Dominion Law Reports

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ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. I-XLVIII. D.L.R.
See Pages vii-xviii.

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CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 48 INCLUSIVE.

WALKER v. WALKER. IMP.

(Annotated.) P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin, Lord Shaw and Lord Scott Dickson.
July 3, 1919.

DIVORCE AND SEPARATION (§ II—5)—IMPERIAL STATUTE IN FORCE IN MANITOBA—DOMINION LEGISLATION—PROVINCIAL LEGISLATION—JURISDICTION OF COURT OF KING'S BENCH TO ENTERTAIN DIVORCE ACTIONS.

The Dominion Act of 1888, which was passed to remove certain doubts as to the application of certain laws to the Province of Manitoba so far as it extended to the subject of marriage and divorce, was within the exclusive power of legislation conferred on the Dominion Parliament by s. 91 of the B.N.A. Act. This Act provided that the laws of England relating to matters within the jurisdiction of the Parliament of Canada so far as the same existed on July 15, 1870, had been as from that date and were in force in Manitoba insofar as applicable to the Province, and unrepealed by Imperial or Dominion legislation.

Their Lordships held, following the *Watts* v. *Watts* case ([1908] A.C. 573), that this Act was sufficient to make the provisions of the English Divorce and Matrimonial Causes Act of 1857 part of the substantive law of Manitoba. The English Act of 1857 not only set up a new Court, but introduced new substantive law and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old Ecclesiastical Tribunals possessed, but a jurisdiction arising out of the principle then for the first time introduced into the law of England of the right to divorce *a vinculo matrimonii* for certain matrimonial offences.

The Court of King's Bench Act, passed by the Legislature of Manitoba in 1913, was sufficient to give the Court of King's Bench jurisdiction to entertain petitions for divorce, and in respect of matrimonial offences.

[Review of Acts and authorities.]

Statement. APPEAL by defendant from the judgment of the Manitoba Court of Appeal, 39 D.L.R. 731, which held that the English divorce laws in force in 1870 were in force in Manitoba, and that the Court of King's Bench had full power to administer these laws. Affirmed.

F. H. Maughan, K.C., and *Horace Douglas*, for appellant; *Sir John Simon*, K.C., and *John Allen* (Deputy Attorney-General for Manitoba) for respondents.

The judgment of the Board was delivered by

Viscount Haldane. VISCOUNT HALDANE:—The question to be decided in this case is one of much importance, and is of a class as to which their

IMP.
P. C.
WALKER
v.
WALKER.
Viscount Haldane.

Lordships always desire that, before any topic falling within it is brought before them on appeal, that topic should have previously been submitted for consideration by the Supreme Court of Canada. However, in bringing the appeal directly from the Court of Appeal in the Province the appellant is within his legal right, and it becomes the duty of this Board to dispose of the question raised.

That question is whether the Court of King's Bench for the Province of Manitoba has jurisdiction to deal with a petition for a decree declaring a marriage null and void on the ground of impotency. The answer to this question depends on what is the law relating to dissolution of marriage in the Province, and to the jurisdiction of its Court of King's Bench.

It will be convenient in the first place to refer briefly to the history of the territory of the Province. Originally, what is now Manitoba formed part of so much of what is to-day the territory of Canada as had been included by King Charles II. in the Charter which he granted in 1670 to the Hudson's Bay Company. The area comprised in this Charter was treated as extending to what became known later as Rupert's Land and the North-Western Territory. When the Dominion of Canada was formed in 1867 the Hudson's Bay Company's territory was not brought within it. Its inclusion, at all events partially, was however rendered practicable by subsequent legislation. In particular by s. 146 of the B.N.A. Act of 1867, it had been provided that the Sovereign in Council might, on Address from the Dominion Parliament, admit Rupert's Land and the N.W. Territory into the Union on terms and conditions to be set out in the Address and approved by the Sovereign. By Order in Council of June 23, 1870, Rupert's Land and the N.W. Territory were admitted accordingly into the Dominion. The terms and conditions are not important for the present question.

Before referring to the steps which were taken to form what became the Province of Manitoba, after this admission, it is important to see what was the state of the law in Rupert's Land and the N. W. Territory at the time when the admission took place. The Charter of 1670 enabled the Hudson's Bay Company to make laws and administer justice in the region confided

to them. There is no doubt that the settlers brought with them to that region such of the laws of England in 1670 as were applicable under the circumstances. In course of time Imperial legislation took place, designed apparently for the protection of those living within Indian territories and other parts of America outside Upper and Lower Canada and the Civil Government of the United States, legislation long prior to Confederation, and which gave jurisdiction to the Courts of U. Canada to entertain suits arising outside U. Canada, but within these regions, and to deal with the subject matter as if (with certain exceptions) the law of U. Canada applied. Their Lordships do not think that the provisions so made took away the general power to make laws and set up Courts conferred by the Charter of 1670 on the Company.

What afterwards became the limits of the Province of Manitoba included a part of Rupert's Land called the District of Assiniboia. For this district the Company had set up a Governor and Council, who acted as a Court of Justice. At a meeting of this body in 1851 an Ordinance was passed providing that, in place of the laws of England as they were at the date of the original Charter of 1670, these laws as they had become at the date of the accession of Queen Victoria should regulate the proceedings of the Court. In 1864 there was substituted for the laws at the date of the Queen's accession "all such laws of England of subsequent date as may be applicable."

Whatever relevance these steps in legislation might possess were the answers to the present question dependent on how far the law of England, as it stood at the time of Confederation, was applicable in Manitoba or in part of it, the point becomes unimportant in view of what followed after Confederation. For the Dominion Parliament in the first place passed an Act in 1869 which provided *ad interim* that all the laws which should be in force in Rupert's Land and in the N.W. Territory at the time of their admission, which was then likely to take place, should, so far as consistent with the B.N.A. Act of 1867, remain in force until altered. Shortly after this, in 1870, the Dom. Parliament passed a second Act by which the Province of Manitoba was formed out of Rupert's Land and the N.W. Territory, and the provisions

IMP.
P. C.
WALKER
v.
WALKER.
Viscount Haldane.

of the B.N.A. Act (except those parts which were inapplicable to the Provinces generally then composing the Dominion) were made to apply to the new Province of Manitoba in the same way and to the like extent as if this Province had been originally included at Confederation, with provisions for the representation of Manitoba in the Dom. Parliament and for the establishment of a Legislature in the Province. In order to get rid of doubts as to the power of the Dom. Parliament to enact these statutes an Imperial Act was passed in 1871, which confirmed them as from the dates at which the Governor-General assented to them in the Queen's name, and provided generally that the Dom. Parliament should have power to establish new provinces in territory within the Dominion but not included in any of its existing provinces, and to make provision for administration and for the peace, order and good government of any such provinces, and for any territory not for the time being included in any province.

The most important of these statutes for the purposes of the present question is the second of the Dominion Acts, that of 1870, providing for the formation and Government of Manitoba, and confirmed as from its date by the Imperial Act of 1871. By s. 2 of this Dominion Act it had been enacted, as their Lordships have already stated, that the provisions of the B.N.A. Act of 1867 (excepting those not applicable to the whole of the Provinces of the Dominion) should apply to the new Province of Manitoba. The effect of this was that the Legislature of the Province was enabled, when set up, to pass an Act in 1871 establishing a Supreme Court with jurisdiction over all matters of law and equity. As far as possible, consistently with the circumstances of the country, the laws of evidence and the principles which governed the administration of justice in England were to obtain in this Supreme Court of Manitoba. Moreover by s. 52, so much of the laws of the Governor and Council of Assiniboia as were not inconsistent with the Act were to be extended to the whole of the Province of Manitoba.

It may be that the effect of the amending Ordinance already referred to, passed by the Council of Assiniboia and declaring that the laws of England not only down to but subsequent to

Queen Victoria's accession were to regulate the proceedings of the General Court, taken together with the statutes just referred to, and with s. 52 of the Manitoba Act of 1871, were sufficient to make all existing English law, except so far as inapplicable, extend to the new Province. But their Lordships are of opinion that it is unnecessary to consider this point, in view of the provision made by an Act of the Dom. Parliament passed in 1888 to remove doubts as to the application of certain laws to the Prov. of Manitoba. This Act, if it extended to the subject of marriage and divorce, was, insofar as it did so, plainly within the exclusive power of legislation conferred on the Dom. Parliament by s. 91 of the B.N.A. Act of 1867. It provided by s. 1 that, with an exception that is not material, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as the same existed on July 15, 1870, had been, as from that date, and were in force in Manitoba, insofar applicable to the Province and unrepealed by Imperial or Dominion legislation.

In the case of *Watts* v. *Watts*, [1908] A.C. 573, it was decided by this Board that legislation in British Columbia, whereby it was declared that "the civil and criminal laws of England as the same existed on November 19, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force," was sufficient to make the provisions of the English Divorce Act of 1857 apply so far at least as to enable the Court of British Columbia to grant divorce for adultery. Even if their Lordships were disposed to treat this decision as not binding on them, they see no reason to dissent from it, or to doubt the application, *mutatis mutandis*, of its principle to the present case. For the Divorce Act of 1857 did much more than set up a new Court and regulate its procedure. It introduced new substantive law, and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old Ecclesiastical Tribunals possessed, but a new jurisdiction, arising out of the principle, then for the first time introduced into the law of England, of the right to divorce *a vinculo matrimonii* for certain matrimonial offences. This right had thus been made part of the law of England by July 15, 1870, and their Lordships are of opinion that it became part of the substantive law of Manitoba. The circumstance that Ontario has no such law as to divorce

IMP.
P. C.
WALKER
v.
WALKER.
Viscount Haldane.

does not appear to their Lordships to militate against this construction of the Dominion Act in question.

A further point has however been raised by the appellant. It is that the Dom. Parliament, even assuming that it introduced new substantive law on the subject, had committed no jurisdiction to the Courts of Manitoba to apply such law, and that the Legislature of Manitoba had not, when constituting its Supreme Court, endowed it with power to do so. It is sufficient that their Lordships should point out that in 1913, prior to the proceedings in the present case, the King's Bench Act of that year passed by the Legislature of the Province had provided that the Court of King's Bench, which had taken the place of the former Supreme Court, was to be a Court of Record of original jurisdiction, and to possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of civil and criminal jurisdiction in all matters civil and criminal whatsoever, and was to possess all the rights and privileges of such Courts, as fully as the same were on July 15, 1870, possessed by any of her late Majesty's Superior Courts of Common Law at Westminster or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other Court in England having cognizance of property and civil rights and of crimes and offences. The Act goes on to direct the Court to hold plea in all manner of actions, suits and proceedings, whether at law or in equity or probate or howsoever otherwise.

Their Lordships find nothing in the context of the Act to limit the natural meaning of these words, and they are therefore of opinion that the case is indistinguishable from what was decided in *Watts* v. *Watts* by this Board. It appears to them to be clear that, in the absence of words limiting its jurisdiction under the Act referred to, the Court of King's Bench of the Province of Manitoba was rightly held by the Judges in the Court of Appeal of the Province, as the result of the careful and learned judgments they delivered, to have had jurisdiction, as contended by the respondent and the intervenant.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. It has been agreed that nothing should be said about costs.

Appeal dismissed.

ANNOTATION.

EXISTENCE OF JUDICIAL DIVORCE IN MANITOBA, SASKATCHEWAN AND ALBERTA AS DETERMINED BY THE PRIVY COUNCIL IN THE *Walker* v. *Walker* AND *Board* v. *Board* CASES. BY JOHN ALLEN, DEPUTY ATTORNEY-GENERAL FOR MANITOBA.

The judgment of the Privy Council in the case of *Walker* v. *Walker and the Attorney-General of Manitoba* is most interesting as finally determining that judicial divorce exists in Manitoba and has existed, in any event since the year 1888 when the Dominion Parliament enacted the Act c. 33, of the Statutes of that year, entitled "An Act respecting the application of certain laws therein mentioned to the Province of Manitoba."

It was argued before the Court of Appeal of Manitoba that the right to judicial divorce had existed in Manitoba since Jan. 7, 1864, because the Ordinance of the Governor in Council of Assiniboia introduced the laws of England of that date so far as applicable to the old Hudson's Bay Colony, and there could be no question of the applicability of the English law of divorce and matrimonial causes (c. 85 of 20 and 21 Vict.) after the decision in *Watts and Att'y-Gen'l for B.C.* v. *Watts*, [1908] A.C. 573. (See judgment of Cameron, J., in *Walker* v. *Walker and Att'y-Gen'l* (1918), 39 D.L.R. 731, at p. 752.)

The Judicial Committee, however, refused to deal conclusively with the effect of the Ordinance of 1864 and rest their judgment on the 1888 Dominion Act.

In the argument before the Judicial Committee it was pointed out that the Ordinance of 1864 had already been interpreted by the decision in *Sinclair* v. *Mulligan*, 3 Man. L.R. 481 and 5 Man. L.R. 17, as referring only to procedure and not to substantive law. Hence their Lordships in the Judicial Committee doubtless hesitated to upset the *Sinclair* v. *Mulligan* judgment which was rendered over thirty years ago, and founded their judgment on the 1888 Dominion Act which is expressed in language which leaves no room for doubt.

It would have been interesting indeed if the Judicial Committee had finally determined just what was meant by the old Ordinance of Jan. 7, 1864, which caused so much trouble to the early lawyers and judges in the Prov. of Manitoba.

It would appear, however, that the judgment in *Sinclair* v. *Mulligan* is not correct for the following reasons: Killam, J., held that the Ordinances of April 11, 1862, and of Jan. 7, 1864, introduced procedure only and not substantive law. The Statute of Frauds is procedure and hence if the reasoning of Killam, J., is correct, the 1862 and the 1864 Ordinances and similarly the Ordinance of 1851 (found at p. 378 of Oliver) couched in the same language would introduce the Statute of Frauds. Hence the finding in *Sinclair* v. *Mulligan* that the Statute of Frauds was not introduced would appear to be incorrect. It is worthy of note that neither court in *Sinclair* v. *Mulligan* touched on the 1851 Consolidation of the Ordinances of the Governor and Council of Assiniboia.

Annotation.

The 1888 Dominion Act is as follows:—

An Act respecting the application of certain laws therein mentioned to the Province of Manitoba.

(Assented to 22nd May, 1888).

For the removal of doubts, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows:—

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, insofar as the same are applicable to the said Province and insofar as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada.

2. Whenever, between the said day and the first day of March, one thousand eight hundred and eighty-seven, interest was payable in the said Province by the agreement of parties or by law and no rate was fixed by such agreement or by such law, the rate of interest was six per centum per annum.

3. Nothing in the first section of this Act contained shall affect any action, suit, judgment, process or proceeding pending, existing or in force at the time of the passing of this Act.

S. 1 above is the important section. This s. 1 was re-enacted in the same form in the 1906 revision of the Statutes of Canada.

Now "Divorce" is one of the subjects assigned exclusively to the Dominion Parliament by sub-head 26 of s. 91, of the B.N.A. Act. Hence the 1888 Dominion Act enacted that for Manitoba from July 15, 1870, the law as to divorce should be the law of England as of July 15, 1870, if the same were applicable. The case of *Watts and Att'y-Gen'l* v. *Watts, supra*, decided that the English Divorce and Matrimonial Causes Act of 1857 (which became law in Jan., 1858) was applicable to British Columbia on Nov. 19, 1858. Hence the divorce law of England of July 15, 1870, must have been applicable to Manitoba on that date. Hence the effect of the 1888 Dominion Act was to introduce into Manitoba the substantive law of England of July 15, 1870, as to divorce.

The counsel for the appellant, however, before the Judicial Committee argued at great length that there was not, on July 15, 1860, and is not now, any Court in Manitoba with jurisdiction in divorce pleas.

As respects jurisdiction of the courts the *Walker* case differs from the *Watts* case, because prior to the entry of British Columbia into Confederation one law-making body there had full power to enact the substantive law, and to give jurisdiction to its courts, and as was conclusively shewn by the *Watts* case and the cases on which it depended, the substantive law had been introduced and the courts clothed with the fullest power to try divorce and other pleas. After the entry of British Columbia into Confederation the same law as to divorce remained in force, and its courts still retained their power to adjudicate in divorce pleas.

Prior to July 15, 1870, however, there was no Province of Manitoba. Hence if the 1888 Dominion Act did introduce into Manitoba the substantive English laws of divorce of July 15, 1870, without creating any Court there still remained the question as to whether or not the Provincial Legislature of Manitoba had created a Court with jurisdiction wide enough to hear

Annotation.

divorce cases. It might be said that the argument before the Judicial Committee turned largely on the question as to whether or not the Provincial Legislature had created a Court with jurisdiction in divorce. At one stage of the argument Lord Buckmaster stated to Mr. Maughan, K.C., "If a man has certain definite statutory rights conferred upon him by the Dominion Parliament do you mean to say that the Provincial Parliament can render them wholly inoperative by not providing any means by which they can be made effectual?" Mr. Maughan replied that the Dom. Parliament could confer jurisdiction on a Prov. Court (see *Valin* v. *Langlois* (1879), 5 App. Cases, 115) or create a Court of its own under s. 101 of the B.N.A. Act. Viscount Haldane then interposed as follows:—

"That is quite a different thing, this meant a Court such as the Court of Exchequer in Canada for settling disputes between people in different Provinces."

This might indicate that s. 101 of the B.N.A. Act does not give the Dom. Parliament the fullest powers in creating courts. Perhaps, however, Viscount Haldane did not intend to finally determine the point.

The Judicial Committee hence took the broad ground that once there is a substantive law in force in any province, that law cannot be rendered nugatory by any legislation of the province. The Supreme Court of the Province must administer the law where no other provision is made. Hence the Legislature of Manitoba could not now validly enact that the Court of King's Bench shall not adjudicate in divorce pleas. Such legislation would be *ultra vires* if one interprets correctly what was said in the argument before the Judicial Committee.

If one traces the history of the General Quarterly Court, which existed in Assiniboia prior to July 15, 1870, it would appear that it had jurisdiction to adjudicate in "All causes, civil as well as criminal." (See Hudson's Bay Company's Charter) and did adjudicate in all kinds of cases as the records in the Provincial Library at Winnipeg shew. Such cases as the following were heard before it:—Criminal conversation, defamation, theft, murder, assault, selling beer, supplying Indians with drink, giving false statements of imports, trespass, rape, false pretences, seduction, defamatory conspiracy, perjury, infanticide, concealing birth, breach of contract, debts, manslaughter, kindling a fire in open plains, all kinds of civil claims.

The General Quarterly Court tried more than one murder case, and it inflicted the death sentence, which was carried out.

The General Quarterly Court adjudicated in Probate matters after 1858—Oliver, p. 569, also in regard to Guardianship of Minors—Oliver, p. 558.

As to the power and jurisdiction of the General Quarterly Court see Recorder Johnson's charge to the first Grand Jury in Manitoba reported in *The Manitoban* newspaper of May 20, 1871; Wood, C.J.M., in *R.* v. *Lepine*, Provincial Library Volume; Recorder Johnson's evidence before the Committee of the Dominion House to investigate the dispute as to boundary between Ontario and Manitoba—Provincial Library Volume.

The General Quarterly Court was in existence and exercised full power and authority on July 15, 1870, and for some two years thereafter until the Manitoba Supreme Court was created and a Judge appointed.

Annotation.

The General Quarterly Court was recognized by Imperial, Dominion and Provincial legislation. See s. 5 of Rupert's Land Act, 1868 (Imp.), ss. 5 and 6 of 32-33 Vic., c. 3 (Dom.), s. 36 of 33 Vic., c. 3 (Dom.), s. 2 of 34 Vic., c. 14 (Dom.), ss. 39, 40 and 41 of 34 Vic., c. 2 (Man.) Schedule A to c. 13 of 34 Vic. (Dom.) by which the General Quarterly Court was given certain bankruptcy jurisdiction by the Dominion, s. 5 of 34 and 35 Vic., c. 28 (Imp.), s. 1 of 35 Vic., c. 4 (Man.)

Hence it is submitted that after July 7, 1864, the General Quarterly Court of Hudson's Bay days could have adjudicated on divorce pleas if same had been brought before it, and this Court was clothed with this power on July 15, 1870, and thereafter until it went out of existence in 1872. Hence on July 15, 1870, there was a Court in Manitoba with full power to adjudicate in divorce pleas.

After the creation of the Manitoba Supreme Court its jurisdiction and constitution were changed from time to time by the Provincial Legislature. It is worthy of note that the first jurisdiction legislation of the Province after 1888 was in 1891. (See ss. 8 and 9 of c. 36 of 1891 Con. Stats. of Manitoba.) The foot note to said s. 9 has the reference "51 Vic. c. 33, s. 1 (D)." This is the 1888 Dominion Act which introduced the laws of England and shews conclusively that the draftsman of the 1891 Provincial Act had at his elbow the 1888 Dominion Act and drafted accordingly. The chairman of the board which consolidated the Manitoba Statutes in 1891 was Killam, J. Nowhere else in all the Statutes of Manitoba can one find a reference in a foot note to a Dominion Statute. The change which was made in the said jurisdiction s. 9 in 1891, together with this foot note referring to the Dominion Statute would indicate that the then Court of Queen's Bench was clothed with the fullest powers to meet the change in the law effected by the 1888 Dominion Act.

The Judicial Committee held that there is nothing in the present jurisdiction sections of the Provincial legislation cutting down the jurisdiction of the Court of King's Bench, and that it consequently has jurisdiction to adjudicate in divorce pleas. Hence the substantive law of Manitoba as to divorce and matrimonial causes must be found in the English Statutes in force on July 15, 1870. These are: C. 85 of 1857 Statutes (20 and 21 Vic.); c. 108 of 1858 Statutes (21 and 22 Vic.); c. 61 of 1859 Statutes (22 and 23 Vic.); c. 144 of 1860 Statutes (23 and 24 Vic.); c. 81 of 1862 Statutes (25 and 26 Vic.); c. 44 of 1864 Statutes (27 and 28 Vic.); c. 32 of 1866 Statutes (29 and 30 Vic.); c. 77 of 1868 Statutes (31 and 32 Vic.).

One will have to extract from these Statutes those parts which are applicable to Manitoba and such will constitute the substantive law of Manitoba as to divorce.

Those who next consolidate the Manitoba Statutes will have to go through the above mentioned English Acts and extract the divorce law of Manitoba. The same should be given the dignity of a chapter in the next Consolidation of the Manitoba Statutes (See c. 67 R.S.B.C. 1911, which is the English law of divorce of Nov. 19, 1858, so far as applicable to British Columbia.)

Unless the Canadian Parliament changes the law, Manitoba will continue to have as its divorce law the law of England of July 15, 1870, just as British Columbia continues to this day to have the law of England of

Nov. 19, 1858. In the fifty years since Confederation no general divorce law has been enacted by the Parliament of Canada. Annotation.

The 1856 English Act is the most important of the above. This enacted new substantive law and transferred all cases of divorce and matrimonial causes to the Court created by the Act and regulated the procedure of the Court. It in effect rendered unnecessary divorce by Act of Parliament for persons domiciled in England, and did away with the jurisdiction of the Ecclesiastical Court which jurisdiction was transferred to the new Court.

S. 27 of the 1857 English Act is important. It is as follows:—

> XXVII. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a *mensa et thoro* or of adultery coupled with desertion, without reasonable excuse, for two years or upwards, and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded; provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person being married to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

This shews that the new order of things does not effect any great change in the law. It is the method of administering the law which has been changed. Recently statements have been made in public to the effect that the *Walker* case will result in divorces being granted for reasons which have not prevailed hitherto. The Senate and House of Commons have hitherto recognized adultery as the only valid ground for divorce, although in a few instances other reasons have prevailed. The woman was on the same level as the man in applications for divorce at Ottawa. Now, however, the Manitoba Courts will be compelled to give the man higher rights than the woman, as the above s. 27 indicates. Hence the Courts of Manitoba will not be able to grant divorces in some cases in which relief could be given at Ottawa.

It would appear that the Senate and House of Commons can still be appealed to by any Manitoba citizens who desire a private Bill. The Canadian Parliament did not surrender its rights to grant relief when it enacted the 1888 Dominion Act.

Perhaps where the wife cannot bring her case within the above s. 27, she will get relief by application to Ottawa, under the old procedure.

The *Walker* case was not one of adultery, but was one in which the wife asked for a decree on the ground of impotency. The Ecclesiastical Courts in England had jurisdiction to grant a decree of nullity for this reason, long before 1857. In the Alberta case of *Board* v. *Board* (*post* p. 13) adultery was alleged. Prior to the 1857 Act no court in England had

Annotation. jurisdiction to grant a decree of absolute divorce where adultery was proved. The decree in a case of impotency is given instanter while in cases of adultery a decree *nisi* is first given. This is in accordance with the law of England of July 15, 1870.

The Manitoba Judges will probably promulgate rules and regulations to govern the procedure for that Province. The Rules and Regulations of the English Courts of July 15, 1870, are no part of the law of England, and hence were not introduced into Manitoba by the 1888 Dominion Act.

Professor Oliver's work, "The Canadian North-West, its early Development and Legislative Records" was placed before their Lordships of the Judicial Committee, and would have been invaluable if the Judicial Committee had found it necessary to determine the authority and jurisdiction of the Governor and Council of Assiniboia and the General Quarterly Court of the Hudson's Bay Company's regime.

When the 1888 Act was introduced into the House of Commons by Sir John Thompson, the then Minister of Justice at Ottawa, David Mills, who was a member of the House of Commons, approved of the Bill, and pointed out the necessity for same. Mr. Mills had done much research work in assisting Oliver Mowat to prepare Ontario's case against the Dominion in the famous boundary dispute. Mr. Mills said, in part, in regard to the 1888 Act: "So that what particular law is in force in that country apart from our legislative declaration would be a matter of extreme doubt, whether it would be the old law of France or the common law of England, and whether it was the law of England in 1774 or 1791 is also a matter of doubt. Therefore it seems to me that the proposed legislation by the Minister of Justice is highly necessary to remove all doubt and determine what law does govern the people in that country within the jurisdiction of the Parliament of Canada."

From an historical standpoint one must regret that the Judicial Committee did not find it necessary to deal conclusively with the period prior to July 15, 1870.

In the Alberta case of *Board* v. *Board* (*post* p. 13) the argument covered much the same ground as in the *Walker* case. The main part of the argument was as to the capacity of the Courts, first of the North West Territories and later of the Province of Alberta, to adjudicate on divorce pleas after the substantive law was in force.

The Province of Saskatchewan took no part in these divorce cases, but the Courts of that Province will now have the same rights to adjudicate on divorce pleas as belong to the Courts of Manitoba and Alberta. The Judges in Alberta and Saskatchewan will also probably enact rules to settle the procedure for their respective Provinces.

As to whether or not the new order of things resulting from the decisions in the *Walker* and *Board* cases is as it should be one cannot do better than quote the words of Sir Richard Bethell (afterwards Lord Westbury) the then Attorney-General, in introducing the English Act of 1857:—

"He had abstained of course from dwelling on the evils existent in the present law, which has been so long admitted, so universally recognized, so frequently pointed out not only in Parliament but out of Parliament, not only by lawyers but by every writer upon the habits and manners of the

people, that it would be a mere waste of time to enter upon so trite a subject." Annotation.

What Sir Richard Bethell said in the English Parliament on that occasion is applicable to the system by which only Parliamentary divorces can be obtained in parts of Canada. Such a system in its operation means one law for the rich and another for the poor. The decisions in *Walker* and *Board* will place all classes in Manitoba, Saskatchewan and Alberta on an equality as far as getting a divorce is concerned.

BOARD v. BOARD.

IMP.

P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin, Lord Shaw and Lord Scott Dickson. July 3, 1919.

DIVORCE AND SEPARATION (§ II—5)—IMPERIAL STATUTE IN FORCE IN ALBERTA —DOMINION LEGISLATION—PROVINCIAL LEGISLATION—JURISDICTION OF SUPREME COURT TO ENTERTAIN DIVORCE ACTIONS.

For the reasons given in *Walker* v. *Walker* (*ante* p. 1), their Lordships held that the effect of the Dominion Act of 1886 was to make the English law of divorce as established by the Divorce Act of 1857 apply to the Territories as well as to Alberta. The Supreme Court Act passed by the Legislature of Alberta in 1907 gave the Court jurisdiction to entertain petitions for divorce.

APPEAL from the judgment of the Supreme Court of Alberta (1918), 41 D.L.R. 286, which held that there was jurisdiction in the Court to entertain proceedings on a petition for divorce on the ground of adultery. Affirmed. Statement.

F. H. Maughan, K.C., and *Horace Douglas*, for appellant; *Sir John Simon*, K.C., and *M. W. McNaghten*, K.C., for respondent.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—This is an appeal from a judgment of the Supreme Court of Alberta (1918), 41 D.L.R. 286, by which it was held that there was jurisdiction in the Court to entertain proceedings on a petition for divorce on the ground of adultery. Viscount Haldane.

The Province was established in 1905 by a Dominion Act of that year, being formed out of the North West Territories. By s. 16 of the Act it was provided that the laws previously in force in the N.W.T. included in the new Province should continue subject to certain reservations which are not material. No law relating to marriage or divorce has been enacted by the Dominion Parliament since the Province was established, and it is therefore necessary to ascertain what was the law relating to marriage and divorce in the Territories before the Province was constituted.

In the appeal, immediately previous to this one, of *Walker* v. *Walker*, their Lordships have referred to the legislation by which

IMP.
P. C.
BOARD
v.
BOARD.
Viscount Haldane.

the Parliament of the Dominion acquired power to make laws relating to the N.W.T. In 1886, the Dominion Parliament passed, under the powers it had so acquired, an Act to amend the law respecting them (49 Vict. c. 25). By s. 2 of that Act, all its statutes which were not inapplicable were to be in force in the Territories, and by s. 3 the laws of England relating to civil and criminal matters, as the same existed on July 15, 1870, were to be in force in the Territories, insofar as the same were applicable, unless excluded by Imperial or Dominion statute, or by ordinance of the Lieut.-Governor in Council.

For the reasons given in their judgment in *Walker* v. *Walker*, their Lordships are of opinion that the effect of the Act of 1886 was to make the English law of divorce as established by the Divorce Act of 1857, apply to the Territories as well as to Alberta.

But there is another question which has been raised in this appeal, which is whether the Supreme Court of the Province of Alberta has been so constituted as to have jurisdiction in matrimonial causes, including divorce.

The Dominion Act of 1886, by s. 4, established in the Territories a Supreme Court of record of original and appellate jurisdiction, called the Supreme Court of the N.W.T. By s. 14, this Court was, for the administration of the laws within them, to possess all such powers and authorities as by the law of England are incident to a superior Court of civil and criminal jurisdiction, and was to have and exercise all the rights, incidents and privileges of a Court of record, and all other rights, incidents and privileges, as fully to all intents and purposes as the same were on July 15, 1870, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, or by the Court of Chancery, or by the Court of Probate in England, and was to hold pleas in all, and all manner of actions causes and suits, as well as criminal and civil real and personal and mixed, and was to proceed in such actions, causes and suits by such process and course as are provided by law, and as should tend with justice and despatch to determine the same, and should hear and determine all issues of law, and should hear and (with or without a jury as provided by law) determine all issues of fact that might be found, and give judgment and award execution, in as full and ample a manner as might at the date mentioned be done in Her Majesty's Courts of Queen's Bench,

Common Bench, or, in matters which regarded the Queen's revenue (including the condemnation of contraband and smuggled goods), by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

It will be observed that in the above enumeration of Courts the Court of Divorce and Matrimonial Causes, established by the English Divorce Act of 1857, is not mentioned.

By s. 91 of the B.N.A. Act of 1867, the subjects of marriage and divorce are among the matters as to which the Dominion Parliament has exclusive jurisdiction. It has never passed any general Act relating to divorce, but it is obvious that it had power to, and did establish the substantive right to divorce in the Territories, if the general words of s. 3 of its Act of 1886, putting into force there the law of England as it was on July 15, 1870, were wide enough to cover this subject. Their Lordships have already intimated that they are of opinion that these general words had this effect.

Under s. 92 of the B.N.A. Act of 1867, the administration of justice, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts, belongs exclusively to the Provincial Legislatures. Acting under this power, the Legislature of Alberta in 1907 passed a Supreme Court Act, establishing a Supreme Court of Alberta as a superior Court of civil and criminal jurisdiction in, and for the Province. By s. 9 of that Act, it was provided that this Court should, within the Province, and for the administration of the laws for the time being in force within it, in addition to any other jurisdiction which before the Act was vested in, or capable of being exercised within the Province by the Supreme Court of the Territories out of which it had been carved, possess the jurisdiction which on July 15, 1870, was vested in, or capable of being exercised in England by (1) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court; (2) the Court of Queen's Bench; (3) the Court of Common Pleas at Westminster; (4) the Court of Exchequer as a Court of Revenue as well as a

IMP.
P. C.
BOARD
v.
BOARD.
Viscount Haldane.

Common Law Court; (5) the Court of Probate; (6) the Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any of such commissions.

S. 9 of this Supreme Court Act of 1907 further provided that the jurisdiction aforesaid should include the jurisdiction which, at the commencement of the Act, was vested in or capable of being exercised by all or any one or more of the Judges of the said Courts, respectively sitting in Court or Chambers or elsewhere, when acting as Judges or a Judge in pursuance of any statute, law or custom; and all powers given to any such Court or to any such Judges by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so conferred.

It will be observed that in the above enumeration of Courts, the Court for Divorce and Matrimonial Causes, set up by the English Divorce Act of 1857, is again omitted.

Turning to this English statute, their Lordships observe that its effect is as follows:—It transfers to a new statutory Court which it sets up all the jurisdiction of the existing Ecclesiastical Court (which did not extend to divorce *a vinculo matrimonii* for adultery, but did comprehend divorce *a mensâ thoro* and lesser matters). This new Court was to be called the Court for Divorce and Matrimonial Causes, and was to sit in London or Middlesex. The right was given to present a petition for dissolution of marriage, for adultery, and for certain other causes, and the decree might include not only such dissolution, but damages as at common law. As regards the composition of the new Court, it was to consist of the Lord Chancellor, the Lord Chief Justices of the Queen's Bench and Common Pleas, the Lord Chief Baron of the Exchequer, the senior Puisne Judge in each of these Courts, and the Judge of the Court of Probate, then about to be established. The last named Judge was to be the Judge Ordinary of the new Matrimonial Court, and was to exercise all its ordinary jurisdiction except trials of petitions for nullity of marriage and divorce, and applications for new trials.

