid. His name appears in the company's stock book and in the government return in the same way as does that of the plaintiff Pierson. There is no evidence as to why this payment of February 25, 1914, was made, but it is consistent only with the idea that he knew that his application for the shares had been accepted. It is impossible for me to believe that this payment was made to and accepted by the company more than four months after his application for any other reason than that his application had to his knowledge been accepted by the company. I hold therefore that there was before action an allotment to each of the plaintiffs of the shares for which he had subscribed.

These allotments which were made in plain contravention of the provisions of sec. 108 were under sec. 109 voidable at the instance of the plaintiffs within one month after the holding of the statutory meeting of the company. That meeting has never been held, so that this period of grace is still open to the plaintiffs unless they have by their conduct since knowledge of the facts came to them affirmed their contracts or otherwise disabled themselves from repudiating them. The plaintiff Pierson says that in either January or February, 1914, he learned from the defendant Egbert, the president of the company, that the shares offered for public subscription had not been fully subscribed for and that he very shortly after this so informed the plaintiff Burns who asked him to look after his interests in the matter, and everything that was thereafter done by Pierson seems to have been done not only for himself but for Burns. On March 21, 1914, the plaintiffs' solicitors wrote to each of the directors of the company complaining that many of their acts had been illegal and *ultra vires*, and amongst them "that the allotment and issue of shares was irregular" and demanding from each individual director payment of the amount paid to the company by each of

the plaintiffs. This was, I think, plainly a repudiation of the contracts which had then been constituted between the plaintiffs and the company.

Then was there anything in the plaintiffs' conduct between the date when they learned of this contravention of sec. 108 and the date of this letter to make it impossible to give effect to this repudiation. I am unable to say, however, upon the evidence that such was the case.

In my opinion therefore the plaintiffs having within the prescribed limit of time elected to avoid the allotments of the company's shares improperly made to them are entitled to a judgment against the company for the amounts paid by them respectively on their shares with interest on each payment at the rate of 5% per annum, to the return to them of their unpaid notes and to have their names removed from the company's register of shareholders.

As I have already intimated the plaintiffs' remedy against the directors under the facts here present is not under sub-sec. 4 of sec. 108, but under sub-sec. 2 of sec. 109, and there is absolutely nothing in evidence before me upon which to found any liability under that sub-section upon any named director. All of the directors are defendants, but there is nothing at all to shew which of them contravened or permitted or authorised the contravention of the provisions of the Ordinance as to allotment or that those who did so did it knowingly, which Neville, J., in *Burton* v. *Bevan*, *supra* at p. 247, says "means with knowledge of the facts upon which contravention depends." I must therefore dismiss the action as against the individual defendants.

This makes it unnecessary for me to consider Mr. Hannah's other contention based upon the fact that the prospectus was not filed, as I have given him the full measure of relief as against the company to which he could under any circumstances be entitled, and I did not understand him to urge any personal liability upon the directors on this ground.

The question of costs is not without its difficulties. Originally there were two actions, one by Pierson and one by Burns. By the order for directions, however, they were consolidated and since then have been carried on as one action. The company and all of the individual defendants except Zimmerman defended by one firm of solicitors, one defence being delivered for all of

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them, while the defendant Zimmerman defended by another firm of solicitors. There does not appear to have been any good reason for this severance in the defences as all of the individual defendants were in the same interest and there is nothing in the facts suggestive of any difference in their degrees of liability, so that they could not in any event tax more than one bill of costs. The plaintiffs have recovered to the full extent of their claim as against the company and they should therefore have their costs as against it as of an action brought against the company alone. The individual defendants have successfully resisted the claim of the plaintiffs and they should have such costs as have been incurred by reason of their joinder. The difficulty is that there is no way by which the costs incurred by them can be separated from those incurred by the company. Their pleadings were delivered in their joint defence and were in terms equally applicable to them all. In all the subsequent proceedings, including the examination for discovery and the trial of the action, no line of demarcation seems to have been drawn between the company and the other defendants. A liberal construction of rule 29 of the rules as to costs will make it apply to this case, and it is I think a fitting case for its application. I therefore direct that the plaintiffs' costs in the Pierson case down to the consolidation be taxed under column 5 and in the Burns case to the same point under column 3, and that after the consolidation one bill be taxed to the plaintiffs under column 5 and that the plaintiffs recover from the defendant company one half of the total so taxed including witness fees, such costs to be as of an action against the company alone and to be taxed in one bill, and that otherwise there shall be no taxation of costs by any of the parties against the other.

Nothing was said by any person about the counterclaims against the plaintiff Pierson. He is entitled to have them dismissed, but as the only costs of them are a few paragraphs of pleadings I make the dismissal without costs. *Judgment for plaintiff.*

[Affirmed on appeal June 30, 1916.

RUSCH v. McANDREWS.

Alberta Supreme Court, Harvey, C.J. March 27, 1916.

JUDGMENT (§ V—252)—*Foreign judgment—Assignment—Effect of payment by co-debtor—Foreign law.*]—Action by assignee of a judgment.

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Frank Ford, K.C., for plaintiff.

O. M. Biggar, K.C., for defendant.

HARVEY, C.J.:—In 1909 the defendant and one Hollister and one Hellstrom were partners in a journalistic enterprise in Fargo, North Dakota. The business was subsequently converted into a joint stock company. Obligations were incurred by the three parties and subsequently three actions were brought and judgments obtained in North Dakota in favour of the Commercial Bank, Wright, Barrett & Stilwell Co. and Bismark Bank.

The judgments were subsequently assigned to the plaintiff and this action is brought to recover from the defendant his share of the liability.

It appears from the evidence that the plaintiff has no beneficial interest whatever in the judgments, that he paid for one assignment only, that of the Commercial Bank judgment, and was subsequently re-imbursed by Hollister or the Northern Savings Bank who advanced the money for the purpose on the credit of Mr. Hollister. The other two judgments were apparently both paid by Hollister, and the assignment made to plaintiff at his request. In the first two actions judgments were obtained for the full amount of the claims, but in the Bismark Bank case the judgment was for only the defendant's share of the liability, Hollister and Hellstrom having previously paid their shares.

In the Commercial Bank case Hollister claims to have been only a surety and the plaintiff claims the full amount of the judgment. In the Wright, Barrett & Stilwell's case the claim is for one-third of the amount of the judgment and in the Bismark Bank case it is of course for all.

It is apparent that the plaintiff has nothing to support his claim but the judgments, and Mr. Biggar for defendant contends that the judgments are extinguished by the payment by a joint debtor and the assignments to the plaintiff therefore pass nothing. It is true as Mr. Ford for plaintiff points out that the witnesses as to the foreign law, who are men of much experience, one of them being an ex-Chief Justice of the Supreme Court of the State, express the opinion that in hypothetical cases framed to suit the circumstances of the judgments, the judgment would not be extinguished, but they both admit that there is no statute or decision of that State establishing the law as they define it, and they base their conclusions on the principles of the common law

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as interpreted in other jurisdictions. Naturally the only authorities they refer to are those of other States of the Union.

I feel no doubt that in these conditions, though the foreign law involved is of course a question of fact, I am not bound to accept the opinion of the experts as conclusive, but may consider the reasons they give for it, and if, in my opinion, they lead to a different conclusion, I may adopt that conclusion, just as I might decline to find that a defendant was indebted to a plaintiff for $500, although the fact was sworn to, if the reasons given were that it was for 150 days' work at $3.50 a day or that it was for a certain sum of money with interest at a certain rate for a certain time, which by computation gave a different amount.

It may be noticed, too, that the opinions expressed seem to be largely confined to the right to bring an action on a judgment assigned under circumstances similar to those of the present case. Now it is apparent that a judgment is not ordinarily assigned to enable the assignee to sue on it, but rather to enable him to collect the amount without suit. A debtor who pays his co-debtor's share of the debt whether in judgment or not has no doubt a right to contribution, and would have a right of action against his co-debtor for such contribution. If, upon payment by him, an assignment of the judgment were made to him, it would be of little consequence whether his right of action were on the judgment or on the right of contribution, though it would be of some importance whether he could enforce the judgment without action. If Mr. Hollister were suing the difference would be unimportant, but when some one else is suing a different case is presented. The opinions seem to be confined to the question of the right to sue on a judgment when assigned, nothing being said about the right to enforce the judgment without action. It may be that this is due to the way the questions were put, and that no importance should be attached to this because if the judgment debt is extinguished by payment it would be extinguished as a foundation for a right of action as well as for all other purposes, though there is a possibility of forming an erroneous opinion by confusing the two rights. It seems clear that under the common law as interpreted by the English Courts until it was altered by the Mercantile Law Amendment Act, 19 & 20 Vict. ch. 97, the payment by one joint judgment debtor of the judgment debt extinguished it so as to leave nothing

capable of being assigned. A reference to the authorities referred to by the witnesses, including a somewhat exhaustive note contained in 68 L.R.A. (1904) at p. 573, shews that the decisions in the different State Courts are not all in harmony with the English decisions, though at p. 570 of the note referred to it is stated that:—

> The general rule that payment by one of several judgment debtors is payment by all, and absolutely extinguishes the judgment regardless of the intention of him who makes and the creditor who receives the payment, is well established.

I do not, however, find it necessary to come to a conclusion whether the opinion just quoted or that expressed by the experts in this case should be taken as the proper interpretation of the law of North Dakota, since it appears to me that as far as the judgments other than that of Bismark Bank are concerned, there is another defence which is good, and as regards that judgment different principles apply.

It is admitted by both expert witnesses that by the law of North Dakota as by our own law, it is competent to the defendant in such an action as this to set up any equities that exist between himself and the co-debtor on whose behalf the judgments are held. The defendant swears that he turned over to his co-defendant Hollister all his shares in the company, and that Hollister in consideration therefor released him from all liabilities, except the debt to the Bismark Bank. This evidence is supported by a letter dated August 16, 1910, signed by Hollister, addressed to the defendant, stating that the writer had sold all the common stock of the company for $13,435, which he was applying as stated in the letter, the Commercial Bank claim being one of the debts specially set out, some others being included under a general description. He continues that he has taken obligations as specified and concludes:—

> As fast as these notes are paid the items will be retired in the order above named, and retires all of the obligations upon which you, Hellstrom, and I are liable, with the exception of the $2,500 note at Bismark, my share of which I am ready to pay at any time

This defence was not set up specifically by the original or amended statement of defence, but notice was given six weeks before the trial of application to amend by setting up that Hollister received assets of the partnership and of the defendant more than sufficient to discharge all liabilities. At the opening of the trial Mr. Ford admitted that he had received ample notice of the intended application, and could not oppose it, and it was accord-

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ingly granted. Indeed, I understand that the trial was adjourned after the notice was given to give plaintiff time to meet it if desired. The evidence was objected to by Mr. Ford on the ground that Hollister was not a party and that the judgments were conclusive. On the first point I held that as Hollister was the person beneficially interested, evidence could be given of any statement or arrangement by him, and on the other that the judgments were in no way conclusive of the rights of the co-defendants as between themselves.