During his temporary absence the Lord Chancellor was empowered to authorise the Master of the Rolls, the Judge of the Admiralty Court, either of the Lords Justices, or any Vice-Chancellor, or any Judge of the Superior Courts of Law at West-

minster, to act as Judge Ordinary of the new Court, and to exercise all the jurisdiction of the Judge Ordinary. The Divorce Act of 1857 was amended by a further Act in 1859, under which all the Judges of the three Common Law Courts were to be Judges of the new Divorce Court.

Their Lordships think that the way in which the Act of 1857, as it stood originally unaltered by subsequent legislation such as the Judicature Acts, constituted the existing Judges of other Courts Judges of the new Court, detracts from the weight of any inference based on the omission of a reference to it in the Acts setting up the Supreme Courts of the N.W.T. and of Alberta. Had it been intended to exclude jurisdiction in divorce it would have been necessary to say so; for the language of s. 9 of the Act of 1907 in particular is so comprehensive that it confers on the Supreme Court of Alberta all the capacity given by the Divorce Acts to the Judges of the other Courts in England to act as the Court established by those Acts. Their Lordships would arrive at this conclusion even if the words "at the commencement of this Act" in s. 9 of the Act of 1907 were treated as rendered nugatory by the changes effected by the English Judicature Act.

But the matter does not rest here. The right to divorce had, before the setting up of a Supreme and Superior Court of Record in Alberta, been introduced into the substantive law of the Province. Their Lordships are of opinion that, in the absence of any explicit and valid legislative declaration that the Court was not to exercise jurisdiction in divorce, that Court was bound to entertain and to give effect to proceedings for making that right operative. Had the Legislature of the Province enacted that its tribunals were not to give effect to the right which the Dominion Parliament had conferred in the exercise of its exclusive jurisdiction, a serious question would have arisen as to whether such an enactment was valid. But not only is there no such enactment but, on the mere question of construction of the language of the Provincial Act of 1907, their Lordships are of opinion that a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can

IMP.
P. C.
BOARD
v.
BOARD.
Viscount Haldane.

enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities, such as the well-known judgment of Lord Mansfield in *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, 98 E.R. 1021, and the judgment of Lord Hardwicke in *Earl of Derby* v. *Duke of Athol* (1749), 1 Ves. Sen. 201, 27 E.R. 982. They are collected in the admirable opinion of Stuart, J., in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned Judges there, their Lordships have derived much assistance. They only desire to add that independently of the rule just referred to, there is another principle of construction which would in their opinion have been by itself sufficient to dispose of the question whether the words of the Act of 1907 excluded matrimonial jurisdiction. That Act set up a superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes, J., in *Mayor of London* v. *Cox* (1867) 2 E. & I., App. 239, at p. 259, nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so.

As the result their Lordships entertain no doubt that the second point raised was decided correctly as well as the first one. They will therefore humbly advise His Majesty that the appeal should be dismissed. As costs have not been asked for there will be no costs of this appeal. *Appeal dismissed.*

IMP.
P. C.

Re THE INITIATIVE AND REFERENDUM ACT.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin, Lord Shaw and Lord Scott Dickson. July 3, 1919.

CONSTITUTIONAL LAW (§ I D 2—90)—INITIATIVE AND REFERENDUM—ULTRA VIRES.

An Act to confer upon the electors of a Province the right to initiate legislation which should come into force if certain votes in its favour were given would be an abdication of the powers conferred upon the Legislature by the B.N.A. Act, 1867, and an interference with the powers of the Lieutenant-Governor, and, therefore, the Initiative and Referendum Act, Man. Stat. 1916, c. 59, is *ultra vires*.

Statement.

APPEAL from a judgment of the Manitoba Court of Appeal, (1916), 32 D.L.R. 148, which held that the Initiative and Referendum Act, c. 59, 6 Geo. V., Man., was *ultra vires*. Affirmed.

IMP.

P. C.

RE THE INITIATIVE AND REFERENDUM ACT.

Viscount Haldane

F. H. Maughan, K.C., and *Horace Douglas*, for appellant; *Sir John Simon*, K.C., and *John Allen* (Deputy Attorney-General for Manitoba), for respondent.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—In this case questions were raised in the Province of Manitoba as to the validity of an Act passed by its Legislature and entitled the Initiative and Referendum Act. In consequence, under a statute which enabled him to do so, the Lieutenant-Governor in Council referred to the Court of King's Bench of the Province the two questions which follow:—

1. Had the Legislative Assembly jurisdiction to enact the said Act, and, if not, in what particular or respect has it exceeded its powers?

2. Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4*a*, 7, 8, 11, 12, 17 (sub-s. 1) of the said Act, or any of them; and, if so, which of them?

On October 27, 1916, these questions came before Mathers, C.J. By consent there was no argument, and the Judge decided that the Legislative Assembly had jurisdiction to pass the Act and the several sections referred to in the second question.

The matter was then brought before the Court of Appeal of the Province, and was argued before Howell, C.J., and Richards, Perdue, Cameron and Haggart, JJ.A. On December 20, 1916, the Court of Appeal delivered judgment, answering the questions submitted in the negative. The answer to the first question was: "No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith." The answer to the second question was: "As to ss. 3, 4, 4*a*, 7, 9 and 11 the answer is 'No.' As to ss. 12 and 17 (sub-s. 1), the answer is, 'Taken with their context, No.'"

In October, 1918, special leave was granted by His Majesty in Council to the Att'y-Gen'l of the Province to appeal to the Sovereign in Council, and by Order dated November 25, in the same year leave was granted to the Att'y-Gen'l of Canada to intervene.

It would have been a convenient course if, before bringing these questions before the Sovereign in Council, the authorities of the Province had seen their way in the first place to submit them for the opinion of the Supreme Court of Canada. It is desirable that topics affecting the constitution of Canada should come before that Court prior to being brought to London for

IMP.

P. C.

RE THE INITIATIVE AND REFERENDUM ACT.

Viscount Haldane

argument. However, the parties appear to have concurred in asking that special leave for a direct appeal should be granted. Their Lordships desire to observe that it is by no means a matter of course that such leave should be given, for they attach much importance, not only to the position which belongs to the Supreme Court under the constitution of Canada, but to the value, in the decision of important points such as those before them, of the experience and learning of the Judges of that Court. However, the Att'y-Gen'l of the Province has succeeded in obtaining special leave to bring the case directly before the Judicial Committee, and their Lordships will therefore deal with it. They will only observe further at this stage that they have derived much assistance from the judgments delivered by the members of the Court of Appeal for Manitoba.

The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the constitution of Canada as defined by the B.N.A. Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be made and repealed by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than 8% of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change by the Assembly in the session in which it is submitted, must be submitted by the Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Att'y-Gen'l, and if necessary of the Court, as to whether the proposed law is *intra vires*. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within 6 months from the presentation of the

petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, "subject, however, to the same powers of veto and disallowance as are provided in the B.N.A. Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly," on a date to be proclaimed by the Lieutenant-Governor, and to be not later than 30 days after the official announcement of the result of the vote.

The proposed law further provides that a number of electors, equivalent in this case to not less than 5% of the number of votes polled at the last election, may petition for the repeal of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from these already referred to, are made for the repeal of such Act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until 3 months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding $100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in His Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the matters referred, not exceeding 1,200 words for each side.

The framework of the constitution of Canada was enacted in 1867 by the Imperial Parliament in order to give effect to the desire expressed in the resolutions adopted by the conference of Canadian and other delegates held at Quebec in October, 1864. The object was to form in the first instance out of the old Province of Canada, along with Nova Scotia and New Brunswick, a Dominion with a constitution similar in principle to that of the United Kingdom. Provision was made for the extension of this constitution to other Colonies, such as Newfoundland and Prince Edward Island, should they desire to come in, and also to Rupert's Land and the N.W.T. It is out of these last that the Province of

IMP.

P. C.

RE THE INITIATIVE AND REFERENDUM ACT.

Viscount Haldane

Manitoba was formed, the provisions of the Act of 1867 that are applicable having been meantime strengthened by subsequent Imperial and Dominion legislation. The Executive Government of Canada was declared by the Act of 1867 to remain vested in the Queen, and, by s. 12, all powers, authorities and functions vested in or exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation were, so far as the same continued in existence and were capable of being exercised after the Union in relation to the Government of Canada, to be vested in and exercisable by the Governor-General. A Parliament was then set up for Canada. Part V. of the Act established analogous constitutions for the Provinces. For each of these there was to be a Lieutenant-Governor. Although he is under s. 58 appointed by the Governor-General, it has been settled by decisions of the Judicial Committee, such as that in *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* [1892], A.C. 437, that, as the appointment of a Provincial Governor is made under the Great Seal of Canada, and therefore really by the Executive Government of the Dominion which is in the Sovereign, the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial government as is the Governor-General for all purposes of Dominion government. S. 65 and the other sections dealing with the subject define the powers of the Lieutenant-Governor as being such of those powers having been exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation, as are exercisable in relation to the government of a Province. The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a Central Government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plentitude of its own freedom before it handed them over to the Dominion and

the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

The importance of bearing this in mind when construing the subsequent provisions of the B.N.A. Act will presently appear. After thus defining the executive power the statute goes on to provide for a Legislature for each Province, and concludes Part V. by declaring in s. 90 that what has been laid down as to the Dominion Parliament in regard to appropriation and money Bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Sovereign and for a Secretary of State, and of one year for two years, and of the Province for Canada.

The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the Dominion Parliament and the Provincial Legislatures. Nothing in s. 91, which relates to Dominion powers, affects the question under consideration, excepting in one important respect. The residuary power of legislation, beyond those powers that are specifically distributed by the two sections, is conferred on the Dominion. Had the Provinces possessed the residuary capacity, as in the case with the States under the constitutions of the United States and Australia, this might have affected the question of the power of their Legislatures to set up new legislative bodies. But it is not so, and it is therefore unnecessary to pursue a point which is merely speculative. The language of s. 92 is important. That section commences by enacting that "in each Province the Legislature may exclusively make laws in relation to matters" coming within certain classes of subjects. The only one of these classes which is relevant for the present purpose is the first enumerated, "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor."

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position

IMP.
P. C.
RE THE INITIATIVE AND REFERENDUM ACT.
Viscount Haldane

as directly representing the Sovereign in the Province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the Province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion statute of 1870, which formed the new Province out of Rupert's Land and the N.W.T., and established it with the constitution provided by the Act of 1867. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was insofar *ultra vires*.

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent its becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. S. 11 of

the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of 30 days after the Clerk of the Executive Council shall have published in the "Manitoba Gazette" a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the *ultra vires* character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act of 1865, therefore, which was invoked in the course of the argument, does not assist the appellants.

Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. S. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen* (1883), 9 A.C. 117, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

They have already indicated that on the point considered earlier in this judgment they are of opinion that the first part of the first question submitted for judicial decision, that relating to the jurisdiction to pass the Act, must be answered in the negative. As to the second part of this question, and as to the second question submitted which covers the same ground, namely,

IMP.

P. C.

RE THE INITIATIVE AND REFERENDUM ACT.

Viscount Haldane

whether the Legislative Assembly could enact ss. 3, 4, 4*a*, 7, 9, 11, 12 and 17 (sub-s. 1), or any of them, they agree with the Court of Appeal, subject to a reservation as to s. 12, in thinking that none of them were validly enacted, for they were merely steps towards the accomplishment of a purpose that was *ultra vires*. As to s. 12, if the last sentence were omitted they think that the main part of this might be made a subject of valid enactment. The earlier part of the section is severable, and if it had been capable of interpretation apart from the title of the Act and its context, it could have been validly enacted. But it is obvious that this provision was introduced where it stands in the midst of a number of other sections as preparatory to the accomplishment of *ultra vires* purposes.

It may well be, therefore, that the Court of Appeal was right in refusing to look at it apart from the rest of the sections, the purposes of which it was put in to subserve. Their Lordships think it unnecessary to decide a point which the appellants did not raise as a separate one at the Bar, and which has no relation to the real topic of controversy, or to interfere with the conclusion come to by the Judges in the Court below.

They will humbly advise His Majesty that the questions submitted should be answered in the terms indicated. There will be no order as to costs. The appeal should be simply dismissed.

Appeal dismissed.

MAN.

K. B.

HOLLAND v. HOLLAND.

Manitoba King's Bench, Galt, J. July 12, 1919.

DIVORCE AND SEPARATION (§ IV—40)—SEPARATION AGREEMENT—RELEASE FROM ALL PRIOR CLAIMS—ADULTERY PRIOR TO AGREEMENT—ACTION FOR DISSOLUTION—AGREEMENT PLEADED AS DEFENCE.

A release in a separation agreement made between husband and wife, whereby each of the parties released and discharged the other from all claims and demands whatsoever incurred or accrued up to the day of the date thereof, cannot avail the husband as a defence in an action by the wife for dissolution of the marriage, based on cruelty, and adultery committed by the husband prior to the date of the agreement but of which the wife had no knowledge until shortly before the proceedings for dissolution were commenced.

Statement.

PETITION by wife for dissolution of the marriage; separation agreement pleaded as defence.

J. E. Hansford, for petitioner; *J. H. Chalmers*, for respondent.

MAN.

K. B.

HOLLAND v. HOLLAND.

Galt, J.

GALT, J.:—This is a petition by Nina Holland against her husband Isaiah Holland praying for a dissolution of her marriage, payment of costs and further and other relief.

The petitioner bases her claim on desertion and cruelty practised upon her by her husband, and adultery committed by her husband at various times. The respondent denies the petitioner's allegations. He was represented at the hearing by counsel but did not himself appear.

From the evidence it appears that the parties were married in 1897 and that the respondent was guilty of both cruelty and desertion towards the petitioner prior to the year 1910. On May 10, 1910, a separation agreement was entered into between the parties in the words and figures following:—

This agreement made in duplicate this tenth day of May, A.D. 1910,

Between

Isaiah Holland, of the Village of Elkhorn, in the Province of Manitoba, stonemason (but formerly of Township Twelve (12) and Range Twenty-eight (28) farmer), (hereinafter called "the first party"),

Of the first part

and

Nina Holland, of the said Village of Elkhorn, wife of the first party (hereinafter called "the second party").

Of the second part.

Whereas the second party is the lawful wife of the first party, and the said parties have been living together as husband and wife for upwards of 11 years last past.

And whereas the said parties have one child, only issue of their marriage, namely, a girl of 11 years of age.

And whereas the second party has for some time been compelled to keep boarders and to perform work and services to assist in providing the necessaries of life for herself and the said child, whom the first party is and has been legally liable to support.

And whereas the first party is, and for many years last past, has been the owner of a dwelling-house in the said Village of Elkhorn and of a farm, namely, the N.E. quarter of sect. thirty (30) in Tp. Twelve (12) and Range twenty-eight (28), west of the principal meridian in the said Province, and is and for many years has been well able to earn a sufficient amount to keep himself, the second party and the said child in comfort or to provide for them if living apart from him.

And whereas the first party has been guilty of several assaults upon the second party, and of using abusive and threatening language to her without just cause.

And whereas the second party has, by reason thereof and of various acts of cruelty by the first party to her, been recently compelled to leave the first party and to live separately from him and has taken the said child to live with her.

MAN.

K. B.

HOLLAND v. HOLLAND.

Galt, J.

And whereas it has proved to be impossible for the said parties to live together.

Now this indenture witnesseth that in consideration of the premises and of the covenants, matters and things herein contained the first party doth hereby covenant, promise and agree to and with the second party as follows:

1. That that second party shall not from henceforth be bound to cohabit with the second party unless and until it shall be mutually agreed by and between the parties hereto that they shall again live together as husband and wife, and that the first party will not in any way during such period attempt to compel the second party to do so or to have any intercourse with him whatsoever.

2. That the second party shall for such period have the sole custody of the said child and the first party hereby waives all his rights to the custody and control of the said child, as he, the first party, has by reason of the premises rendered himself unfit to have the custody and control of the said child.

3. That the first party will forthwith convey the said farm to the second party for an estate in fee simple in possession free from all incumbrances in order that the rents and profits thereof, or the proceeds of a sale thereof, may enable the second party to live without further financial assistance from the first party while the second party shall be living apart from him.

4. That the first party during such period will not by himself, his servants or agents, enter upon any premises in which the second party and the said child, or either of them, may be, and that he, the first party, will not, during such period, in any way directly or indirectly interfere with the second party or with the said child.

5. That upon the failure of the first party to carry out all the terms of this agreement according to the true intent and meaning thereof the second party shall be at liberty to apply for an order against the first party under the Married Women's Protection Act (being c. 107 of the R.S.M., 1902), (see R.S.M. 1913, c. 206), containing all the terms set forth in s. 3 thereof if the first party shall then be living in Manitoba, but if he shall then be living out of Manitoba the second party may apply to the Courts where the first party is then residing for a similar order and the first party hereby consents and agrees that upon such application being made in Manitoba or elsewhere such order may thereupon be made against him and that he will abide by and obey the terms thereof.

6. In consideration of the premises and of the due performance and observance by the first party of everything herein contained by him to be observed or performed, the second party covenants with the first party that she will, while living apart from the first party, care for, maintain and educate the said child, and that when the first party shall have so conveyed the said farm to the second party free from all incumbrances and the said conveyance shall have been registered and the title to the said lands passed on to the satisfaction of the solicitors of the second party, she will not call upon the first party for any further financial assistance and will not incur any debts or liabilities in the name of the first party and will duly notify any parties to whom she may incur any liability that such parties are to look to her only for payment thereof, and the second party doth hereby covenant and agree to and with the first party that she will indemnify him against any and all loss, costs, damages or expenses that shall or may be incurred by him by reason of

any such liability that shall or may be incurred after the said conveyance shall have been so executed and registered and the title passed on as aforesaid.

7. Everything herein contained shall so far as applicable and legal extend to and include the heirs, executors, administrators and assigns of each of the parties hereto.

8. Each of the parties doth hereby, in consideration of the premises, release and discharge the other from all claims and demands whatsoever, incurred or accrued up to the day of the date hereof.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

It will be observed that under the eighth paragraph of this agreement each of the parties did in consideration of the premises, release and discharge the other from all claims and demands whatsoever incurred or accrued up to the day of the date thereof.

At the hearing evidence was given by Isaac Symington of adultery committed by the respondent with a woman in the year 1905, and another witness Arthur Stokoe gave evidence that the respondent had loose and immoral women in his house four or five years ago. The petitioner swears that she had no notice or knowledge of these acts of adultery by her husband until quite recently.

Under all the circumstances of the case I think the separation agreement, and the release therein contained, cannot avail the respondent now, and the petitioner is entitled to a decree for dissolution of her marriage with costs against the respondent on the grounds of cruelty, desertion and adultery.

Petition granted.

McBRATNEY v. McBRATNEY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Simmons and McCarthy, JJ. June 20, 1919.

DESCENT AND DISTRIBUTION (§ I E—24)—MARRIED WOMEN'S RELIEF ACT (ALTA.)—WIFE RECEIVING LESS THAN UNDER INTESTACY—JURISDICTION OF COURT.

By the Married Women's Relief Act, Alta. Stats. 1910, 2nd sess. c. 18, the right to apply for relief is given to any wife who is left less than she would receive on an intestacy. Held by Harvey, C.J., and Scott, J., that the Court had no jurisdiction on such an application to grant the widow more than she would have received on an intestacy.

Held by Simmons and McCarthy, JJ., that the jurisdiction of the Court was not so limited.

Statement.

APPEAL from the order of Stuart, J., 45 D.L.R. 738, awarding the plaintiff, the widow of the testator, of whose will the defendants are the executrices, a sum of over $10,000 by way of relief under the

ALTA.

S. C.

McBRATNEY v. McBRATNEY.

Harvey, C.J.

Married Women's Relief Act (c. 18 of 1910, 2nd sess., Alta., dismissed by an equally divided Court).

C. T. Jones, K.C., for appellants; *M. B. Peacock*, for respondents.

HARVEY, C.J.:—The valuation of the estate at the time of the death was a little over $25,000. This composed, however, $7,000 for cattle which the plaintiff states did not belong to the testator. This means that deducting the costs of administration the value of the estate is considerably less than $20,000.

By the terms of the Act, the right to apply for relief is given to any wife who is left less than she would receive on an intestacy. In the present case there was one child, so that the widow would have been entitled on an intestacy to one-half of the estate. She was left nothing, and, therefore, undoubtedly had the right to apply but it is contended by the appellants that the Court's jurisdiction to grant relief is limited to the amount she would have been entitled to on intestacy and that the order in this case is in excess of the Court's jurisdiction. There are certainly no express words of limitation and the Judge makes no reference in his reasons for judgment to the question. In January, 1916, however, Walsh, J., in *Re Matheson* (1916), 9 W.W.R. 996, held that there was such a limitation implied and there has been no other decision upon the point.

The will gives a reason for leaving nothing to the wife, viz. that the testator had made ample provision for her by transferring her other property. The property evidently referred to was some the widow owned, which, however, had not been in fact transferred to her by the testator but which had an assessed value of $13,600 in the year 1918, and probably in 1917, when the will was made, had an even higher assessed value. Its real value may, of course, have been less but if the testator thought that a fair value it would mean that in his view the wife already had almost as much as he had to dispose of by will.

This fact, of course, has no bearing upon the question of the extent of the Court's jurisdiction but it may have some effect upon the view one would take of the apparent iniquity of cutting the wife off without any benefit under the will and also upon the extent to which the dispositions of the will should be interfered with by the Court.

The statute is, in my opinion, quite clearly for the purpose of imposing upon the estate of the husband the obligation which rests upon him in his lifetime for his wife's necessities which do not end with his death but continue till hers. S. 10 of the Act, which is now repealed and which provided that if she would not be entitled to alimony she would not be entitled to relief under the Act, bears this out. Though that section is not now part of the Act it may be of assistance in determining the intention and the implied restrictions of the Act at its passing.

Now what are necessaries depends on the financial means of the husband and his style of living, and naturally has regard to the wife's other means of support. It is clear that when the wife has adequate means she cannot make her husband liable for support. See 16 Hals., p. 422 (par. 857), p. 427 (par. 868) and p. 429 (par. 873). The amount granted for alimony also always bears some reasonable proportion to the husband's income. In *Kettlewell* v. *Kettlewell*, [1898] P. 138, it was stated that the ordinary rule was to give the wife one-third of the husband's income but in that case she was given much less, and it was limited to the time she remained unmarried, since in case of a new marriage, someone else would have cast on him the obligation of support. In the grant under the Married Women's Relief Act of a fixed sum, the obligation is settled once for all, though the need of the widow may be of short duration. In *Sykes* v. *Sykes*, [1897] P. 306, it was stated that that amount would be ample for alimony for a wife that would be an adequate jointure for her as a widow, that is a provision for her in lieu of all dower.

If, therefore, it was intended, as s. 10 seemed to imply, that an allowance by a Judge should bear some relation to an adequate allowance for alimony, and as the Act was passed if she had adequate provision so that she would not be entitled to alimony she would not be entitled to relief, then the Act could scarcely have intended that the whole estate could be given to her against the husband's will, if there were any other defendants at least. S. 10 was repealed in consequence of the decision in *Drewry* v. *Drewry*, 30 D.L.R. 581, [1916] 2 A.C. 631, in which the Privy Council reversed our Court (27 D.L.R. 716, 9 A.L.R. 363), and held that a wife who had been living apart from her husband by mutual consent and would consequently be unable to maintain an

ALTA.

S. C.

McBRATNEY v. McBRATNEY.

Harvey, C.J.

action for alimony, could obtain no relief. It is quite clear that the object of meeting that decision involved no intention to make available for the Court's action any larger proportion of the testator's estate than had been previously available.

Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property? I agree with Walsh, J., that such an anomaly could scarcely have been intended.

It has long been a well recognized principle of construction that an Act should be so interpreted as not to change the common law further than is necessary to give effect to the clear intention of the statute. As far back as *Arthur* v. *Bokenham* (1708), 11 Mod. 150, 88 E.R. 957 the Court of Common Pleas said, "Statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare." I cannot see that the terms of s. 8, which give the Court absolute discretion, furnish any assistance one way or the other. The question is not the nature or the extent of the discretion but the extent of the jurisdiction within which that discretion may be exercised.

In my opinion, therefore, the order appealed from is wrong and should be set aside, because it is in excess of the jurisdiction given by the statute, but as this conclusion cannot become the judgment of this Division owing to the difference of opinion among its members no good purpose would be served by considering how I would consider the discretion which is within the power of the Court should be exercised.

Scott, J.

SCOTT, J.:—I concur.

Simmons, J.

SIMMONS, J.:—This is an appeal from Stuart, J., and it raises the question of the interpretation of the Married Women's Relief Act, c. 18, 1910, and amendments of 1917 and 1919.

The legislation is entitled:—"An Act respecting the Rights of Married Women in the Estate of their deceased Husbands." S. 2 provides that the widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the Judge before whom the application is made, receive less than if he had died intestate, may apply to the Supreme Court for relief.

S. 8 says the Court on such application may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

In *Re Matheson Estate, supra*, Walsh, J., held that the jurisdiction of the Court under the Act was by implication limited to the amount the widow would have received if the husband had died intestate. In order to support this view it must be held that s. 2 not only declares under what circumstances the jurisdiction shall arise, but also imposes a limit upon the jurisdiction.

Since the Act does not specifically in words declare any such limitation of jurisdiction it is contended that the implication as to limitation is in accordance with the intention of the Act. I am not able to accept this view. The history of the law of testamentary disposition leads one to the opposite conclusion.

The unrestricted power of testamentary disposition of the husband's estate by the common law of England conferred upon the husband is an anomaly, and is ascribed by Sir Henry Maine to the feeling inspired by the rule of primogeniture in the descent of land. Maine's Ancient Law, 10th edition, p. 240.

This principle did not exist in ancient Rome where the *querela inofficiosi testamenti* secured for children disinherited by their father's will, without just cause, one-fourth of what they would have received upon intestacy.

The acceptance of the right of dower was an encroachment upon the unlimited testamentary power.

> The provision for the widow was attributable to the exertions of the Church, which never relaxed its solicitude for the interest of wives surviving their husbands, winning perhaps one of the most arduous of its triumphs when after exacting for two or three centuries an express promise from the husband at marriage to endow the wife, it at length succeeded in ingrafting the principle of dower on the customary law of all western Europe. Maine's Ancient Law, *supra*, p. 239.

Modern civil law countries such as France and Spain have limited the testamentary powers of the husband. Likewise the State of Louisiana has placed restrictions upon this right of the husband. The Territories Real Property Act, 1886, c. 51, R.S.C., abolished dower and gave to married women all the rights of a *femme sole* in regard to holding or transferring real property.

The purpose of the Act is clearly intended to ameliorate the rigour of the common law rule and to provide for the widow who

ALTA.

S. C.

McBRATNEY v. McBRATNEY.

Simmons, J.

has not received a share of her husband's estate, sufficient for her maintenance to the extent of her requirements in life, having in view probably the adequacy of the estate to supply such requirements and the lack of any other provisions for her maintenance. If the estate were of a very moderate value, it is obvious that the relief which the Court could give under the Act might fall far short of this, and if the implied limitation was upheld the relief would be still further materially diminished. My conclusion upon these considerations is that the limitation would, in many cases, to a considerable extent defeat the plain purpose and intent of the Act.

Upon the second aspect of the case, namely, the lines upon which discretion must be exercised, it must be admitted there is nothing in the Act to indicate the lines upon which the discretion of the Judge should be exercised except "what would be just and equitable under the circumstances." A judicial discretion should be exercised along known rules of law and not on the mere whim or caprice of the Judge. *Per* Willes, J., in *Lee* v. *Bude Railway Co.* (1871), L.R. 6 C.P. 576.

On the other hand, "judicial discretion must be exercised according to common sense and according to justice and if there is no indication in the Act of the ground upon which discretion is to be exercised it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run," *per* Bowen, L.J., in *Gardner* v. *Jay* (1885), 29 Ch. D. 50.

I do not propose to discuss the facts which have been set out in detail in the judgment appealed from further than this, that upon the merits the respondent has done nothing to disentitle her to the most favourable consideration which the Court can legally exercise and I think that once jurisdiction is conceded in the Court to give more than she would be entitled to in the case of intestacy that the discretion was properly exercised.

I would, therefore, dismiss the appeal with costs.

McCarthy, J.

McCARTHY, J.:—This is an appeal from an order or judgment of Stuart, J., upon an application under the provisions of the Married Women's Relief Act, being c. 18 of the Alberta Statutes, 1910.

The application was by notice of motion returnable on August 26, 1918, made on behalf of the widow against the estate of her late husband, whose executrices now appeal.

ALTA.

S. C.

McBRATNEY v. McBRATNEY.

McCarthy J.

Upon the application, the Judge allowed the widow $10,198 out of the estate to be a first charge on the assets of the same, saving certain exceptions.

The testator by his will left the whole of his property to his sister, specifying in his will that he had made ample provisions for his wife by transferring to her certain real properties in the City of Calgary. The issue between the parties is, therefore, apparent and the *viva voce* evidence taken before the Judge upon the hearing was quite voluminous. The question to be determined upon this appeal is, "has the Judge power upon such an application to allow the widow of a man who dies leaving a will more than she would have received had he died intestate?" In this application that was admittedly the effect of the order appealed from.

There are two conflicting decisions, the order appealed from and the order of Walsh, J., in *Re Matheson Estate, supra*, the former deciding in effect that there was such power and the latter that it was limited by implication to the amount the widow would have received if the husband had died intestate.

The Legislature of Alberta, in 1910, enacted as follows:—

1. This Act may be cited as the Married Women's Relief Act.

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the Judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

8. On any such application the Court may make *such allowance* to the applicant out of the estate of her husband disposed of by will *as may be just and equitable* in the circumstances.

The effect of the above sections has already been adjudicated upon by the House of Lords. Lord Shaw of Dunfermline in *Drewry* v. *Drewry*, 30 D.L.R. 581, [1916] 2 A.C., at p. 634, says:—

By the law of Alberta there is certain invasion of the unlimited power of testacy. Under the law of Scotland and of those nations which have followed the principles of the Law of Rome such limitation is definite and in certain countries, particularly in Northern Europe, is very large. The limitation has not been adopted by the law of England and the power of disinherison both of the wife and children there remains to the testator. By the law of Alberta a middle course is adopted. As the appellants state in their case, "prior to the passing of the Married Women's Relief Act a husband could, by his will, omit to leave any part of his estate to his wife, and she would have no relief whatever. This occasioned some hardship, and relief was thought advisable." Such relief was conferred by the Married Women's Relief Act of Alberta, the material sections of which are these: ss. 2, 8 and 10.

ALTA.

S. C.

McBRATNEY v. McBRATNEY.

McCarthy J.

The case above cited though was decided upon the construction of s. 10 but is referred to here merely to shew the variation here from the laws of England.

I am of the opinion that Stuart, J., was right in making the order appealed from and that no possible construction which can be placed upon the wording of ss. 2 and 8 could limit the amount to be allowed to the widow to what she would have received if her husband had died intestate, and I would not feel inclined to interfere with his order, as, I take it, the amount to be allowed was a matter within his discretion.

Having reference to the sections above referred to the meaning appears to me to be plain and we must obey the directions of the Legislature, no matter what dissatisfaction it may create in any quarter anywhere. Strictly speaking there is no place for interpretation or construction except where the words of a statute admit of two meanings.

Where the language of an Act is clear and explicit we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature.

Warburton v. *Loveland* (1831), 2 Dow. & Cl. 480, at 489. "In other words, if the language used by the Legislature is precise and unambiguous a Court of law at the present day has only to expound the words in their natural and ordinary sense." The intention of the Legislature is not to be speculated on. In *Reg.* v. *Archbishop of Canterbury* (1848), 11 Q.B. 483, at p. 665, 116 E.R. 557, Lord Denman observed:

My brother Coleridge's admirable argument has confirmed me in the opinion of the danger of exposing the Act of Parliament, and the most simple construction of the plainest language . . . to the speculations of those who will bring their forgotten books down, and wipe off the cobwebs from decretals and canons, before they can find one argument for disturbing the settled practice of 300 years.

If (said Pollock, C.B., in *Miller* v. *Salomons* (1852), 7 Exchequer 560), the meaning of a statute is plain and clear we have nothing to do with its policy or impolicy; its justice or injustice; its being framed according to our views of right or the contrary. . . . We have nothing to do but to obey it —to administer it as we find it, and I think to take a different course is to abandon the office of Judge and to assume the province of legislation.

The rule is expressed in various terms by different Judges, the epithets "natural," "ordinary," "literal," "grammatical" and "popular" are employed almost interchangeably but their indiscriminate use leads to some confusion and probably the term "primary" is preferable to any of them. Hardcastle's Statute Law, 2nd ed., p. 77.

There are two rules as to the way in which ordinary terms and expressions are to be construed when used in an Act of Parliament. The first rule was stated by Lord Tenderton in *Att'y-Gen'l* v. *Winstanley* (1831), 2 D. & Cl. 302, 310, to be that

> the words of an Act of Parliament which are not applied to any particular science or art are to be construed as they are understood in common language.

The second rule is put by Bowen, L.J., in *Wandsworth District* v. *United Telephone Co.* (1884), 13 Q.B.D. 904, at 920:

> That if a word in its popular sense and read in an ordinary way is capable of two constructions it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as necessary for carrying out the objects of the Act and not to give any unnecessary powers.

There is nothing that I can observe in the other sections of the statute which would, in any way, limit the amount to be allowed out of the estate as is provided for by s. 8 and the amount is, I think, in the discretion of the Judge who entertains the application with the stipulation that it must be just and equitable in the circumstances. To place any other construction on the section which would limit the amount to be allowed to the amount which the widow would have received if the husband had died intestate would be to read words into the section which are not there or into the Act which are not there, and it might be noticed in passing that in the neighboring Province of Saskatchewan they passed a somewhat similar Act subsequent to the passing of the Alberta Act and that such limitation there is set out in terms:

> 11g. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as shall in the opinion of the Judge be equal to what *would have gone to such* widow under this Act *had her deceased husband died intestate* leaving a widow and children. Statutes of Sask. 1910-11, c. 13.