On behalf of the plaintiff there is no evidence whatever to answer that of the defendant, and upon that evidence I think I must find that in respect of the judgments of the Commercial Bank and Wright & Company, Hollister is the principal debtor and consequently that he has no right of contribution from the defendant. It is quite clear that any claim which the Northern Savings Bank has in respect of these judgments is a claim derived through Hollister since it is clearly stated that its claim is only as collateral security. Its claim therefore can be no higher than that of Hollister and for the reasons stated he could not succeed upon these judgments against the defendant, and the plaintiff as trustee therefore cannot maintain his action.

The Bismark Bank judgment, however, is in a different position for two reasons, both because it was not included in the settlement, and because Hollister and Hellstrom having paid their share of the indebtedness before judgment, they are liable as sureties only.

Whatever may be the rights in respect to joint debtors equally liable under a judgment, both by reason of the statutory law of the State of North Dakota cited by the witnesses, and the interpretations by the Courts of the States, I feel no doubt that the opinion expressed by the witnesses that the payment of the judgment by Hollister, who was a surety only, did not extinguish the debt, and that it could be assigned.

In the same notes to which I have referred on p. 571 following the page from which I have already quoted, it is stated:—

> If at the time of paying off the judgment the surety does some positive act evincing an intention to have the judgment survive and be enforced for his benefit against the principal, the judgment will remain in force. . . . For instance, if the surety takes an assignment of the judgment, the inference is unmistakable that he intends to keep it alive for his own benefit. . . .

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This is the case in States which adhere closely to the legal rule, when the assignment is taken in the name of the third party.

The plaintiff has released Hollister from the judgment and in one of the cases cited by the plaintiff's expert witnesses, the report of which is extended in the evidence, which was taken on commission, it is stated that a release of one judgment debtor is a release of all. But it appears that that result may not follow unless the release is under seal, and the evidence does not shew that this release is under seal. Moreover, the witnesses state that by the statutory law of the State, which they quote, a release of one debtor does not release his co-debtor, and I consider that is the law applicable. Mr. Biggar further objects that this liability is one arising out of partnership transactions which have not been settled, and that there should be no judgment until such settlement. The defendant states that upon a taking of the account he is satisfied that he would be found entitled to about $3,000 while Hollister states that he has advanced $12,000 more than his share.

Notwithstanding both of these statements, I am of opinion that if I am to give effect to the settlement sworn to by defendant and supported by the letters of Hollister, as I have done, I must consider that the partnership affairs have been settled except as to this claim.

Some objections were taken by Mr. Biggar to the proof of the assignments, but they did not go to this particular one. There will be judgment therefore for the plaintiff for $1,054.03, the amount of the judgment of the Bismark Bank, with interest thereon from its date, March 8, 1912, at 7% per annum, the legal rate by the laws of the State of North Dakota, with costs.

Judgment for plaintiff.

NEWMAN v. BRADSHAW.

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British Columbia Supreme Court, Clement, J. February 19, 1916.

ALIENS (§ III—19)—*Alien enemies—Actions by—Residence in neutral country.* [See annotation in 23 D.L.R. 375.]—Motion to set aside a writ.

G. E. Martin, for plaintiffs.

Donald Smith, for defendant.

CLEMENT, J.:—Motion to set aside the writ in this action on the ground that the plaintiffs are alien enemies. The plaintiffs

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are two brothers who for many years owned and worked a ranch in the Fraser Valley. In 1913, more than a year before the outbreak of the present war, they sold the ranch to the defendant and then moved to the State of Washington, where they now reside. Both are of German birth. One of the brothers, Gustaf Newman (or Neuman), emigrated from Germany in 1872 to the United States. In 1876 he received a certificate of naturalisation in the State of Pennsylvania. The other brother, Carl, left Germany in 1881 for the United States but never became naturalised there. Lately, however, he has taken the first step to that end by signing a declaration on oath of his intention to renounce allegiance to any foreign prince "and particularly to George V., King of Great Britain and Ireland, of whom I am now a naturalised subject." In explanation of this last statement, it should be mentioned that both brothers were on the municipal voters' list in this province and were, they say, in possession of some papers given them by a Canadian customs' officer, which they thought were naturalisation papers. These cannot be found and it is not now contended that these plaintiffs are British subjects or still of the German Emperor. In this situation I have not to consider the position of a natural born German who has become a subject or citizen—as distinguished from a mere inhabitant—of the United States. Whether or not he is still, as to all other countries than the United States, a subject of the German Emperor is a debatable question upon which it is not necessary to express any opinion. His co-plaintiff is a German subject and the broad question I have to consider is whether a German subject resident in the United States can sue in a Canadian Court.

Were it not for what was said by the Lord Chief Justice of England (Lord Reading), in delivering the judgment of the Full Court of Appeal in England in *Porter* v. *Freundenberg*, 84 L.J.K.B. 1001, as to the scope of the phrase "alien enemy" as used in the proposition that an alien enemy cannot sue in a British Court, I should have no hesitation in saying that a German subject by birth living in the United States and not naturalised there is debarred while the war lasts from seeking redress in a Canadian Court by a rule of law of long standing and undoubted authority. Much of what was said in *Porter* v. *Freundenburg* was *obiter* but it was a deliberate examination of and pronouncement upon the general principles which govern in cases where alien enemies are

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parties, plaintiff or defendants, to litigation in British Courts. So that if there were a pronouncement upon the very point now before me I should think it my duty to bow to the view expressed by such an august tribunal. But on a careful study of the judgment I am convinced that it does not lay down any such proposition as that residence in a neutral country by a natural born German takes him out of the category of alien enemy to the King of England. The judgment deals with the enlargement of the ambit of the term "alien enemy" so as to include those, even British subjects, who choose to signify their identification with the German cause by taking up or continuing their residence in Germany. But as I read the judgment the other side of the question is not touched. I think therefore I am free to follow what I have termed a long line of clear authority that the only exception to the rule that an alien enemy by birth can have no standing in a British Court is the case of an alien residing upon British soil under the King's Peace. I have found nothing in decided cases—and I have searched rather carefully—to weaken what was laid down by Sir Wm. Scott (afterwards Lord Stowell), in the oft-cited case of *The Hoop*, 1 C. Rob. 196:—

> Another principle of law forbids this sort of communication as fundamentally inconsistent with the relation at the time existing between the two countries and that is *the total inability to sustain any contract* by an appeal to the tribunal of the one country on the part of the subjects of the other. . . . The peculiar law of our own country applies this principle with great rigour.

And speaking of the High Court of Admiralty, he adds:—

> No man can sue therein who is a subject of the enemy unless under peculiar circumstances that *pro hac vice* discharge him from the character of enemy such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's Peace. But otherwise he is totally *ex lax*.

How completely war cuts off all intercourse, commercial or otherwise, between the subjects, respectively, of the states at war is emphasised in the recent judgment of the President of the Admiralty Division (Sir Samuel Evans), in *The Panariellos*, 84 L.J.P. 140; and this judgment was adopted by the Court of Appeal in *Robson* v. *Premier Oil &c. Co.*, 84 L.J. Ch. 629, in which it was held that an alien enemy can not validly give a proxy to a resident of England to vote his shares in an English company.

It is not necessary to discuss the earlier cases but I would point out that in several passages the effect of residence in the enemy's state is said to be that such a resident is to be treated as

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an alien enemy by birth, thus treating this letter as the case *par excellence* of exclusion. Nationality therefore is *primâ facie* one test but not the only test of the alien enemy.

In the case of an alien, resident here, subject by birth of the enemy state, *primâ facie* he cannot sue. The only reason must be that the tie of allegiance to the land of his birth is considered as a tie of such strength as to warrant the belief that it would lead the alien resident here to do what he could for his home land in the war. If in such case, where this country has control of the person of the would-be plaintiff,a special license is necessary, *a fortiori* in a case such as this the presumption of desire to act upon his allegiance on the part of the alien enemy resident in a neutral country where this country has absolutely no control over his actions should preclude the King's Court from affording such an alien any assistance *flagrante bello*. To hold otherwise is to say that the tie of allegiance when the subject is abroad is an idle fiction.

But in view of the course taken in the recent case *Re Mary, Duchess of Sutherland*, 30 T.L.R. 394, I enlarge this motion to the trial, to which the plaintiffs may proceed at their own risk.

Judgment accordingly.

HOWE v. HOWE.

British Columbia Supreme Court, Murphy, J. June 27, 1916.

MORTGAGE (VI E—90)—*Failure to pay interest—Right of foreclosure—Equitable relief.*]—Application for an order of foreclosure.

Maclean, K.C., for plaintiff.

Johnson, for defendant.

MURPHY, J.:—Whilst the case of *Canada Settlers' Loan Co.* v. *Nicholles*, 5 B.C.R. 41, decides that failure to pay interest gives a right of foreclosure, it does not deal with the matter from the standpoint of equity. The equitable view is set out in the judgment of Spragge, V.C., in *Cameron* v. *McRae*, 3 Gr. 311, the case relied upon in *Canada Settlers' Loan Co.* v. *Nicholles*, *supra*. The Court there, apparently, as the law then stood, could not give effect to the equitable view, and a new order was introduced conferring this enabling power which was acted upon in *Knapp* v. *Cameron*, 6 Gr. 559, and see particularly p. 563. The mortgage herein is made in pursuance of the Act Respecting Short Forms of

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Mortgages. It contains no acceleration clause, but it is argued the case of *Canada Settlers' Loan Co.* v. *Nicholles* imports such a clause. If it does, and I agree that is its effect, sec. 15 of the second schedule shews if the clause had been expressly incorporated in the mortgage that the mortgagor would on payment of all arrears with lawful costs and charges be relieved from the consequences of non-payment. It is argued that because the clause is not expressly set out but is inserted by operation of law, the clause can have no application. This would be I think a strange view for a Court of equity to take, but assuming it to be correct, by sub-sec. 14 of sec. 2 of the Laws Declaratory Act, ch. 133, R.S.B.C., the Court has ample power to relieve against penalties and forfeitures. What is contended for here is clearly one or the other, and further is imported by operation of law for the documents themselves make no provisions in reference thereto. In my opinion I am bound in equity to grant relief (see judgment of Spragge, V.C., *supra*, and *McLaren* v. *Miller* (1874), 20 Gr. 637. If the matter were at large I confess my inclination would be to allow interest at the statutory rate on the instalments in arrears from the dates they respectively fell due. In view of sec. 15 of the Act Respecting Short Forms of Mortgages, *supra*, which if not directly applicable—a debatable question in my opinion—is, at any rate, an indication of the mind of the legislature in the premises, I do not think that course open to me. The application is granted on the terms of the offer set out in defendant Edward Collyer's affidavit, and on payment by the defendant, in addition, of plaintiff's taxed costs herein, for though defendant succeeds, I think payment of costs a just term, particularly as the money admittedly due was never so far as the record shews actually tendered. To enable plaintiff to appeal, if he is so advised, I desire to state that my action herein is not based on discretion, but on what I conceive to be the legal principles which I must enforce. *Judgment accordingly.*

COPETHORNE v. ELLIOTT.

British Columbia Supreme Court, Murphy, J. June 27, 1916.

MORATORIUM (§ I—1)—*War Relief Act—Soldiers and their dependants—Retroactive provisions—Construction.* [See annotation in 22 D.L.R. 865.]—Application for an order of foreclosure.

Stacpoole, K.C., for plaintiff.

Prior, for defendant.

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MURPHY, J.:—The retroactive provision of the War Relief Act applicable herein is "if any such action or proceeding is now pending against any *such person* the same shall be stayed until after the termination of the war." The expression "such person" or "such persons" occurs in the preamble and in sec. 2, and clearly refers only to residents of British Columbia who have within the terms of the Act joined the forces. The extension of protection to the "families" or "dependant member of the family" of such person is accomplished both in the preamble and in sec. 2 by the use of express words. Sec. 2 makes it unlawful to bring any action or take any proceeding not only against those who have joined the forces as understood by the Act, but also against *inter alia* "any dependant." When however it proceeds to deal with pending actions it stays them only against "such person." Assuming without deciding for the moment that the father here is a dependant, he can only obtain the protection of this section of the Act by giving a different and much wider meaning to the expression "such person" than it clearly has when used in the preamble, and in the earlier part of said sec. 2. The matter was made perfectly clear as to fresh actions by using apt words and carefully enumerating the protected classes. If it was intended to make this protection retroactive one would expect to find a like enumeration instead of the use of an expression already several times used in a sense exclusive of such classes. In view of the principle of strict construction to be applied to retroactive legislation, I am of opinion the applicant does not fall within sec. 2.

If the matter rested at this I would grant the decree. But, by sec. 10, evidence must be furnished that the parties interested in land are not volunteers, reservists, or dependants in order that proceedings "taken or continued" be valid and binding. In my opinion such evidence must be adduced before any order affecting land can be made. The onus is on the plaintiff to adduce such evidence. None has been adduced except as to defendant Campbell, and as to him reliance is placed on the cross-examination of Annie Campbell. As to the other defendants, the application is enlarged for plaintiff to comply with sec. 10, if she can. As to defendant Campbell, it is clear I think on the cross-examination that the onus on plaintiff is not satisfied. This cross-examination shews the wife has only received $79 from the

husband in 2½ months. He had to go away to look for work. She is getting $15 per month from one of the boys and had received $125 from the other in March and expects a like sum shortly. The interest on the mortgage on the home is falling into arrears. The evidence as a whole, instead of shewing as I think the Act requires that this money is not necessary for the support of the family, proves it is necessary. As the father is under a legal duty to support the family I find he is a dependant in the circumstances disclosed by this cross-examination: (*Main Colliery Co.* v. *Davies*, [1900] A.C. 338.) No order against his interest can at present in my opinion be made that would be valid and binding. *Application refused.*

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DRINKLE v. REGAL SHOE CO.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, Galliher and McPhillips, JJ.A. April 4, 1916.

PRINCIPAL AND SURETY (§ I B—10)—*Continuing guaranty—Discharge—Change of relationship—Chattel mortgage.*] — Appeal from the judgment of Macdonald, J., 20 B.C.R. 314, dismissing a counterclaim upon a continuing guaranty.

Where a continuing guarantee is given, the surety is discharged if the contract between the debtor and the creditor is varied without the knowledge of the guarantor, by taking a mortgage on the property of the debtor, and practically taking charge of his business.

M. A. Macdonald, for appellant, plaintiff.

E. B. Ross, for respondent, defendant.

MACDONALD, C.J.A.:—I would dismiss the appeal. When the guarantee was given Endicott was entering into business as a retail shoe merchant.

Assuming that the guarantee was intended to be a continuing one, it could not, I think, continue without the consent of the guarantor after the relationship between the Regal Shoe Co. and Endicott had, without notice to the guarantor, become radically changed.

In the early part of the year 1912, the company took a chattel mortgage on Endicott's stock, and an assignment of his lease, and practically took charge of his business.

I think that Drinkle cannot be held to have guaranteed the payment of goods supplied by the shoe company to Endicott there-

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after, and as payments on account were not appropriated to particular items by the parties, and as all items existing at the date of such change were satisfied by subsequent payments, by application of legal rule of appropriation, the prior liability to Drinkle was extinguished.

IRVING, J.A.:—I would dismiss appeal.

GALLIHER, J.A.:—I agree with the Chief Justice.

MARTIN and MCPHILLIPS, JJ.A., dissented.

Appeal dismissed.

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PIPESTONE v. HUNTER.

Manitoba King's Bench, Mathers, C.J.K.B. February 4, 1916.

TAXES (§ III E—140)—*As debt—Penalties and interest—Statute of Limitations—Municipal levy against purchaser of Crown lands.*]—Action by a rural municipality to recover taxes and penalties for default assessed against certain lands of the defendant for the years 1907 to 1914 inclusive.

H. E. Henderson, K.C., and *A. K. Cates*, for plaintiffs.

F. Kent Hamilton, for defendant.

MATHERS, C.J.K.B.:—For the purpose of the trial the following facts were admitted: 1. In the year 1906 the defendant became the purchaser from the Crown in right of the Dominion of Canada, of the S. ½ and N.E. ¼ of sec. 29, in tp. 9, r. 27, west of the 1st principal meridian; all of sec. 29, in tp. 8, r. 28; the N. ½ of sec. 11, in tp. 7, r. 29; and the S. ½ of sec. 11, in tp. 9, r. 29, all west of the 1st principal meridian in the Province of Manitoba. 2. The defendant has paid to the Crown a portion of the purchase money, but there still remains a balance unpaid, and the Crown Patent had not yet issued. 3. The defendant is not now and never has been in actual occupation of the lands. 4. After the agreement to purchase, the plaintiff municipality assessed the lands in the name of the defendant. 5. The said assessments were legal and in compliance with the provisions of the Assessment Act, and the penalties were added from year to year in pursuance of the provisions of the Act.

The total amount claimed, including penalties, is $3,309.32. Firstly: As to the taxes levied for the years 1907 and 1908, the defendant sets up the Statute of Limitations, and claims that if any liability existed as to these taxes, it accrued more than 6 years before the commencement of this action. Secondly: As

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to all of the taxes claimed, the defendant contends that his interest as a purchaser from the Crown of the said lands was not assessable. Thirdly: As to the penalties added, the defendant contends that even if the plaintiffs have a right to sue for taxes, they have no right to sue for the said penalties.

As to the 1st point. No by-law of the council was passed fixing the due date for taxes in any year, and by sec. 136 of the Municipal Act, in such an event the taxes are to be considered imposed and due on October 1 in each year. The taxes for 1907 were therefore due on October 1, 1907, and for 1908, on October 1, 1908. As this action was not commenced until September 15, 1915, more than 6 years elapsed since these taxes became due.

Sec. 144 provides that taxes levied may be recovered as a debt due to the municipality.

A municipal tax is not a debt in the ordinary sense of that term: Dillon Municipal Corporations, sec. 1414; *Lynch* v. *Canada N.W.L. Co.*, 19 Can. S.C.R. 204, and in the absence of legislative authority, an action at law cannot be maintained for its recovery: *Louisville* v. *Louisville*, 65 S.W.R. 814; *Rochester* v. *Bloss*, 185 N.Y. 42; 7 A. & E. Ann. Cas. 15, except possibly where the statute gives the power to impose taxes but is silent respecting the method of their recovery. In such a case the well known rule would probably be acted upon that where a statute creates a right and gives no remedy the party may resort to the usual remedy applicable in such a case: Dillon, sec. 1417. The fact that the statute permits a municipal tax to be sued for as a debt does not change its character. Debts are obligations for the payment of money founded upon contract, express or implied, but taxes are imposts levied for the support of the municipality without the consent or concurrence of the person taxed. They are not based upon a contract between the owner of the property taxed and the municipality, but the liability is purely statutory. I make these observations for the purpose of leading up to the objection that this claim is within the Statute of Limitations, 21 Jac. I., ch. 16, sec. 3, and that such portion of the claim as accrued more than 6 years before the action is therefore barred.

That statute applies to "all actions of debt grounded upon any lending or contract without specialty." It does not apply to all actions of debt, but only to such as are grounded upon a simple contract. Clearly this action is not so grounded. That

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this section does not apply to an action brought to recover a special rate made for payment of seed supplied by the Guardians of the Poor under the Seed Supply (Ireland) Act, 1880, was held in *Guardians* v. *Gribben*, L.R. Ir. 24 Q.B. 520, and that it does not apply to an action to recover municipal taxes was decided by the Full Court of New South Wales in *Borough of Tamworth* v. *Bussell*, 3 W.N.N.S.W. 57.

In *Los Angeles* v. *Ballerino*, 32 Pac. R. 581, 34 Pac. R. 329, it was held that an action for the recovery of taxes was not covered by a statute which limited to 2 years actions upon a contract obligation or liability not founded upon an instrument in writing. The question is, in my opinion, concluded by *Cork and Bandon R. Co.* v. *Goode* (1853), 13 C.B. 826. That was an action for calls under the Companies Clauses Consolidation Act and the Company's Special Act. The defendant pleaded that the action was not brought within 6 years, relying upon 21 Jac. I., ch. 16. To this plea the plaintiff demurred and the Court sustained the demurrer. Maule, J., said, p. 835:—

> It is manifest, upon reading the declaration, that it is a declaration in debt upon these two statutes. Now, a declaration in debt upon a statute is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability are facts *de hors* the statute . . . . That appearing to be so, the allegation in the plea, that the action is upon contract without specialty, is a false allegation of a matter of law . . . . I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty.

An action for the recovery of taxes under sec. 144 of the Assessment Act is an action for debt upon the statute. Such being the case, *Cork and Bandon R. Co.* v. *Goode*, *supra*, is direct authority that the statute, 21 Jac. I., ch. 16, does not apply to it and therefore the right of action is not barred by a lapse of 6 years.

The defendants relied upon *Re Newbeggin's Estate*, 36 Ch.D. 477. What that case decides is that the guardians of the poor of a parish who have expended money for the maintenance of a pauper lunatic can, in the event of his becoming entitled to property, only recover for 6 years' maintenance under sec. 104 of The Lunatic Asylums Act, 1853. The decision turned upon the wording of that statute and was not intended to overrule the principle laid down by *Cork and Bandon R. Co.* v. *Goode*, *supra*.