In the Alberta Act no such limitation can be implied. There could only be such implication if the meaning of the words of the section were not plain according to the ordinary rules of construction of statutes as I understand them. I take it, therefore, that the amount to be allowed out of the estate is in the discretion of the Judge who entertains the application. This discretion, of course, must be a judicial discretion as is pointed out by Bowen, L. J., in *Gardner* v. *Jay*, 29 Ch. D. 50, at p. 58: "After a Court of justice is invested by Act of Parliament with a discretion, that discretion, like other judicial discretions, must be exercised

ALTA.

S. C.

McBRATNEY v. McBRATNEY.

McCarthy, J.

according to common sense and according to justice, and if there is no indication in the Act of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run."

I hesitate to place any broader construction upon the Act than is absolutely necessary. I think the legislation is dangerous but I cannot assume the functions of a legislator but must obey the directions of the Legislature. It seems to me that there should be allowed to the testator some privilege of directing whom should be the objects of his bounty and it is, I think, dangerous legislation to allow any Judge in his discretion to designate to whom the testator's property should go. In some cases it might be by the mere whim or caprice of the Judge to whom it is entrusted to exercise a discretion on the assumption that he is discreet, and to dispose of a testator's property, from whom he has had no opportunity of obtaining his views, and who probably did not require the assistance of any Judge in disposing of his property. At least that is the way I view it, but we must give effect to the statute and the Judge who heard the application was bound to give effect to the wording of the statute and, as it turns out, in my view, in this case from a perusal of the evidence, I think he exercised a proper discretion.

I would dismiss the appeal with costs.

Appeal dismissed, the Court being equally divided.

B. C.

C. A.

DUMPHY v. B.C. ELECTRIC RY. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. July 15, 1919.

APPEAL (§ VII L—476)—COLLISION—NEGLIGENCE—EVIDENCE—JURY JUSTIFIED IN VERDICT—INTERFERENCE OF APPELLATE COURT.

Where there is ample evidence to justify the findings of the jury as to negligence and as to the absence of contributory negligence the verdict will not be interfered with. The fact that the jury polled themselves will not affect the verdict although the proper course is for them to answer the questions simply and leave it to the Court to poll them in respect to their answers when that course may be thought necessary.

Statement.

APPEAL by defendant from the trial judgment in an action to recover damages for injuries received when plaintiff's motor car was struck by one of defendants' street cars. Affirmed.

L. G. McPhillips, K.C., for appellant; *S. S. Taylor*, K.C., for respondent.

MACDONALD, C.J.A.:—I would dismiss the appeal.

There was ample evidence to justify the findings of the jury both as to negligence and as to the absence of contributory negligence.

Some confusion has arisen because of the manner in which the jury answered the questions. They, in effect, polled themselves, and in their answers shewed how many stood pro and con. For example, they answered No. 3: "1 yes, 7 no." This answer is followed by another which must necessarily be the answer of the dissenter only, since an answer of the kind is only to be given if the third question should be answered in the affirmative. This is the second example of this innovation, and in both cases it has given rise to contentious arguments, which could not have arisen if the jury had followed the conventional and rational course of answering the questions simply. The verdict is none the less the verdict of the jury when it is the verdict of the majority. Under proper instructions the jury cannot very well make a mistake as to the result of their conclusions in respect of the different questions. There is, therefore, no reason why they should do more than answer the questions simply, and leave it to the Court when that course may be thought necessary to poll them in respect of their answers.

Macdonald, C.J.A.

GALLIHER, J.A., concurs with Macdonald, C.J.A.

Galliher, J.A.

MCPHILLIPS, J.A. (dissenting):—In my opinion the appeal should succeed. The jury's finding in any case is too vague to support the entry of judgment for the plaintiff. The jury have said "insufficient precaution on account of approaching crossing and conditions existing on morning in question." This cannot be said to itemise or sufficiently indicate the act of negligence. Had the jury brought in a general verdict without answering questions it would be different—see *Newberry* v. *Bristol* (1912), 29 T.L.R. 177; *Bank of Toronto* v. *Harrell* (1917), 39 D.L.R. 262, 55 Can. S.C.R. 512, at p. 538; *Lewis* v. *G.T. Pacific Ry. Co.* (1915), 26 D.L.R. 687, 52 Can. S.C.R. 227, at pp. 231, 232, 233; *Sawyer* v. *Millett* (1918), 25 B.C.R. 193, Martin, J.A., at p. 195. Further, vague and insufficient as the finding of the jury is in the result all other claimed acts of negligence stand negatived, see *Newberry* v.

McPhillips, J.A.

B. C.
C. A.
DUMPHY v. B. C. ELECTRIC RY. CO.
McPhillips, J.A.

Bristol, supra; Andreas v. *C.P.R.* (1905), 37 Can. S.C.R. 1, at pp. 10, 11; *McEachen* v. *G.T.R.* (1912), 2 D.L.R. 588, at p. 593; *Farmer* v. *B.C. Electric R. Co.* (1910), 16 B.C.R. 423, at p. 432; *Mader* v. *Halifax Electric T. Co.* (1905), 37 Can. S.C.R. 94, at p. 98. The question now is whether it is a proper case for the granting of a new trial, and this has given me much concern, but in view of the fact that according to the cases all the other acts of negligence must be held to be negatived, and it not being shewn that there was the absence of any precaution called for by the Railway Act under which the railway was being operated, it is difficult to come to the conclusion that a new trial can properly be directed. *Andreas* v. *C.P.R. Co., supra,* seems most explicit on the point.

Had there been, say, a specific finding of the jury upon the question of the non-operation of the automatic bell, and no light although not called for by any requirement of the Railway Act or order of the Board of Railway Commissioners, but voluntarily installed, then, I think, on the authority of *Baldock* v. *Westminster City Council* (1918), 35 T.L.R. 188 (C.A.), such a finding of negligence could have been supported. However, as a further point in my opinion concludes any question of liability upon the appellant, that is, has the effect, in my opinion, of entitling judgment being entered for the appellant, I merely now, on this point, content myself by saying that I consider it would be within the province of this Court, in view of the special powers capable of being exercised by this Court on appeals, to either direct a new trial or sustain the judgment for the plaintiff in the absence of that specific finding by the jury. In view though of *McPhee* v. *E. & N. Rly. Co.* (1913), 16 D.L.R. 756, 49 Can. S.C.R. 43, at p. 53, I think the proper course would be the direction of a new trial, and that would have been my decision in this appeal did I feel myself at liberty to do so. The difficulty, however, is this, and it is insuperable in my opinion, and prevents recovery by the plaintiff. In the case for the plaintiff a witness was called who was sitting in the back seat at the time of the accident, and this witness gave the following evidence:

(The Judge here quoted the evidence at length and continued.)

Now this evidence establishes contributory negligence in the plainest possible manner. A motor capable of being stopped at

the speed at which it was going, almost instantly, at the most in ten or twelve feet, is driven heedlessly and recklessly upon the railway track although the driver thereof, the plaintiff, is warned in precise terms of the oncoming electric car. It is clear that the plaintiff, knowing that the electric car was speedily approaching, undertook the risk of an attempt to pass over the level crossing ahead of the electric car, and was the author of his own injury. It was a case of mistaken judgment, but it is impossible to visit the damages suffered upon the railway company—the railway company are not insurers—and even if the railway company were negligent in any respect, upon this evidence standing in the case, no legal liability for the happening can be imposed upon the railway company. It is significant that although the plaintiff was called after this evidence was given no effort was made to introduce evidence in denial of the statement made by Cross that he warned the plaintiff in the manner set forth in the above quoted evidence. The plaintiff would have been admitted to deny, if able to do so, the statement that he was warned as sworn to by Cross. (See Best on Evidence (11th ed.), 1911, at p. 630; and Phipson on Evidence (5th ed., 1911)—contradiction of party's own witness when allowed—at pp. 468, 470, 477, and *The Stanley Piano Co. of Toronto* v. *Thomson* (1900), 32 O.R. 341.) The evidence having been left as we see it in the present case, an authority which seems to me concludes the question against the plaintiff and any right to recover in the action is *Forget* v. *Baxter* (1900), 69 L.J.P.C. 101, at p. 106. Strong, J., delivered the judgment of their Lordships of the Privy Council and said:—

> The respondent gave evidence afterwards and took no notice of Forget's statement which stands uncontradicted. The inference must be that the respondent knew that the appellants had acted within the terms of their employment.

The inference in the present case must be that the plaintiff heard the witness Cross's warning but determined (although he was then in no peril and could have stopped the motor car) to pass over the level crossing in front of the electric car. This was reckless conduct which precludes any recovery by the plaintiff even if it be admitted that the facts disclose evidence of negligence on the part of the railway company, and even if it be admitted that the jury have made an effective finding of negligence, the

B. C.
C. A.
DUMPHY
v.
B. C. ELECTRIC RY. CO.
McPhillips, J.A.

contributory negligence of the plaintiff disentitles the plaintiff recovering for the injuries sustained. The question now is what should be the result. There is no compulsion upon this Court to direct a new trial considering the case upon this phase of the matter (see *Winterbotham Gurney & Co.* v. *Sibthorp & Cox* (1918), 1 K.B. 625, at p. 630). The situation is so unanswerable that it would not be in furtherance of the ends of justice, and in this connection I would refer to the language of Davies, J. (now Chief Justice of Canada), in *Andreas* v. *C.P.R.*, *supra*. There is considerable analogy in the cases; in the present case a great deal was attempted to be made out of the fact that there was considerable brush near to the place where the accident took place, obstructing the view, but evidently Cross could see the electric car coming although sitting in the back seat.

(Also see *Banbury* v. *Bank of Montreal* 44 D.L.R. 234, [1918], A.C. 626.)

All the facts of the present case having careful attention there is but one conclusion to be drawn and capable of being taken by any reasonable jury, and that conclusion is that the plaintiff was the author of his own injuries. There is no suggestion that the plaintiff's case can be supported by any further evidence or that all the relevant facts attendant upon the accident were not adduced before the jury.

In my opinion the proper course to pursue is to enter judgment for the defendant notwithstanding the finding of the jury.

SASK.
C. A.

Re GALBRAITH ESTATE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A.
July 9, 1919.

TAXES (§ V C—204)—SUCCESSION DUTY ACT (R.S.S. 1909 c. 38)—WHO MUST BEAR.

Under the Succession Duty Act (R.S.S. 1909 c. 38) the tenant for years should pay the duty upon the appraised value of the term and the remainderman upon the appraised value of the contingent fee simple going to him. The succession duty—particularly on a contingent interest in real estate—is not a testamentary expense.

Statement.

APPEAL by the official guardian from a judgment interpreting a will. Affirmed.

H. Fisher, for the official guardian; *E. S. Williams*, for the executors.

SASK.

C. A.

RE GALBRAITH ESTATE.

Newlands, J.A.

The judgment of the Court was delivered by

NEWLANDS, J.A.:—Samuel Galbraith, deceased, left certain real property to his nephew upon his attaining the age of 21 years. He also directed that his executors pay his debts, funeral and "testamentary expenses" out of his estate.

The official guardian took out a summons to interpret the will, and, amongst other questions, required the opinion of the Court upon what fund the succession duties charged upon the estate and paid by the executors should be charged by the executors.

The Judge before whom this summons came held:—

I am of opinion that the will contains no provision to take the case out of the operation of s. 16 of c. 38 of the R.S.S., 1909, in force at the time of the death of deceased. The tenants for years should therefore pay the duty upon the appraised value of the term, and the remainderman upon the appraised value of the contingent fee simple going to him. These are not included in the expression "testamentary expenses." *Re Estate of Elizabeth Watkins* (1906), 12 B.C.R. 97; *Re Holland* (1902), 3 O.L.R. 406.

From this decision the official guardian appealed, on the ground that "testamentary expenses" which the testator directed to be paid out of his estate included succession duty.

In England it has been held (*Re Clemow*, [1900] 2 Ch. 182), that the words "testamentary expenses" included estate duty on personal property, because such estate duty was in substitution for the probate duty, a stamp tax which had to be paid upon the estate before the executor could get probate of the will, this probate duty having been held to be a "testamentary expense."

It was also held that estate duty on real estate was not a "testamentary expense" because the executors could get probate without paying this duty, it being charged on the real estate. *Re Sharman*, [1901] 2 Ch. 280.

I am of the opinion that *Re Clemow*, *supra*, is not an authority in this Province. We had no probate duty payable out of the estate prior to the Succession Duties Act, and therefore our succession duty is not in substitution of a prior duty which had to be paid before the executors could probate the will. The reasons for the *Clemow* case do not apply here.

Our Act does not make this tax an estate duty but a succession duty. By the Act the duty is paid by the devisee. S. 16 of c. 38, R.S.S. 1909, the Act in force when the will in question was made, provides that the executor

shall deduct the duty therefrom or collect the duty thereon upon the appraised value thereof from the person entitled to such property,

SASK.

C. A.

RE GALBRAITH ESTATE.

Newlands, J.A.

and, in sub-s. 2 of s. 13, that where duty is paid in respect to a contingent interest (which would be this case) the duty so paid to be a charge on such contingent estate and is to be repaid with interest at 5% to the executor by the person who is to become entitled to such estate.

S. 13 further provides that duty on a contingent estate may be paid as other duties, *i.e.*, within eighteen months of the decease, but it further provides that if it is not sooner paid it shall be payable forthwith when such estate comes into possession.

Our succession duty, particularly on a contingent interest in real estate, is not payable before probate issues, and therefore this tax is more like the estate tax in England on real estate, and as that tax was decided in *Re Sharman* to not be a testamentary expense, I am of the opinion that neither is the tax in this case a testamentary expense, and that the appeal should be dismissed with costs. *Appeal dismissed.*

ONT.

S. C.

CARROLL v. EMPIRE LIMESTONE Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. January 27, 1919.

DEEDS (§ II C—30)—COMMON LAW OF ENGLAND NOT APPLICABLE TO GREAT LAKES OF ONTARIO—BED OF NAVIGABLE WATERS ACT (ONT.)—"THE BANK OF LAKE ERIE"—MEANING OF.

The common law of England is not applicable to the Great Lakes of Ontario and the presumption of the common law that lands bordering on an inland lake extend to the middle of the lake if there be any such presumption is in the case of the Great Lakes rebutted. Any doubt that there might have been on the point is removed by the Bed of Navigable Waters Act, R.S.O. 1914, c. 31. The bed of Lake Erie extends only to low water mark.

The south boundary of a lot, described as "the bank of Lake Erie," held to be the water's edge or low water mark.

[*Williams* v *Pickard*, 17 O.L.R. 547, followed.]

Statement.

APPEAL by the defendant from a judgment of Falconbridge, C.J.K.B., in an action for the recovery of possession of the beach in front of a certain lot from Lake Erie to high water mark. Reversed.

The facts of the case are as follows:—

The action was brought for the recovery of possession of the beach in front of lot number 5, from Lake Erie to high water mark or bank, in the 1st concession of the township of Humberstone, of which, as the respondent alleges, the appellant was his tenant under a lease dated the 20th January, 1904, which expired on the 1st January, 1917.

Particulars were delivered by the respondent, in which it is stated that:—

"The portion of the beach claimed by the plaintiff is that portion of the plot not covered with water, marked 2.82 A.C. and outlined in red on the plan attached to the report of G. R. C. Conway, a blue print of which plan is to-day sent to the defendant's solicitors, and all the beach to the water's edge lying south of the said plot."

By the statement of defence, the appellant denies the alleged tenancy and alleges that the respondent has no title to the land, possession of which is claimed by him, and that it forms part of the water lot in front of lot number 5, the title to or ownership of which is in the Crown as represented by the Government of the Province of Ontario, and that the appellant is in possession and occupation of it under lease and license from the Crown, and that, if the beach does not form part of the lot, it is the property of the appellant.

By his amended reply the respondent alleges that the appellant is, and has been for many years, tenant to the respondent of the land described in the writ of summons, and has paid the rent to the respondent, and that the appellant is estopped from disputing the respondent's title or from setting up the title of any third party to the land.

To this pleading the appellant answers by alleging that in the year 1902 the appellant purchased from the respondent and his brother William E. Carroll, "all the property and estate owned and operated by" them "in the township of Humberstone, among which said property and estate was a certain lease dated the 22nd of October, 1897, from Annie Benner and Alexander Benner to the plaintiff, whereby the said Annie Benner and Alexander Benner demised and leased to the plaintiff, for a term of ten years, that certain tract of land being composed of the beach in front of lot number 5, from Lake Erie to high water mark or bank in the 1st concession of the said township of Humberstone, and which said lease and the premises thereby demised were assigned by the plaintiff to the defendant by deed of assignment dated the 22nd day of August, 1902;" and that, "subsequently and on the termination of the term in the aforesaid lease mentioned, the defendant took a lease from the said Annie Benner and Alexander Benner

ONT.

S. C.

CARROLL v. EMPIRE LIMESTONE CO.

of the same tract of land for a term of 10 years from the 1st day of January, 1907."

It is further alleged that, at the time the appellant took the assignment of the lease and obtained the new lease, the appellant "had no idea or intention that it was taking a lease of any part of land covered by water, the title of which was in the Government," nor did it intend to take a lease of any portion of beach or land from Annie Benner lying south of the south boundary of the Benner lot, and that, if the lease covers it, it was so drawn by mutual mistake.

And it is also alleged that the lease from the Benners to the appellant terminated on the 1st January, 1917, and that, if the appellant paid rent to the respondent, as it accrued due under the lease, it was not a payment of rent for any land or beach occupied by the appellant lying to the south of the south boundary of the Benner lot, and that the rent, if paid, was paid by the appellant with "the understanding and belief only" that it was for the use and occupation of a small strip of land occupied by the appellant with its railway tracks "above what is known as high water mark."

The reasons for judgment of the learned Chief Justice are very brief and are confined to the statement that "the arguments in this case have been extended by the court reporter, and therefore it is sufficient for me to say that I agree with the contentions of the plaintiff's counsel."

It appears from the arguments of the respondent's counsel, referred to by the Chief Justice, that they rested the respondent's case on estoppel—contending that, having paid rent to the respondent after he became assignee of the reversion, the appellant was estopped from disputing his title and from setting up the title of any one else, and upon the further ground that the Benner lot extended south to low water mark, at least, and that the Crown had no title to the land between high and low water mark.

By letters patent dated the 31st December, 1798, the front of that lot and of lot number 4 was granted to Daniel Forsyth, and the metes and bounds are, "beginning at the south-west angle of lot number 5, being the south-east angle of lot number 6, on the bank of Lake Erie, then north to lands surveyed for James House, 97 chains, 50 links, more or less, then east 41 chains, then south to the bank of the lake, then westerly along the bank to the place of beginning."

On the 19th April, 1833, Ezekiel Forsyth conveyed to Conrad Shisler 100 acres of lot number 5, described as "commencing where a stake has been planted at the north-east angle of said parcel of land, thence west 20 chains, thence south 50 chains more or less to the lake, thence easterly along the bank of the lake, 20 chains more or less, thence north 50 chains more or less to the place of beginning."

Conrad Shisler, on the 15th February, 1845, conveyed to David Shisler 60 acres of lot number 5, described as the south part of lot number 5, "commencing at the south-east angle of said lot on Lake Erie, thence north to a stake planted at the bottom of the north side of sand hills and to land now owned by Abraham Shisler, thence westward along the main or large sand hills to the west limit of said lot, thence south to Lake Erie, thence easterly along the lake to the place of beginning.

David Shisler, on the 18th June, 1853, conveyed to William Halpin a part of lot number 5 described as follows: "commencing at a stone planted in presence of John Near and Abraham Shisles at about the distance of 6 chains west from the north-east angle of the south half of said lot, thence southerly to a stone also planted in the presence of the said John Near and Abraham Shisler, thence south-westerly to a stone planted as aforesaid, thence west to Lake Erie, thence north on the western boundary of said lot, to land owned by Abraham Shisler, and thence east to the place of beginning."

This parcel is the Benner lot, and Annie Benner derived title to it from William Halpin, who was her father.

Annie Benner and her husband, on the 20th April, 1905, conveyed to the respondent the 25 acres which David Shisler had conveyed to her father, William Halpin.

The following conveyances were put in at the trial:—

(1) A conveyance dated the 22nd March, 1917, from Annie Benner to the respondent of "the beach in front of lot 5 from Lake Erie to high water mark or bank in the 1st concession of the township of Humberstone."

(2) A conveyance dated the 29th October, 1917, from Annie Benner, as executrix of her husband Alexander Benner, who had died on the 29th January, 1915, of the same land as was conveyed by her on the 22nd March, 1917, to the respondent.

(3) A conveyance dated the 12th January, 1886, from Abraham

ONT.

S. C.

CARROLL v. EMPIRE LIMESTONE CO.

Shisler to the respondent of the water lots in front of the west half of lot number 3 and lots numbers 4, 5, and 6 in the 1st concession of the township of Humberstone.

The conveyance numbered (2) contains a recital that the grantor's husband "was seised at the time of his decease of an estate of inheritance in fee simple in the lands conveyed," and the conveyance was executed after the commencement of the action (11th May, 1917).

On the 1st March, 1918, the Crown (Ontario) leased to the appellant for a term of 10 years from the 15th April, 1918, the water lots in front of the west half of lot 3 and of lot 4 and in front of lots 5 and 6 in the 1st concession of the township of Humberstone, "reserving therefrom a right of access from Carroll Brothers' property on the west part of lot 5 to Lake Erie, and also reserving the right of Carroll Brothers to construct a wharf or dock on the lake in front of lot 6, with approaches thereto, the location of such dock and approaches to be subject to the approval of the Minister of Lands Forests and Mines.

W. M. German, K.C., for the appellant company.

Wallace Nesbitt, K.C., and *H. D. Gamble*, K.C., for the respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O. (after setting out the facts as above):—The first question to be considered is as to the position of the south boundary of lot number 5 on Lake Erie. The contention of the respondent is that the lot extends, at least, to the water's edge—low water mark—and the contention on the other side is that the south boundary is at high water mark.

If the common law of England is applicable, lot number 5 doubtless extends to the middle line of Lake Erie. The question of its applicability to the Great Lakes of this Province was referred to by the late Chief Justice Moss, delivering the judgment of the Court of Appeal, in *Keewatin Power Co.* v. *Town of Kenora*, 16 O.L.R. 184, where, after holding that the doctrine of the common law applied to the Winnipeg River, he went on to say:—

"I am not unmindful of the fact that in a number of instances there are found expressions of very learned and able Judges strongly favouring the view that the rule of the common law is inapplicable to the Great Lakes and rivers of this country. But, while there are these expressions, there has been no actual decision on the direct point" (pp. 190, 191).

This decision was pronounced on the 22nd January, 1908, and on the 9th October, 1906, the late Chancellor had decided in *Stover* v. *Lavoia* (1906), 8 O.W.R. 398, that the boundary of the plaintiff's land, which was the shore of Lake St. Clair, was "the edge of the water in its natural condition at low water mark," and in stating his opinion the learned Chancellor said:—

"Along the shore of a non-tidal river, or of a navigable inland lake, is now well understood to mean along the edge of the water at its lowest mark, both in this country and in the United States."

That the well-settled law in the United States is what it is stated to be, is undoubted, but it is to be borne in mind that in that country the common law of England has not been adopted by statute, as it has been in this Province.

Stover v. *Lavoia* was followed by Mabee, J., in *Servos* v. *Stewart* (1907), 15 O.L.R. 216.

In my opinion, the common law of England is not applicable to the Great Lakes of this Province. It, no doubt, has been held to apply to lakes in Great Britain and Ireland of considerable extent, but there are there no such bodies of water as our Great Lakes, and I venture to think that the common law is elastic enough, when introduced into this Province, to adapt itself to conditions here, and that in any case we should hold that the presumption of the common law that lands bordering on an inland lake extend to the middle of the lake, if there be any such presumption, is, in the case of the Great Lakes, rebutted. Any doubt that there might have been on the point is, however, removed by the Bed of Navigable Waters Act, R.S.O. 1914, ch. 31, the second section of which provides that:—

"Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English common law."

That the bed of Lake Erie extends only to low water mark is, I think, unquestionable, but it will have been observed that in the Crown grant the description of lot number 5 is that it begins at

ONT.

S. C.

CARROLL v. EMPIRE LIMESTONE CO.

Meredith, C.J.O.

the south-east angle of lot number 6 "on the bank of Lake Erie," and that two of the courses are south "to the bank of the lake" and westerly "along the bank" to the place of beginning.

But for the decision of the Court of Appeal in *Williams* v. *Pickard*, 17 O.L.R. 547, I should have been inclined to hold that the "bank of Lake Erie," and not the water's edge, is the southerly boundary of lot number 5. I am unable, however, to distinguish that case from the case at bar, and it must therefore be followed, with the result that it must be held that the south boundary of lot number 5 is the water's edge or low water mark; and, the lease of the 20th January, 1904, having expired, it follows that the respondent is entitled to recover whatever passed to him by the conveyance of the 20th April, 1906, from Annie Benner to him.

According to the description in the conveyance to Halpin, the boundaries of the land conveyed to him are fixed monuments—stones—and, according to the plan—exhibit 1—put in by the respondent at the trial, that description does not embrace any part of the land in question. The respondent cannot therefore recover on the strength of his own title, but is entitled to succeed only if the appellant is estopped from disputing his title and from setting up the title of any one else.

The respondent's case, on this branch of it, is that the appellant became, by the lease of the 20th January, 1904, from Annie Benner to the appellant, her tenant of the beach in front of lot number 5 from Lake Erie to high water or bank (the land described in that lease), and that the respondent, being by virtue of the conveyance by her to him of the 20th April, 1905, assignee of the reversion expectant on the determination of the lease, the appellant is estopped from denying his title to the land embraced in the lease, notwithstanding that the term of it has expired.

That the appellant paid rent to the respondent, and that the cheques were drawn in favour of the respondent, expressed to be for rent payable under the lease, is proved.

Assuming that this would have raised the estoppel for which the respondent contends, had the conveyance to the respondent embraced the land which was covered by the lease, there is, if I am right in my view as to what passed by the conveyance to Halpin, the insuperable difficulty in the way of the respondent's

success that he is not the owner of the reversion because the land demised by the lease did not pass by the conveyance to him nor did it pass to him by the conveyance from Annie Benner of the 22nd March, 1917.

For these reasons, I am of opinion that the appeal must be allowed and the judgment at the trial be reversed, and that there should be substituted for it judgment dismissing the action.

As the parties are each standing on their strict legal rights, there is no reason why the costs throughout should not be borne by the respondent, and I would so direct.

Appeal allowed.

JACOBSON v. WILLIAMS.

Alberta Supreme Court, Walsh, J. July 10, 1919.

MORTGAGE (§ VI D—85)—OBTAINED AS PART OF FRAUDULENT TRANSACTION —DISHONESTY OF MORTGAGEE—NO MONEY ADVANCED—FORECLOSURE OR SALE—RIGHTS OF ASSIGNEE.

The assignee of a mortgage which has been obtained as part of a transaction which was in essence a fraudulent scheme of the mortgagee, the true agreement between the parties not being put in the proper form through the dishonesty of such mortgagee, who had no right under the circumstances to take the mortgage, and the amount agreed to be advanced never having been advanced cannot succeed in an action for foreclosure or sale because the original mortgagee could not have done so.

Statement.

ACTION for foreclosure or sale with the usual remedies. Dismissed.

R. B. Davidson, for plaintiff, *A. A. Ballachey*, for defendant.

Walsh, J.

WALSH, J.:—The defendant mortgaged his land to one Mark to secure the payment of $600 and interest. This mortgage has by various assignments become the property of the plaintiff, the mortgage and the various transfers of it under which the plaintiff claims being duly registered. The action is brought for foreclosure or sale with the usual remedies.

The mortgage states upon its face that it was given in consideration of the sum of $600 lent to the defendant by the mortgagee. That however was not the true consideration for it. It was given under the following circumstances: Mark the mortgagee was interested under contract with the G. M. Annable Co. Ltd. in the sale of certain British Columbia lands which that company owned. He was introduced to the defendant in the guise of a real estate agent who was anxious to secure a listing of his (the defend-

ALTA.

S. C.

JACOBSON v. WILLIAMS.

Walsh, J.

ant's) land for sale. In the course of their talk over the sale by Mark of the defendant's land, mention was made of these British Columbia lands and eventually the defendant signed what is called a farm-listing contract authorising the Annable Co. to sell his land at a price and on the terms set out in it and also an application to the Annable Co. for the purchase from it of some of its British Columbia land for $1,215, of which $600 was to be in cash or its equivalent and the balance in instalments. The application provides that, in lieu of the cash thereby called for, the company was to accept a mortgage for $600 on the defendant's land. This farm-listing contract and application, though quite distinct documents, were printed on the same sheet of paper. After signing them a formal agreement of sale was drawn up between the company and the defendant for the sale by the former to the latter of the land applied for by him calling for the payment by the defendant of $600 in cash on the execution of it. A subsequent clause however provided that in lieu of that cash payment the company agreed to accept and the defendant agreed to give security to the amount of $600 on his quarter section, describing it. This was signed by the defendant. It purports to be executed for the company by G. M. Annable, its president, though not under its corporate seal. The fact is that Mark had a number of these contracts in blank signed in this way and he filled up one of them for the purposes of this deal. The mortgage was then drawn up and executed by the defendant and delivered to Mark who promptly had it recorded. This all took place on December 10, 1915. Nothing more was ever done under either the farm-listing contract or the agreement of sale. Mark apparently made no effort to sell the defendant's land and no attempt has ever been made to enforce performance by him of the agreement of sale.

One of the defendant's contentions is that he did not know that he was signing a mortgage. I must hold against him on that even upon his own evidence, which quite satisfies me that he knew what he was doing. He handed over his duplicate certificate of title at the same time so that the mortgage might be registered, though he says at another time that he did this because he thought Mark would need it in selling the land. A short time after signing, and on the same night, he became uneasy over what he had done and went and demanded the mortgage back but was told that

it had been sent to Calgary for registration. The next morning two of Mark's agents called upon him and told him they would call the deal off if he wished but this satisfied him that they were honest and he decided to go through with it. The only other witness who testified to this transaction was Weir, one of Mark's agents. He struck me as being a very candid witness and his evidence confirms to the point of certainty the impression given me by the defendant's own evidence that he knew perfectly well what he was doing when he signed the mortgage. I think however the defendant is a very truthful man and that he was not dishonest in his attempt to prove his ignorance of what he was doing.

I am satisfied that this whole scheme was engineered by Mark with the sole purpose and design of getting this mortgage, disposing of it as quickly as he could for the best price he could get for it and leaving to their fate the listing agreement and the agreement of sale of the British Columbia lands. I don't think that he ever had the slightest intention of selling or even trying to sell the defendant's lands. His talk to that effect was the merest camouflage put up to conceal his real design of getting this mortgage. He gave the defendant the impression that, notwithstanding the form of the documents which he signed, his purchase was conditional upon the sale of his own land, and that his mortgage would become an effective security only when his purchase became absolute by the sale of his own lands through Mark's agency.

According to the evidence of Annable, the president of the company, Mark had no authority whatever to make this sale to the defendant, Alberta being excluded from his territory. He does not seem to have even reported to the Annable Co. this sale of its land probably because he had no right to make it. The evidence is that he had no right to take the mortgage in his own name even if the sale had been properly made. It should have been taken in the company's name. The defendant struck me as being an exceedingly simple-minded fellow with no business instinct whatever. I did not see Mark for he was not a witness, but from his description by those who know him I should take him to be a schemer. In a battle of wits between them I should think the defendant would be but a babe in his hands. If he was the plaintiff in this action, I think he could not succeed because the whole transaction was in essence a fraudulent scheme and because

ALTA.

S. C.

JACOBSON v. WILLIAMS.

Walsh, J.

upon the true agreement of the parties, which, by the dishonesty of Mark, was not put in proper form, the defendant's purchase of the British Columbia property was conditional upon the sale by Mark of his property, and because he had no right to take the mortgage at all and particularly he had no right to take it to himself.

The question is "can the plaintiff as his assignee stand in any better position?"

The plaintiff is not the first assignee of this mortgage. Mark assigned it to one King 19 days after he got it. Seven months later King assigned it to one Reid, and in less than 3 months later, one Reid transferred it to the plaintiff, who paid $550 for it, though the amount then secured by it for principal and interest was about $640. There is no suggestion that the plaintiff is not a *bonâ fide* holder of it for value. I think that he took it without any notice whatever that it was otherwise than it purports to be, namely, a mortgage given to secure the repayment of $600 borrowed by the defendant from Mark, though he made absolutely no enquiry about it. The mortgage is under seal and in it the defendant acknowledges the receipt of the principal money.

The general principle broadly stated is that the assignee of a mortgage takes it subject to the equities existing between the mortgagor and mortgagee. There are however different kinds of equities by which a mortgage may be affected. As to those which relate to the state of the mortgage account there seems to be no room for doubt that the assignee is in no better position than the mortgagee would have been unless an estoppel has in some manner been raised against the mortgagor. There is a long line of authorities covering this proposition of which I will mention but the most recent which I have been able to find, namely, *De Lisle* v. *Union Bank of Scotland*, [1914] 1 Ch. 22. But when the equity is one which does not simply affect the state of the account but is as here a collateral one to avoid the mortgage transaction or to reform it the position is by no means so clear. There are authorities both ways but no one of them, so far at least as my research has led me, is binding upon me.

There are a good many cases on the point in Ontario. In *Davis* v. *Hawke*, (1854), 4 Gr. 394, it was held that as a covenant to pay is a mere chose in action the assignee of a mortgage fraudulently

obtained could not enforce it although as a *bonâ fide* purchaser for value without notice he was entitled to hold the land in security for the amount. Boyd, C., in *Wright* v. *Leys*, 8 O.R. 88, points out the distinction between the equity which he was there discussing which was one between the mortgagor and the purchaser of a mortgage from whom the defendant had taken an assignment of it and an equity which affected the state of the mortgage account and held that the former was not one which attached upon the assignment of the mortgage. On the other hand, Strong, V.-C., afterwards Chief Justice of Canada, held in *Ryckman* v. *Canada Life* (1870), 17 Gr. 550; *Smart* v. *McEwan* (1871), 18 Gr. 623, and *Elliott* v. *McConnell* (1874), 21 Gr. 276, that an assignee of a mortgage cannot set up a defence of purchaser for value without notice and that he stands in no better position than the original mortgagee.