In my opinion the plaintiffs have a right to sue for taxes accrued due in 1907 and 1908, notwithstanding the lapse of 6 years before action.

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The next point is that the defendant's interest was not assessable. Sec. 6 of The Municipal Assessment Act (ch. 134 R.S.M. 1913) provides that:—

> The right, interest or estate of the occupant or claimant, whether as locatee, licensee, purchaser, homestead or pre-emption entrant, squatter or otherwise, to or in Crown land or lands vested in or held by His Majesty, is, and shall be, liable to taxation from the date of such location, license, purchase or homestead or pre-emption entry; and the business or occupation of such claimant or occupant, as well as such claimant or occupant, is, and shall be liable to assessment and taxation.

It is established by authorities binding upon this Court that the Province has a right to authorise the taxation of the beneficial or equitable interest in lands of a subject of which the Crown in right of the Dominion holds the legal title, and in which it has some beneficial interest: *South Norfolk* v. *Warren*, 8 Man. L.R. 481; *Hannesdottir* v. *Mun. of Bifrost*, 21 Man. L.R. 433; *Calgary & Edmonton R. Co.* v. *Atty.-Gen. of Alberta*, 45 Can. S.C.R. 170; *Smith* v. *Rur. Mun. of Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563.

These authorities make it clear that the interest of the defendant as purchaser from the Crown of the lands in question was taxable by the plaintiff municipality, although the defendant has not paid the whole purchase money payable to the Crown and consequently the Crown not only holds the legal estate but has a beneficial interest in the lands.

The third point is that even if the tax may be recovered, that there is no authority to recover the penalties.

Sec. 128 of the Assessment Act provides that in rural municipalities all persons paying taxes on or before December 15 of the year in which such taxes shall be levied, shall be entitled to a reduction of 10% on the same from December 15, until the last day of February, taxes shall be payable at par, and March 1, as a penalty, an additional sum, amounting to 10% of such taxes shall be added thereto: on March 1 in each year thereafter, as a penalty, an amount of 10% of arrears of taxes shall be added.

Sec. 144 says that taxes heretofore or hereafter levied may be recovered with costs in any Court of competent jurisdiction in the province as a debt due to the municipality from any person or corporation by whom the same are payable, in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person or corporation, purporting

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to be certified by the clerk as a true copy, shall be *prima facie* evidence of debt.

The contention of the defendant is that sec. 144, which authorises the recovery of taxes as a debt, speaks of taxes only and not penalties. It is argued from this that although the legislature has made taxes a debt recoverable by action, it has not dealt with penalties in the same way.

The point taken raises a question of very considerable difficulty. The right to recover penalties by action is conferred, if at all, by sec. 144. That section says that:—

> Taxes heretofore or hereafter levied may be recovered with costs in any Court of competent jurisdiction in the province as a debt due to the municipality from any person or corporation by whom the same are payable.

The precise point was dealt with by the Court of Appeal in New York in *Rochester* v. *Bloss*, 185 N.Y. 42 (1906), 7 A. & E. Ann. C. 15.

It was there decided that a statute which authorised the recovery by action of the "taxes spread upon the assessment rolls" did not authorise the recovery by action of the penalties for default in payment which by another part of the same statute the municipality had a right to add to the original tax. While express authority to sue for taxes was given, the statute was silent on the subject of penalties, and the Court said:—

> Whatever the intent of the legislation, the fact remains that there is no express provision for the collection of percentages or interest by suit. The responsibility for the injustice, if any, of omitting authority to collect percentages and interest by suit rests upon the legislature.

According to the New York decision the right to sue for penalties must be expressly conferred or it does not exist. It is manifest that sec. 144 contains no express authority to sue for penalties.

Then is there anything in the other parts of the Assessment Act to indicate that the legislature meant the word "taxes" where used in sec. 144 to have a wider meaning than the word itself would ordinarily bear? I find throughout the portions of the Act relating to the collection of taxes three expressions frequently made use of, viz., "taxes," "taxes in arrears" and "arrears of taxes." For example, sec. 121 provides that the collector's roll shall contain a column in which shall be entered "arrears of taxes." Sec. 128 provides for the addition of 10% of all "arrears of taxes." Then come the provisions as to distress for taxes.

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Sec. 129 provides that if a person neglect to pay his "taxes" for 30 days the same may be levied by distress and sub-sec. 2 of sec. 130 provides that the by-law directing distress may provide for the levy being made for all "taxes in arrears," and sub-sec. 3 makes the collector's roll shewing "taxes in arrears" *prima facie* evidence that such taxes are in arrears. Then comes sec. 144 authorising the recovery of "taxes" by suit. Now, turning to the provisions respecting the sale of land for taxes, I find sec. 152 declaring that when the tax on land is overdue for more than a year the land shall be liable to be sold for "arrears of taxes." The same expression is used in sec. 154 as to inquiries for distress, in sec. 156 dealing with the advertisement, in sec. 160 as to sale of land where the title is vested in the Crown, in sec. 161 as to omissions from the list, in sec. 165 as to mode of sale. Without multiplying instances, it will be found that the phrase "arrears of taxes" is used throughout in dealing with the sale of lands for taxes. It thus appears that when conferring the right to recover taxes by distress or by action the expressions made use of are "taxes" and "taxes in arrears;" but when dealing with the sale of land for taxes different phraseology is adopted and the expression used throughout is "arrears of taxes." According to the ordinary meaning of words the expressions "taxes in arrears" and "arrears of taxes" mean one and the same thing. The word "taxes" has a wider meaning and would include in addition taxes not yet in arrears. Then, had the legislature any design in using one phrase when providing a remedy by suit or distress and another when providing a remedy by sale? The answer to this question is found in sub-sec. (*m*) of sec. 2, which says that:—

> The expression "arrears of taxes" includes penalties or penalty for default in payment as provided for by this Act.

There is no definition of either the word "taxes" or the phrase "taxes in arrears." That furnishes a pretty plain indication of the legislative intention that penalties should not be included in the word "taxes" where used alone *expressio unius est exclusio alterius*. No reason can be assigned for the studied use of an expression which includes penalties when dealing with the sale of land for taxes and of another which ordinarily would not include penalties and concerning which no legislative interpretation is given when providing a remedy by distress or by action other than that the legislature intended that land might be sold to realise

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penalties as well as the original tax, but that the right to recover by distress or suit is confined to taxes exclusive of penalties.

The fact that it is difficult, if not impossible, to assign a logical reason for this distinction cannot prevail against the plain intent of the legislation as gathered from the Act itself.

The case of *Lynch* v. *Canada N.W. Land Co.*, 19 Can. S.C.R. 204, an appeal from the Manitoba Full Court, was relied upon by the plaintiffs. That appeal involved three actions, one of which, *Morden* v. *S. Dufferin*, is reported, 6 Man. L.R. 515. The question before the Supreme Court was the constitutional one as to whether the province had the right to impose penalties for default in paying taxes. The contention of the owner was that the percentages imposed were interest over which the province had no jurisdiction. The decision was that the percentages were not interest, but merely an addition to the tax. The language of Ritchie, C.J., who delivered the principal judgment, might be interpreted as meaning that a tax which was one amount on the last day of February automatically became larger by 10% on the first day of March, and that this augmented sum could properly be designated as the taxes thereafter payable. It must not be overlooked, however, that the mind of the Court was not directed to that question, but to another and very different question.

On the whole, I think the legislature has furnished a clear indication of intention that taxes only, and not penalties can be recovered by suit. To arrive at this conclusion I have not to go as far as the Court went in *Rochester* v. *Bloss*.

There will be judgment for the plaintiff with costs of suit for the taxes sued for less penalties. I refer it to the registrar to make the necessary computation. *Judgment for plaintiff.*

SHAW v. CANADA MOTOR CAR CO., LTD.

Manitoba King's Bench, Galt, J. June 5, 1916.

EXECUTION (§ I—9)—*Payment—Priorities—Equitable assignment—Costs.*]—Motion on behalf of the Corona Lumber Co. Ltd. (hereinafter called the Corona Co.) for payment out of Court of the sum of $188.86, balance of moneys paid into Court by the defendants.

W. P. Fillmore, for Corona Lumber Co.

H. N. Baker, for Gough.

GALT, J.:—The motion was opposed by J. B. Gough, who

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claims to be entitled to it under a judgment and execution, and under a stop order filed by him on or about April 18, 1916.

The Corona Co. based their claim upon an alleged assignment obtained in August, 1915, which reads as follows: "To Western Canada Motor Car Co. (hereinafter called the Motor Co).

"For valuable consideration, I hereby assign, transfer and set over unto the Corona Lumber Co. Ltd. all moneys which are now or may hereafter become due or payable by you to me in respect of the seizure and sale of two automobiles under lien notes held by you made by me; and this is your authority for paying the Corona Lumber Co. Ltd. any surplus remaining in your hands after the sale of the said automobiles or either of them.

E. J. SHAW (L.S.).

On 22nd June, 1915, Gough sued Shaw, and on December 17th, 1915, obtained judgment against Shaw for $2,763.50 and costs and issued execution therefor. The action brought by Shaw against the Motor Co. was settled on or about April 25th, 1916.

The original application before me was supported by an affidavit by W. P. Fillmore.

On said application Mr. H. N. Baker appeared for Gough, and made several statements in reference to the position of his client, but said statements were not expressed in any writing or affidavit. After the argument, I requested Mr. Baker to embody the facts which he relied upon in an affidavit, which he did. It then became manifest to me that several points material to the case made by the Corona Co. were not dealt with in the original affidavit by Mr. Fillmore, so I gave him permission to file a further affidavit relating to the matter, which he did, and the motion was then re-argued. Later on counsel furnished me with written arguments on the points of law which applied to the completed material.

It appeared to me that the so-called assignment was only an order or direction by Shaw to the Motor Co. to pay over the moneys to the Corona Co., and that the original material entirely failed to shew either that this order or direction had been accepted by the Motor Co. or had been communicated to the Corona Co. by Mr. Fillmore. These points were in part cleared up by the additional material filed by the applicant. But it also now appears that the document was given, not to the Motor Co., but to the Corona Co.

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Mr. Baker's affidavit shewed that at the time of the giving of said order several judgments were outstanding and registered against the said Shaw, and alleged that Shaw was at the date of said order in insolvent circumstances. It was argued from this that the said order should be disregarded. I think it is not open to me on this application to deal with any such question as this, or to set aside transactions on the ground of insolvency on a mere collateral issue based upon such flimsy material.