One of the earliest English cases is *Parker* v. *Clarke*, 30 Beav. 54, in which Sir John Romilly held that the assignee of a mortgage which was void as between the parties to it could only take what the mortgagee could give him and could not stand in a better position than the mortgagee himself. This however was expressly disapproved by Kekewick, J., in *French* v. *Hope*, (1887), 56 L.J. Ch. 363, who held it overruled by *Bickerton* v. *Walker*, (1885), 55 L.J. Ch. 227. Bacon, V.-C., in *Judd* v. *Green*, (1875), 45 L.J. Ch. 108, was dealing with a case in which a mortgagor who claimed that his mortgage was induced by the fraud of the mortgagee asked that it should be declared void as against the assignees of it. He says at p. 111:—

> The case against Swasey and the insurance company (the assignees) was opened upon the assumption of the imputed fraud and it was insisted that the defendants could not be in any better position than Green (the mortgagee) inasmuch as they took their transfers, 'subject to all the equities' subsisting between the plaintiff and Green. Now although that expression occurs frequently in the text books and elsewhere it cannot be adopted without amplification. So far as the equities affect the account between the mortgagor and the mortgagee no doubt a transferee takes it so subject. If the precaution of requiring the concurrence or the sanction of the original mortgagor is not taken the transferee can claim on his security no more than is justly due from the mortgagor. But I am not aware that this principle has been carried further or that a security impeachable upon equitable grounds by the mortgagor as against the mortgagee has been held to be therefore impeachable upon any other grounds against the transferee without notice; as between them the better equity which I hold to be that of the transferee must prevail.

ALTA.

S. C.

JACOBSON v. WILLIAMS.

Walsh J.

He cites in support of this conclusion the judgment of Lord Cottenham in *Lord Aldborough* v. *Trye*, (1840), 7 Cl. & F., at 463:—

If a man puts into the hands of another the means of obtaining money from a third person he never can be able to get a decree to get rid of that transaction arising out of the security which he has entrusted to another and of which he, the party complaining, was the author, without first repaying the money thus obtained.

Proceeding he says at p. 111: —

If indeed it could be held that the mortgage was void from the beginning the transferees could be in no better condition than the original mortgagee and the case of *Parker* v. *Clarke*, would be an authority for excluding them from all benefits, but the plaintiff having, as I conceive, failed to establish that the mortgage was void from the beginning I am of opinion that he has no other right against the defendants who claim to be entitled under the mortgage than to redeem upon the terms of paying the amount for which the mortgage was given with interest and costs.

This view he reaffirmed in his judgment in the later case of *Nant-y-glo & Co.* v. *Tamplin*, (1876), 35 L.T.R. 125. I have been unable to find any criticism of this except in the note (2) to par. 333 at p. 178 of 21 Hals. which simply says: "This is opposed to the general principle and is doubtful." In Coote on Mortgages, 7th ed., at p. 840, the learned author's opinion of the effect of the decisions is thus stated:—

But the transferee is in no better position than the mortgagee when the mortgage is absolutely void from the beginning although he took for valuable consideration and without notice (*Parker* v. *Clarke, supra*, and *Ogilvie* v. *Jeaffreson* (1860), 2 Giff. 353, 66 E.R. 147), but where the security is only voidable it may become valid in the hands of such a transferee (*Judd* v. *Green*, 45 L.J. Ch. 108, and *Lord Aldborough* v. *Trye, supra*, and *George* v. *Milbanke*, (1803), 9 Ves. 190).

I do not think that the much cited case of *Bickerton* v. *Walker, supra*, has any application to this case. The question there was one relating exclusively to the state of the mortgage account and moreover it was so entirely decided upon the fact that a receipt for the mortgage money was endorsed upon the mortgage in addition to the usual acknowledgment in the body of the instrument as to make it of no value here. The later case of *Bateman* v. *Hunt*, [1904] 2 K.B. 530, is much along the same lines but is based upon an Imperial statute making a receipt for the consideration money in the body of a deed sufficient evidence of the payment of it in favour of a subsequent purchaser without notice and so it is not helpful in the decision of this case.

I do not think that the Land Titles Act advances the matter any. Ss. 67 and 68 are those which affect the question. Under the former, upon the registration of the transfer "the estate or interest of the transferrer as set forth in such instrument, with all the rights powers and privileges thereto belonging or appertaining shall pass to the transferee" and under the latter the right to sue and to recover the mortgage money is transferred so as to vest the same in law in the transferee. Neither of these sections confers upon the assignee any greater right than the assignor had.

In this confused and unsatisfactory state of the authorities, I find but little to help me. I am unable to appreciate the distinction which is drawn in some of the cases between the transferee's rights with respect to equities affecting the mortgage account and collateral equities as they are called. If this mortgage had been taken to secure the payment of $600 which the mortgagee had agreed to advance but never did advance the equity arising out of the fact that the mortgage money had never been advanced at all would be one relating to the state of the mortgage account and unless the facts brought it within *Bickerton* v. *Walker*, *supra*, or some other estoppel was raised against the mortgagor an innocent transferee for value could not realize a dollar upon his security. Why should there be any difference in principle between that case and such a case as this where no money was advanced because it was never intended that any should be? It seems to me that in substance upon the facts here present the question really gets down to one of mortgage account. If the question is asked "How much is owing on this mortgage?" the answer undoubtedly would be "nothing," because none was ever advanced, none was ever intended to be and the mortgage was never intended as an absolute security for the amount represented by it or any other sum.

My conclusion is from the best consideration I have been able to give the case that the plaintiff cannot succeed because the original mortgagee could not have done so. I must, therefore, dismiss the action with costs and give effect to the defendant's counterclaim with costs by declaring that the mortgage sued on is null and void as against the defendant, directing its removal from his certificate of title. *Action dismissed.*

MAN.

C. A.

GROSSENBACK v. GOODYEAR.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. July 23, 1919.

VENDOR AND PURCHASER (§ I E—29)—PURCHASER OF REALTY—TENDER OF LAST INSTALMENT DUE UNDER CONTRACT—FAILURE OF VENDOR TO FURNISH TITLE—RIGHT OF PURCHASER TO HAVE CONTRACT RESCINDED AND PURCHASE MONEY RETURNED.

A purchaser of realty is entitled to have the contract of purchase rescinded and the purchase money returned, if upon tender of the last instalment due, the vendor is not able to furnish title, and takes no pains to procure same until action is commenced, although shortly after action is commenced he becomes in a position to furnish title.

[*Baskin* v. *Linden* (1914), 17 D.L.R. 789, followed.]

APPEAL by defendant from the trial judgment in an action to recover money paid under an agreement for the purchase of land.

W. H. Trueman, K.C., and *A. J. Sutherland*, for plaintiff; *A. E. Hoskin*, K.C., and *E. R. Siddal*, for the defendant.

Perdue, C.J.M.

PERDUE, C.J.M.:—The facts of this case are very fully set forth in the judgment of Galt, J., from whose decision this appeal is brought. At the time the defendant entered into the agreement to sell to the plaintiff the lots in question, all that the defendant had in the way of title was an agreement entered into with one Dawnay in March, 1912, by which Dawnay agreed to sell these and other lots to the defendant on deferred payments, the last of which would fall due in the year 1917. Dawnay's interest in the lots was a right of purchase from one Hoddell, who was the actual owner, under an agreement dated Feb. 19, 1912, by which Hoddell agreed to sell to Dawnay these and other lots on deferred payments, the last of which would fall due in August, 1917. Under the agreement between the plaintiff and the defendant the last payment to be made by the plaintiff fell due on Sept. 18, 1916. All of the above agreements contained a clause enabling the purchaser to pay off the whole or any portion of the purchase money without notice or bonus.

The plaintiff made all his payments except the last which fell due on March 18, 1916. The trial Judge is of opinion that the plaintiff discovered the defendant's lack of title shortly after that payment fell due. The plaintiff's solicitor wrote to defendant on Sept. 26, 1916, calling attention to the fact that the title stood in the name of Hoddell, with a caveat filed by Dawnay and a judgment registered against the latter. The defendant on Sept.

29 wrote in reply that he did not know anything of Hoddell "until lately" when he searched the land titles office. On Nov. 2, 1916, plaintiff's solicitor again wrote in regard to perfecting the title and threatening an action for specific performance or for the return of the purchase money.

In 1917 Hilson, the plaintiff's agent, offered to pay the balance of the purchase money, but defendant said he had not yet got title.

The trial Judge finds that defendant did not appear to have taken any pains to procure title or to pay what he owed to Dawnay. On Oct. 12, 1918, plaintiff's agent tendered to defendant the amount due and demanded a transfer. Defendant stated he was not in a position to give title. On Oct. 16, 1918, plaintiff's solicitors notified the defendant that the plaintiff, for the reasons set out in their letter, rescinded the contract and demanded the return of all moneys paid thereunder.

This action was commenced on Oct. 21, 1918. The plaintiff sues for the return of the moneys paid under the contract. After the action was commenced the defendant made efforts to obtain title and shortly before the trial became in a position to furnish title to the plaintiff. The defendant then by his amended statement of defence alleged that he was able, ready and willing to give a conveyance in accordance with the terms of the agreement, and he counterclaimed for specific performance of the agreement. At no time between the making of the contract with the plaintiff and the commencement of the suit was the defendant in a position to furnish title. He had not even an equitable title. He had only an equity upon an equity. He had not paid Dawnay and was not in a position to demand a conveyance from him. But Dawnay himself had only a contract of purchase from Hoddell and was in default in his payments to the latter. The several contracts, Hoddell to Dawnay, Dawnay to the defendant and the defendant to the plaintiff, were quite independent of each other; there was no privity between the plaintiff and Dawnay or between the defendant and Hoddell. The plaintiff could not enforce the contract which Dawnay had with the real holder of the title. The later contracts were not, and cannot be treated as, assignments in whole or in part of the contract of purchase which Dawnay obtained from Hoddell, the registered owner of the land. The

MAN.

C. A.

GROSSENBACK v. GOODYEAR.

Perdue, C.J.M.

defendant had ample time given to him in which to furnish title, but up to the commencement of the suit he failed to do so. I think, therefore, that the plaintiff was entitled to rescind the contract on the ground that the defendant had not a title and to recover the purchase money he had paid. See *Want* v. *Stallibrass* (1873), L.R. 8 Ex. 175. The present is a suit to recover money paid under an agreement for the purchase of land which had been rescinded because the vendor had failed to furnish a title to the land. It is no defence to shew that after action commenced the defendant acquired title.

The agreement contains a clause that the purchaser accepts the title of the vendor to the land and shall not be entitled to call for the production of any abstract of title or proof or evidence of title, etc. A clause such as this does not prevent the purchaser from objecting to the title when it appears that the vendor had no title, because title is the foundation of the contract. See *Want* v. *Stallibrass*, *supra*; *Armstrong* v. *Nason* (1895), 25 Can. S.C.R. 263, 269; *Anderson* v. *Douglas*, (1908), 18 M.R. 254, 265; *Baskin* v. *Linden* (1914), 17 D.L.R. 789, 24 Man. L.R. 459; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666.

In April, 1916, Dawnay, who had enlisted and was going overseas, signed a writing stating that in consideration of getting a transfer of lots 17 and 18 he transferred, assigned, etc., to Hoddell all his "right, title, interest, equity and obligations" in the agreements of sale mentioned in the writing, one of them being the agreement between Dawnay and the defendant covering the lots sold by the defendant to the plaintiff. This writing was not signed by Hoddell and he was not bound in any way to release Dawnay and accept the defendant as purchaser. It affords no answer to the plaintiff's objection to the defendant's title.

I think the judgment of the trial Judge should be affirmed and the appeal dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—I concur in the judgment of the Chief Justice, which I have read, and in addition to the cases mentioned by him, I refer to *Re Bayley* and *Shoesmith's Contract*, (1918), 87 L.J. Ch. 626, cited on the argument. There by a contract for the sale of freehold property dated September 27, 1917, the date fixed for completion was Nov. 1. The vendors having failed to shew title by Nov. 6, the purchaser on that date gave notice of repudiation unless a

MAN.

C. A.

GROSSENBACK v. GOODYEAR.

Haggart, J.A. Fullerton, J.A.

proper title was shewn by Nov. 11. It was held by Sargant, J., that the vendor's failure to comply with the notice entitled the purchaser to repudiate and recover the deposit. This decision seems to me to be very much in point. I also refer to *Harris* v. *Robinson* (1892), 21 Can. S.C.R. 390. The appeal must be dismissed with costs.

HAGGART and FULLERTON, JJ.A., concurred.

Appeal dismissed.

ONT.

S. C.

JARVIS v. LONDON STREET RAILWAY Co.

Ontario Supreme Court, Appellate Division, Britton, Riddell, Latchford and Middleton, JJ. February 7, 1919.

STREET RAILWAYS (§ III B—25)—OPENING DOOR WHEN NOT AT REGULAR STOPPING PLACE—INVITATION TO ALIGHT—SPEED OF CAR—QUESTION FOR JURY—NEGLIGENCE—NEW TRIAL.

The door of a street car being opened by the conductor when the car was not at a regular stopping place, it is a question of fact to be decided by the jury in an action for damages for injuries received by a passenger in alighting from the car, whether the car was moving so fast that the motion would be perceptible to any reasonable passenger, and so negative an invitation to alight which might be implied by the opening of the door. This question can not be summarily dealt with by the trial Judge.

[*Gazey* v. *Toronto R. Co.* (1917), 38 D.L.R. 637; *G.T.R. Co.* v. *Mayne* (1917), 39 D.L.R. 691, applied.]

Statement.

APPEAL by the plaintiff from the judgment of ROSE, J., pronounced at the trial, dismissing the action at the close of the plaintiff's case, on the ground that there was no evidence of negligence to go to the jury.

The facts of the case are as follows:—

The plaintiff was a passenger on a car of the defendants, going eastward upon Dundas street. Nearing the place where he intended to alight, he signalled the conductor to stop the car so that he might alight. He complains that the exit-door of the car was opened before the car had actually stopped; and that, relying upon the opening of the door as being in the circumstances an invitation to alight, he stepped on the pavement, and, owing to the motion of the car, was thrown down and injured. The place where the plaintiff attempted to alight and fell was about 100 feet before the stopping place was reached. The only evidence was the story of the plaintiff himself. After giving the signal, he says, he went to the back of the car, to the exit-door; he stood for a short time, and the conductor then opened the door, and the plaintiff immedi-

ONT.

S. C.

JARVIS v. LONDON STREET RAILWAY CO.

Middleton, J.

ately stepped out. He admits that, if he had looked before stepping out, he probably would have noticed that the car was in motion; he did not look; but, upon the opening of the door, at once stepped out. From the way in which he fell, he thinks that the car must have been travelling at about 5 miles per hour.

R. G. Fisher and *W. G. R. Bartram*, for the appellant.

J. M. McEvoy and *R. H. G. Ivey*, for the defendants, respondents.

MIDDLETON, J. (after stating the facts as above):—The trial Judge dealt with the case upon what he took to be the view of the Divisional Court in the case of *Gazey* v. *Toronto R.W. Co.* (October, 1917), 38 D.L.R. 637, 40 O.L.R. 449, and the decision of the Supreme Court of Canada in *Grand Trunk R.W. Co.* v. *Mayne* (November, 1917), 39 D.L.R. 691, 56 Can. S.C.R. 95. He says: "The *Gazey* case seems to be a clear authority for the statement that to open the door of a car running or obviously running at such a rate as that" (5 miles per hour) "is not evidence of an invitation to alight;" and, there being no other evidence, he dismisses the action.

In the *Grand Trunk R. Co.* v. *Mayne* case, the car was an ordinary railway car. The car-door opened upon an outside platform, and there was beyond this a vestibule door, closed when the train was under way. The deceased and his party were the only passengers intending to alight at a way-station; the conductor had warned them that the station was near, and had opened the vestibule-door and car-door to enable the deceased and his party to alight upon the arrival at the station. The train was still going at 25 miles per hour. The holding of the majority was that all that was done was in preparation for the arrival at the station, and was not, in the circumstances of the case, an invitation to alight while the train was yet in motion and before it reached the station.

In the *Gazey* case, a verdict for the plaintiff was upheld where the motorman opened the exit-door of the car while in motion, but the car "was in fact moving so slowly that the movement was not readily noticeable; the jury have concluded that, under the circumstances, the plaintiff acted reasonably, carefully, and with ordinary prudence in stepping off the car at the place where and when she did, and that, the car having arrived at the stopping place, and the plaintiff having, to the knowledge of the motorman, come to the door for the purpose of alighting there, it was negligent of the motorman to open the door of the car when the car was

moving so slowly as probably to deceive the plaintiff into the belief that it was actually stopped, and by his very act of opening the door strengthening that belief and creating in the plaintiff's mind a belief that she should alight and might do so with safety" (38 D.L.R. 642, 643).

Of course this case is not on all fours with the *Gazey* case; but that case is certainly not an authority warranting a dismissal of the action. In the very careful judgment of Mr. Justice Ferguson all the cases upon the subject are reviewed, and he states his view, based upon these authorities (642) "that the opening of the door of a standing train or street-car, at a regular stopping place, is *primâ facie* an invitation to alight, but that opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; that opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; that circumstances alter cases, and that each case of these kinds must depend on its own circumstances."

Seeking to apply the principle so laid down, this case would fall in the intermediate class: the door was opened when the car was not at a stopping place; and the question to be solved is, whether it was moving so fast that the motion would be perceptible to any reasonably careful passenger. This apparent motion would negative the invitation to alight which might be implied from the opening of the door. This question, it appears to me, was one for the jury. I do not say that there cannot be a case in which the motion must obviously be so apparent that no reasonably careful passenger would think of alighting; but, in the circumstances here disclosed, it is, to my mind, a question of fact to be passed upon by the jury and one that cannot be summarily dealt with by the Judge.

Care must be taken in all these cases to avoid dangerous generalisations. There is a wide difference between the opening of an exit-door upon a train constructed and operated in the manner of carriages on English railways by a guard approaching the car from outside, and the opening of a door leading upon a platform, which might be a mere preparation for the approach to a railway station. For the same reason, the opening of an exit-door permit-

ONT.

S. C.

JARVIS v. LONDON STREET RAILWAY CO.

Middleton, J.

ting the passenger to alight immediately upon the highway, in the style of cars known as "Pay-as-you-enter" cars, would be of far greater significance as an invitation to alight than the opening of a door leading upon a platform as in an ordinary car; particularly would this be so if it could be shewn that the rules of the company required that the door should not be opened so as to permit of the passenger alighting until the car was at a standstill.

For these reasons, I think that there should be a new trial, and that the costs of the former trial and of this appeal should be to the plaintiff in the cause.

Upon the argument, an objection to the ruling of the trial Judge excluding evidence as to statements made by the conductor immediately after the accident, was dealt with. To avoid confusion in the event of a further trial, I think it important to explain the reasons for our decision. It was said that, immediately after the plaintiff had fallen, the conductor alighted and helped him to his feet, and that then a conversation took place in which the conductor said: "It was my fault, I should not have opened the door, but I thought the car had stopped." The conductor was clearly not a person whose statement would bind the company; he was not the agent of the company for the purpose of making any admissions. His statement, if it be admissible in evidence at all, should only be received upon the ground that it formed part of the *res gestæ;* and it must be borne in mind that, if it could be received when tendered by the plaintiff, it would be equally admissible if tendered by the defendants. If, instead of the statement said to have been made, the conductor had thrown the whole blame upon the plaintiff, his counsel would more readily appreciate the injustice of allowing his unsworn statement to be admitted in evidence. The truth is that the statement said to have been made by the conductor formed no part of the *res gestæ*, it was a mere narrative or discussion anent a thing then past. The principle upon which such evidence can be admitted is clearly stated in *Garner* v. *Township of Stamford* (1903), 7 O.L.R. 50: to make the statement admissible, it must be an involuntary and contemporaneous exclamation made without time for reflection; it is because the statement is involuntary and contemporaneous that it is received. These characteristics are supposed to import some indication of its veracity.

ONT.

S. C.

JARVIS v. LONDON STREET RAILWAY CO.

Riddell, J.

If the plaintiff really desires to rely upon the statements made by the conductor, he can be called; and, if he does not now admit having made the statement, evidence may be given attacking his veracity in this respect.

BRITTON and LATCHFORD, JJ., agreed with Middleton, J.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment of Mr. Justice Rose, at the trial, dismissing the action.

The plaintiff, riding on a car on the London Street Railway, was approaching his stopping place and signalled the conductor to stop the car. The conductor did so and opened the exit-door while the car was in motion. The plaintiff could easily see, had he looked, that the car was moving, and it had not yet reached its ordinary stopping place, but he, as he says, without looking, stepped out and fell. The car was moving, as he thinks, at about 5 miles an hour. My learned brother dismissed the action, and I think he was right in so doing.

The case of *Grand Trunk R.W. Co.* v. *Mayne*, 39 D.L.R. 691, 56 Can. S.C.R 95, is, to my mind, conclusive, that merely opening the door or having the door open is not an invitation to alight.

In *Gazey* v. *Toronto R.W. Co.*, 38 D.L.R. 637, 40 O.L.R. 449, it was decided by the First Divisional Court "that the opening of the door of a standing train or street-car, at a regular stopping place, is *primâ facie* an invitation to alight, but that opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; that opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; that circumstances alter cases, and that each case of these kinds must depend upon its own circumstances."

I am of opinion that a car moving at the rate of 5 miles an hour was going so fast that the motion was perceptible to any reasonably careful passenger, and that the plaintiff is excluded from recovering by the principles of the judgment in the *Gazey* case.

It is also to be noted that the door was not opened at a stopping place, but before the stopping place was arrived at, which distinguishes this case from the *Gazey* case in a sense favourable to the defendants.

ONT.

S. C.

JARVIS v. LONDON STREET RAILWAY CO.

Riddell, J.

At the trial a question of evidence arose which is of great practical importance.

The plaintiff says that, after he had fallen, the conductor got off the car, helped him to his feet, and said: "It was my fault, I should not have opened the door, but I thought the car had stopped." The plaintiff urges that he should have been allowed to give that statement in evidence, and he moves for a new trial upon the ground of improper exclusion of evidence.

I think that the learned Judge was clearly right. There can be no pretence that what was said by the conductor was said by him in the course of his employment by the defendant company, and it is quite clear, both upon principle and authority, that statements made by an agent in this position are not evidence against the principal: *Wilson* v. *Botsford-Jenks Co.* (1902), 1 O.W.R. 101, and cases cited.

But it is urged that this statement should have been admitted on the *res gestæ* principle—I do not think so. This "is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts:" Wigmore on Evidence, vol. 3, sec. 1747.

Whether this is an exception to the doctrine that hearsay evidence is not admissible is largely a question of terminology. It admits a statement or exclamation by a person injured, immediately after the injury, declaring the circumstances of the injury, or by a person present at the collision or other exciting occasion asserting the circumstances as they appear to him. The principle is said to have first made its appearance in 1693, when Chief Justice Holt in the case of *Thompson* v. *Trevanion*, Skinner

402, in an action for assault and battery, allowed what a woman said immediately after the hurt was received, and before she had time to devise or contrive anything for her advantage, to be given in evidence.

The principle is well stated by Lacombe, J., in the Circuit Court of the United States, in *United States* v. *King* (1888), 34 Fed. Repr. 302, at p. 314, as follows:—

"There is a principle in the law of evidence which is known as '*res gestæ*;' that is, that the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might otherwise not have. That rule is very carefully guarded by the courts . . . But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth; forced out against his will, or without his will, by the particular event itself, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say. With that qualification, I think the testimony can be left safely with you"—that is, the jury—"and that there has been no error in admitting it."

In some State Courts of the United States the doctrine has been carried very far, much further than is admitted in our Courts or in the Courts by whose judgments we are bound—for example, *Hermes* v. *Chicago and Northwestern R.W. Co.*, (1891), 80 Wis. 590—but I do not think it necessary to cite or discuss these cases.

Cases in our own Courts are not numerous. *Garner* v. *Township of Stamford*, (1903), 7 O.L.R. 50 and *Regina* v. *McMahon* (1889), 18 O.R. 502, may be referred to.

It is plain that the statements made by the conductor were not made under a stress of nervous excitement produced by the accident. They were not a spontaneous and sincere response to the actual sensations and perceptions produced by the external shock—they were not forced out of him against his will—they were mere attempts on his part intentionally made, purposefully made,

ONT.

S. C.

JARVIS v. LONDON STREET RAILWAY CO.

Riddell, J.

in order to excuse himself, and they did not answer any of the tests which determine statements to be admissible under the *res gestæ* doctrine.

It is somewhat difficult to my mind to reconcile the admission of this kind of evidence with the ordinary rules governing the admission of evidence, and it is equally difficult to reconcile all the dicta or indeed the decisions on the subject; but the above, I think, represents the law as it is considered to exist at the present time.

Best on Evidence, 11th ed., pp. 466 and following, Phipson on Evidence, 5th ed., pp. 46 and following, have a discussion of these principles, but the most philosophical and satisfactory to my mind is to be found in Wigmore on Evidence, vol. 3, sec. 1747, *supra*. This learned author's statements must in all cases, however, be read with caution, as is the case with any American text-book, as he gives greater weight to the decisions of the Courts of the United States and of the various States of the Union than we are accustomed to do.

I am of opinion that the evidence was properly excluded, that the plaintiff has no cause of action, and that this appeal should be dismissed.

New trial ordered (RIDDELL, J., *dissenting*).

SASK.

C. A.

HUNTER v. CITY OF SASKATOON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Newlands, JJ.A. July 12, 1919.

NEGLIGENCE (§ II C—98)—PERSON RIDING IN AUTOMOBILE OF THIRD PERSON TO DIRECT DRIVER—LIMITATION OF OBLIGATION—NEGLIGENCE OF DRIVER—INJURY—RIGHT TO RECOVER DAMAGES.

The obligation of a person who rides in the automobile of a third party, on the invitation of the owner, in order that he may shew the driver the way is limited *primâ facie* to directing him along what streets he should proceed and what turnings he should take; he is not under obligation to point out obstacles or dangers on the route which would be apparent to any careful driver, and his failure to do so is not negligence.

Statement.

APPEAL from the order of the trial Judge dismissing an action for damages for the death of party killed in a collision between a street car belonging to defendants and an automobile belonging to a third party in which he was riding at the time of the accident, on the ground that the deceased was guilty of contributory negligence. Reversed.

SASK.

C. A.

HUNTER v. CITY OF SASKATOON.

Lamont, J.A.

J. F. Frame, K.C., for appellant; *P. E. MacKenzie*, K.C., and *H. L. Jordan*, K.C., for respondents.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an action for damages for the death of George Albert Hunter, killed in a collision between a street car belonging to the defendants and an automobile belonging to one Ewing W. Organ.

In the forenoon of Sunday, May 5, 1918, Mr. and Mrs. Organ and their three children came to Saskatoon in an automobile. The automobile was driven by the son, E. H. Organ, a boy 18 or 19 years old. On reaching Saskatoon they stopped at a garage, where they were getting some repairs. The deceased, Hunter, came up to them, and, on learning that the repairs would not be ready for some 2 or 3 hours, he asked the Organs to come up to his house and have dinner, and remain until the repairs were ready. Mr. Organ, Sr., suggested that the deceased get into the front seat with the son, "so as to tell him the way." The deceased did so, and told the boy what turns to make and along what streets to proceed. In the course of the trip they turned west upon 29th St. Running north and south across 29th St. is Avenue E., and along that avenue the defendants have one of their street car lines. As the automobile was approaching Avenue E., the deceased had his eyes fixed on the floor of the car, observing the clutch. No one in the automobile observed that a street car was coming along Ave. E. from the south until they were within a short distance from the track, when Mrs. Organ uttered an exclamation which caused the deceased to look up. He rose to his feet, put one hand on the windshield, and jumped out. As he did so, the automobile struck the street car about the front door. The forward motion of the street car turned the front of the automobile to the north, and the deceased was crushed between the car and the body of the automobile, receiving injuries from which he died.

The rules of the defendant company governing motormen provide that

> on approaching street crossings the foot-gong must be sounded at least 50 yards therefrom and must be continued until such crossing is passed.

The jury found that this rule had not been complied with, and that the defendants' failure to comply with it amounted to negligence contributing to the accident. The jury however also

SASK.

C. A.

HUNTER v. CITY OF SASKATOON.

LAMONT, J.A.

found that the deceased had been guilty of negligence contributing to the accident in that "he failed to warn the chauffeur of the approaching street crossing."

On these findings the trial Judge dismissed the plaintiff's action. The plaintiff now appeals.

The main ground of appeal is that the jury, under the facts proven, were not entitled to find the deceased guilty of contributory negligence, because there was no duty cast upon him to warn the driver of the automobile that he was approaching a street car line.

That the defendants' negligence contributed to the accident does not seem to me to admit of doubt. The defendants' motorman admits that he did not sound his gong until he reached the crossing on the south side of 29th St. Neither Organ nor the deceased appear to have heard the gong. Their attention at the moment, it would seem, was directed to the mechanism of the automobile engine. But had the gong been sounded 50 yards from the crossing, it cannot be said that they would not have heard it. The jury in my opinion were amply justified in finding negligence on part of the defendants contributing to the accident.

The evidence also establishes negligence on the part of Organ in not looking ahead whilst driving his automobile. The automobile was on the north side of 29th St. The street car came from the south side. Had Organ, Jr., been looking ahead, he could not have helped seeing the street car when he was far enough from the track to avoid the accident. But negligence on the part of the driver of the automobile is not, of itself, enough to disentitle the plaintiff to succeed. The law is laid down in 21 Halsbury, pp. 451 and 2, in the following words:—

> 764. A defendant cannot excuse himself for the consequences of his misconduct by proving that the plaintiff's injury was contributed to by the negligence of a third party. The plaintiff in such a case can sue either of the persons who have been negligent, provided that his injury does not result from contributory negligence for which he is responsible. Accordingly, where a person travelling in a vehicle belonging to a third person is injured by the negligence of the defendant, he is entitled to recover against the latter notwithstanding that the driver of the vehicle in which the plaintiff is travelling may have been guilty of some negligence contributing to the accident. He is not identified with the negligence of the driver of the vehicle in which he is, merely because he is travelling in it.

To disentitle the plaintiff to succeed, therefore, the deceased himself must have been guilty of negligence which contributed

to the accident, or he must have stood in such a relation to the driver of the automobile as to imply responsibility for his actions. Examples of such relationship are, master and servant, or employer and agent acting within the scope of his authority. *Mills* v. *Armstrong* ("The Bernina") (1888), 13 App. Cas. 1.

The jury found the deceased negligent in that he omitted to warn the driver that he was approaching a street car line. It is frankly admitted that he gave no such warning. Was there any duty on his part so to do? In my opinion there was not. Where one person undertakes to shew the way to another, his obligation is, *primâ facia*, limited to directing him along what streets he should proceed and what turnings he should take. He is not ordinarily under obligation to point out obstacles or dangers on the route which would be apparent to any reasonably careful driver. Of course if a man entrusts himself to the control of a driver who, to his knowledge, is blind or incompetent, he cannot, if he is injured as a result of such blindness or incompetence, be heard to say that he did not contribute to his own injury. But here the driver of the automobile was competent; he had possession of all his faculties; he could have avoided the accident had he been looking ahead. The deceased was in my opinion entitled to assume that in driving the automobile he would use due care. His relationship to the driver was not that of master and servant or employer and agent. He had no control over the car and the driver. He was simply a passenger at the invitation of Organ, Sr., and the only obligation he assumed was to point out the way to his house.

Under these circumstances I cannot see that there was any obligation upon the deceased to warn Organ, Jr., that they were approaching a street railway crossing. There being no such duty, failure to give such warning cannot constitute contributory negligence. In my opinion the plaintiff is entitled to recover.

While the damages awarded by the jury are smaller than I should probably have awarded under the circumstances, I cannot say they are not such as 12 men might reasonably award.

The appeal should, therefore, be allowed with costs; the judgment below set aside, and judgment entered for the plaintiff with costs for the amount awarded by the jury.

Appeal allowed.

ALTA.

S. C.

BROWNS v. BROWNS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Simmons and McCarthy, JJ. June 20, 1919.

EXECUTORS AND ADMINISTRATORS (§ VI—130)—FOREIGN ADMINISTRATOR—RIGHT TO SUE ON NEGOTIABLE INSTRUMENTS HELD BY HIM.

A foreign administrator has the right to sue, on negotiable instruments held by him, in any other jurisdiction without any other grant.

Statement. APPEAL from an order of Ives, J., that an action by a foreign administratrix on certain promissory notes held by her be discontinued on the ground that she had no grant of administration in Alberta. Reversed.

J. McCaig, for appellant; *S. H. Adams*, for respondent.

The judgment of the Court was delivered by

Harvey, C.J. HARVEY, C.J.:—The plaintiff sues as administratrix of the estate of Alfred T. Browns, deceased. The action is on two promissory notes given by the defendant. One note was payable to the order of the deceased alone and the other was payable to the order of the deceased and W. A. Smith. In respect to the interest of W. A. Smith the plaintiff claims as the assignee from him to her as administratrix.

At the time of the death of the deceased, and of the grant of letters of administration by the Colorado Court, where the deceased was domiciled, the defendant was also resident and domiciled within that Court's jurisdiction, but subsequently removed to this Province, where he now resides.

Upon the above facts, as disclosed by the pleadings, upon motion of the defendant Ives, J., ordered that the action be discontinued on the ground that the plaintiff has no grant of administration from an Alberta Court and this appeal is from that order.

The defendant relies upon dicta by different Judges which seem to be wide enough to support his contention.