As regards the main question, I decide on the evidence now before me that the order in question given by Shaw to the Motor Co. operated as an equitable assignment of the moneys, and that Gough could not subsequently gain priority either by execution or stop order.

The legal result of this state of facts is aptly expressed by Swinfen-Eady, J., in *Re Marquis of Anglesey*, [1903] 2 Ch. 727, at p. 732.

For the above reason, I give judgment in favour of the claim of the Corona Co.

As regards the question of costs, it appears to me that both parties have conducted this application without adequate preparation. The original material filed by the applicant was insufficient. The statements made by counsel for Gough, although made without objection by his opponent, had to be supplemented by affidavit, and then the applicant had to supplement his material by evidence which should have been included in his first affidavit. The motion has been argued on at least three different occasions.

The applicant is entitled to the costs of the motion, but these costs should be limited to a single attendance in Chambers, and with no costs of the written arguments, which I did not ask for.

Judgment for claimant.

ALLISON v. GREATER WINNIPEG WATER DISTRICT.

Manitoba King's Bench, Galt, J. April 22, 1916.

CONTRACTS (§ IV A—321)—*Building agreement—Extras—Reasonable additional expenses—Transportation—Delays.*]—Action on a contract for construction of buildings.

H. V. Hudson, for plaintiff.

J. G. Harvey, K.C., for defendants.

GALT, J.:—The plaintiff sues for payment of certain buildings erected by him for the defendants under a contract made by tender

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and acceptance, and also for a large number of extras, and for $2,000 damages caused by defendants' delay in payment. The defendants say that they have already paid the full contract price and are not liable for any part of the balance of the claim.

The plaintiff did not press his claim for $2,000 damages at all.

The main contest between the parties related to the plaintiff's claim for payment of expenses incurred by him in getting his material in by way of Ingolf instead of by water. Mr. Allison and his son both admitted in their evidence that if Capt. Dodds had taken the empty barges back with him to Kenora, and had promptly returned with the balance of the material, he could have reached Indian Bay by water notwithstanding the existence of more or less surface ice.

The dispute as to these additional expenses depends upon the construction to be given to the contract.

Allison's tender included the furnishing of all material and labour, and also the transportation of all material and labour from Kenora to Indian Bay, and the completion of the buildings. But both parties contemplated a transportation by water.

In *Betts* v. *Smith*, 15 O.R. 413, the plaintiff was invited to tender for a supply of meals for the Knights of Pythias at the Exhibition Grounds in Toronto. One of the defendants said there would be from 1,500 to 2,000 uniformed Knights who would require to take meals for three days. The same thing was said by another person acting for defendants. On the faith of these statements, the plaintiff put in a tender which was accepted, but nothing was inserted as to the number of meals. Very few of the Knights took their meals at the Exhibition Grounds, and the plaintiff suffered loss. The Common Pleas Division held that the tender and acceptance constituted the whole contract. This decision was reversed by the Court of Appeal, (16 A.R. (Ont.) 421) and a new trial was ordered. No reasons for judgment are given in the report of the appeal; but it is reasonable to suppose that the Court agreed with the reasons given by MacMahon, J., who dissented in the Court below, and held that "the requirements for furnishing meals" could not be disregarded.

The acceptance of the tender was expressed to be

based on completion at the earliest date reasonably possible to the satisfaction of the Commissioners as to workmanship and materials, your obedience of instructions from time to time of the Commissioners or by their chief engineer or whomsoever he may deputize for that purpose.

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If a freeze-up occurred before the plaintiff could, by reasonable diligence, get his material transported to Indian Bay, he would be entitled to wait until the following spring.

The plaintiff employed Dodds to transport the material and Dodds failed to do his duty when he returned to Kenora on Tuesday, November 4, leaving the two empty barges behind him. Possibly Dodds would be liable to the plaintiff for this default and could have been sued for damages, but the defendants were urging the prompt completion of their buildings. Allison apparently did the best thing he could under the circumstances in sending a special courier to the Rat Portage Lumber Co., who, on their part, promptly sent the balance of material on a barge to Ash Rapids. But this was 25 or 30 miles away from Indian Bay, and it was too late for it to reach Indian Bay. There was no feasible road overland from Ash Rapids to Indian Bay, so that an indefinite time must pass before the lake would freeze over sufficiently to furnish the means of transportation. When it appeared that Dodds' default had prevented the transportation by water, as contemplated by the parties, it may well be that it was open to the defendants to claim damages against Allison for the delay which would follow, or perhaps even cancel their contract with him. But it was surely also open to the parties to make some new arrangement whereby the inconvenience and expense of adhering literally to the existing contract might be lessened. In my opinion this is what actually occurred. McLean, the engineer, saw a feasible means of securing the balance of Allison's material promptly at Ingolf, and the only delay which could arise would be a few days' labour in cutting out a sufficient winter road from Ingolf to Indian Bay. Of course snow would be necessary, but that might fall any day. Having all these circumstances in mind, McLean instructed Allison on November 24 to "rush lumber to camp via Ingolf."

In thus departing from the terms, express and implied, of the contract, I think the defendants must be held liable for any reasonable additional expense which was incurred by the plaintiff in following such instructions.

Mr. Harvey, at the conclusion of the case, admitted the defendants' liability for 6 small items, amounting in all to $23.88.

I consider that the plaintiff is entitled to the following additional items:—

Freight, Kenora to Ingolf	28.97
Teaming, lumber from Ingolf to Indian Bay (Fraser)	180.00
Teaming, lumber from Ingolf to Indian Bay (Knudsen)	16.00
Extra sheeting and siding ordered and completed by plaintiff	6.40
Balance of materials left over and checked up by Fred Allison and Douglas McLean	186.25
Value of shack agreed by Mr. Reynolds as being reasonable	32.00
Total	$473.50

I think the plaintiff's claim as set forth in his statement of claim is wholly unreasonable and two days have been spent in sifting out of the oral evidence and 60 exhibits the various small amounts to which he is entitled. On the other hand, the defendants have throughout stoutly contested liability for anything. Instead of paying amounts which were admittedly due to the plaintiff, they needlessly delayed their payments, and in one instance they refused to honour an order which the plaintiff had given at their request, whereby the plaintiff was involved in more than one piece of litigation which cost him very substantial sums of money.

I therefore give judgment in favour of the plaintiff for the sum of $473.50, with costs on the County Court scale, and I certify to prevent the defendants from setting off costs.

Judgment for plaintiff.

Re FORBES ESTATE.

Manitoba King's Bench, Curran, J. February 1, 1916.

WILLS (§ III G 8—157)—*Devise to a class—Children—Survivorship.*]—Motion to determine the beneficiaries under a will.

J. T. Thorson, for defendant.

R. W. Craig, for official guardian.

CURRAN, J.:—This matter came before me by way of originating notice of motion, in Chambers, under rules 928 and 933, given by Mary Mawhinney, a devisee, and the National Trust Co., stakeholders of the purchase price of the farm mentioned in the will of Margaret Cassie Forbes, deceased, for a determination of the following questions:—

The ascertainment of the class of persons, and the decision as to who is entitled to share under paragraph 5 of the said will in the devise of the north east quarter of sec. 34, tp. 7, r. 11, W. in the Province of Manitoba, which devise is in the words and figures following:—

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5. I devise my farm, the north-east quarter of section 34, in tp. 7, and r. 11, W., in Manitoba, among the following persons, namely: my son Alexander James Smart, his four children, Margaret Cassie, James, John Taylor, and Elizabeth Chisholm; Edna Mawhinney, aforesaid, and James Mawhinney, son of Edward Mawhinney, of Holland, aforesaid, farmer, and I direct that my said son Alexander James shall not be compelled to sell the said farm, but that the same shall be valued by my executors immediately after my decease, and the one-seventh part thereof be by the said Alexander James Smart paid within one year to the said Edna Mawhinney and James Mawhinney respectively, if they shall, or to such of them as shall have then attained the full age of twenty-one years, or within the said time be invested in proper securities authorized by law, or placed in a chartered bank for the benefit of the said Edna and James Mawhinney respectively; the farm to remain in the possession of my said son Alexander James, and the one-seventh part of the said valuation to be made by him paid to each of his four children before named, as they respectively attain the age of twenty-one years.

The testatrix died on May 22, 1904. The devisee Alexander James Smart, her son, named in par. 5 of the will, died on May 2, 1908, intestate, and the Royal Trust Co. is his administrator. Of the four children of the said Alexander James Smart named in said par. 5, James Smart and Elizabeth Chisholm Smart are dead, having pre-deceased the testatrix, both unmarried and under 21 years of age. The survivors of the persons named in said paragraph are therefore Margaret Cassie Smart, John Taylor Smart, Edna Mawhinney and James Mawhinney.

The question is, what becomes of the one-seventh share each of James Smart and Elizabeth Chisholm Smart, which, had they survived the testatrix, they would have become entitled to under this clause of her will? This is the question for the Court to determine.

All proper parties have been served with notice of this motion, and there is no dispute about the facts.

Three propositions have been tentatively put forward by counsel for the motion for the consideration of the Court. First, that the devise is a gift to a class, in which event the survivors take all; second, that it is a devise to Alexander James Smart, subject to a charge in favour of his four children and the two Mawhinneys with the resultant effect that the charge in favour of the two children who predeceased the testatrix lapsed on their demise, thus freeing the estate from the charge and enuring to the sole benefit of Alexander James Smart or his estate; third, that there is an intestacy as to these two shares, which, being undisposed of, revert to and become part of the general estate of the testatrix.

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I have little difficulty in deciding against the first of these propositions. It is clear to me from the language of the devise that the devisees do not take as a class, but as *personæ designatæ*.

Primâ facie, a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator:

Per Lord Davey in *Kingsbury* v. *Walter*, [1901] A.C. 187 at 192.

The devise in question contains persons related to the testatrix in the degree of child and grandchild. The language in the will discloses this. Alexander James Smart is described in it as "my son:" but he is not the only son; the will mentions another son George, so that the sons of the testatrix as a class are not included, nor are all her grandchildren, nor any particular families of grandchildren, as for example, "my grandchildren, the children of . . . " a married son or daughter of the testatrix.

Again, the gift is limited to four children of Alexander James Smart, who are named. The language used is "his four children, Margaret Cassie, James, John Taylor, Elizabeth Chisholm."

See the language of Malins, V.C., in *Re Smith's Trusts*, 9 Ch.D. 117 at 119.

And he holds that the five daughters took as *personæ designatæ* and not as a class, and that as two died before the testatrix their share lapsed.