In *Whyte* v. *Rose* (1842), 3 Q.B. 493, 114 E.R. 596, at p. 602, Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber, said:—

> It is also well established that in order to sue in any Court of this country whether of law or equity in respect of the personal rights or property of an intestate the plaintiff must appear to have obtained letters of administration in the proper spiritual Court of this country. See the judgment of Sir John Nicholl in *Spratt* v. *Harris*, 4 Hagg. Ecc. Rep. 405, and see also the judgment of the Lord Chancellor in *Price* v. *Dewhurst*, 4 Mylne & Cr. 76. So that, if the plaintiff in the case now before us had in the first instance taken out

administration in the proper spiritual Court in Ireland for the purpose of administering this bond which was found in Ireland (as it is contended he ought to have done) he could not have sued in England upon such letters of administration but must have also taken out administration in England from the proper spiritual Court there. This latter point was expressly decided in *Carter* v. *Crost's* case, Godb. 33, where the Court say that an administrator made by an Irish bishop could not bring an action here, as administrator.

The rule thus stated by the Chief Justice is repeated in the same broad terms in *Vanquelin* v. *Bouard* (1863), 15 C.B. (N.S.) 341, 143 E.R. 817, by Williams, J., at p. 370-1, but in neither of these cases was the rule essential to the decision.

In *Whyte* v. *Rose*, the action was by an English administrator and the Court was simply meeting the objection that it should have been by an Irish administrator, while in *Vanquelin* v. *Bouard* the Court held that the foreign administrator could in the circumstances of that case maintain the action without any English grant.

It is necessary, therefore, to refer to the cases which are given as authority for the rule.

The case of *Spratt* v. *Harris*, referred to by Tindal, C.J., is not available, but the other two are. In *Price* v. *Dewhurst*, the contest was between English administrators and Danish administrators of the Island of St. Croix in respect to certain moneys secured on mortgages of land in that island due to the deceased resident and domiciled at the time of their death in England. The foreign administrators were the defendants who resisted the title of the plaintiffs and it is thus apparent they were making no attempt actively to report to the Court to maintain any claim under the foreign grant. At p. 80 the Lord Chancellor says:—

> The first question which occurs is how can this Court, in administering a testator's property, take any notice of a will of which no probate has been obtained from the Ecclesiastical Court of this country. This Court knows nothing of any will of personalty except such as the Ecclesiastical Court has by the probate adjudged to be the last will.

And again at p. 84 he says:—

> It is in many cases necessary that the Courts of the country where the property is found, should grant probate or give authority by letters of administration, for the purpose of giving a legal right to recover and deal with the property.

It is apparent that what the Court was considering here was the question of administering the estate and of title and not one of right to bring an action. In *Anderson* v. *Caunter* (1833), 2 My.

ALTA.
S. C.
BROWNS
v.
BROWNS.
Harvey, C.J.

and K. 763, 39 E.R. 1136, an objection that an English administrator was not a party was overruled on the ground that the estate could not be administered in the action.

The report of the other case referred to by Tindal, C.J., *Carter* and *Crost's* case, is to be found in 78 E.R., p. 21. As the case was in the year 27 Eliz. the report is somewhat difficult to interpret. It appears, however, that the action was by an Irish administrator to recover a claim which had been the property of the deceased. I gather from the report that the chains had been in Ireland at the time of the grant of administration but had in some manner come to England where the action was brought to recover it. The report states in part as follows:—

> The second point was, if an administrator made by a bishop of Ireland might bring an action here as administrator, and it was holden that he could not because of the letters of the administration granted in Ireland there could be no trial here in England; although that Rodes Justice said that acts done in Spirituall Courts in forrain places, as at Rome or elsewhere, the law saith, that a jury may take notice of them because such Courts and the Spirituall Courts here make but one Court.

Now, even assuming that that means what Tindal, C.J., says the case decided the decision did uphold the right of the plaintiff to maintain the action for the report ends as follows:—

> The substance in this case was the possession and not the administration for he might have an action of his possession without shewing the letters of administration

and afterwards judgment was given for Carter the plaintiff.

There is risk, therefore, in treating these general statements as establishing that under no circumstances can a foreign administrator maintain an action in our Courts in his representative capacity. One can see that if it is necessary to establish his title in the action through his grant the grant must be one to which the Court must give faith, but if the title has been already established the same considerations do not apply.

In *Thomson* v. *Advocate-General* (1845), 12 Cl. & F. 1, 8 E.R. 1294, the House of Lords held that primal property having no situs of its own follows the domicile of its owner, but in *R.* v. *Lovitt*, [1912] A.C. 212, at p. 221, it is pointed out that while that principle applies for the purpose of succession and enjoyment yet for the purposes of legal representation of collection and of administration the law of the locality of the chattels applies. The same

case points out at p. 218 that the locality to be ascribed to choses in actions is the locality of the debtor where the assets to satisfy them would probably be. This appears to have been the law at least as far back as *Rex* v. *Sutton* (22 Car. II), 1 Wm. Saunders 273, 85 E.R. 331, where it is said in the editor's note at p. 275:—

> But where only *simple contract debts* are due to the deceased, these are *bona notabilia* in that diocese where the debtor inhabits at the time of his creditor's death.

The contention of the defendant is that under the rule just expressed the property in the notes sued on which are only choses in action is in Alberta and, therefore, the plaintiff should obtain letters of administration before suing here but it is clear that the property was not here at the time of the death of the deceased.

In *Att'y-Gen'l* v. *Bouwens* (1838), 4 M. & W. 171, 150 E.R. 1390, Lord Abinger, C.B., in delivering the judgment of the Court, at p. 191, says:—

> Whatever may have been the origin of the jurisdiction of the ordinary to grant probate it is clear that it is a limited jurisdiction and can be exercised in respect of these effects only, which he would have had himself to administer in case of intestacy, and which must, therefore, have been so situated as that he could have disposed of them *in pios usus*. As to the locality of many descriptions of effects, household and movable goods for instance, there never could be any dispute; but to prevent conflicting jurisdiction between different ordinaries with respect to choses in action and titles to property, it was established as law that judgment debts were assets for the purposes of jurisdiction, where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be; and simple contract debts where the debtor resides at the time of the testator's death; and it was also decided that as bills of exchange and promissory notes do not alter the nature of the simple contract debts but are merely evidences of title, the debts due on those instruments were assets where the debtors lived and not where the instrument was found.

And in *Att'y-Gen'l* v. *Dimond* (1831), 1 C. & J. 356, 148 E.R. 1458, Lord Lyndhurst, L.C.B., during the course of the argument (p. 360), says:—

> Suppose a simple contract debtor to reside in Ireland, in which case probate must be taken out in that country, and after the death of the creditor the debtor to come into England and probate to be taken out there in respect of property in England could the debt be recovered in England under the latter probate?

The answer given by counsel is, "The criterion would be whether the executor obtained possession of the property under the probate in this country. If he obtained possession under the probate granted in another country he would not be bound to pay duty here."

ALTA.

S. C.

BROWNS v. BROWNS.

Harvey, C.J.

And later, in delivering the judgment of the Court, Lord Lyndhurst, at p. 369, said:—

> Formerly, in cases of intestacy, the ordinary or spiritual Judge had a right to administer. The probate of wills (as Blackstone (2 Com. 494) observes) followed, of course, for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate whose right of distributing his chattels for the good of his soul was superseded thereby.

But when probate was passed (that is when the ordinary has declared that he is satisfied with the will) Ashurst, J. (*Smith* v. *Milles* (1786), 1 T.R. 480, 99 E.R. 1205), says expressly:—

> The executor has a right immediately upon the death of the testator: probate is a mere ceremony, but when passed the executor does not derive his title under the probate but under the will. Probate is only evidence of his right.

So Plowden, probate is but a confirmation and allowance of what the testator has done. The jurisdiction to grant probate is regulated by the place of the testator's death and the local situation of his effects at the time of his death. If, for example, he die in one diocese and have *bona notabilia*, that is, goods to the value of £5, at the time of his death in another diocese of the same province the jurisdiction belongs to the metropolitan. If he have also at the time of his death effects to the above amount in more than one diocese of the other province, the archbishop shall in each province grant a probate according to the *bona notabilia* within their respective jurisdictions. The probate is granted in respect of the effects which are within the jurisdiction of the spiritual Judge at the death of the testator. The jurisdiction is exercised in respect of these effects only. If the executor thinks fit, he may remove the goods from one jurisdiction to another, he may shift them from jurisdiction to jurisdiction. But this does not affect the right of granting probate which is regulated by the local situation of the effects at the testator's death. If they are removed into another jurisdiction it is not necessary to obtain any sanction or authority from such jurisdiction.

It seems clear from these last two cases that there would be no jurisdiction in this Province to grant administration in respect of the promissory notes in question and that no sanction is required here.

Dicey, however, in his Conflict of Laws (2nd ed., at p. 307), states that the High Court has jurisdiction to make a grant in respect of the property of a deceased person either;

(1) When such property is locally situate in England at the time of his death or

(2) When such property has, or the proceeds thereof have become locally situate in England at any time since his death, and not otherwise.

He gives no authority for (2), and in the following pages quotes with apparent approval Walker and Elgood (4th ed.), p. 35, as follows:—

The foundation of the Court's jurisdiction being property of a deceased to be distributed in this country administration will not be granted in respect merely of property abroad. It is a condition precedent to a grant that it should appear that the deceased left property in this country either real or personal.

But whether Dicey is right in declaring a jurisdiction in the High Court to grant administration, though there were no assets within its jurisdiction at the time of the death of deceased, it is clear that our District Court, which is not a superior Court, and whose jurisdiction is limited to the terms of the statute creating it, has no such jurisdiction where the deceased was not resident within its jurisdiction (see s. 41 of District Court Act, c. 4, of 1907).

The plaintiff would then be in a very difficult position if she could neither obtain a grant of administration in this Province nor maintain her action without it.

As already indicated the plaintiff's claim is in part as assignee of Smith. That title is one she does not derive from the deceased but is in her own right, and it is clear that she is entitled to sue in her representative capacity in respect to that claim without a local grant. This is established by *Vanquelin* v. *Bouard*, *supra*.

The question is whether, in respect of the remainder of the claim, she has a similar right.

Dicey, on p. 447, gives as note 120 the following:—

A foreign personal representative has a good title in England to any movables of the deceased which:

(1) If they are movables which can be touched, *i.e.*, goods, he has, in any foreign country, acquired a good title to under the *lex situs* [and has reduced into possession(?)]

(2) If they are movables which cannot be touched, *i.e.*, debts or other choses in action he has, in a foreign country, acquired a good title to under the *lex situs* and has reduced into possession.

On p. 449 he explains reducing into possession in respect of a debt as payment or obtaining a judgment.

Westlake also (5th ed.), p. 132, par. 96, points out that:—

Negotiable instruments . . . can be sufficiently reduced into possession by means of the paper which represents them. They are, in fact,

ALTA.
S. C.
BROWNS
v.
BROWNS.
Harvey, C.J.

in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person and his bonds, or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order and he or his indorsee can sue on them in any other jurisdiction without any other grant.

That rule is unquestionably a direct authority in support of the plaintiff's right in the present action.

The same rule appears to be in force in some of the United States, for Wharton in his Conflict of Laws (3rd ed.), p. 1371, par. 615, states that:—

> A foreign administrator also has a right to sue without local authorisation on negotiable paper held by him.

In *Currie* v. *Bircham* (1822), 1 Dowl. and Ry. (K.B.) 35 (24 R.R. 634), it was held that where the Indian administrator had sent to England certain of the effects of the estate she, and not the administrator appointed in England, was entitled to maintain an action in respect of them.

In *Young* v. *Cashion* (1909), 19 O.L.R. 491, the action was on bills of exchange payable in Ontario. The deceased died domiciled in California, where the bills were at the time of his death, but had property in Ontario. Administration was taken out in both places and both administrators claimed to be entitled to payment of the bills. The Appellate Divisional Court held unanimously that the plaintiff, the California administrator, was the one entitled.

On these authorities it appears to me clear that the plaintiff herein has a right to maintain her action without any local grant.

I would, therefore, allow the appeal with costs and reverse the decision of the Court below with costs to the plaintiff in the cause in any event. *Appeal allowed.*

N. B.
S. C.

LEE v. ARTHURS.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.,K.B.D., and Chandler, J. June 6, 1919.

DEEDS (§ II F—65)—RECTIFICATION OF —MUTUAL MISTAKE—CANNOT BE RECTIFIED AGAINST THE PROTEST OF ONE OF THE PARTIES.

The principle of rectifying or reforming a conveyance rests upon the idea that the document as written is not evidential of the contract as made, and if both parties agree upon that point the Court will proceed to reform the deed or writing in accordance with the common intent, but a deed or writing cannot be reformed or rectified against the protest of one of the parties who contends that it is already right.

N. B.

S. C.

LEE v. ARTHURS.

McKeown, C.J., K.B.D.

APPEAL from a decree and judgment of Grimmer, J., in an action arising from a dispute as to the ownership and boundaries of lands conveyed to him by the defendants. Varied.

G. H. V. Belyea, K.C., supports appeal; *H. A. Powell*, K.C., *contra*.

The judgment of the Court was delivered by

McKEOWN, C.J., K.B.D.:—This is an appeal from a decree of the Chancery Court in an action brought by plaintiff and arising from a dispute as to the ownership and boundaries of lands conveyed to him by the defendants.

Prior to the time when the disputed conveyance was executed, the defendant Walter Arthurs was the owner of a lot of land consisting of 100 acres in the Parish of Westfield, Kings County, bounded on the south and west by coast waters of the Kennebecasis Bay. For the purpose of acquiring the right to remove stones and sand from the beach and foreshore of this lot, plaintiff, on or about Aug. 10, 1912, made a purchase from defendant Walter Arthurs of the right or privilege of removing the stones and gravel then on the beach, for which he paid the sum of $125. After further negotiations, plaintiff made a purchase of the beach as described in the deed thereof to him from the defendants, and herein lies the dispute. Plaintiff claims that under his deed he is entitled to all the beach fronting the defendants' property, and defendants upon their part claim that a certain portion of said beach, being at the north-westerly corner of the property, did not pass under the conveyance. This, I think, is the most serious difference between them, although other features of the case will necessarily receive consideration.

As above remarked, plaintiff purchased the right to remove the gravel from the defendants' beach on or about Aug. 10, 1912. On Aug. 7 in the following year he purchased the freehold along the shoreward portion of defendant's lot and received a deed thereof. The description of the property so conveyed by deed in evidence, sets out the full extent of defendant's land containing 100 acres more or less, and as far as the shoreward portion thereof is concerned, its boundary commences at

a marked stake on or near the shore of the Milkish Creek or Bay, thence following the several courses of the shore in a southwesterly direction to the place of beginning.

N. B.

S. C.

LEE
v.
ARTHURS.

McKeown, C.J., K.B.D.

The "place of beginning" alluded to is a marked oak tree which has been well identified, and stands near the shore of Bayswater Bay on the western boundary line of lot 4.

There is no evidence to shew where the marked stake above referred to was placed, and the original grant of the property is not before us. I think it is proper to conclude that the foreshore did not pass under the grant, and that the property between high and low water mark still remains in the Crown. With this presumption in mind it will be instructive to notice particularly the description of the land actually deeded to the plaintiff by defendants. It is thus set out in the deed:

A portion of that lot of land conveyed by Samuel Jones to the late David McCoy, dated June 30, 1844, and therein described as situated in the Parish of Westfield, Kings County, known as to be No. 4, beginning at a marked oak tree standing near the shore of the Milkish Creek or Bay, being the boundary between lots Nos. 3 and 4, thence running by the magnet of 1843 N. 43 degrees W. to a marked stake standing on the rear line of the same lot on the northeastern side line of lot C, as there shewn on the plan aforesaid, thence on the said rear line N. 47 degrees E. 14 chains of 4 poles each and 25 links to the N.W. angle of lot No. 5 sold to Joseph Barlow, thence by the northwesterly side line of lot No. 5 as conveyed by the late Charles Whitney S. 43 degrees E. to a marked stake on or near the shore of the Milkish Creek or Bay, thence following the several courses of the shore in a southwesterly direction to the place of beginning, containing 100 acres more or less—the portion hereby conveyed being particularly described as—all the beach around or on the property above described measuring back on the eastern side from high water mark 300 ft., preserving the same width or thereabouts in a straight line to a marked willow tree, and measuring back from the high water mark on the southern or western side 100 ft., preserving the same width to the line to the willow tree above mentioned, excepting thereout lot sold to one Logan and lot sold to one Myers and the lot reserved by said Walter Arthurs extending from Logan's line to a marked five prong willow tree, the beach in front of above Arthurs lot to be used by said Arthurs and his heirs only, besides said John H. Lee; also road and right of way along eastern boundary or side line of said Arthurs property to the Main Road from Ferry Landing to Lands End; also road and right of way from southern or western boundary to said Main Road; and also right of way to and from and right to use of the spring below the big oak to John H. Lee his heirs and assigns.

Plans of the property were put in evidence shewing the rights of way conveyed and exemplifying the contention of both parties.

On Aug. 8, 1914, the defendants conveyed to one Joseph O. Logan and wife a portion of the said 100 acres owned by defendants, being at the southwest extremity of their lot, and a description of such property is as follows:—

All that piece or parcel of land situate lying and being in the Parish of Westfield, Kings County, and being a part of lot No. 4, conveyed by Charles E. Williams and Mary Williams, his wife, to Walter W. Arthurs by deed dated July 15, 1908, and bounded as follows: Beginning at an oak tree (marked) standing near the shore of the Bayswater Creek or Bay, being the boundary line between lots Nos. 3 and 4, and following said line in a northwesterly direction 310 ft., thence at right angles northeasterly 56 ft., to a birch tree, thence at right angles southeasterly 310 ft., to the shore of Bayswater Bay, thence following the shore in a southwesterly direction to the place of beginning.

Although Logan's deed bears date Aug. 8, 1914, he bought a portion of the land from defendant in 1913, and got a deed thereof which was not recorded; and in the following year he purchased an adjoining portion and took a deed of the whole portion so purchased, and destroyed the first conveyance, which was unrecorded. This later deed is in evidence. It bears date Aug. 8, 1914, and was recorded on Sept. 1 following. Logan testifies that when he got the deed so in evidence he knew that Arthurs had sold the beach to Lee, but he was not aware of that fact when he made the purchase of the smaller portion in 1913. As against the plaintiff, Logan claims the beach in front of his own property and the defendant Arthurs claims the beach in front of his (defendant's) property down to a certain point hereinafter more particularly mentioned. Whereas the plaintiff, as against both Logan and the defendant, claims that the whole beach was passed to him under the conveyance to him by the defendants, subject to the exceptions therein made. It will be seen that Lee and Logan have a common grantor, namely, Arthurs, and apart from the question of the interpretation and validity of the deed, their rights must be governed by the priority of recorded conveyance. Plaintiff claims the entire beach, subject to the exceptions made in the deed, and also that the number of feet determining the breadth thereof should be measured from high water mark in freshet season. Plaintiff concludes his statement of claim by asking:

(1) A declaration as to the ownership and boundaries of lands under the deed to him from said defendants under date of Aug. 7, A.D. 1913. (2) Or a cancellation of the same and return of the purchase money. (3) Or damages for fraud and misrepresentation on the sale of the same. (4) Or a rectification thereof. (5) And for a declaration as to the rights of way and easements under said deed, and the rights in the rocks, stones,

N. B.

S. C.

LEE
v.
ARTHURS.

McKeown, C.J., K.B.D.

gravel and sand on the said Arthurs reserved lot. (6) And for such further and other relief as may be just and equitable.

Defendant in his reply contests plaintiff's right to the entire beach, claiming that a certain portion on the northwesterly part thereof did not pass under the purchase, and further claims that the breadth of the beach conveyed must be measured from ordinary high water mark as the starting point thereof. And against the plaintiff the defendants ask and pray:

(a) That the rights of the plaintiff under the said deed of conveyance so made to him by the defendants and dated Aug. 7, 1913, may be declared and determined.

(b) That it may be declared that the plaintiff is not entitled in fee to the soil of or under the said road or way leading from or near the westerly side of the plaintiff's said lot to the said main highway, and that the plaintiff is not entitled to the exclusive use of said way, but only to the right to use the same in common with the said defendants and such persons as they, the defendants, may authorize or permit to use the same.

(c) That it may be declared that the defendant, Walter Arthurs, is entitled in fee to the lot so reserved for himself and lying next easterly from the said Logan lot down to ordinary high water mark and that the only right or easement to which the plaintiff is entitled in respect thereof, or in respect of the beach in front thereof down to between ordinary high water mark and low water mark is the right to cross the same to get to the said farm road hereinbefore mentioned.

(d) That if the said conveyance from the said defendants to the plaintiff gives to him any other or greater rights or easements than is hereinbefore mentioned in pars. 10 and 11 of this defence, then, that the said deed of conveyance may be rectified or reformed so as to be limited to the said rights and easements so alleged in said two paragraphs.

(e) That if the said deed of conveyance grants or conveys to the said plaintiff the fee or other interest or title in the soil of the said way, then, that the same may be rectified or re-formed so as to grant to him only the easement or right of passage over the said way in common with the defendants and others.

The serious part of the dispute concerns the westerly portion of the beach. In the decree from which appeal is taken, plaintiff's right to the beach upon that side of the property is thus described:

Beginning at high water mark at Bayswater Bay at the westerly corner of the lot hereinbefore described (being the southeasterly portion of the beach conveyed) thence running northwesterly following the course of high water mark until it strikes a point thereon at which a right angle thereto would pass through the five pronged willow tree thence running from said last mentioned point through said five pronged willow tree to a point distant 100 ft. from said high water mark thence running southeasterly parallel to said high water mark, preserving a distance therefrom

of 100 ft. until it strikes the northwesterly boundary of the lot first described, thence following the said last mentioned line westerly to the place of beginning.

In his reasons for judgment the Judge says:

Having given careful consideration to all the evidence which has been adduced by the parties hereto, to cover the land conveyed to the plaintiff under his deed and carry out the intention of the parties, the description of this lot should be as follows:

Then follows the description of the lot immediately above quoted.

It is clear that the Judge ascribes the above boundaries to plaintiff's lot as the result of his interpretation of the description in the deed, or as he says: "To cover the land conveyed to plaintiff under his deed," as well as to "carry out the intention of the parties."

With reference to the question of interpreting the description of the property conveyed in the deed, the contention made by the defendant, and acquiesced in by the Court below on this branch of the case is, that the beach above or to the westward of the line indicated as passing through the five pronged willow, did not pass under the deed, from which it follows that no part of the beach in front of Logan's lot, and no part of the Arthurs beach between Logan's line and the five pronged willow tree line are within the description of the land conveyed. But the words of description in the conveyance are: "all the beach around the property above described," then the measurements of depth are given, and an exception is made as follows:

Excepting thereout lot sold to one Logan and lot sold to one Myers and the lot reserved by said Walter Arthurs extending from Logan's line to a marked five prong willow tree.

Dropping Myers exception, which is not involved in the suit, it is clear, that if the beach conveyed ends where the decree appealed from says it does, these exceptions have no meaning at all, for such excepted portions never were within the boundaries of the land conveyed by the deed, as such deed is interpreted by the Court below, and consequently they never could be "excepted thereout." These exceptions can only be given a meaning by assuming and determining that all the beach around or on the property above described passes under the conveyance and it seems to me, with the utmost deference to the Judge of

N. B.

S. C.

LEE
v.
ARTHURS.

McKeown, C.J., K.B.D.

the Court below, that as a matter of interpretation of this deed, the land conveyed to plaintiff thereunder must comprise the whole beach, subject to the exceptions specifically expressed.

But notwithstanding the above interpretation, which, to my mind, seems to be the correct one, it is of course open to the defendant to claim, as he has successfully claimed in the Court below, that it was not the intention of the parties to convey all the beach, and that even if the deed does include it all, the contract should not be enforced against a common error, but that the deed should be rectified or reformed.

In dealing with this question of a reformation of plaintiff's deed, it is well to remember that, as regards the beach in front of the Logan lot, when plaintiff recorded his conveyance from the common grantor, vesting him with "all the beach around or on the property above described measuring back, etc.", Logan had no registered title to any land in this locality at all. It is true that Logan was in occupation of a portion of his lot, but certainly not of the beach. Lee testifies that he was unaware of Logan claiming any of the property in question, and that just before the sale Arthurs told him that nobody owned any of the beach excepting himself (Arthurs). In the case of *Bourque* v. *Chappell* (1900), 2 N.B.Eq. 187, Barker, J., says, at p. 190:

> The plaintiff is here seeking to obtain priority over the defendant Jackson's registered title, and one of the essential elements in a suit of this kind is that the plaintiff should establish affirmatively to the Court's satisfaction that the owner of the registered title had actual notice of the plaintiff's right before purchasing.

We have no evidence before us of the nature above indicated, neither is there evidence of any user or occupation of the beach by Logan, or of anything which might arouse a suspicion on Lee's part that Logan had any claim thereto. These remarks concerning the beach in front of Logan's property are, I think, applicable even in a stronger degree, to that part of the beach in front of the property of Arthurs, because Arthurs himself was the grantor, and anything in the deed requiring an interpretation must be construed most strongly against him as such grantor. While the defendant is very specific and clear in his statement of what he claims the deed should cover, the plaintiff is equally clear to the contrary, and there is no common ground

between them at all. The whole principle of rectifying or reforming a conveyance rests upon the idea that the document as written is not evidential of the contract as made, and if both parties agree upon that point, the Court will proceed to reform the deed or writing in accordance with the common intent, but a deed cannot be reformed or rectified against the protest of one party thereto who says it is right already, at least in a case like the one at present before the Court. Cases are conceivable in which the evidence could be so overwhelmingly one-sided that the Court might intervene, but in the words of Farwell, L.J., in *May* v. *Platt* (1900), 69 L.J.Ch.D. 357, at p. 362:

> I have always understood the law to be that there can only be rectification in the case of a common error. Where, however, it is a case of a unilateral mistake the remedy is not rectification, but rescission, and in such a case there must be something which the Judges, Lord Romilly in *Harris* v. *Pepperell*, and perhaps Vice-Chancellor Bacon in *Paget* v. *Marshall*, shrank from calling fraud, but which would in effect have all the effects of fraud, and therefore, would be fraud in the eye of the Court—in order to deprive a man of the legal estate which he has obtained *ex hypothesi* without any act on his part inducing that error. In my judgment, the only way in which rescission can be obtained is by something which amounts to unfair dealing sufficient to allow of the contract being set aside. It is only necessary for me to say this in the present case in consequence of the argument urged before me that I might admit evidence notwithstanding that rescission could not be obtained. Of course fraud unravels everything.

In 21 Hals., p. 20, the text says, in dealing with this subject: "Rectification can only be had if the mistake is mutual or common to all parties to the instrument." For this a great many cases are cited in the notes. Where the mistake is unilateral only, the proper remedy is rescission, not rectification. On the preceding page, par. 35 of the text, it is said:

> After conveyance, rescission cannot in the absence of fraud, be obtained on the ground of a unilateral mistake. But when a mutual mistake of a fundamental character is proved, the Court may, in a proper case, grant rescission even after conveyance. The general rule, however, is that in the absence of such a mutual error, after the conveyance has been executed, a purchaser has no remedy by way of rescission or compensation in respect of any defects, either in the title to or quantity or quality of the estate, which are not covered by the vendor's covenant or by collateral warranty as to the quality of the subject-matter of the transaction.

As remarked by Kekewich, J., in *Bonhote* v. *Henderson* (1895), 64 L.J.Ch.D. 556, p. 558:

N. B.

S. C.

LEE
v.
ARTHURS.

McKeown, C.J., K.B.D.

Suffice it to say, that a judgment reforming a deed proceeds on the basis that the deed as it stands does not express the real bargain between the parties, of which real bargain the Court has satisfactory evidence.

While not attempting even to suggest what would be satisfactory evidence in every instance, I nevertheless think that evidence such as that presented before the Court in this case could not be construed to come up to the necessary requirements. There cannot be said to be a common error or a mutual mistake between plaintiff and defendants in this matter, because plaintiff stoutly maintains that the description is right and that he is entitled to all the deed gives him. The mistake, if any, is unilateral, and I therefore think it is not open to the Court to reform the deed against the protest of the plaintiff. Defendant has not asked for a rescission of the conveyance, neither in my opinion is he in a position to do so. There is no finding of misrepresentation or fraud on the part of plaintiff in securing his deed in the terms which it contains, nor is there any evidence upon which such finding could be based. It has appeared that Keith, who drew the conveyance under consideration, made two deeds of the property, both of which were executed by defendants and both are in evidence. The latter only was recorded, it being made in substitution for the former, because, according to Keith, certain portions of the first were badly written and crowded together, and he thought it would be more satisfactory to rewrite the same. A change in the description of the property conveyed appears in the second deed, but they both convey "all the beach around the property above described," which is the question at issue. The first deed contains a reference to "a tree 500 ft. from the back of the said eastern lots," which expression is not found in the second conveyance. There were not only two separate deeds drawn and executed, but it also appears from the evidence that a description of the land to be conveyed was written on a large envelope by plaintiff and handed by him to Keith. The description in the first deed more closely approximates that written on the envelope, in that they both contain a reference to a tree "500 ft. back of the said eastern lots," and it is to be noted that they both use the expression "all the beach around," etc. From the evidence, as well as from the wording of the deed itself, I do not think this reference to the above indicated tree

is intended to cut down the conveyance of "all the beach," etc. It substantially comes to this: We have the evidence of defendant against that of the plaintiff, who is supported in his contention by the wording of the deed, and in no view of the testimony can the defendant be construed to have established the position that he takes, bearing in mind that the onus of clear and distinct proof rests upon him in this particular. The full distance to which the defendant has carried his case (assuming everything he says is true) is that a mistake has been made upon his part by assenting to and executing the deed in its present form. In the case of *Carman* v. *Smith* (1904), 3 N.B.Eq. 44, in dismissing a bill which prayed rectification of a conveyance, Barker, J., said, at p. 47:

> The cases are extremely rare in which the vendor, who is presumed to know all about his own property and what it is he has agreed to sell, finds himself in the position of having, as the present plaintiff alleges she has done, conveyed in completion of his contract of sale more land than he actually sold or than the purchaser bought. 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 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.

I have thought best to express the views above stated upon this point, although the defendant in his counterclaim has not asked for rescission of the deed, but for a rectification thereof. The rectification or reformation sought by the defendant is, of course, to have the deed altered in the way shewn by the decree appealed from. It will be noticed that the plaintiff, in addition to asking for a declaration as to the ownership and boundaries of the land conveyed, also asks for rescission of the deed, and return of his purchase money, or for a rectification thereof. He approaches the subject from the standpoint of the breadth of the beach conveyed. His contention is that he should have on the southwesterly side a breadth of 100 ft. from freshet mark, and it is from that point of view that rectification on his part is sought.

In support of this contention, it was pointed out by Belyea that such construction is necessary to give effect to the exception made in defendant's favor in the deed in question, wherein the

N. B.
S. C.
LEE
v.
ARTHURS.
McKeown, C.J., K.B.D.

grantor (defendant) retains, for himself and his heirs, a right of user of the beach in front of his lot, and also specifically excepts from the deed "the lot reserved by said Walter Arthurs extending from Logan's line to a marked five prong willow tree." It must be admitted that if the beach itself has a full breadth of 100 ft. from ordinary high water mark, very little effect, if any, can be given to the above exception. But if the deed be interpreted to mean (or is reformed so as to read) 100 ft. from freshet mark, the force of the above exception is very apparent and its meaning is very clear, for it would thereby include a strip of Arthurs' meadow lying between the boundaries mentioned, which plaintiff admits he never asked for and never bought. The insuperable difficulty, to my mind, of accepting the above argument is that it gives the deed a meaning at variance with the reading of the description therein written. It was open to the plaintiff to adduce testimony, if in his power, to convince the trial Judge that, by local custom and usage in that place, the words "high water mark" mean high water mark at freshet time, but he did not do so; and I therefore think that the Judge of the Court below has correctly interpreted the deed as conveying 100 ft. from ordinary high water mark. The words in the description, twice used, are "high water mark," and, in my view, they should not be construed as exceptionally high, or exceptionally low, water mark, but, as the Judge says, ordinary high water mark.

The effect of so interpreting the deed must be secondary to its proper construction. "The beach in front of above Arthurs lot" (to use the expression contained in the deed), is not excepted from the purchase. The title to this portion of the beach has passed to plaintiff, and over it defendant has reserved a right of user—but that is all. But he does not except therefrom what he calls his "lot," extending from Logan's line to the willow tree. It would seem to follow that there must be some distinction between this beach (over which he has retained rights of user) and the "lot," full title to which he has retained by the exception above noted; and having regard to this "exception" on the one hand, and the "right of user" on the other hand, and considering them both in the light of the 100 foot measurement from

ordinary high water mark, which by the proper interpretation of the deed must presumably include both the excepted lot and the beach over which defendant retains a right of user, I conclude that if the 100 foot strip between Logan's line and the five pronged willow tree, should be found to comprise more than the actual beach, such excess must be a portion of the excepted "lot"; while, on the other hand, if, by actual measurement, the breadth of such beach, at the places named in the exception, is a full 100 ft., I can see no force in the exception. But if such beach is narrower than 100 ft. (say 80 ft.) then I think the effect of this exception is to retain the title and ownership of the balance (20 ft.) in the defendant, as his excepted lot.

In my opinion also, plaintiff has failed to establish a right to have the deed either rectified or reformed; his attempt in that particular way being judged by the same rules as have been applied to defendant's unsuccessful effort to curtail the extent of beach conveyed by the rectification of the deed. Consequently, for the reasons given above, and following what I believe to be the authorities applicable, some of which are above quoted, I think both plaintiff and defendant must fail in their prayer to have the deed rectified or rescinded. Both parties have asked the Court for a declaration concerning the rights of way, as well as concerning the ownership and boundaries of the lands, and the decree appealed from gives attention to the various issues dealing successively with the matters in controversy.

I think the decree appealed from should be amended so as to except the Myers lot from the 300 foot strip deeded to plaintiff on the southeasterly portion of defendants' lot, and to declare plaintiff to be the owner in fee simple of the entire beach on the remaining or S.W. portion of defendants' said land, measuring back from the high water mark on said southwestern side 100 feet, and preserving the same width, from the western side line of the Logan lot until it strikes the N.W. boundary of the 300 foot strip above mentioned, subject to a right of user by the defendant Walter Arthurs and his heirs of that part of said beach extending from Logan's eastern line to a marked five prong willow tree; and subject further to the exception of such portion of defendants' lot as may lie between the following

N. B.
S. C.
LEE
v.
ARTHURS.
McKeown, C.J., K.B.D.

boundaries, viz: Logan's easterly side line as the westerly boundary, the line of actual high water mark as the southerly boundary, a line passing through the five prong willow tree as the easterly boundary, and a line 100 ft. distant from the line of high water mark and parallel thereto as the northerly boundary thereof. Also that the decree concerning the rights of way be amended where necessary in accordance with the above declaration of ownership.

There remains only the question of costs to be considered. It is clear that both parties have failed in part, and succeeded in part. Plaintiff has succeeded in establishing his title to the beach around the entire shore—subject to exceptions which he never questioned—and he has failed to substantiate his right to have his holding measured from high freshet mark; defendant has succeeded in holding plaintiff down to the 100 foot strip measured from ordinary high water mark, but has been unsuccessful in his attempt to extinguish plaintiff's right to the beach to the west of the five pronged willow tree. Under these circumstances I think there should be no costs, either of this appeal or in the Court below.

B. C.
C. A.

BROOKS v. B.C. ELECTRIC RAILWAY Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. July 15, 1919.

NEGLIGENCE (§IIC—98)—MARRIED WOMAN—PASSENGER IN HUSBAND'S MOTOR CAR—COLLISION—CONTRIBUTORY NEGLIGENCE OF HUSBAND—RIGHT OF WIFE TO RECOVER IN ACTION FOR DAMAGES.

A wife who is injured in a collision while riding in a motor car driven by her husband may, under the Married Women's Property Act (R.S.B.C. 1911, c. 152), maintain an action in her own name and for her own benefit in respect of the injury sustained.

Contributory negligence on the part of the husband will not prevent her succeeding in the action, on the ground that he is not her servant and she is not responsible for his negligence.

[The "Bernina" (1888), 13 App. Cas. 1, applied.]

Statement.

APPEAL by defendant from the trial judgment in an action for damages received by the plaintiff in a collision between a motor car in which she was riding, and one of the defendant's streets cars. Affirmed.

L. G. McPhillips, K.C., for appellant; *Duncan* and *Robinson*, for respondent.

MACDONALD, C.J.A.:—The plaintiff was riding in her husband's automobile, driven by him, when she was injured in a collision between the automobile and the tramcar of the defendants.

The jury found the company negligent, and while I might not have done so, I think there was evidence to support their finding. The jury also found that the driver was not guilty of contributory negligence. In my opinion that finding is clearly contrary to the weight of evidence. It is hard to conceive of a more pronounced case of contributory negligence than that which was made out against the plaintiff's husband on his own testimony, and therefore if the plaintiff is to be identified with her husband's negligence there ought to be a new trial, as in my opinion the finding against contributory negligence was perverse.

But if the contributory negligence of the driver is not in law that of the plaintiff, then it would be idle to grant a new trial. Had the plaintiff been an ordinary passenger in a conveyance driven by a stranger, and not under her orders, the case would fall within the rule of law laid down by the House of Lords in *The Bernina*, 13 App. Cas. 1, and the contributory negligence of the driver would not be a factor in this case.

The submission is that because at common law husband and wife are one, his negligence is hers. But for the Married Women's Property Act she might not sue alone. At common law the husband was a necessary party to a suit for injuries to the wife, and he was entitled to the damages recovered. Therefore at common law damages could not have been recovered in this case because of the negligence of the husband.

The answer then to the question under consideration depends upon the extent of the change made in the married woman's status by the Act referred to. So far as it affects this case, our Act is the same as the English statute of 1882, and is in effect the same as the legislation of Ontario. I say in effect, because while the Ontario Act was amended by the deletion of the words "in tort or otherwise," yet the courts of that Province have regarded this as not lessening the married woman's status to sue in tort. The decisions therefore in the English and in the Ontario courts are upon statutes which, for the purposes in hand, are identical with our own.

B. C.
C. A.
BROOKS
v.
B. C. ELECTRIC RAILWAY CO.
Macdonald, C.J.A.

That the Act gives a married woman the requisite status to sue in her own name and for her own benefit in respect of a personal injury is not now open to controversy, with this qualification to be found in the Act itself, that she cannot sue her husband for a tort of that nature: Eversley on Domestic Relations, 3rd ed., 177; *Thynne* v. *St. Maur* (1887), 34 Ch. D. 465; *Weldon* v. *Winslow* (1884), 13 Q.B.D. 784; *Spahr* v. *Bean* (1889), 18 O.R. 70. The latter is referred to with approval by Osler, J.A., in *Lellis* v. *Lambert* (1897), 24 A.R. (Ont.) 653. It is also settled law that one or both of two *tort feasors* may, at the option of the person complaining of an injury to the person arising out of their joint negligence, be sued.

The plaintiff might proceed against one only of the joint *tort feasors*, as she has done, and as has already been pointed out, the contributory negligence of the other could be no answer to her claim. If it be an answer in this case it is solely because the driver was her husband.

The husband has no interest in her cause of action. True he might, but for his own negligence, have had a cause of action of his own arising out of the same tort, but that has nothing to do with the case. In relation to this action the common law doctrine of the unity of husband and wife is rendered non-existent by the statute. In the eye of the law the wife is a *femme sole*. Bramwell, L.J., in *The Bernina*, *supra*, at p. 13, said:—

> Suppose the owner's wife is a passenger and injured, can she maintain such an action. If not, why not? The driver is not her servant, and she is not responsible for his negligence

and there is nothing in their Lordships' judgment at variance with what Lord Bramwell said. On the contrary, it seems to me to follow from what their Lordships have said that the relationship which must exist between the passenger and the driver to render the negligence of the driver that of the passenger, must be such as either gives the passenger control over the driver, or creates a common interest, so that, to quote the words of Lord Herschell, "the acts of the one may be regarded as the acts of the other."

The fact that the wife was, so to speak, the guest of the husband, and not a passenger for hire, is, I think, not material to

the issue, if, as here, she was not herself guilty of any want of care which contributed to her injury.

In *B.C. Electric* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, the deceased was riding on the vehicle with the driver *gratis*, and the jury found that he was negligent in not looking out for an approaching train. Their Lordships appear to recognize, although it was not an issue in the appeal, that the deceased was, in the circumstances of that case, under an obligation to be on the lookout for danger. Their Lordships did not, therefore, criticise the finding that he was guilty of contributory negligence, but gave judgment in favour of his administrator because they thought that in the result the railway company might by care have avoided the collision.

It was not a ground of appeal, nor was it argued before us that the wife was not entitled to recover the expenses of her treatment, amounting to a large sum, and which formed part of her claim. Primarily the husband is liable for these expenses, but no question based on that obligation is before us. In view of what I have said, a new trial ought not to be ordered, and as the verdict cannot be impeached on the other grounds taken, the appeal must be dismissed.

GALLIHER and EBERTS, JJ.A., agreed with the Chief Justice. Galliher, J.A. Eberts, J.A.

MCPHILLIPS, J.A. (dissenting) :—I am not in agreement with my brothers as to what should be the disposition of this appeal. With great respect I am entirely unable to accept the view that the appeal should be dismissed. I cannot persuade myself that negligence upon the part of the Railway Co. was established. The speed of the electric car cannot be said to have been shewn to be greater than say at the outside 12 miles an hour, and a speed of twenty miles an hour was permissible in the municipality. This speed, of course, would always have to be gauged by the attendant circumstances. McPhillips, J.A.

The evidence is conclusive that the husband of the plaintiff was guilty of gross negligence in driving close up to the electric car on the one track, then without opportunity to see whether or no a car was coming down on the parallel track, swinging over and placing his automobile in which the plaintiff was directly in front of that car. The accident then was inevitable, and it is not contended that the motorman could then have obviated the

B. C.
C. A.
BROOKS
v.
B. C. ELECTRIC RAILWAY CO.
McPhillips, J.A.

impact between the electric car and the automobile. The truth is that the jury were perverse in absolving the plaintiff's husband from the guilt of contributory negligence, and as at present advised, although not without some hesitation, I am of the opinion that the plaintiff is affected by the negligence of her husband. The plaintiff, the wife, was under the protection of the husband, the husband and wife are in theory one person, and in this class of action, the husband being the driver of the automobile, and guilty of contributory negligence, the result in law is that the situation is the same as it would have been if the plaintiff, the wife, had been driving the automobile and was guilty of contributory negligence, and on this ground alone is disentitled from recovering any damages in respect of the injury sustained. See Eversley on Domestic Relations 170-181, Lush on Husband & Wife 11-13; *The Bernina* (1888), 13 App. Cas. 1, at p. 13. Lord Bramwell, 1st col. Lord Herschell at pp. 7-8, Beven on Negligence (3rd ed., 1908), at p. 178.

Traction systems are necessary in these modern days. The electric cars can only traverse the streets upon the steel rails, and whilst the traffic must not be to the public danger, pedestrians, drivers and occupants of vehicles must exercise due and proper care and not recklessly place themselves in positions of danger and look to the traction companies as insurers. The plaintiff, in a negligence action, must make out a case of negligence. That is the bounden duty of the plaintiff. Lord Moulton in *Rickards* v. *Lothian* (1913), 82 L.J. P.C. 42, at p. 47, [1913] A.C. 263, said:

> It is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury.

Here we have only the following findings (a) negligence; (b) the motorman did not have his car under proper control, in view of the fact that he was passing a street car approaching a crossing; (c) he (the motorman) could not stop; (d) the street car had too much impetus to stop in the distance between his street car and motor car. These findings are insufficient, in my opinion, as they do not import negligence in view of the circumstances as they do not demonstrate that there was negligence in the operation of the street car. The precipitation of the motor car shot out upon the track coming from behind the other street car was such that no control was possible to prevent that which

was inevitable accident. There is no finding of excessive speed nor evidence that there was want of proper control—what occurred shewed there was proper control. The force of the impact was only such as a street car under proper control would necessarily cause, all the independent witnesses make this clear. I do not consider it necessary to give in detail all this evidence. Now apart from whether the plaintiff may rightly be said to be affected and bound by the contributory negligence of the driver of the motor car, her husband, there is no evidence upon which the jury could reasonably find that there was negligence upon the part of the railway company. The verdict of the jury is so opposed to the weight of the evidence that it can only be characterized as flagrantly perverse (see *Jones* v. *Spencer* (1897), 77 L.T.R. 536. Lord Morris at p. 538).

This is not a case of a general verdict. I would refer to what Lord Cozens-Hardy said in *Newberry* v. *Bristol*, etc. (1912), 29 T.L.R. 177, at p. 179:

> They (the jury, as they have done in the present case) had negatived all the alleged acts of negligence, or at least they had held that no one of these alleged acts of negligence was established to their satisfaction. He thought they in substance treated the tramways company as insurers, as being bound to "ensure" the safety of their passengers (here all vehicular traffic on the street). In other words, they thought the company ought not to carry passengers (here ought not to run their cars) on the car unless they could carry them safely (here insure all such vehicular traffic) and this without any question of negligence on the part of the company.

In the same case, at the same page, Lord Justice Hamilton, now Lord Sumner, said he

> did not think that a jury could fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notions of the fitness of things. The evidence shewed how the accident happened. It proved a small residuum of risk which nobody at present knew how to guard against. The jury were not tramway experts. They might conceive an ideal tramcar (here they might conceive a traction system capable of being carried on without risk to even those who flung themselves on their vehicles in the way of a tramcar as "a bolt from the blue") but their hopes and aspirations could not take the place of evidence, or support a verdict which rested on no foundation of actuality.

This Court had a case of precisely similar character to the present case before it, where all the evidence is closely scanned, viz: *Tait* v. *The B.C. Electric Ry. Co.* (1916), 22 B.C.R., 571, and it was held that there was such contributory negligence as

B. C.

C. A.

BRIGGS v. B. C. ELECTRIC RAILWAY CO.

McPhillips, J.A.

precluded recovery for injuries sustained in consequence of a collision with a street car, and that decision is binding upon this Court. Then the answers returned by the jury are insufficient and vague, and upon this ground alone cannot be given effect to (see *Lewis* v. *G. T. Pac. Ry. Co.* (1915), 26 D.L.R.687; 52 Can. S.C.R. 227).

In 21 Halsbury's Laws of England at p. 452 we find this statement of the law:

> He is not identified with the negligence of the driver of the vehicle in which he is, merely because he is travelling in it (*Matthews* v. *London Street Tramways Co.* (1888), 5 T.L.R 3). The proper test as to the liability in such a case is whether the negligence of the driver of the vehicle which collided with that in which the plaintiff was travelling wholly or in part caused the accident. If so, the plaintiff can recover, and the fact that there was negligence on the part of the driver of the vehicle in which the plaintiff was travelling makes no difference.

No question was put to the jury to cover this point, and it was the plaintiff's duty to see to its being put, and the requisite answer must be got from the jury (also see *Nicholls* v. *G.W.Ry. Co.* (1868), 27 U.C.Q.B., 382). Mr. Duncan, counsel for the respondent, frankly stated that the case as presented by the respondent is as complete a case as can be made. In view of this I do not think it a proper case to direct a new trial as, in my opinion, one conclusion only is open to a jury upon the facts of this case, and that is that no evidence of negligence upon the part of the appellant has been established, and the proper course to adopt is to enter judgment for the appellant. (See *McPhee* v. *E. & N. Ry. Co.* (1913, 16 D.L.R. 756; 49 Can. S.C.R. 43; Duff, J., at p. 53.) *Hanly* v. *Mich. Cen. R. Co.* (1907), 13 O.L.R. 560 at p. 567; *Antaya* v. *Wabash R. R. Co.* (1911), 24 O.L.R. 88 at pp. 93-101).

I would therefore allow the appeal. *Appeal dismissed.*

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K. B.

MERCHANTS AND EMPLOYERS GUARANTEE AND ACCIDENT CO. v. PARENT.

Quebec King's Bench, Lamothe, C.J., Cross, Carroll, Pelletier and Martin, JJ. November 11, 1918.

INSURANCE (§ VI A—246)—ACCIDENT—CONDITION IN POLICY—IMMEDIATE NOTICE—DELAY—RECOVERY.

Where an accident insurance policy requires immediate notice of the accident to be given, the insured may be allowed a reasonable time in which to give the required notice according to the circumstances of the case. Held that a delay of fifty-two days in giving the notice was, under the circumstances, a want of compliance with the condition which prevented recovery under the policy.

QUE.

K. B.

MERCHANTS AND EMPLOYERS GUARANTEE AND ACCIDENT CO. v. PARENT.

CROSS, J.

APPEAL by defendant from a judgment of the Superior Court, Quebec district, in an action on a policy of insurance against employer's liability. Reversed.

Fergus Murphy, K.C., for appellant; *Louis St. Laurent*, K.C., for respondent.

CROSS, J.:—This is an action taken by the respondent upon a policy of insurance against employer's liability.

The action is taken to have the respondent (the assured) indemnified against a claim, made upon him in an action by one Dufresne, for compensation under the Workmen's Compensation for Accidents Law.

It is not disputed that Dufresne met with an accident or that his claim falls within the description of the risks insured against.

The appellant pleads two grounds of defence. The first is that notice of the accident was not given to it immediately upon the occurrence of it as covenanted in condition C of the policy. The second is that no judgment has been given in favour of Dufresne nor has respondent paid anything to Dufresne, and that, as covenanted in condition F, no action can be taken against the insurer so long as the insured shall not have paid the loss in satisfaction of a judgment.

It appears that, pending the action, judgment was given on Dufresne's action for $1134, as the so-called capital of a rent payable in respect of permanent partial disability.

Shortly afterwards, judgment was given in the present action condemning the appellant

à indemniser le demandeur de la somme de $1,134 en capital, intérêt et frais, laquelle il a été condamné à payer par jugement de cette Cour rendu le 1er mars, 1918, dans l'action principale de *Dufresne* v. *Parent*, le tout avec intérêt et les frais de la présente action récursoire.

It is from that judgment that the present appeal has been brought and against it the defendant relies upon the two grounds of defence above mentioned.

The material facts may be summarized as follows: The respondent is a masonry contractor; Dufresne was working in his service at slacking lime on August 23, 1917. On that day upon water being poured upon the lime, some of it splashed up against Dufresne and carried particles of lime into his right eye. That is a thing which happens from time to time without involving serious

QUE.

K. B.

MERCHANTS AND EMPLOYERS GUARANTEE AND ACCIDENT CO. v. PARENT.

Cross, J.

consequences. The eye is washed or bathed and the workman goes on with his work. Dufresne washed his eye, but, in the evening, he saw his doctor and was told to bathe his eye with boracic acid and that it would probably soon be well again. He went on with his work in respondent's service for about a week. In the course of that week, the respondent noticed that Dufresne's eye was inflamed or red, and, upon asking what was the matter, was told that mortar had got into the eye. In answer to further questions, he was told by Dufresne that his doctor had advised the treatment with boracic acid.

In the week next following, the respondent's men did not work on September 1 and 2, it being exhibition time, and Dufresne did not return to work afterwards.

It was about 3 weeks later that the respondent, seeing Dufresne's son working with his men, asked the son about his father and was told for the first time that Dufresne had been in hospital since September 3, and that the surgeons were saying that he would lose the sight of his right eye. It appears that upon being told of this the respondent said:

il ne m'a pas notifié pour mes assurances.

The respondent gave notice of the accident to the appellant on October 15 or 16, about 52 days after the occurrence of the accident.

It is not shewn what interval of time elapsed between the interview above mentioned which the respondent had with the son by which he was apprized of the gravity of the injury, and October 15. The respondent has testified that he gave the notice as soon after the interview with the son as he could get a doctor's certificate; but he admits that it was Dufresne himself who brought the certificate to his house on October 15.

The covenant as to notice is as follows—

Condition C.—Lorsqu'il survient un accident, l'assuré doit donner immédiatement, au bureau principal de la compagnie, à Montréal, par lettre recommandée, avis contenant les détails les plus complets qui puissent être procurés à ce moment. Et si une réclamation est produite concernant cet accident, l'assuré devra aussitôt en donner avis audit bureau et en fournir tous les détails. En tout temps, l'assuré devra donner toute l'aide et l'assistance possibles à la compagnie.

From what has been said, it is manifest that, when the accident happened, immediate notice of it was not given to the appellant so

that, if the covenant is to be applied in its literal sense, the objection is unsurmountable.

But it is said that the covenant is not to be applied in this rigid sense. There are authorities which support that view, and it is declared in art. 2478, C.C., that

> if it be impossible for the insured to give notice or to make the preliminary proof within the delay specified in the policy, he is entitled to a reasonable extension of time.

In respect of the giving of such a notice, it was said by Cockburn, L.C.J., in *Reg.* v. *Justices of Berkshire*, [1878] 4 Q.B.D. 469, in reference to the words "forthwith" or "immediately," that they are stronger than the expression "within a reasonable time" and imply prompt, vigorous action, without any delay and whether there has been such action is a question of fact having regard to the circumstances of the particular case. That is an observation which judges have quoted and relied upon in later cases such as *Accident Ins. Co. of North Am.* v. *Young* (1891), 20 Can. S.C.R. 280. In my view, it is a better guide than the definition given in Beach, on Insurance, to the effect that:

> Forthwith (in all policies) means without unnecessary delay or with reasonable diligence under the circumstances of the particular case,

because it seems clear that "forthwith" or "immediately" must mean more than "with reasonable diligence."

There is, it is true, high judicial authority to the effect that the requirement, that upon the occurrence of an accident immediate notice shall be given of it, does not necessarily mean that the notice must be given immediately upon the occurrence of the particular incident by which the accident is brought about. There must be time to ascertain if the incident will bring about something which amounts to an accident.

That is well illustrated by what happened in the occurrence here in question. The getting of a drop of lime-water into the eye of a mortar mixer, in the great majority of cases, causes only a momentary pain and the man goes on with his work. So far no one could dignify the occurrence with the name of "accident" and no employer would run off to his insurer. But if, at the end of three or four days, it is known that the eye has become red and inflamed and that the man has been treated by his doctor, the person who realizes this knows that the occurrence does amount

QUE.

K. B.

MERCHANTS AND EMPLOYERS GUARANTEE AND ACCIDENT CO. v. PARENT.

Cross, J.

to an accident. He knows that that is something more than the ordinary sting caused by a splash of mortar.

The respondent had that knowledge in August, but waited over 40 days before giving any notice to the appellant. He seems to have thought that the eye would get better and that there would be no claim. He took a risk. It was not for him to judge of the gravity of the case, if he intended to look to his insurer for indemnity. The employer is in a better position to be in touch with his men than is the insurer. I therefore conclude that on this point there is error in the judgment appealed from, I consider it appropriate to add, in reference to the same ground of appeal, that there would seem to be, in the argument for the respondent and in some of the decisions cited in the notes, a failure to distinguish between "impossibility" of giving notice on the part of the assured, such as is spoken of in art. 2478, C.C., and ignorance of the fact of the occurrence of the accident.

One can figure the case of an assured party having in his service a labourer who has lost a limb by accident in a remote locality and in which the labourer has lain for months in an hospital saying nothing, so that the assured has not heard of the accident until 10 months after it had occurred. A notice then given could not be a notice "immediately" upon the occurrence of the accident. The assured's recourse would have been lost just as parties to contracts every day lose rights, because they happen not to have heard in time of some occurrence which, had they known of it, would have enabled them to give notice or to do what was necessary to save the recourse. Inability to ascertain the facts of the case could not save to the plaintiff in *Charpentier* v. *Craig*, (1913), 22 (Que.) K.B. 385, of his recourse against extinction of his claim by prescription. Knowledge on the part of the assured of the occurrence of an accident and of the gravity of it is no doubt a material fact to be considered in estimating whether the notice has been given immediately or not within the limit above indicated, but it must be remembered that liability of the insurer here has been made dependent upon the giving of immediate notice. The fact that the reason why such a notice was not given is that the assured did not know of the accident, does not make the insurer liable without notice. To hold otherwise would be to change the contract, and one can readily see that there is no juridical process of

reasoning upon which a court can say with one of the United States decisions cited in the notes, that, in such circumstances, the giving of the notice "will be excused." Our Code provides for the one case in which a debtor liable on a condition can be held unconditionally liable. It is the case where the debtor himself prevents fulfilment of the condition.

Commenting upon the United States decisions in which that sort of weakness of reasoning or confusion of ideas is manifested, it is pointed out in McGillivray Insurance Law, p. 958, that: It is, however, open to question whether this view gives sufficient effect to the somewhat forcible nature of the words "immediately" or "forthwith" and he goes on to cite the words of Cockburn, C.J., in *Reg.* v. *Justices of Berkshire* above quoted.

It has been argued that the delay in giving the notice had no significance, as the insured man received the attention of medical men of unquestioned skill. That reasoning at best has little force, but it may be observed that there is another obvious reason for the stipulation for immediate notice in the facts that the premium for this kind of insurance is adjustable from time to time according to the assured's aggregate wage liability to the classes of men as to whom the risk is taken, that there is a maximum liability fixed in respect of any single accident and that the risk is terminable at the will of either party. The insurer thus has an interest to have prompt notification of accidents.

It has been also argued that the failure to give the notice does not entail loss or forfeiture (*déchéance*) of the right of the assured. It is true that that result is not specifically covenanted in the policy, but, if that is not the effect of the condition, what is the effect of it? It would seem to have no other effect. The decision in *Employers Liability Assur. Corp.* v. *Taylor* (1898), 29 Can. S.C.R. 104, is an authority against the respondent on this ground of defence.

I therefore conclude that the respondent's action fails for want of compliance with condition "C."

We are unanimous in the opinion that this first ground of defence is well-founded. That being so, it is unnecessary to express an opinion on the other ground of defence. We consider that the respondent has not shewn that it was impossible for him to have given the notice much sooner than he did give it.

QUE.

K. B.

MERCHANTS AND EMPLOYERS GUARANTEE AND ACCIDENT CO. v. PARENT.

CROSS, J.

JUDGMENT:—Seeing that, by the insurance contract in question in this cause, the obligation of the appellant as insurer in favour of the respondent as assured was subjected to the condition that when an accident would happen, the assured would immediately give to the insurer notice containing the fullest particulars then procurable;

Considering that the accident to the employee Dufresne, in respect of which compensation had been claimed by the latter from the respondent by action pending at the date of the summons in this cause occurred on or about August 23, 1917, that within 10 days thereafter the respondent observed that the said Dufresne was suffering from an inflamed condition of his right eye and was informed by Dufresne that the injury arose from lime which had penetrated his eye while in respondent's service and that the eye had been treated by direction of a physician whom Dufresne had consulted;

Considering that the respondent did not give notice or particulars of the said accident, to the appellant until October 16, 1917;

Considering that the respondent did not comply with the said condition by giving immediate notice or even by giving a notice promptly after having ascertained that the accident had occasioned an injury such as required the service of a physician;

Considering that the respondent has not shewn that it was impossible for him to have given notice of the said accident more than forty days sooner than he in fact gave it;

Considering therefore that there is error in the judgment appealed from;

Doth maintain the appeal; doth reverse and set aside the said judgment, to wit, the judgment pronounced by the Superior Court at Quebec on May 10, 1918, and now giving the judgment which the said Superior Court ought to have pronounced, doth maintain the defendant's plea and dismiss the action of the respondent against the appellant with costs in the Superior Court and costs of the appeal against the respondent and in favour of the appellant. *Appeal allowed; action dismissed.*

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. Co.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell, Latchford and Middleton, JJ. May 16, 1919.

NEGLIGENCE (§ I B—5)—PROPERTY LEFT IN CONDITION THAT MAY BE DANGEROUS—INTERVENING ACT OF THIRD PARTY CAUSING INJURY—LIABILITY OF OWNER.

A person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another, is answerable for the resulting injury, even though but for the intervening act of a third party the injury would not have occurred, if such act is one which, in the circumstances, he should reasonably be called upon to anticipate, where the intervention of a third party is the direct cause of the accident. The test applied is whether the party guilty of the primary negligence had cast upon him the duty of anticipating such intervention.

[*Geall* v. *Dominion Creosoting Co.* (1917), 39 D.L.R. 242, 55 Can. S.C.R. 587; *Cooke* v. *Midland Great Western*, [1909] A.C. 229, applied.]

Statement.

APPEAL by defendants from a judgment of the County Court in an action for damages for the destruction of a pole of the plaintiffs, planted in a highway in the city of Toronto, by a street-car of the defendants, which ran off the track and into the pole.

The car was left by the defendants' servants standing upon a track, and was set in motion by some person unknown, who drove it along the tracks in the city for a considerable distance, and finally abandoned it; the car then, being left without guidance, became derailed and did the damage complained of.

Gideon Grant, for the appellants.

C. M. Colquhoun, for the plaintiffs.

Middleton, J.

MIDDLETON, J.:—A car of the defendant company was left standing upon Frederick street at 12.30 a.m. on the 12th July, 1918. The current was off the motors, as the circuit-breaker was open and the hand-brakes were set. The car remained on the street until shortly after 4 a.m., when some one boarded the car and set it in motion. The car was taken west along Front street, north to Queen street, and then east along Queen street, and, after passing over the Don bridge, was finally derailed at Broadview avenue, when it ran into and broke one of the plaintiffs' poles. Whoever started the car in motion abandoned it before this point had been reached.

This action having been brought to recover the damages sustained, the learned Judge found for the plaintiffs, holding that the defendants were guilty of negligence in allowing the car to remain on the street unattended and unsecured and in leaving the controller-key in the car so that an evil-disposed person might start the car.

ONT.

S. C.

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. CO.

Middleton, J.

I think this judgment cannot be sustained.

When the proximate cause is the malicious act of a third person which intervenes between the negligence of the defendant and the injury to the plaintiff, the defendant is not liable unless it is shewn that he ought to have foreseen and provided against it.

The difference of opinion in *Geall* v. *Dominion Creosoting Co. Limited*, 39 D.L.R. 242, 55 Can. S.C.R. 587, arose from the fact that, in the opinion of the majority, the defendants ought to have anticipated that boys might release the cars standing at the head of the incline. The minority were of opinion that this was something which ought not to have been anticipated.

In *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148, the point is clearly stated by Mr. Justice Lush (p. 157, *ad fin.*): "The chain of causality may be complete although a link in the chain is the intervening act of a third person. But the act which causes the mischief must be one which he would properly anticipate."

Here the action of the trespasser who entered the car and set it in motion was "a fresh independent cause," which, under the circumstances, the defendants had no reason to contemplate.

Most of the authorities are collected in the case in the Supreme Court of Canada. I refer particularly to *Rickards* v. *Lothian*, [1913] A.C. 263, and *Hudson* v. *Napanee River Improvement Co.* (1914), 31 O.L.R. 47.

Shortly, the plaintiffs fail because the negligence found is not the proximate cause of the damage. The sole proximate cause was the action of the trespasser.

The appeal should be allowed and the action should be dismissed, both with costs.

Riddell, J.

RIDDELL, J., agreed with Middleton, J.

Britton, J.

BRITTON, J.:—For my decision in this case I rely upon the ordinary rule as to definition of negligence.

Negligence is said to be the doing of something that a reasonable man acquainted with all the circumstances of the case would not do, or the leaving undone something that a reasonable man would not leave undone, contrary to obligation or rule requiring it to be done under the circumstances.

The person charged here is presumably a reasonable man; he was acquainted with all the circumstances in the case, and he did what is complained of.

It is purely a question of fact, and I agree with the opinion of those who decide that the act of leaving the car as it was left, and doing anything that can be called negligent, was in fact not negligent under the circumstances.

LATCHFORD, J.:—The rule applicable to this case is that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another, is answerable for the resulting injury, even though but for the intervening act of a third party the injury would not have occurred, *if such act is one which in the circumstances he should reasonably be called upon to anticipate:* Lush, J., in *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148, at p. 157.

The defendants were undoubtedly negligent in leaving their car upon the public highway, in the circumstances disclosed in the evidence. But for such negligence the accident could not have happened. Another element must, however, be added before liability can result. In all the cases following *McDowall* v. *Great Western R.W. Co.*, [1903] 2 K.B. 331, where the intervention of a third party was the direct cause of the accident, the test applied is, whether the party guilty of the primary negligence had cast upon him the duty of anticipating such intervention. Was there a likelihood of injury happening through the acts of others? If so, the original wrongdoers are liable: *Geall* v. *Dominion Creosoting Co. Limited*, 39 D.L.R. 242, 55 Can. S.C.R. 587.

No finding upon this material point was made by the learned trial Judge; and, on perusing the evidence, I find nothing that, in my opinion, would justify such a finding.

To paraphrase what was said by Lord Macnaghten in *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, at p. 234, a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, would have no reason to anticipate such an act as that which caused the damage sustained by the plaintiffs.

I therefore think the appeal should be allowed, and with costs.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—Although the amount involved in this litigation is small in the eyes of the parties to this action, the substantial question involved in it is one of much moment, not only to them, but to every one. That which hap-

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S. C.

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. CO.

Meredith, C.J.C.P.

pened in this case, providentially, did not cause the death of any being, nor, except perhaps to the defendant wrongdoers, cause any considerable injury to property: but one may very well think that it could not happen again without loss of human life, the life of some, perhaps a number, of His Majesty's liege subjects in the lawful exercise of their rights on his highways; and without also great injury to property.

If such things could happen, without liability, civil or criminal, on the part of the owners of a "runaway" car, running upon their tracks, and running "wild" through their gross negligence, merely because some one, unknown, had wrongly given effect to their gross negligence by the simple means which put the car in motion, the law would be lamentably weak and ineffectual. That, in such a case, the gross wrongdoing-owners should be justified in law, and the injured, public and private, without any remedy, that the law should uphold them in saying to the injured, seek your redress from the unknown—and possibly worthless—person who joined with us in enabling the wild car to kill and injure beings and property, seems to me to be inconceivable.

The facts are few, and there seems to have been little dispute as to them at the trial, though I am bound to say that it would have been better if they had been elicited in the usual way, or, if admitted, admitted in writing signed by counsel or solicitors.

The first link in the chain of negligences was that of the defendants: they left upon one of the main streets of Toronto—Front street—or in another street close to it, one of their passenger street railway cars, from midnight until its wild run began about four hours afterwards. That was not only an act of gross negligence, but an act which created a public nuisance in the public way: a wrong not lessened by the fact that this was not the first occasion of such wrongdoing; that, indeed, it had been a practice of the defendants to "stable" their cars upon the street until it was convenient for, or suited, them to bring them upon their own property. The story of the "night shed foreman" of the defendants, given in the witness-box at the trial, was that: "It was ordered to be hauled in the next day, but for what purpose I do not know: it may be that it was wanted for a pattern for the 'pay-as-you-enter' cars." So that this car's stabling on the highway was to last until the next day.

All this is not without significance; it gave to any one whose rights upon the highway were violated by the car being there, a right to abate the nuisance, a right to enter the car and put it in motion in effecting that object; and it would have been an act commendable, rather than otherwise, to have abated the nuisance by running the car into the defendants' property. The case is obviously different from that which it would have been if the car had been upon the defendants' property, and any one entering a mere trespasser. We must therefore start from the actual starting point, not from a wrongly imagined one, of an innocent and injured owner of property

Then the car was left with its doors open, though the locking of them was a precaution that none but the careless and indifferent to consequences could have neglected; being a "pay-as-you-enter" car, there must have been a very effectual way of closing the car against all intruders; and if the "night shed foreman" had not, as he should have had, a "pass-key" suitable for all doors, the key of a door of this car should have been given to him when the car was left under his control.

To leave the car open and wholly unguarded upon a highway all night, was something like making an "enter-as-you-please-for-any-purpose-you-like" car of it also, and one must have a very unimaginative mind if he did not think that in such a place it might be made use of by some one with evil or harmless purpose.

Then the car was left connected with the electric power, though it would have been a very easy and proper thing to have disconnected it, leaving it powerless. The excuse made by the night shed foreman was that, being upon the highway, the car had to be lighted so that the obstruction it created might be made more noticeable. An excuse which fails, for one thing, because it was daylight when the car was set in motion, within half an hour of sunrise in mid-summer; and light enough for a "suspicious character," "hanging around," to have been seen by the night shed foreman or one of his fellow-employees and "Mr. Berry;" and yet not a step was taken to protect the car: and an excuse which fails, for another thing, because the proper protection was not lights inside the car, but was danger red lights outside, at both ends.

ONT.

S. C.

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. Co.