In *Lord Bindon* v. *The Earl of Suffolk*, 1 P. Wms. 96, it was held the devise being to five grandchildren, *share and share alike*, that the legatees were tenants in common and not joint tenants, so that if one died his share went to his executors and not to the survivors. The devise, however, contained this provision: "And if either of them die, to the survivor or survivors of them," which was held to mean if any of them (legatees) should die in the lifetime of the testator . . . for were it not for this clause if any of the grandchildren had died in the lifetime of the testator that grandchild's one-fifth part would have been a lapsed legacy and have gone to the executor as undisposed of by the will." See also *Bagwell* v. *Dry*, in the same report, at p. 700, where it was held the testator having devised the residuum of his estate in fourths and one of the residuary legatees dying in his (testator's), lifetime, the devise of that fourth part became void and was as so much of the testator's estate undisposed of by will; that it could not go to the surviving residuary legatees, because each of them had but a fourth devised to them in common. But

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here the residuum being devised in common it was the same as if a fourth part had been devised to each of the four, which could not be increased at the death of any of them."

Again, if a will contains no residuary devise and a specific devise fails, the devised property passes to the heir. Halsbury, vol. 28, p. 617.

If any further authority is needed for this proposition, I refer to *Re Venn; Lindon* v. *Ingram*, [1904] 2 Ch.D. 52 at 56, where one of the legatees having died in the lifetime of the testatrix, the question arose as to what became of his share. Did it lapse to the next of kin, or did it pass to the other legatees? Joyce, J., having decided that this was not a class gift, this legatee's share lapsed to the testatrix's next of kin.

Now, the gift contained in the will in question is, in my opinion, a gift to those designated persons, seven in number, as individuals and not to them as a class. It is therefore not a class gift. It is clearly specified in the will itself that each one of these persons is to be entitled to a one-seventh share only. Two of these legatees having died during the lifetime of the testatrix, I am of opinion that their shares have lapsed and passed to the executors as undisposed of by the will. Their disposition by the executors will be governed by our Devolution of Estates Act as in case of an intestacy.

I cannot agree with the contention that from the effect of this clause in the will as a whole and looking at the will and construing it as a whole, there can be gathered any intention on the part of the testatrix that she intended her son Alexander James Smart to benefit to any greater extent than a one-seventh share in the land devised. I do not think it was intended either that any of the other legatees, the grandchildren of the testatrix, should have any greater share than each a one-seventh of the value of this land. They were each to get that and no more, and for the purpose of ascertaining the value of such interest, the executors were directed by the will to value the land immediately after the decease of the testatrix, and thus obviate the necessity of immediately selling the land for the purposes of division and distribution.

The contingency of any of the beneficiaries dying before the testatrix does not seem to have been present to her mind when making this will—if one considers that the terms of the will

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actually express such mind—and no provision in such an event has been made by the will.

I therefore determine the question in the affirmative as to the third proposition propounded by counsel for the motion.

The costs of the different parties interested and who were represented on the motion will be paid out of the estate after taxation. *Judgment accordingly.*

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HART v. BOUTILIER.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley and Chisholm, JJ. May 13, 1916.

REFORMATION OF INSTRUMENTS (§ I—1)—*Wrong description of property—Mutual mistake—Rectification—Review on appeal.*]—Appeal from a judgment of Harris, J., in an action claiming rectification of a deed.

T. S. Rogers, K.C., and *J. A. Knight*, K.C., for appellants.

E. P. Allison, K.C., for respondent.

GRAHAM, C.J., concurred with RUSSELL, J.

RUSSELL, J.:—The plaintiff claims that the whole of these two properties westwardly of the Woodill lot was meant to be conveyed to him but the deed was drawn in such terms as to include only the Holland property, and the defendant says that this was all that was meant to be conveyed. Plaintiff is an astute business man and his case is that although he gave the draft deed to the solicitor to have the title searched, and had the deed under his control continuously after the sale, he did not until about 4 years after the transaction was closed discover that there was an error in the deed of which he now seeks rectification so as to include the new barn and the space between the barn and the main road spoken of in the evidence as a lane from the barn to the main road.

The negligence of the plaintiff in not examining his deed and satisfying himself that it correctly described the property that he intended to purchase, and his consequent delay in applying to the Court for rectification of the alleged mistake, present very serious obstacles in his way when seeking equitable relief, even assuming that there was a mutual mistake calling for the reformation of the instrument of conveyance. But a still greater difficulty presents itself under the evidence in the fact that he does not seem to have established the affirmative of the issue

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with that degree of certainty which is required in such a case. It may or may not be correct to say that the mutual mistake must be proved as in a criminal case beyond any reasonable doubt. However that may be, I think the concensus of authority is to the effect that something more is required than such a mere preponderance of evidence as would suffice if it were not sought to impose upon the defendant a contract different from that which he on his part declared he intended to make, and which is found in the document solemnly signed, sealed and delivered as the concluded act of the parties.

The trial Judge lays great stress on the circumstance that, according to defendant's view, he retained a barn, to the main floor of which there was no access except by the doors opening on the plaintiff's property and that he sold to the plaintiff a warehouse (the so-called annex) to which the plaintiff would have no access without trespassing on defendant's property. Those are strong circumstances it must be admitted. But against them is the fact that according to the plaintiff's view, the defendant was selling plaintiff a lot which would prevent his tenant Woodill from having access to the dwelling in which he was living without destroying his garden. It would not be a very costly matter for the defendant to move the double doors of his barn when necessary from the side opening on the plaintiff's property to the opposite side of the barn. As to the warehouse or annex, as I understand the evidence, there were at one time doors opening into the yard now owned by the plaintiff and if he is denied access through the property he now claims he had only to return to the former manner of using the building.

The result of my consideration of the evidence is to leave my mind in an almost even balance as to the merits of the plaintiff's and defendant's contentions. If I were the trial Judge I should have been obliged to say that there was not any preponderance of evidence at all in the plaintiff's favour—that there was at least as much to be said for the defendant as for the plaintiff. If the issue were of the usual kind between parties at variance and there were anything to indicate that the trial Judge had derived advantage from observation of the demeanour of the witnesses I should be inclined to dismiss the appeal from his decision. But the issue is not an ordinary one. It is a suit for rectification of a sealed instrument 4 years after it was executed

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and as to the acceptance of which the plaintiff has distinctly admitted his own carelessness. I cannot find that the trial Judge has given any consideration at all to the difficulties presented by the plaintiff's necessary knowledge or clear notice of the facts to be learned from the sketch plan with the broken line, or to the inference to be drawn from the evidence of Peverill. Some teamsters were examined with reference to the user of the lot between the Holland property and the Woodill house, that is the lot which plaintiff seeks to add to his holdings, but I cannot attach much importance to this evidence. It seems to me to prove that defendant and plaintiff both hauled over this lot as and when they felt inclined. The plaintiff's user would be explained by his license to occupy the barn and the defendant's or his tenants' would be consistent with the legal title to the property.

The principles on which in my judgment the Court should proceed in dealing with the findings of a trial Judge where there is no jury are set forth in the cases of *Jones* v. *Hough*, 5 Ex. D. 115 and *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, which I do not consider should be held overruled or modified by the loose dictum of Loreburn, L.C., at a later date. The effect of these cases is that where there is an appeal to the Court from the findings of the trial Judge the appellate tribunal has to draw its own conclusions from the evidence paying due regard to the superior advantages possessed by the trial Judge from the fact of his opportunity to observe the demeanour of the witnesses.

My conclusion is that the plaintiff, even supposing as I do not concede, that he had successfully established his own intention to bargain for and his belief that he was securing the property claimed, has not proved by convincing evidence that the defendant ever intended to part with anything beyond the Holland lot. There is no adequate proof therefore of a mutual mistake and I think the appeal should be allowed and the claim dismissed.

LONGLEY, J.:—I agree to the proposition that the appeal in this case should be allowed, and I do it simply on the ground that the evidence is not sufficient for reforming the deed. In the recent English cases the Judges use the expression "The evidence must be clear and indubitable," and Barker, C.J., in a recent case in New Brunswick, says:—

> Even in the more usual cases the rule of the Court requires as a condition of its interference on the ground of mistake, either by way of rectifying

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the instrument, if the mistake be mutual, or by way of rescinding it, if the mistake be only unilateral, that the evidence should be so strong and convincing as to leave no reasonable doubt that the mistake has been made.

The Judge who tried this case may be under the impression that the evidence was sufficient in favour of the plaintiff, but this is not the rule by which cases of this character are determined. In this case we have a solemn deed, under seal, made several years ago, and the evidence that it was a mistake and omitted something that it ought to have had in, must be clear and unmistakeable, indubitable, whereas the evidence in this case is extremely doubtful, and will not justify, in my judgment, a verdict for the plaintiff.

CHISHOLM, J.:—In this case the trial Judge finds all the issues in favour of the plaintiff; and where there is a conflict of testimony between the plaintiff and defendant, he accepts the statement of the plaintiff. In accepting the statement of the plaintiff in respect to one very material fact, namely, the presence of the small sketch plan W/A on the deed, he must reject as untrue, not only the defendant's testimony, but that also of the solicitor's clerk. The trial Judge's findings are undoubtedly entitled to great weight and the observations of Lord Lindley, when Master of the Rolls, in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, recently approved by the present Master of Rolls in the *Attorney-General* v. *Slingsby*, 32 T.L.R. 364, apply to his findings. I have great doubt, however, that in a case claiming the reformation of a deed, the evidence to establish the mutuality of the mistake, adduced by the plaintiff, is of so strong and convincing, and, to adopt a term used in one of the cases, so almost irresistible a character as to sustain his claim: *Wylde* v. *Union Ins. Co.*, R.E.D. 302; *Banks* v. *Wilson*, R.E.D. 210.

In cases of this class the mutual mistake must be established by such a proof as leaves no rational doubt of the fact: *Green* v. *Stone*, 54 N.J. Eq. 387.

In addition, I think the mistake is one which must be held to be due to the negligence of the plaintiff. The defendant, after making the bargain with the plaintiff, engaged his solicitor to prepare the deed to plaintiff. It was prepared, the description of the property which plaintiff now desires to vary was inserted in it, the deed not yet executed was then submitted to the plaintiff for his approval, and in order to enable his solicitor to search the

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title; and in due course it was returned by the plaintiff to the defendant without any objection being made to it. It was then executed by the defendant and his wife, delivered to the plaintiff and by him recorded in the Registry of Deeds. If the plaintiff had exercised ordinary care, he would have read the deed and have seen what it purported to convey.

It is an elementary rule that a Court of equity will assist only the vigilant. It will give no relief against the results of an essential error, when by the use of ordinary care, the party aggrieved could have avoided the error: *Wilmott* v. *Barber* (1880), 15 Ch.D. 96 at 106.

I am of opinion that the appeal ought to be allowed and the action dismissed with costs. *Appeal allowed.*

THE KING v. SMITH.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley and Chisholm, JJ. April 22, 1916.