Meredith, C.J.C.P.

Then the controller-key of the car, though it had been turned, was left hanging to a chain which kept it within six inches of the place of turning on again: something after the fashion of the proverbial latch-string hanging outside the door of hospitality or "help-yourself."

Then, for the fifth act of gross negligence—neglect of the defendants' own interests as well as of those of every one else—the controller-handle was left in place: it must have been, or the unknown person could not have put the car in motion. A handle so easily removed, and so proper to be removed whenever the driver is even momentarily out of sight of his car, that no driver of ordinary care so leaves his car, at any time, when it is in his charge, without removing it and taking it with him.

And yet all has not been said that can be said against the defendants. The car, wholly uncontrolled by any one, and without any one in it, was running "amuck," about 4 o'clock in the morning, at the rate, it is said, of 60 miles an hour, on the defendants' railway tracks, when, at a turn of the road, it "jumped" from them and ran into a pole of the plaintiffs' electric light and power lines, doing the injury for which damages were sought, and awarded, in this action.

So that the plaintiffs start with a very clear *primâ facie* case of liability on the part of the defendants. It is a plain case of that which is commonly called *res ipsa loquitur*. Street-cars do not run at high rates of speed, hardly perhaps at 6, not to speak of 60, miles an hour, when approaching a turn of the road from one street into another; "jumping" from the track would be inevitable if they did.

Then, being *primâ facie* liable, how do the defendants justify or excuse themselves? First, by shewing themselves guilty of the grossest negligences in the several ways before mentioned; and then saying that all that would not have caused the injury complained of if some one else, unknown, had not done something also; that is to say, that, although they laid the train, and left it open to any one to apply the match, they are not answerable for the consequence of any explosion not "set off" by themselves. That they can place a great danger in a thoroughfare, and be blameless because some weak, or bad, or frolicsome, person "touched it off." That they can so induce mischievous, bad, or frolicsome impulses—impulses perhaps momentary only—and

be saved harmless from the wrongs their temptations caused, because their own hands did not do everything.

If the defendants had left a loaded fowling-piece in the highway unguarded, could any one reasonably say that the act of a stranger in setting it off should relieve them from liability? That which these defendants did was a much more dangerous thing; and something more easily "set off." There are few men or boys, or women or girls, who have not seen the electric cars in operation, and who could not have released the hand-brake—no other brake was applied—have put the key in place, have drawn the hood switch, and have set the car in motion, more in number I am sure than those who could have discharged the gun with its brakes, safety device, applied to the triggers, and yet, in either case, there should be no difficulty, in any one of common intelligence—or perhaps without it—setting off either gun or car, though never shewn how.

The case may be one of fact, but one which seems to me so clear against the defendants that I do not feel the need of any support for my conclusion; yet I am glad to know that it is entirely in accord with that of the learned Judge who tried the case and based his judgment upon like reasons; that Judge being the Senior Judge of the county in which these things happened: a Judge of great experience in the locality, so much so that in regard to ways and manners, good and ill-doing characters and impulses, and what is likely and unlikely to happen in such circumstances as those of this case, if a Judge's experience teaches, he should have more and better knowledge than any of us, regarding the questions of fact involved in this case.

Nor can I find a single case in which anything was decided, or even said, inconsistent with the views given effect to by him. Indeed I undertake to shew that in none of the cases from which the defendants seek support would the plaintiff have failed were the facts as they are in this case; and the importance of the subject quite justifies a short reference to all of them.

In the case of *McDowall* v. *Great Western R. W. Co.*, [1903] 2 K.B. 331, the brake-van, which was let loose by mischievous boys, was on the property of its owners, and "it was locked up, it was braked, and it was coupled by a screw coupling to the train;" so that these boys "had to break into the van, or get into it with

ONT.

S. C.

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. Co.

Meredith, C.J.C.P.

keys, which it is not suggested they did; and when they got there they had a great deal to do before this van could be loosed and allowed to run down the incline" (p. 335); there was no evidence of any van or vehicle having before been set loose; and two at least of the appellate Judges considered that there was no negligence of the defendants in the manner in which the car was left on the defendants' own property. Now let it be supposed that the van was left through the night upon a public highway in a great city, with the van-doors open, and only a few simple movements needed to set it going, and then say whether it is possible that the verdict n the plaintiff's favour in that case could have been disturbed. At the trial of the case by a Judge as capable as the late Lord Justice Kennedy, after consideration, judgment was pronounced in the plaintiff's favour. That fact is met by Mr. Grant by calling attention to the circumstances, alleged by him, that in this case the car was facing an upward incline, though Mr Colquhoun was very sure it was not, whilst the van in the other case was acing a downward one, but the reply to that is very obvious: whether up hill or down dale, th's car was connected with the electric power, and when the car's restraints were removed would run either up or down grade with great ease, without even the push the van needed to start it. It was simply a matter, and a very simple matter too, of "cutting loose" by releasing the hand-brake and turning the driving power on.

In that of *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148, a judgment of a Divisional Court, not of the Court of Appeal, it was held that there was no negligence on the part of the defendants; that they were within their lawful rights, the lorry by which the injury complained of was done having been only "left momentarily unattended while the three men were delivering the beer;" and each of the two Judges, who composed the Court, carefully abstained from ruling that the defendants would have escaped liability—if there had been negligence on their part—only because the injury complained of was caused by two soldiers, during that momentary absence, having climbed into the lorry, and after some difficulty succeeded in setting in motion—the wrong way—the steam power lorry, a somewhat complicated and difficult feat. If they could not find for the defendants on that ground in such a case as that, how could they in such a case as this, of the grossest

neglect extending over four hours of the night, and including leaving the car open, and all ready to be started, when a moment's time should have been enough to have made it "safe."

In that of *Rickards* v. *Lothian*, [1913] A.C. 263, it is said to have been held that "where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it;" and it was said, of the wrong that caused the injury, "against such acts no precaution can prevail." How can such a case help the defendants in this case, in which they laid the whole train ready for the "third person," whether his act was malicious or revengeful—and the defendants have enemies—or, much more likely, only mischievous or merely exuberant, and left it on a Toronto highway with such invitation as open doors afforded: and a case in which the simple precaution of locking the doors, or one of several like things, would have prevailed against the third party's wrong?

In *Hudson* v. *Napanee River Improvement Co.*, 31 O.L.R. 47, the water was on the defendants' own property, and no negligence of the defendants was proved. The jury thought the defendants should have provided watchmen to prevent any wrongful destruction of their dam. One of the Appellate Division Judges thought that such a precaution would have been useless: but said: "If any means could be reasonably devised to avoid or minimise the evil results of such attempt"—to blow up the dam—"it should be adopted." To make that case and this case at all alike, we must imagine the dam a nuisance upon a highway; and with ready and easy means in the plaintiffs' power—a locked room merely for one of several things—to prevent the injury; but the room left unlocked, and a simple means of letting the water go all ready for the hands of any one who cared to let them go, or in whom an impulse to do so might be raised on seeing all things so ready.

In *Dominion Natural Gas Co. Limited* v. *Collins*, [1909] A.C. 640, Lord Dunedin, speaking for the Judicial Committee of the Privy Council, said (pp. 646, 647):—

"The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency

ONT.

S. C.

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. Co.

Meredith, C.J.C.P.

than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (1816), 5 M. & S. 198, *Thomas* v. *Winchester* (1852), 6 N.Y. 397, and *Parry* v. *Smith* (1879), 4 C.P.D. 325, are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

Although very many years ago it was said that the whole law could be taught while a man could stand upon one leg, it seems difficult in these days to make any part of it plain in a few words. "The conscious act of another volition" may to a Scotch lawyer be ample because of something pertaining to the laws of Scotland not generally known, but to me the expression would not be helpful: however, for present purposes, the context makes the very learned Judge's meaning very plain. "The conscious act of another volition" is something against which "no precaution can really avail." That puts the act of the unknown person under which the defendants seek shelter very far away from "the conscious act of another volition," for there were several simple, obvious precautions, any one of which must have prevailed, precautions that would cost nothing, and could have been taken in a few moments, without any labour: for instances: (1) run the car into the car-sheds, instead of leaving it on the public way: it will be observed that the night shed foreman is very careful to avoid saying that there was not room in the shed for it, and does say that it was ordered to be hauled in next day, for what reason he does not know; (2) lock the doors of the car; (3) disconnect the electric current by separating the pole from the wire; (4) remove the controller-key; (5) remove the handles of the controller; and (6) prevent "suspicious characters" from "hanging around" the car when seen by the night shed foreman or his fellow-employee and Mr. Berry.

To say that the unknown person did more than put the car in motion is to say something that is not proved, though if it were it could make no difference. A car started must keep on running

until it collides with some other object heavy enough to stop it, or until it runs through an open switch or "jumps" the track, or becomes disconnected from the power wire: it needed no guiding hand. To talk of the car being stolen is of course nonsense. And to say that no one could imagine that any one would put the car in motion is, I have no doubt, quite as inaccurate as to say that no one could help expecting it. The manner in which it was left for hours during the night could not but be an incentive to impulses to set it going. Toronto is a university town, and in war-time a military town, said to contain about a half million inhabitants; Front street is, as its name implies, a front street; the buoyant, impulsive, adventurous spirit of youth has not yet, fortunately, departed; and, unfortunately, malice, revenge, destructiveness, and impertinent curiosity are not yet dead; nor are soldiers yet deprived of their pipes and fed on lollipops; nor is a sense of humour dead altogether. The youths or young soldiers who would pass by such a tempting opportunity for a run, a harmless run, or even a harmful one, in the car, leaving it with a note of thanks pinned to it, for the thoughtfulness of the company in providing the carriage all ready for them, and thus affording them the unique experience of a run in a car that was not overcrowded, are different youths and soldiers—if really there be any such—from those of other days, and much perhaps less likely to be among those who make the best soldiers and men. To say that no one would think of setting the car in motion, and then to cite the case of the two soldiers who did not permit the hulking steam lorry to remain unattended even "momentarily," and then again the case of the boys breaking into the locked van and setting it in motion, is to be inconsistent and prove the contention unfounded. A car at night, open and fully lighted and ready to go upon a main street, cannot but attract travellers as well as others; and I am bound to say that any entering it, expecting to be carried on their way by it, might well be tempted to put it in motion on finding it only a deceiver of weary travellers; and, as I have said, setting it in motion was a simple matter, simpler than setting an automobile car in motion, and there are few in these days who cannot do that. Only to-day we have been told of the case of 3 children, girls, 4, 6, and 8 years of age, doing so, with a result the same as in this case—an electric line post run into and broken down.

ONT.

S. C.

TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R. CO.

Meredith, C.J.C.P.

The defendant's negligence need not be *the* proximate cause of an injury to give a right of action: it is enough if it be *a* proximate cause, or effective cause. The defendants' wrongdoing was surely proximate enough, and effective enough; without them, and even with some of them and one simple, everyday, and I may say every-door, precaution, the injury could not have been caused—the "third person" was powerless: and, more than that, their negligences were the proximate and effective cause of the third person's wrong—they tempted and induced the impulse to do the wrong, as well as supplied, all ready at hand, the means to give effect to it, whether tempted and induced or not.

We are sure to reach a wrong conclusion if we treat this case as one of ordinary negligence, if we forget, or fail to give due weight to, the fact that the thing which did the injury was an exceedingly dangerous thing, owned by the defendants, and placed by them wrongfully where and in such a state as to make it most likely to do the greatest wrong and mischief. We are in more danger of missing the mark if we treat this case as one of negligence merely, overlooking the fact that it is one of nuisance, a public nuisance raught with great danger and accompanied by gross neglect of common precautions: see *Crane* v. *South Suburban Gas Co.*, [1916] 1 K.B. 33, and *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14.

I would dismiss the appeal; affirming the judgment appealed against, which seems to me to be well supported by the judgment of the Supreme Court of Canada in *Geall* v. *Dominion Creosoting Co. Limited* and *Salter* v. *Dominion Creosoting Co. Limited*, upon which the learned County Court Judge relied, even though cases of negligence only. *Appeal allowed.*

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EX. C.

The "KEYVIVE" v. The "S. O. DIXON" et al.

Exchequer Court of Canada, Toronto Admiralty District, Hodgins, L.J. in Adm. June 23, 1919.

SALVAGE (§ I—2)—TOWAGE—COSTS.

When about twenty miles out from Kingston the sole engineer on the tug "Dixon," towing two barges, fell overboard and was lost. He was the only one on board who knew anything about engines and the tug was, in consequence, without means of keeping up motive power. She was drifting and was in a position of actual or apprehended danger, and was signalling for help, when the "Keyvive," with some risks to herself, took them in tow and brought them to safety. *Held* (1), that the claim arising thereunder was one of salvage and not merely of towage. (2) That the act of plaintiff in claiming an excessive amount and having the ship arrested therefor was oppressive, and costs relative to the arrest and release on bail, and applications relative thereto, will not be allowed him.

ACTION for salvage by the plaintiffs against the ship "S. O. Dixon," and certain barges in tow, all of which were arrested with their cargoes and freight and afterwards released on bail.

Francis King, for plaintiffs; *H. W. Shapley*, for defendants.

HODGINS, L.J.A.:—The claim in this case is for salvage, which, as originally stated, was estimated at $50,000, but that amount, I am informed, was based upon erroneous information as to the value of the cargoes and was not asked after October 11, 1918. This date was before the statement of claim was filed. I presume, however, that it had considerable bearing on the amount fixed for bail, but no argument has been addressed to me with regard to any unfair features in the fixing of the original amount of bail beyond the fact that it was based on a much larger sum than is now contended for.

This vessel "Keyvive" is a comparatively new steamer worth about one-half million dollars, possibly three-quarters of a million dollars, and was, during the year 1918, engaged in transporting coal from Lake Erie ports to Montreal; she is 1,044 tons registered tonnage, has triple expansion engines and was built in 1913. She carries a crew of 21 men, a first and second mate, a chief and assistant engineer. On September 15, 1918, when she was upbound from Montreal, light, her master observed on the starboard bow the tug "Dixon" and the 2 barges "Louisa" and "Idlewild," which were in the position shewn on the chart 1, something like 20 miles away from Kingston and north of a line drawn from the main Duck light to the false Duck light. The "Keyvive" answered the signals of distress and at the request of the captain of the tug, took the 3 vessels in tow and towed them into Kingston.

The case was argued by the defendants on the basis that it involved only a simple towage claim, and on the part of the plaintiffs that it was really a salvage claim and should be allowed for as such. The evidence shews that the situation of the 3 vessels, the tug and the 2 barges, which were drifting in Lake Ontario in the position I have mentioned, was brought about by the fact that the engineer of the tug had fallen overboard, and being the only one among all those on the vessels who knew anything about engines they were without any means of keeping up their motive power. Mr. Kerr says they pulled fires and couldn't start again without obtaining a new engineer. The

CAN.

EX. C.

THE "KEYVIVE" v. THE "S. O. DIXON" ET AL.

Hodgins, L.J.A.

"Louisa's" gas engine was also disabled, or rather useless, because the line of the "Dixon" had got entangled in her propeller, and altogether they were at a standstill, the statement being made that they couldn't cut the rope, which had wound around the wheel of the "Louisa," on account of the wind at that time.

Now, these 3 vessels, the tug and the 2 barges, were on a commercial enterprise, the 2 barges carrying molasses, but the tug itself was not such a valuable vessel, apparently not being a lake tug. On the evidence she is worth about $8,000. The "Louisa" was apparently quite an old barge, a wooden barge. The "Idlewild" was an A1 iron boat. They were both loaded with molasses, and the value of the cargoes, as stated, amounts, on the "Idlewild," plus freight to Belleville, to $15,568.58, and on the "Louisa," including freight to Belleville, to $7,317.48, in all, nearly $23,000.

The situation on the morning of September 15, 1918, was not very serious when the vessels were sighted, the velocity of the wind, as given by the meteorological office, based on Kingston, was estimated, for the vicinity of Duck Island, at 8.00 a.m., S.W. 5 miles, and at 10.00 a.m., S.E. 8 miles. The wind, however, was from a southerly direction, which would be the dangerous wind in that locality, and it was increasing, and did increase, as a matter of fact, through that day, so that at the Ducks at 5.00 p.m., it was blowing 17 miles S.E., and at 6.00 p.m., 24 miles S.E., and, from the meteorological office records, this appears to be the same velocity as occurred at Kingston at the same hour. It was suggested that it would be blowing harder there than in Kingston, but this was not shewn on the meteorological chart.

The vessels were making, at the time they were sighted, distress signals. The tug whistled 4 times, which indicates that assistance is wanted; the "Idlewild" had a United States flag hoisted upside down, which is a distress signal, and signals were being made from the "Louisa" with table-cloths or bed blankets all these being explained to me as distress signals.

Previous to the "Keyvive" coming up, and according to Daniel Ludwig, who was in charge of the entire fleet of the Sugar Products Co., which owns and controls the 3 vessels, another vessel had passed but had declined to answer their signals and tow them. This was between 8.00 and 8.30 a.m. I am rather

impressed with the fact that under the conditions which then existed and in view of their previous request which had been declined, the persistence of the men on these 3 vessels in signalling for assistance is a very important fact in determining whether there was or was not any danger either present or impending.

It must be remembered that the barges had had a collision in Lake Ontario, and the cargo in one of the vessels was said to be fermenting. The cargoes were valuable, they were near their place of destination and being undoubtedly off shore, might, if allowed to drift on, and the weather became worse and the wind increased, be in a very considerable difficulty. It is quite true that the vessels could have anchored, but that in itself is not safety, and I cannot help thinking that those 3 vessels, which were completely helpless, with valuable cargoes and with a number of men on board, were in a position of danger at that time, an impending danger, and that their desire to be rescued was genuine. I think some importance should be attached to the fact that this vessel, the "Keyvive," was under a time contract, was earning a large amount of money, that it was up-bound for the purpose of getting its cargo and was not likely to turn aside to undertake the towing of these 3 vessels into harbour unless there had been in the mind of the captain an apprehension that these vessels were in danger. The fact that the vessels were where they were stated to be, and were anxious for help, notwithstanding the evidence given by the men on the defendants' side that they had a fine chance of drifting into excellent ground to anchor, would indicate that they were not at that time quite so sure about their being in safety as they now appear in the witness box to be. The "Louisa" had been damaged through the collision; some of the planks at the stem had started and it is not unreasonable to conclude that this was an element in making them prefer to be towed into the dock instead of having to spend the day and possibly the night at anchor, with the wind increasing. There must be some weight given to the evidence that there was a danger of it growing worse, although I cannot accept the ideas of those who suggest that at that time it had become nearly a hurricane. However, I think that there was a chance of danger. There was no motive power at all; the anchoring which they say would have made them safe was not resorted to; they didn't wait to drift in to a position safe

CAN.

EX. C.

THE "KEYVIVE" v. THE "S. O. DIXON" ET AL.

Hodgins, L.J.A.

to anchor but preferred to call for assistance and if they had gone ashore one of the barges might have gone to pieces. Under all the circumstances this should be considered upon the basis of a salvage claim in the sense that there was danger, apprehended danger at all events which might be very real apprehended danger of these vessels and their crews and that the "Keyvive" undertook the work under the belief that they were in danger and at some risk to herself.

I agree with the argument that has been made that a vessel, of this size, 260 feet long, and with the engines at the stern, a steel vessel, having to undertake to gather up and tow in waters that were somewhat confined a tug and 2 barges, all of them unable to help themselves would mean fairly good seamanship and might very easily have resulted in an injury to the salving vessel.

I, therefore, pronounce in favour of the plaintiffs that the claim is a proper salvage claim and they are entitled to recover upon that basis. As to the amount, I have heard argument upon that now and I shall have to consider it a little further and work it out more in detail before stating the exact amount, and I will in a day or two, I hope, be able to hand out the result to the litigants.

June 25, 1919. HODGINS, L.J.A., delivered further judgment.

The amount of salvage remains to be fixed. The value of the vessels and cargoes involved are large while the actual services rendered proved comparatively easy of accomplishment and were carried out without accident. The danger to which the salved vessels and cargoes were exposed, though real, was largely an apprehended one and fortunately did not develop any evil consequences. The services were skilfully and smartly rendered without causing any damage to the salvors.

A claim is made that by reason of the operation the "Keyvive" was delayed, and being under contract to carry coal from Lake Erie ports, lost her turn into Cleveland and under the spout at Toledo. This delay, though not long, is carried into the account as shewing why further delay caused by a break in the Soulanges Canal on October 14 should be charged up to the defendants. I am unable to follow out this chain of causation. It takes apparently only 4 or 5 days to make the trip and there are lay days in

Montreal and Toledo to be explained before it is possible to prove that this deviation was the sole cause of the vessel being at the Soulanges Canal so as to be held up on October 14 by the break.

Waller, the defendants' marine superintendent, admits that unless the trips planned, which were interrupted by the salvage operation, had occurred exactly as intended and without incident or accident, their claim for delay cannot be sustained although he is very positive that nothing would or could have prevented the ship completing the trips on schedule time. To my mind the margin is too close to allow damages upon, as claimed, even if they were not too remote, as I think they are. All I can allow is the value of the salvage, including the actual delay which it caused, coupled with a reasonable allowance for the actual dislocation of the schedule at a busy time of the year.

The plaintiff vessel was earning, net, about $200 per day under the 5-year contract. She could earn, it was said, much more if free from that. The fair value of the tug and of the 2 barges is, I think, $55,000, and the cargoes and freight $22,985. The value of the "Keyvive" is over $500,000.

The allowance which I think can fairly be made in this matter should not exceed $2,500. $200 should be apportioned to the master and $300 to the crew according to their ratings and the balance to the owners of the "Keyvive." The claim originally made was for $50,000 and vessels were arrested for that sum.

The demand was not modified until October 11, 1918, nearly a month afterwards.

I think the making of this claim and the arrest therefor, were oppressive, and while I give the plaintiffs the general costs of the action, these will not include therein any costs relative to the arrest and release on bail or any applications relative thereto.

Judgment will therefore be entered for the plaintiff for $2,500, of which $200 will be apportioned to the master and $300 to the crew, with costs of action except as above mentioned.

Judgment accordingly.

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S. C.

JOHN HALLAM Ltd. v. BAINTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Latchford, JJ. May 16, 1919.

SALE (§ II—40)—OF GOODS BY SAMPLE—OPPORTUNITY TO INSPECT—ACCEPTANCE OF GOODS—IMPLIED WARRANTY—GOODS NOT UP TO SAMPLE—RESCISSION OF CONTRACT—DAMAGES.

In the case of a contract for sale by sample the following conditions are implied: (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. If, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the goods into his possession or deals with them, he will not be allowed to repudiate the bargain *in toto* and claim that the property has never passed but he is driven to rely upon the implied warranty, the condition becoming a warranty on change of ownership, for the breach of which compensation can be sought only in damages.

[*Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438; *Wells* v. *Hopkins* (1839), 5 M. & W. 7; *Lucy* v. *Mouflet* (1860), 5 H. & N. 229; *Grimoldby* v. *Wells* (1875), L.R. 10 C.P. 391, referred to.]

Statement.

APPEAL from a judgment of Middleton, J. in an action for damages upon a purchase of about 50,000 lbs. of wool. The plaintiffs, the purchasers, alleged that the sale was by sample and that the bulk was not equal to the sample. Affirmed.

The judgment appealed from is as follows:—

MIDDLETON, J.:—The sale was made by a telephone conversation after a sample had been asked for and sent. On the day of the sale (the 5th January, 1918), the plaintiffs sent a confirming letter, speaking of the purchase as "of 48 to 50,000 lbs. of the mixed grey and black wool at 40c. per lb. . . . sample expressed to us on Dec. 31st." After asking about arrangements for cars, the letter adds: "The writer will go up and have the wool weighed." This letter was received and read by the defendants but was not answered.

What is said to be a copy of a letter from the defendants to the plaintiffs is produced, but this was never received by the plaintiffs. This confirms the contract as a sale "of about 50,000 lbs. of gray shoddy wool . . . price 40c. per lb. f.o.b. Blyth. . . . You to come as usual to take over stock."

This, it is argued, makes the sale subject to inspection and acceptance of quality at Blyth.

If this was the intention of the writer (the defendant Frank Bainton), he knew that it was not the plaintiffs' view when he (Frank Bainton) received the letter of the 5th, and it was incumbent upon him to answer the letter of the 5th.

At the examination for discovery he (Frank Bainton) speaks of the sale as a sale by sample, and at the trial his evidence is not in accord with the letter; if accepted at its face, it would indicate an attempt to add a term to the contract, after a parting remark which would probably not be fully appreciated by the person to whom addressed.

In view of the whole evidence, I prefer to accept the evidence of Mr. Arscott (the asisstant-manager of the plaintiffs and the writer of the letter of the 5th January), and find that the transaction was a sale by sample, and that the letter of the 5th January truly set forth its terms.

A sample (exhibit 18 and 19) is produced, and some controversy exists as to this being the sample by which the goods were sold. I find that this is the very sample furnished by the defendants, and on the basis of it the contract was made.

It is admitted that the goods sent were not in accordance with this sample, but much inferior. One of the defendants says this sample was worth 57-60 cents as against the contract-price of 40 cents.

An actual trying out of two bags (nearly 500 lbs.) of the wool sent shewed that about 25 per cent. weight was "dirt," i.e., wool that had been so often fabricated into cloth and then put through the shoddy-mill as rags that it was so broken as to have lost the quality of wool and had become short, broken fibres of no value whatever. In addition to this, there was "waste," i.e., fibres not quite so short but of very little value, and some fair shoddy. About 25 per cent. consisted of low grade wool.

When there was such a scarcity of wool of any kind upon the market that anything having a semblance of wool could be sold, some of this stuff was disposed of. A large quantity is still on hand and may be on hand for a long time.

I fix the damages at 15 cents per lb. or $7,500, estimating this as the difference in value between the thing contracted for and the thing delivered. This, as I understand the law, is the measure of damages unless a case for special damage is made out.

I think the defendants should have the right to take over the goods on hand (on paying the amount of this judgment) within a reasonable time, at this reduced price, 25 cents plus interest at 7 per cent. and a fair allowance for freight, storage, etc. If they elect to do this, and the parties cannot agree, I may be spoken to.

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Unless this matter is mentioned to me within 10 days, this will form no part of the formal judgment.

I have not discussed the cases because, upon the finding of fact, the law is simple. The mere fact that there was a sample does not necessarily make the sale a sale by sample with its implied warranty that the bulk is up to sample, and in some cases it is not easy to ascertain the true nature of the contract, but when once this is ascertained there is no trouble.

Other cases cited deal with the implied warranty upon sale by a manufacturer—these form no guide when the sale is a sale by sample.

Mr. Dancey asks, why any visit to Blyth at all if not for inspection? The answer is in the letter of the 5th, for it says this was "to have the wool weighed." No doubt there might have been an inspection then, but there was not, and it is idle to contend that the plucking of a little wool from the holes in a few odd sacks was in truth any attempt to inspect the contents of the whole 215 sacks. It is not thus that an inspection of wool is made.

D. L. McCarthy, K.C., and *L. E. Dancey*, for appellants.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of my brother Middleton at the trial in favour of the plaintiffs.

The facts of the case are accurately and sufficiently stated in my learned brother's reasons for judgment.

This is a case of contract for sale by sample, and the law in such a case is accurately stated in Halsbury's Laws of England, vol. 25, p. 161, para. 288, as follows:—

"In the case of a contract for sale by sample the following conditions are implied:—

"(1) that the bulk shall correspond with the sample in quality;

"(2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

"(3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;" citing, among other cases, *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284.

The second of these implied conditions—as to which see *Lorymer* v. *Smith* (1822), 1 B. & C. 1, 107 E.R. 1—is for the purpose of enabling the buyer to determine whether he will take the property in the goods at all. If, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the

goods into his possession or deals with them, he will not be allowed to repudiate the bargain *in toto* and claim that the property has never passed, but he is driven to rely upon the implied warranty that the bulk shall correspond with the sample—the condition to that effect becoming a warranty on change of ownership, on the principle laid down in *Behn* v. *Burness* (1863), 3 B. & S. 751 122, E.R. 281 *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44—*Couston* v. *Chapman* (1872), L.R. 2 Sc. & Div. 250, especially *per* Lord Chelmsford, at p. 254.

Accepting the goods in this way has its dangers for the purchaser, because very little will sometimes estop him from saying that such an acceptance of the goods is not an acceptance of the goods as satisfying the warranty. Any purchaser may, if he sees fit, waive any objection to the goods—*quilibet renuntiare potest juri pro se introducto*—and his conduct in taking the goods and dealing with them will be scrutinised with some care, and in some instances will result in his being considered to have waived objection to the goods: *Parker* v. *Palmer* (1821), 4 B. & Ald. 387, 106 E.R. 978.

But his taking the goods into his possession and dealing with them after an opportunity to inspect, or even after a partial or casual inspection, will not necessarily be considered an acceptance of the goods as answering the contract and a waiver of the term that the goods shall correspond with the sample.

The rule *caveat emptor*, it has been held, does not apply to a sale by sample: *Barnard* v. *Kellogg* (1870), 10 Wall. (U.S.) 383, at p. 388.

If there has been no acceptance by the purchaser of the goods as answering the contract, although there is an acceptance sufficient to pass the property, he may still rely upon the warranty that the bulk shall correspond with the sample.

This principle is so plain that it is difficult to find authority for it. It has, I think, been taken for granted in some instances; but I have been able to find only one case in which the point was actually decided. In *Khan* v. *Duché* (1905), 10 Commercial Cases 87, the defendants were merchants carrying on business at New York; they bought from the plaintiff certain cases of Cocos butter to be shipped to them from England to New York—"Quality, packing, etc., as per our sample shipment made to New York on October 30 last. . . . Payment net cash after inspections of

ONT.
S. C.
JOHN HALLAM LTD. v. BAINTON.
Riddell, J.

goods immediately on arrival of steamer to New York, result to be cabled." The defendants superficially examined the goods on their arrival at New York, and did not detect any defect in them, but beyond this there was no inspection of the goods on arrival. The goods were found not to be in accordance with the sample. The plaintiff sued for the price, and his counsel argued that, "by the words 'Payment net cash after inspections of goods immediately on arrival of steamer to New York, result to be cabled,' the defendants were under an obligation to inspect the goods immediately on the arrival of the steamer and to cable the result, and if upon the arrival of the steamer they did not immediately inspect the goods they must be taken to have waived their right to claim damages if the goods were not in fact in accordance with contract. So if they inspected and failed to discover the defect and in consequence did not reject the goods." But Bigham, J., at p. 88 held that "the clause 'Payment net cash after inspections of goods immediately on arrival of steamer to New York, result to be cabled,' does not deprive the defendants of the right to claim damages if the goods are not in accordance with the contract even though they do not inspect or by mistake do not on inspection discover the defect in the goods and I so direct the jury."

There is nothing in the present case indicating that there was an acceptance by the plaintiffs of the goods as answering the warranty, and I think an action lay.

The damages seem to have been assessed on the proper principle, and I am of opinion that the appeal should be dismissed with costs.

I have had occasion to consult a great many cases which have more or less bearing on the matters in question, but do not think it necessary to do more than refer to one or two: *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438; *Wells* v. *Hopkins* (1839), 5 M. & W. 7; *Lucy* v. *Mouflet* (1860), 5 H. & N. 229; *Grimoldby* v. *Wells* (1875), L.R. 10 C.P. 391.

Britton, J.

BRITTON, J., agreed with Riddell, J.

Latchford, J.

LATCHFORD, J.:—This is an appeal from the judgment of Middleton, J., of the 16th October, 1918, awarding the plaintiffs $7,500 damages for breach of warranty.

The contract was for the sale by sample of 48-50,000 lbs. of mixed grey and black wool, at 40 cents a pound, delivered at Blyth, where the defendants carried on business. The wool was

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Latchford, J.

to be "up to" a certain sample expressed to the plaintiffs about 5 days before the contract was made by telephone.

In their letter confirming the purchase, the defendants were informed that the wool had been resold to one Cram, of Carleton Place, and that the writer of the letter would proceed to Blyth to have the wool weighed.

The resale to Cram had been made upon the same sample as the purchase, and before the plaintiffs had any opportunity of inspecting the wool.

Such an opportunity was afforded later when the plaintiffs' representative was at Blyth weighing the wool; but no inspection was in fact made.

Delivery was accepted by the plaintiffs, and the wool was paid for in the belief that the bulk was according to the sample.

The wool was forwarded by rail direct from Blyth to Carleton Place. It arrived at its destination after the plaintiffs had sent the defendants a cheque in payment for it. Cram rejected the wool as inferior to the sample—much of it was unfit to be described even as "shoddy wool"—and it was thrown back on the plaintiffs' hands.

There was undoubtedly a breach of the implied warranty that the bulk was fairly equal to the sample, and there is evidence credited by the trial Judge, that the difference in value at the time between what was delivered and what was sold amounted to $7,500, the sum for which he gave judgment in favour of the plaintiffs.

It is urged on behalf of the defendants that the plaintiffs are not entitled to this or any other sum as damages, as they accepted delivery of the wool after they had had an opportunity of inspecting it.

Towers v. *Dominion Iron and Metal Co.*, (1885), 11 A.R. (Ont.) 315, is relied on to support this contention. In that case the defendants bought by sample a quantity of cotton waste to be delivered at St. Catharines for shipment to Toronto. They afterwards directed that the waste should be shipped to Cincinnati. No evidence was given that the waste could not have been inspected at St. Catharines. On arrival at Cincinnati the goods were rejected as greatly inferior to sample. The action was upon the defendants' acceptance of a bill of exchange drawn by the plaintiff for the price of the waste. The defence set up was that the goods

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Latchford, J.

were not according to sample, and had not been accepted. The defendants did not counterclaim for damages. An application at the trial to amend their defence in a manner not indicated was not entertained by the trial Judge. Probably the defendants asked permission to set up a counterclaim. The jury found that the waste did not correspond with the sample. The defendants appealed. The refusal of the trial Judge to allow the defendants to amend was not made a ground for the appeal. The Court of Appeal held that by accepting the bill of lading of the goods the defendants assumed the complete ownership. "The property became indefeasibly vested in them, and . . . they retained no right to revest it in the plaintiff because it was not equal to sample:" Hagarty, C.J.O., at p. 318. But the learned Chief Justice, citing Parke, B., in *Mondel* v. *Steel*, (1841), 8 M. & W. 858, at p. 870, 151 E.R. 1288, is careful to point out that such absolute acceptance does not interfere with the right of the defendants to seek for damages in consequence of the inferiority of the article to the quality represented. He adds, at p. 320: "I am strongly of the opinion that the only remedy in the case before us must be by cross-action." Osler, J.A., says, at p. 325: "They (the defendants) have not counterclaimed for it" (the difference in value) "in the action, and from the course taken at the trial the learned Judge thought he ought not to permit them to amend, and left them to their cross-action. I think we cannot interfere with his decision."