INTOXICATING LIQUORS (§ III A—55)—*Sufficiency of convictions—Time of offence—Preliminary process—Waiver.*]—Appeal from the judgment of Harris, J., refusing an application for a writ of *certiorari* to remove a conviction for unlawfully keeping for sale intoxicating liquor contrary to the provisions of the Nova Scotia Temperance Act (1910, ch. 2, as amended by Acts 1911, ch. 33; 1913, ch. 46).

V. J. Paton, K.C., for appellant, defendant.

H. W. Sangster, for respondent, informant.

GRAHAM, C.J.:—This is an appeal from a Judge's refusal of an application for a writ of *certiorari* to bring up a conviction dated July 9, 1915, of an offence of keeping for sale intoxicating liquor on or about July 7, contrary to the provisions of the N.S. Temperance Act, 1910, and amendments thereto.

It is supported by evidence which was directed wholly to keeping for sale on that date, and no attempt was made to prove a keeping for sale on any other date.

The magistrate replied to a question of defendant's counsel as follows:—

"Q. Why convict him if there was nothing in the evidence? A. I convicted him on Mr. Fader's and Mr. Spurr's and the liquor produced in Court, and it was proved it was liquor got under the search; if a man is searching for liquor on any one's premises, if he found liquor there, it was deemed to be there for purposes

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of sale until the contrary was proved; and they found it there; it was there and Mr. Smith was given a chance to prove it was not."

In fact, that was the date on which on the defendant's premises at Hantsport seizure for the purpose of destruction under the provisions of that Act was made of certain liquor, that is to say, part of a barrel of something, liquor in a jug and a bottle with a small amount of whiskey in it found with some empty whiskey bottles and a glass on the defendant's premises. The statute creates a presumption that such things found on a person's premises indicate that the liquor is kept for sale.

But there is this difficulty about the case. There was an information laid on July 3, 1915, to obtain a search warrant under the Act, by one Gilbert H. Fader. The search warrant was issued July 3, 1915, and on the same date the magistrate issued a summons and it recited an offence of keeping for sale committed "on or about July 3."

Now, apparently the information for the search warrant was the only information there was. It did not give any date for the offence, but an informer evidently could not lay an information for an offence to be committed in the future, and did not cover that of which the defendant afterwards was convicted, namely, one on the 7th.

In respect to the charge at the hearing to which defendant pleaded the defendant's solicitor says in his affidavit as follows, but whether it was the charge in the summons or a verbal statement of the offence of the 7th is not stated, that is to say:—

"3. That when the case against A. N. Smith was called, before examination or cross-examination of witness, I asked on behalf of defendant to be shown the information or complaint upon which the summons was issued, and the said W. S. Whitman replied that he did not have any information there. The said W. S. Whitman then stated to Smith what the charge was and the said A. N. Smith pleaded 'Not guilty.'"

The magistrate's notes do not shew what charge was made. Of course the liquor had been seized and the scheme of the Act is to secure an order for the destruction of that liquor as well as the infliction of a penalty for keeping it for sale. I refer to *Rex* v. *Townshend*, 39 N.S.R. 189 at 214, 11 Can. Cr. Cas. 115, another Act, but the reasoning is applicable.

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There is no other evidence to which my attention was called on this subject.

By a provision of this Act the defendant, if he had been arrested and brought in when the liquor was seized, as he might have been without any warrant for his arrest or other than the search warrant, could have been tried for the offence of keeping the liquor for sale on the 7th, the date when the seizure was made. Or, if an information had been laid for an offence on the 7th and a summons issued in respect to an offence committed on that date the trial and conviction would have been perfectly good. He was not in fact arrested, and there was not an information or a summons for that date.

Before the stipendiary magistrate the defendant appeared and was called as a witness by his counsel who also cross-examined.

On the application for the writ of *certiorari* before the Judge now under appeal a long contest took place, an unparallelled number of affidavits and long cross-examinations being used, and this point was never taken. Two points were taken, namely, that the stipendiary magistrate was misled and, secondly, that the evidence before the magistrate did not shew an offence, both of which were decided against the defendant. I say it was not taken before the Judge because, although the Crown rules do not apparently require grounds to be taken in a notice of motion for a writ of *certiorari*, as a fact ten grounds were taken in the notice and none of them covers this point. And the prosecutor's counsel contends if it had been taken they might have been able to remedy it by affidavit and by bringing other materials forward. And if the point had been made before the stipendiary magistrate he certainly could have remedied it.

However, there is another contention. If anything has been established in this class of cases this has, that when the writ of *certiorari* is taken away, as it is here (1910, ch. 2. sec. 52), the only cases which can be reviewed on *certiorari* are cases in which the magistrate had no jurisdiction. He is not to be reviewed merely because he blundered in his law or in his findings of facts. I refer to such cases as *The Queen* v. *Walsh*, 29 N.S.R. 521, and *The Queen* v. *Stevens*, 31 N.S.R. 124, 126.

Here the magistrate had jurisdiction over the subject matter of the conviction and he had jurisdiction over the defendant.

It has been decided, too, that at such a hearing a defendant

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may waive the necessity of preliminary process such as the process to bring him before the magistrate, once he is there, or the want of an information in respect to the alleged offence.

I think it may be said that it was waived in this case. It is not stated in any affidavit read before us that the defendant was misled by any charge to which he pleaded, and therefore was not ready for the charge proved against him by the evidence of an offence of a different date. The evidence pointed only to an offence committed on the 7th and not to one of the earlier date, and the counsel for the defence could have raised an objection of that character. Nor is it stated in the affidavits that he or his counsel believed the prosecution was for an offence of the 3rd. The trial and conviction were clearly permissible if the defendant had only been brought there on his arrest without any information or warrant for his arrest (1910, ch. 2, sec. 46). Does the fact that he came there voluntarily or even in obedience to the summons and took his trial vitiate the conviction?

It is very clear I think from the cases of *Reg.* v. *Hughes*, 4 Q.B.D. 614 (Hawkins, J.), and *Reg.* v. *Clarke*, 20 O.R. 642, that the magistrate may proceed on a bare verbal information made instanter in his presence (there being no warrant required) subject of course to a demand for an adjournment on the part of the defendant to enable him to make any defence he may have. And if this is so, it does not, I think differ from this case where the evidence was altogether directed to an offence committed on the 7th and without objection.

For other cases of waiver I refer to *Regina* v. *Hazen*, 20 A.R. (Ont.) 633; *Ex parte Sonier*, 2 Can. Cr. Cas. 121; *Turner* v. *Post Master General*, 34 L.J.M.C. 10.

In my opinion the appeal should be dismissed.

RUSSELL, J.:—An information for a search warrant of the premises had been laid on July 3 and a warrant issued on the same day. The premises were searched and liquor was found on July 7. Had the defendant been arrested and brought before the magistrate he would, under the statute, have stood charged with having kept liquor for sale on the date of the seizure. But he was not arrested. Had he been summoned on an information charging him with keeping liquor for sale on the 7th and convicted for that offence, the liquor could have been destroyed. But I

do not see how he could on a charge of keeping liquor on July 3 be convicted of an offence committed on the 7th.

If these grounds had been taken in the notice of motion for the *certiorari* I should have found difficulty in dealing with them, but they are not mentioned. It is urged that no grounds are necessary in such a notice. That is true, but where grounds are given I do not think a party should be allowed to press a ground other than the ones put forward. *Expressio unius exclusio alterius.*

I think the appeal should be dismissed.

LONGLEY, J.:—The defendant has appealed to this Court, and in none of the grounds in his appeal to this Court does he take the same grounds as those on which the appeal was asserted. The ground on which it is asked to disturb the verdict is that, while there was a search warrant under which the liquor was found and brought before the magistrate, there was also a summons to defendant, dated July 3, calling for A. N. Smith to appear and to answer to the charge of having on or about July 3 unlawfully kept for sale intoxicating liquor, &c. The search warrant was taken out on July 3, but a search was not made until a day or two afterwards, when the parties made the search upon the premises which had become fairly notorious, and some considerable liquor was taken. The defendant appeared on July 7 and was examined in regard to the matter.

It is a sound principle, I think, of law that when a man is charged merely with keeping liquor for sale, and convicted under that, it is sufficient that a search warrant is taken out, that the goods are found and that the cause is tried by the magistrate. The matter of the summons, which was issued on July 3, has no consequence whatever, and the defendant can be reasonably considered to have been there in response to the warrant for keeping liquor for sale.

This point was not taken at any previous stage and I do not feel sure that it is properly taken now, but, allowing it to be taken and rightly taken, I think it is not available to the defendant in the present case.

The appeal is dismissed and the judgment of Harris, J., remains.

CHISHOLM, J. (dissenting):—With respect to an offence of July 3 there is no evidence of, and there is no conviction for, an

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offence on that date. It may be open to question whether there is an information sufficient to give the magistrate any jurisdiction to try for an offence on that date.

With respect to an offence on July 7, there was no information laid.

By reason of sec. 46 of the Act a man can be prosecuted without an information, but in that case there must be an arrest. In the case under consideration there was no arrest.

In the absence of an information and of an arrest I think the justice had no jurisdiction to make the conviction and the writ should be allowed. *Appeal dismissed.*

ROOP v. PICKELS.

Nova Scotia Supreme Court, Graham, C.J., and Longley, Harris and Chisholm, JJ. April 22, 1916.

SHIPPING (§ II—5)—*Part owner of vessel—Managing owner—Powers of—Change of ownership—Insurance policies—Accounting—Adding necessary parties.*]—Appeal from the judgment of Russell, J., varying the referee's report in an action brought by plaintiff as part owner of the vessel "Georgina Roop" against defendant as managing owner of the vessel for an account.

L. A. Lovett, K.C., and *D. Owen*, for defendant, appellant.

S. A. Chesley, K.C., for plaintiff, respondent.

GRAHAM, C.J., and LONGLEY, J., concurred with HARRIS, J.

HARRIS, J.:—This was an action for an account.

The plaintiff was a part owner of a vessel and the defendant was the managing owner. The taking of the accounts was referred to Pelton, J., and it appears that defendant on the hearing stated that he had ceased to be managing owner on September 3, 1914—Captain Richards was registered as managing owner on October 3. The Judge thought that Captain Richards should be added as a defendant and summoned as a witness and ordered to produce all papers, &c., and this I think was the obvious course, and counsel for plaintiff on the argument of the appeal finally consented to that being done.

There will be an order accordingly and the accounts should be taken down to the time of the final hearing before the referee.

Of course the defendant Pickels is bound to produce all accounts, vouchers, &c., as between himself and Captain Richards, and all question as to the liability of the defendant Pickels to

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account for moneys received after September 3 can be further investigated before the County Court Judge.

On the evidence as it stands, I do not see that defendant is liable to plaintiff for the moneys received after September 3, as apparently he must account to Capt. Richards for anything received after that date (see *Sims* v. *Brittain*, 4 B. & Ad. 375), but further evidence may shew that defendant is liable to account for the whole or a part of the period after September 3, 1914, and the whole question is left undetermined and open for the referee to dispose of in accordance with the evidence already produced, or which may hereafter be given before him. Two other questions were argued before the Court.

It appears that the defendant Pickels was sued on some notes given by him for premiums on policies on the ship in question and other ships to the China Mutual Insurance Co., which company had gone into liquidation. Pickels, as well as a number of others who had given notes, was sued and they joined together in defending the actions and he seeks to charge the plaintiff with a portion of the costs because he says she would have profited had the litigation succeeded. She knew nothing about the litigation and was not consulted about the advisability of defending the action. The referee has found against this charge and I think his decision is correct.

In *Campbell* v. *Stein*, 6 Dow. 116 at 135, Lord Eldon, nearly 100 years ago, said:—

> But I cannot conceive that a ship's husband has as such the power to pledge his owners to the expenses of a lawsuit.

This has ever since been the law: Abbott on Shipping 130, 137, I. Maude & Pollock on Shipping, 107.

The other question is more difficult. The defendant was an insurance broker and he looked after the insuring of the ship for the owners, and for his work in connection with the insurance the insurance companies paid him the usual commission. The referee finds that the usual premiums were paid and that the plaintiff and the other owners paid no more for the insurance by reason of the commission which came from the company and would not have paid any less if another broker had placed the insurance. It is also apparent that the commission was paid to the defendant to remunerate him for work done for the insurance company.

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It appears from some letters written by defendant to plaintiff and which were produced before the referee that he had printed on the letterheads used by him the fact that he was a marine insurance broker so that it would appear that plaintiff knew, or ought to have known, as she had the means of knowledge, that he was engaged in that business. She received accounts periodically for many years charging the premiums on the marine policies and she never raised any question about the commissions. She does not deny that she knew all along that defendant was being remunerated for his work in placing the insurance by a commission on the premiums. She is I understand a business woman and a member of the Massachusetts Bar, and I think perhaps we ought to say that she had the means of knowledge and must be held to have known that defendant was receiving a commission on the insurance premiums and if that finding was justified then under the circumstances she could not compel an account. The referee must have taken that view of the facts.

The facts in this case are very like those in *Williamson* v. *Hine*, [1891] 1 Ch. 390, and there a managing owner was sought to be made liable (*a*) for commission on insurance premiums and (*b*) for brokerage on freights and charters.

The trial Judge held with regard to the commissions on insurance premiums such knowledge or means of knowledge of their having been received by the defendant had been proved against the plaintiff as to deprive him of any right to an account.

As to the commission on charters and freights, he held the plaintiff had no knowledge and the case went to the Court of Appeal on this last question.

There was evidence before the referee that the commission received by defendant on the insurance premiums was charged by other managing owners of ships who were insurance brokers and was the usual commission, and the authorities establish that the insuring of the ship was no part of the duty of the defendant as managing owner. It was argued that it was a fair inference that his charge of $100, which is a small one, was for the work which he was called upon to do as managing owner, and for his work done outside of that he was not remunerated by the plaintiff and therefore the case was governed by *Baring* v. *Stanton*, 3 Ch.D. 502, and the *Great Western Ins. Co.* v. *Cunliffe*, L.R. 9 Ch. App. 525, and plaintiff could not recover the commissions

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whether he knew or did not know of the custom (Wright on Principal & Agent, p. 129). See also *Norreys* v. *Hodgson*, 13 T.L.R. 421, Abbott on Shipping 138, *Williamson* v. *Hine*, [1891] 1 Ch. 390, per Kekewich, J.

It is perhaps unnecessary to decide the question raised as to whether the defendant can as a matter of law be compelled to account for these commissions because it is clear that he made his charge of $100 for his services on the supposition that he was to get in addition the commission on the insurance premiums, and if we felt bound on the authorities to compel the defendant to account for the commission he should under the circumstances be allowed to amend his charge for his services and increase it by the amount of the commissions. The evidence is that he received and disbursed upwards of $60,000 and the charge of $100 per year plus the commission on the insurance premiums is in my opinion no more than defendant is entitled to for his services. When plaintiff opens the accounts rendered and seeks to make the defendant account for this commission, the defendant is no longer bound by his charge of $100 if he can establish that he is entitled to more. See *Osborne* v. *Williams*, 18 Ves. Jun. 379 at 383.

I think the decision appealed from should be set aside—that Captain Richards should be made a defendant and the matter should go back to the referee to complete the taking of the accounts down to the date of the final hearing before him.

The costs of the appeal will be reserved to be dealt with when the referee's report comes up for confirmation.

CHISHOLM, J. (dissenting):—In this matter three questions were argued on the appeal:—1. The right of the defendant to charge the plaintiff with a share of the legal expenses incurred in certain litigation in connection with the China Mutual Insurance Co. 2. The right of the defendant to retain commissions on premiums of insurance effected in companies which he himself represented; and 3. The right of the defendant to increase the amount retained by him for salary while he was managing owner.

1. Both the referee and Russell, J., have held that the legal expenses were not recoverable from the owners, who did not authorise the litigation: *Campbell* v. *Stein*, 6 Dow. 116 at 135. That view should prevail.

2. As to the commissions, the only escape from the conclusion

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arrived at by Russell, J., is to hold that the defendant's employment for which he was paid $100 a year was solely as ship's husband. It is not the legal duty of a ship's husband to insure, and these commissions arise from the insurances effected on the ship. The defendant was the managing owner for several years and he rendered his accounts to his co-owners at regular periods. In these accounts he made charges covering all the services rendered by him. There was nothing to indicate that his service in insuring the ship was, or was intended to be, distinct from his other services, or was to be treated in a different manner. At the inception of the undertaking he was not obliged to insure, but he did so and the other owners would naturally think that that was a part of his employment. In that view, which is the one I feel compelled to adopt, the decision of Russell, J., with respect to the commissions, is, in my opinion, correct.

3. It appears from the evidence of W. G. Clarke, that the salary of $100 a year which the defendant retained was only a nominal charge; and that is not disputed. It is now sought to permit the defendant to increase the amount. It is urged that if he knew he would not be permitted to retain his commissions on the insurance premiums he might have made the salary a substantial one. He did however fix the amount, which, in my view, was to be his salary for all his services and the other owners by the course of dealing have accepted the amount he fixed. It has become a term of the employment. However inadequate it may be, I do not think we should interfere with it. If he has made the mistake of supposing that he could add to a charge, which is merely nominal, a charge which is illegal, I do not think the Court should assist him in increasing the innocent item, until it is large enough to include the amount of the illegal item.

Appeal allowed.

CAN.
Ex. C.

DONKIN v. THE "CHICAGO MARU."

Exchequer Court of Canada, Martin, Adm.J. March 23, 1916.

DEPOSITIONS (§ I—4a)—*De bene esse—Use of interpreter.*]—Appeal from the ruling of the registrar as to the employment of an interpreter upon an examination *de bene esse*. The registrar ruled that if the witness said he understood the questions that were put to him in English then he should answer in that language, and as he said he did understand them the services of the interpreter were not necessary.

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Mayers, for the defendant.

Robert Smith, for the plaintiffs.

PER CURIAM:—It depends upon a question of fact as to whether or no an interpreter should be employed, and that fact is—does the witness possess a sufficient knowledge of the language to really understand and answer the questions put to him, whatever the witnesses' opinion may be? There is no one so well able to determine that question as the tribunal before which the witness is being examined. It is desirable to point out for future guidance the course pursued in *Parratt et al* v. *Notre Dame d'Avor*, 16 B.C.R. 381; 13 Can. Ex. 456 (though not reported on that point), where on the trial I finally directed that the French master of a ship should be examined through an interpreter, after his examination had been conducted for some considerable time in English, because it became apparent to me, from my knowledge of the French language and otherwise, that he did not possess a requisite knowledge of English to properly conduct his examination in that language. Each party is in strictness entitled to an interpreter—*Rex* v. *Walker*, 15 B.C.R. 100 at 124-6—wherein will also be found observations upon the competency of interpreters and their selection. *Appeal dismissed.*

Re CONN.

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Ontario Supreme Court, Latchford, J. March 2, 1916.

WILLS (§III F 6—145)—*Conditional limitation—"During their lives respectively"—Marriage—Co-tenancy—Survivorship.*]—Motion by Catherine Ann Conn, a devisee named in the will of Samuel Conn, deceased, for an order determining the true construction of the will in so far as it related to the east half of lot 24 in the 2nd concession of Fitzroy.

Peter White, K.C., for the applicant.

A. Burwash, for certain of the next of kin of the testator.

LATCHFORD, J., said that the east half of lot 24 was, by para. 8 of the will, devised to the testator's two daughters Martha and Catherine Ann (the latter being the applicant) "during their lives respectively or until they marry respectively or during such time as my son James shall continue to live and remain of unsound mind." The farm was to be subject to a charge for

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the maintenance of James during his insanity. Should James recover his reason, the farm was to pass to him in fee. James died without having recovered his reason. All payments for his maintenance seemed to have been made. Martha survived the testator, but died, unmarried, many years before the death of her brother James. The testator's death was in 1897.

"During their lives respectively" must be taken to mean, not only during the life of both daughters, but also during the life of the survivor of them. It conferred upon the sisters a life estate in common. Upon Martha's death, this enured for the sole benefit of the survivor, Catherine Ann: Heathe v. Heathe (1740), 2 Atk. 121; Doe dem. Patrick v. Royle (1849), 13 Q.B. 100, 112, 114.

Para. 11 of the will, the testator said: "In case my said son James should predecease my said two daughters Martha and Catherine Ann, and without having recovered his reason, and both or one of my said daughters are or is unmarried at the time, then I give and devise the said east half of lot No. 24 unto them or her, as the case may be, in fee simple."

If the life estate now vested in Catherine Ann was not enlarged by para. 11, there was an intestacy as to the estate remaining upon the determination of her life interest; and it was urged by counsel for the next of kin that, as both the daughters did not survive their brother James, para. 11 did not enlarge the life estate of the survivor.

The learned Judge said that it was settled law that an estate limited in terms to commence in a certain specified event fails unless that event happens: Holmes v. Cradock (1797), 3 Ves. 317; Theobald on Wills, 6th ed., p. 553; Jarman on Wills, 5th ed., p. 778. But to "predecease . . . Martha and Catherine Ann" simply meant "die before Martha and Catherine Ann die." It expresses the relationship of the time of his death with the times of the death of both his sisters. As he died before they died—one still lives—the devise in para. 11 became operative; and, in the other existing contingencies, conferred upon Catherine Ann an estate in fee simple in lot 24, in which estate her life estate was merged.

Judgment accordingly. Costs of all parties out of the estate.

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