Perkins v. *Bell*, [1893] 1 Q.B. 193, is another case relied on in support of the defendants' contention. There the plaintiff, a farmer, had sold by sample to the defendant, a corn-dealer, a quantity of barley to be delivered at a railway station near the plaintiff's farm. While the plaintiff knew that the barley was bought for resale, he did not know when the resale would take place. The defendant resold the barley by the same sample to a brewing company. The barley was delivered at the railway station, and a sample of it was sent by the station-master to the defendant at his request. Having inspected the sample, the defendant instructed the station-master to ship the barley to the brewers. They rejected the barley as not equal to the only sample shewn to them, and the defendant then claimed that he was entitled to reject it. The Court held that, in the circumstances, the defendant must be considered to have accepted the barley, and could not afterwards refuse it.

This case is far from deciding that, having accepted the goods, the vendee could not bring an action for breach of warranty.

Where an article has been accepted by the buyer, terms which in their origin were conditions, the breach of which would entitle him to reject, must be treated for remedial purposes, *ex post facto*, as warranties, for the breach of which compensation can be sought only in damages.

This, no doubt, was what was in the minds of Hagarty, C.J.O., and Osler, J.A., in the *Towers* case, when they stated that after acceptance the buyer's only remedy was by a cross-action.

In *Fielder* v. *Starkin* (1788), 1 H. Bl. 17, 126 E.R. 11 where a horse warranted sound was retained by the purchaser for 6 months, it was held that, the horse being unsound at the time of sale, the seller was liable to an action on the warranty.

In *Parker* v. *Palmer*, 4 B. & Ald 387, 106 E.R. 976, while it was held that the defendant had by his dealings with the goods precluded himself from asserting that they did not correspond with the sample, Abbott, C.J., says, at p. 392: "The general rule undoubtedly is, in the case of a sale by sample, that the purchaser may reject the commodity, if it does not correspond with the sample; but every man may waive a rule of law which is in his own favour." Holroyd, J., says, at p. 393: There "is a collateral contract on the part of the seller, that the goods should correspond with the sample. If they do not answer the sample, the effect of that is, that the defendant may not be bound to accept them; or, if he does so, he may have a right of action for the damages he sustains by reason of their not corresponding with the sample." He concludes by saying (p. 394) that the plaintiff could insist that the defendant take and pay for the goods, subject to the right of the defendant "to bring an action for damages, on the ground that they did not correspond with the goods actually agreed for." Best, J., after pointing out that the defendant was in no condition to answer an action for goods sold, said (p. 395): "He may still bring an action for breach of the warranty."

To the same effect is the decision in *Poulton* v. *Lattimore* (1829) 9 B. & C. 259, where the law is admirably stated by Andrews Serjt., *arguendo*, at p. 261: "From the very nature of the contract of warranty the vendee has a right to keep the goods, and to recover damages for a breach of the warranty. He may

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Latchford, J.

either rescind the contract *in toto* by returning the goods speedily, and while they remain in the same state, and refuse to pay the price, or recover it in case it has been paid, or he may retain the goods, and recover the difference between the real value and their value as warranted."

If, contrary to my opinion, the breach is of a condition and not of a warranty, then the language of Lord Loreburn, L.C., in *Wallis, Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394, at p. 395, seems pertinent:—

"If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty.

The resale by the Hallam company to Cram before the wool was delivered, and the payment to the defendants of the price of the wool, precluded the plaintiffs from denying acceptance, but did not impair their right to bring action for damages for breach of warranty. The damages found are estimated upon a proper principle, and there is evidence supporting the amount awarded.

I am therefore of opinion that the judgment should be affirmed and the appeal dismissed with costs.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—A good deal of discussion took place at the trial, and some here also, upon a question whether the bargain between the parties, out of which this action has arisen, was more accurately stated in a letter, of confirmation of it, written by the plaintiffs to the defendants, or in a letter, of confirmation of it, said to have been written by the defendants to the plaintiffs: but, if the sale in question were one by sample—and I did not understand that any contention to the contrary was

made at the trial or here—nothing very substantial turns upon that question. The difference between the parties upon this question is: the defendants asserted that it was expressly agreed that the plaintiffs were "to come, as usual, to Blyth and take over the stock," and the plaintiffs denied it; but, whether it was or was not usual for the plaintiffs to come to Blyth and there inspect and take over the "stock," it would be incumbent upon them to do so in this case, as, admittedly, delivery of, and payment for, it were to be made there at the one time; and, if any inspection, examination, or comparison were to be made, there was the place and that the time. If it were contended that the sale was not one by sample, but was one in which the buyers were to examine for themselves, and take or reject the goods upon their own judgment, the question might be one of some moment. The case of *Barnard* v. *Kellogg*, (1870), 10 Wall. (U.S.) 383, affords an instance of that kind. Should it be needful, however, to determine this question here, I should agree with the trial Judge in his finding that the plaintiffs' letter set out the terms of the agreement truly; and should so agree mainly because the defendants admittedly received and read that letter, and yet found no fault, at any time before action, with its statements.

I treat the sale, therefore, as a sale by sample: and it was admittedly one in which the goods were to be delivered and the price paid concurrently, and property and possession to pass, at Blyth; and all that took place there accordingly, though, for the defendants' convenience, the plaintiffs' cheque for the price of the goods was retained by them and payment made a short time afterward in Toronto.

There were no expressed terms of the sale, and the implied terms were conditions that the purchasers should have reasonable opportunity for comparing the bulk with the sample, and that the sample fairly represented the bulk: if either of these conditions was unfulfilled, the purchasers could reject the goods and recover damages for breach of contract; but the conditions were fulfilled as far as the opportunity for comparison of bulk with sample went. The plaintiffs' assistant-manager, the witness Arscott, who made the bargain for the plaintiffs, and who is an experienced wool-buyer, quite competent to make the comparison as well

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Meredith, C.J.C.P.

as deal with all other features of the transaction, went to Blyth, by appointment, to close the transaction and pay the price, and was there parts of two days, and then and there closed it except for the postponement of the payment, for the defendants' convenience, as I have said. He had every opportun ty for examining and comparing the bulk with the sample that he chose to take; and upon the weight of evidence it must be found, as the trial Judge seems to have thought, that some slight examination was made by him, as detailed by four of the witnesses. That the examination of even one bag of the wool would have disclosed the real quality of it, and that an examination was a simple matter, is shewn by the testimony of the plaintiffs' purchaser and witness, Cram. (The judge here reviewed a portion of the evidence and continued).

Why the wool was not more carefully examined seems to me to be manifest. There was such a dearth of wool and such a need for it, to keep the mills going, that it was not so much a matter of quality as it was to get it of any quality, and at the price of 40 cents a pound, at that time, only lowest quality could be expected. One of the plaintiffs' witnesses stated the market condition then in these words:—

"Q. What do you say—if you are in a position to say—what is the difference in value between the bulk you found at Hallam's and this sample? A. It depends upon the manufacturer

"Q The market? A. It has no market-value, unless you can find a man who wants to use it. There were exceptional circumstances. Wool was very, very scarce in Canada all last spring. A good many mills could not get wool, they could not get imports through the country. We were expecting a large amount through the Wool Commission from Australia. We were expecting it to arrive in April or May. It did not arrive until June, and in the meantime they had to use whatever they could get. Some of our manufacturers who were working on gray blankets were glad to pick up almost anything."

The matter of examination of the wool, and comparison w th sample, was admittedly discussed when the wool was being weighed and placed in the cars for shipment to the plaintiffs' purchaser: what was said was stated by the defendants thus:—

"Q. What was said about sewing them up, in Mr. Arscott s presence? A. He turned around and said 'What about Bert

sewing those sacks up?' My brother said 'Do you want to see anything more about it, Fred?' and Fred said 'Better go on and sew them up,' that he did not want to see any more of them—what could you expect for 40 cents? I did not know whether he had looked it over, or how much he had looked through the wool. I had no idea of what he had looked into the wool at all.

But why the plaintiffs did not make any more thorough examination and comparison before the property in the goods passed to them may be unimportant, the important thing may be that they had the opportunity, that the condition in this respect was not broken but was fully performed.

The learned trial Judge seems to have thought that the question was: whether there had been an "inspection;' and, finding that there had not been a real inspection, he considered that the plaintiffs might recover damages for deficiency in quality.

Upon an ordinary sale of goods to which the injunction *caveat emptor* applies, there is plainly no such difference, that is, according to the law of this Province. It is the purchaser's own fault if he neglect his opportunity: he may of course waive or neglect it, but, if he do, he can be in no better position than if he had examined and accepted. The rule at common law plainly was that the *caveat emptor* rule applies when the goods "may be inspected and examined by the buyer:" see *Jones* v. *Just* (1868), L.R. 3 Q.B. 197; though apparently, under the Sale of Goods enactment, the law in that respect has been changed in England: see *Thornett & Fehr* v. *Beers & Son*, [1919] W.N. 52, [1919] 1 K.B. 486.

That, however, does not dispose of this case, it requires the consideration of a more difficult question, namely: whether upon a sale by sample, with or without an examination, when an examination can be had, the buyer can recover damages if the goods received are not equal to the sample.

I should have thought that such a thing is so manifestly unfair that it could hardly be and ought not to be the law; and cannot but think that such a proposition would be derided by traders. The purchaser having the right to examine and compare and to reject, fairness requires that he should "take or leave" the goods, before property or possession passes to him. To permit him to take them, and, in truth—however the truth may be avoided sometimes in the supposed interest of justice—turn a

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Meredith, C.J.C.P.

condition into a warranty *ex post facto*, and subsequently whenever he pleases bring an action for, or as for, breach of warranty of quality, in the meantime doing as he pleases with the goods, appears to me to be too one-sided to be fastened upon any seller by implication of the Courts, even though composed of buyers continuously, sellers seldom if ever. The reason and fairness of the thing seems to me to make the application of the *caveat emptor* rule proper: if the goods be rejected they remain in the possession of the seller, who, in most cases, sells again without loss, and so the matter ends without litigation; whilst whatever sales he makes are made to the best advantage in his own interests for the credit of his own goods, and the maintenance of his contention that they were of good quality: whilst, on the other hand, the buyer's interests are to maintain his contention that they are of inferior quality, and, as the seller is to make good the loss, anything that tends to prove inferiority is welcome to him; and deterioration is not likely to be guarded against; and, beside all this, the ability to make evidence is, with the goods, in his hands. This case affords an instance: no attempt to sell the goods was made from January to April, nor indeed at any time: such sales as were made, at prices almost saving all loss, seem to have been the result of buyers seeking the goods: and the whole evidence shews that if the goods had remained with the sellers they could easily have sold them at more than the price the plaintiffs were to pay. Then there seems to have been a loss of over 1,200 lbs. in weight, said to have been caused by evaporation; and no doubt abstractions for samples, examinations, and other things—including a shortage of one bag of the 215. Until the new wool came in during the summer, sales could be made at extraordinary prices of anything in the shape of wool, as the evidence I have read shews: after that, such wool as that in question found no purchasers, its chances had been thrown away, because the goods were in the buyers' not the sellers' possession and control.

There are passing observations of a general character to be found here and there which taken by themselves indicate that the buyer by sample has an implied warranty as to quality; but neither the industry of my learned brothers, nor my own efforts, has discovered any case at common law, anywhere, in which it has been decided that a buyer by sample, who has compared bulk

with sample, or might—if he chose to do so—have made the comparison, and have rejected the goods if not fairly represented by the sample, could yet, after property and possession had passed to him, have a valid claim upon a warranty of quality.

The *obiter* observations of Holroyd, J., that there "is a collateral contract on the part of the seller, that the goods should correspond with the sample," and of Best, J., that the plaintiff "may still bring an action for breach of the warranty," could not be made in these days; the judgment of the House of Lords in the Sanfoin case, *Wallis, Son & Wells* v. *Pratt & Haynes*, [1911] A C. 394, forbids: the obligation as to quality is not a warránty but s a condition. The true rule is thus stated by Abbott, C.J., at the same time: "In justice and conscience . . . he ought to be estopped from objecting that the goods did not correspond w th the sample," after comparing or having had reasonable opportunity to compare bulk with sample: *Parker* v. *Palmer*, 4 B. & Ald. 387.

The case of *Mondel* v. *Steel*, 8 M. & W. 858, 151 E.R. 1288, was a case of an action upon a warranty, and not upon a sale by sample: nothing more need be said of it, or of any other case upon a warranty.

In the case of *Towers* v. *Dominion Iron and Metal Co.*, 11 A.R. (Ont.) 315, the observations of Hagarty, C.J.O., and Osler, J.A., had not reference to any implied warranty, but plainly meant a counterclaim upon an expressed contract "that if the goods did not equal the sample, Towers would allow the difference:" see p. 325.

In *Heilbutt* v. *Hickson*, L.R. 7 C.P. 438, the bulk did correspond with the sample, it was the sample that was at fault; and so the observation of Bovill, C.J., on the subject, may be taken to have reference to such a case as that where a condition as to correspondence of bulk with sample would have been useless.

The case of *Wallis, Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394, was also one in which a comparison of bulk with sample would have been futile: the kind of seed bought could not be distinguished by sight from the wrong kind which was delivered. What the buyers succeeded upon had nothing to do with the sample, it was upon the fact that the sellers never fulfilled their contract, they did not deliver the seed they sold, but did deliver seed of another kind.

And such cases as *Mody* v. *Gregson* (1868), L.R. 4 Ex. 49, and *Drummond* v. *Van Ingen*, 12 App. Cas. 284, are also cases in

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Meredith, C.J.C.P.

which comparison would not help the buyer to beware: and which go to shew that relief has been given only when an inspection would not help.

It is all very well for a learned author, Benjamin on Sale, to say: that on a sale of goods by sample the vendor warrants the quality of the bulk to be equal to sample, and that the rule is so generally taken for granted that it is hardly necessary to give direct authority for it. It would have been better to have attempted to give direct authority for it—if any could be found—and no one since the decision of *Wallis, Son & Wells* v. *Pratt & Haynes* can very well say that there is such a "*warranty*."

The Sale of Goods Act, 1893, has displaced in England the common law on the subject, and has provided (sec. 15 (1)) that a contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect: and that upon such a sale there are the three implied conditions set out in sec. 15 (2); not that there is any warranty; but, under sec. 11, the buyer may waive the condition, or may elect to treat the breach of a condition as a breach of warranty: and sec. 53 makes provisions in respect of damages where "the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty," among other cases of breach of warranty.

All this makes it plain that under that enactment a buyer may examine the bulk and compare it with the sample, and then accept the goods, and still have a right of action for damages on the ground that the bulk does not correspond with the sample; a state of the law directly in conflict with the first principle of the common law, upon the subject of sales of goods, expressed in the words *caveat emptor*: and a state of it which, I am sure, would somewhat startle buyers and even sellers here if it were well-known. Under the condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample—sec. 15 (2) (*b*)—the comparison, examination, or inspection, as one may choose to call it, might be had, and, having been had, there remains the implied condition that the bulk shall correspond with the sample—sec. 15 (2) (*a*)—which the buyer may treat as a breach of warranty—sec. 11 (1) (*a*): implications, if we have to make them, so one-sided that it seems to me there could be nothing in the mind of any buyer or seller to warrant them.

If that be the law of this Province, the plaintiffs had a right of action as for a breach of warranty, but not on a warranty, the moment the goods passed into their possession at Blyth: they had not a right of action on either condition, because the first had been fulfilled, and it was too late to rely upon the other; the rejection should have been on comparison of bulk with sample before taking possession in such a case as this, in which the opportunity for comparison was given, and, as I have shewn from the evidence, the comparison might easily have been made and would plainly have shewn the condition of the goods for which damages were sought and have been awarded.

The same result might be reached in another way: if the sale in this case were not of certain existing goods which were warranted to be of quality equal to the sample, but was of goods to be delivered corresponding with the sample; then if the goods delivered did not correspond with the sample no right of action for the price agreed upon could arise out of that contract; and if those which were delivered were not accepted in lieu of those which ought to have been delivered, that is, if a new contract were not substituted for the old one, the buyer would have an action against the seller for damages for breach of the contract; but would be liable to the seller for the value of the goods if they were retained, as in this case they were, by the buyer.

In this, as it seems to me, anything but clear and satisfactory state of the law of contracts of sale of goods by sample, the plaintiffs may rightly have been held to have a right of action against the defendants for damages; and, however that right of action may be considered to have arisen, the measure of the damages should be the same, namely, "the loss directly and naturally resulting, in the ordinary course of events, from the breach" of the contract: sec. 53 (2).

The next question discussed upon this appeal was, whether the ruling of the trial Judge that the course of business in similar transactions between the same parties in regard to inspection or examination and accepting delivery of goods, was irrelevant, was right. It was not, in my opinion, irrelevant, but was unnecessary: it was relevant as shewing opportunity for inspection, as it was called at the trial, of the goods; but, as the goods were to be delivered at Blyth, and the property to pass, and payment for

ONT.

S. C.

JOHN HALLAM LTD. v. BAINTON.

Meredith, C.J.C.P.

them to be made, there, and as the whole evidence made it plain that there was reasonable opportunity for comparing bulk with sample there, there was no need for that evidence.

And the last question is, whether the damages awarded are excessive. Some witnesses testified that, in their opinion, the goods in the sample were worth one-third more than those in the bulk: and the trial Judge assessed the damages accordingly, that is, at 15 cents a pound on the 50,000 lbs. sold and delivered: the amount allowed being largely in excess of the claim of the plaintiffs in writing filed at the trial, though it included demands of the remotest character.

But the plaintiffs bought at 40 cents a pound and had resold at 45 cents; so that the most they could have made out of the transaction, if there had been no breach of the contract, was one-ninth of the price at which they had sold. And, having regard to the long haggling between the parties as to price, both of them being among the shrewdest of dealers in wool, it could not but be a mistake to take the opinion of some witnesses, contradicted by others, against the actual facts which disproved them, even if the actual loss were not, as it undoubtedly is, the true measure.

Then a considerable quantity of the goods was actually sold at from 42 cents to 45 cents a pound, by the plaintiffs themselves: in the face of these facts, how can the assessment on the basis adopted by the trial Judge, 15 cents a pound, be sustained?

Beside all this, the plaintiffs apparently made no effort to sell the goods: such sales as were made were to dealers who went to them to buy. The facts have not been sufficiently elicited upon this subject, but from such evidence as was given it seems that for several months nothing was done, probably because for part of the time at all events the plaintiffs thought the defendants were bound to take the goods back. It seems, from such evidence as has been given, that all of the goods might readily have been sold at from 40 cents to 45 cents a pound, and so little or no loss have been sustained. When the utmost the buyers could have made if the contract had not been broken, and when they could have sold—and did in fact sell in part—for from 42 cents to 45 cents, an award of 15 cents a pound damages is manifestly not

an award of compensation, but is a penalty which cannot lawfully be imposed in an action upon a contract.

At this day, it can hardly be contended that, in such a case as this, more than the actual loss can be recovered: see *Hamilton Gas and Light Co. and United Gas and Fuel Co.* v. *Gest* (1916), 31 D.L.R. 515, 37 O.L.R. 132: that the proper method of assessing the damages is not by ascertaining what loss the plaintiffs would have sustained if they had promptly taken reasonable means to dispose of the goods to the best advantage; means such as they would have taken if the loss was to fall upon them, not upon others. On the contrary, the plaintiffs delayed, and apparently made no effort, to sell; and whilst the goods have been in their possession they have wasted greatly, and such as remain have become worthless because not sold when there was a market for them.

I am in favour of allowing the appeal upon this ground, but upon this ground only, and of referring the matter of assessment of damages to the proper local officer of the Court to be assessed in the manner I have indicated.

Appeal dismissed (MEREDITH, C.J.C.P., *dissenting as to damages*).

ESQUIMALT AND NANAIMO R. Co. v. TREAT.

IMP. P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, and Lord Atkinson. August 1, 1919.

DEEDS (§II C—34)—DESCRIPTION OF PROPERTY CONVEYED—"COAST LINE" —MEANING OF.

When a statutory conveyance describes one of the boundaries of land as the "coast line," that boundary is to be found at high water mark.

[*The Esquimalt and Nanaimo R. Co.* v. *Treat* (1918), 43 D.L.R. 653, affirmed.]

Statement.

APPEAL by plaintiff from a judgment of the British Columbia Court of Appeal (1918), 43 D.L.R. 653, in an action to determine the boundaries of certain property. Affirmed.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—The question in this case is what is meant by the expression "coast line" in a statutory conveyance. The Courts below have unanimously held that in its context in the instrument the expression was used to indicate a boundary at high water mark, which excluded the foreshore and the foreshore rights. Their Lordships are of opinion that the decision appealed from was right, and should be affirmed.

The action out of which the appeal arises was brought in the Supreme Court of British Columbia to establish the title of the appellants to the coal and other minerals and substances under the foreshore and sea opposite certain lands which had been conveyed to them. The respondent Treat was a licensee from the Provincial Government who was authorised to prospect for coal under the foreshore and had entered on it for that purpose. The lands in question are situated in Vancouver Island. They form a belt or strip. The portion of it to which the controversy relates is described, in a statute of B.C., which is the root of the appellants' title, as bounded on the east by the coast line of Vancouver Island to the point of commencement, and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

When British Columbia entered Confederation in 1871 under the provision enacted by s. 146 of the B.N.A. Act of 1867, it was one of the terms of the Imperial Order-in-Council then made that the Government of the Dominion should secure the construction of a railway from the Pacific towards the Rocky Mountains, and from the east of the Rocky Mountains towards the Pacific, to

IMP.

P. C.

ESQUIMALT AND NANAIMO R. CO. v. TREAT.

Viscount Haldane

connect the seaboard of the new Province with the railway system of Canada. To facilitate this the Province agreed to convey to the Dominion Government, in trust to be appropriated in such manner as that Government should consider advisable in furtherance of the construction of the railway, a certain extent of public lands along the proposed line, not to exceed 20 miles on each side. There was subsequent negotiation between the two Governments which resulted in an agreement modifying in a fashion which is not material for the purposes of the present question the description of the lands to be conveyed. In the result the Government of the Province undertook to procure the incorporation, by Act of their legislature, of certain persons, to be designated by the Dominion Government, for the construction of the portion of the railway in Vancouver Island from Esquimalt to Nanaimo, and the Government of the Dominion undertook to secure the construction of this railway.

By Act of the Provincial Legislature, passed on Dec. 19, 1883, there was granted to the Dominion Government for the purpose of constructing this railway, land in Vancouver Island described as follows:—Bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca; on the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain; on the north by a straight line drawn from Crown Mountain to Seymour Narrows: and on the east by the coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein, and thereunder.

By a Dominion statute, 47 Vict., c. 6, passed subsequently to the British Columbia Act referred to statutory authority was *inter alia* given to an agreement between the Dominion and Provincial Governments, and also to an agreement relative to the construction of the railway, and for a grant of the whole, with certain exceptions which are not material, of the land conveyed to the Dominion by the Government of British Columbia for the construction of the line. The latter agreement, which was scheduled to the statute, was made between Robert Dunsmuir and others, called the contractors, and associated for such construction, and the Minister of Railways and Canals of the Dominion. It pro-

vided among other things for the grant by the Dominion to the contractors of the land referred to, in so far as such lands should be vested in the Crown in right of the Dominion, and held for the purposes of the railway, and for the minerals and substances in or under such lands, and the foreshore rights in respect of all such lands as aforesaid which were thereby agreed to be granted to the contractors and border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of mining and keeping for their own use all coal and minerals under the foreshore or sea opposite any such lands, in so far as such coal and minerals and other substances and foreshore rights were owned by the Dominion Government. The statute authorised the Governor-in-Council to grant to the railway company, which was stated to have been incorporated by the B.C. Act already referred to, the land in question in terms and with reservations which are for all material purposes identical with those their Lordships have quoted from the scheduled agreement.

On April 21, 1887, a Crown grant was made by the Dominion Government to the appellant. It recited the B.C. Act and the Dominion Act already referred to, and that it had been agreed between the Dominion Government, the Government of B.C. and the company, that the grant to the company of the lands in question should be in the terms thereinafter contained, and that the exact boundaries of the lands should be as settled and agreed upon by and between the Government of B.C. and the company, with certain provisions as to settlers which are not material. It then granted to the company the land situated on Vancouver Island, which had been granted to the Crown in right of the Dominion by the Act already referred to of the Province of Dec. 19, 1883, in so far as such lands were vested in the Crown and held for the purposes of the construction of the railway, with all the coal and other minerals and substances thereunder, and the foreshore rights in respect of such lands as border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of mining and keeping all the coal and minerals mentioned, "in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights were vested in," the Crown as represented by the Government of the Dominion.

IMP.

P. C.

ESQUIMALT AND NANAIMO R. CO. v. TREAT.

Viscount Haldane

The question is whether under the terms of the B.C. and Dominion Acts and the Crown grant referred to the appellant obtained a title to the foreshore or foreshore rights mentioned in the grant. Their Lordships agree with the Courts below in thinking that it did not obtain such a title. The Dominion statute and grant are careful to limit what they purport to convey to the appellants to such rights only as were vested in the Crown in right of the Dominion. This throws the question back to the construction of the words in the B.C. Act of 1883. It may well have been that the general words relating to foreshore rights were introduced to cover the possibility of the Dominion possessing rights apart from the grant to them by the Province in the foreshore on a certain interpretation of the B.N.A. Act of 1867. It has since been made clear by decision that no right of property in the foreshore which was vested in a Province before Confederation has been taken away by that Act, except so far as transferred by express enactment, and there is nothing in the B.N.A. Act of 1867 or in any other statute referred to in this appeal which transfers the foreshore generally as originally vested in the Crown in right of the Province. There are, of course, the provisions of s. 108 of the Act of 1867 which by implication take away the property in specific parts of it, but these provisions have no application to the present case.

Their Lordships are accordingly of opinion that unless the words they have already quoted in full from the statutory grant to the Dominion in s. 3 of the Provincial Act of Dec. 19, 1883, passed the foreshore, it remains in the Crown in right of the Province. The appellants rely on the use of the expression "coast line" as sufficient to include the foreshore. But it is the natural inference from the context that "coast line" is there referred to as contrasted with "straight line," the expression which is apposite in the descriptions of the other parcels in the grant. They think that the natural interpretation of the expression is that it was intended to indicate the actual and normal boundary of land which was divided from the sea by high water mark, and that it consequently included the land down to the normal high water mark, and not further, to the exclusion of the foreshore and all rights to mine under it. In an instrument which in reality did no more than operate as a transfer by the Crown of adminis-

tration in right of the Province to administration in right of the Dominion their Lordships think that there is no presumption or other reason for construing words purporting to be words of grant in any other than their natural and strict sense. They will, accordingly, humbly advise His Majesty that the conclusions arrived at by the Judges of the Courts of British Columbia were correct, and that the appeal ought to be dismissed with costs to be paid by the appellants to the respondent Treat. In accordance with the usual practice the intervening respondent will bear his own costs. *Appeal dismissed.*

CREDIT FONCIER v. LINDSAY WALKER Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Newlands, and Elwood, JJ.A. July 9, 1919.

CONTRACTS (§ III D—150)—RIGHT TO ERECT HOARDING—FIXTURE—LICENSE—CANCELLATION OF—RIGHTS OF LICENSEE.

An agreement entered into by the owner of land giving a company the right to erect a bill posting board or hoarding on the land on certain terms, and subject to certain conditions as to removal, creates nothing more than a license to go on the owner's land for the purpose of erecting such hoarding. A licensee who erects a hoarding for bill posting and advertising purposes, on certain land under a revocable license is entitled to notice of revocation and a reasonable time afterwards in which to remove his goods.

APPEAL by plaintiff from the trial judgment, in an action claiming a mandatory injunction to compel defendants to replace and restore a hoarding and for damages. Affirmed. Statement.

P. H. Gordon, for appellant; *A. G. Mackinnon*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—By a mortgage bearing date May 15, 1912, one Eliza Weeks mortgaged lots 7 and 8, block 280, Regina, to the plaintiff company for $5500, payable on Dec. 1, 1917. The mortgage bore interest at 8%, payable annually. In 1916, the mortgagor being in default, the plaintiffs commenced foreclosure proceedings, and on Nov. 6 of that year obtained an *order nisi*, which decreed that Eliza Weeks was in default in the sum of $1538.94, and that unless that sum with interest thereon and costs was paid on or before Aug. 8, 1917, the interest of Eliza Weeks in the said lands and all persons claiming through or under her would be absolutely foreclosed. The money was not paid, and on Feb. 6, 1918, the plaintiffs obtained a final order of foreclosure, on which they obtained a certificate of title to the said lands. Lamont, J.A.

SASK.

C. A.

CREDIT FONCIER v. LINDSAY WALKER CO.

Lamont, J.A.

In August 1917, before the plaintiffs had obtained title and while the said Eliza Weeks was the registered and beneficial owner of the lands, an agreement was entered into between her and the defendant company, by which she gave the defendants the right to erect a bill posting board or hoarding on the said land, in consideration of their agreeing to place on such hoarding at their own expense a sign advertising her property for sale. It was a term of the agreement that the defendants were entitled to remove the hoarding at any time, and they on their part agreed to remove it on short notice. The hoarding was erected, and remained on the premises—which were otherwise vacant—until after the plaintiffs had obtained certificate of title, when it was removed by the defendants. Prior to the time when the plaintiffs obtained title, the defendants had no knowledge of the plaintiffs' mortgage, or any claim on their part to the said lands. The value of the hoarding was $200.

In September, 1918, the plaintiffs brought this action, claiming a mandatory injunction to compel the defendants to replace and restore the said hoarding, and for damages. At the trial, they abandoned their claim for a mandatory injunction, but pressed for judgment for the value of the hoarding. The reason for this was, because, in the meantime, they had sold the lots for $15,400. Having sold for $15,400 property which they took from Eliza Weeks for a debt of $7,038.94 and some interest and costs, one would have thought that the avarice of the plaintiffs would have been satisfied. Not so, however. They still demanded from the defendants $200, the value of the hoarding. They claimed, that because the defendants had not removed the hoarding from the premises before they (the plaintiffs) had obtained a certificate of title, that they are entitled to recover because the hoarding was affixed to the soil at the time they received title. If the plaintiffs are right in their contention, and under the circumstances the law gives them the hoarding, the defendants must pay.

The trial Judge found in favour of the defendants. From his judgment the plaintiffs now appeal.

The first question is, were the defendants under their agreement with Eliza Weeks tenants of the land or only licensees. This point seems to me to be settled by *Provincial Bill Posting Co.* v. *Low Moor Iron Co.* (1909), 78 L.J.Q.B. 702, [1909] 2 K.B. 344.

In that case, the plaintiffs and defendants agreed that the plaintiffs should erect on the land of the defendants a hoarding for bill posting and advertising. That hoarding was affixed to the soil in the same manner as the one in question in this case. As remuneration for the privilege, the plaintiffs agreed to pay the defendants a stated rent. The plaintiffs omitted to pay the rent, and the defendants distrained on the hoarding. It was held that there was no right of distraint, because the agreement created only a license and not a tenancy. In his judgment, at p. 706, Buckley, L.J., said:

> The agreement gives the plaintiffs the exclusive right of posting bills and exhibiting advertisements upon certain land of the defendants and of fixing hoardings and doing all that is usual and proper in order to utilize the premises for bill posting and advertising purposes for a certain term at the rent and on the conditions specified. It seems to me that this agreement created nothing more than a license to go on the land of the defendants and do something there.

The defendants in the present case are, therefore, licensees and not tenants, but, as licensees, having entered upon the land and erected their hoarding, they were in possession.

Bigham, J., trial Judge in the case above referred to, speaking of the time of the distraint, at p. 704, says:

> At that time the plaintiffs were in occupation of the land, and they had, for the purpose of exhibiting their advertisements, placed upon the land a hoarding.

The only occupation in that case, as here, was the entering on the land and the erection of the hoarding.

The next question is, was the hoarding a fixture. In his judgment above referred to, at p. 706, Buckley, L.J., says:

> It was proved that they were fixed in the soil in a very substantial manner. They were supported by means of vertical posts sunk four feet into the ground, strengthened by cross-pieces attached to them, and they were further supported from behind by a strut and a stay let substantially into the ground in order to prevent any wrench. As a matter of physical construction they were affixed to the land. But they were tenant's fixtures, removable by the plaintiffs during the term. They were so fixed as to become physically part of the soil, and were therefore for the time being not chattels in the ordinary sense, but in virtue of the tenants' right to remove them they might again become chattels.

Although, in my opinion, much might be said in favour of the view that the hoarding in this case was not a fixture, I will assume that it was. We have then to consider whether or not the defendants had a right to remove it. The fixture in this case

SASK.

C. A.

CREDIT FONCIER v. LINDSAY WALKER CO

Lamont, J.A.

was a trade fixture placed upon the land for advertising purposes, and so entitled to protection.

In *Mellor* v. *Watkins* (1874), L.R. 9 Q.B. 400, it was held that a licensee under a revocable license was entitled to notice of revocation and a reasonable time afterwards to remove his goods, and in 18 Hals. 338, the following is laid down:

> If, under the license, the licensee has brought property on to the land, he is entitled to notice of revocation and to a reasonable time for removing his property.

In *Sanders* v. *Davis* (1885), 15 Q.B.D., p. 218, Pollock, B., at p. 220, said:

> The case we have to consider is one in which the goods are not strictly speaking the property of a tenant, but belong to some one who has come in under an agreement of tenancy with the mortgagor of the premises, and not under any agreement with the mortgagee. Hunt, when he entered on the premises, believed he was entitled to consider himself the tenant, and, in my opinion, whatever he brought on as trade fixtures comes within the spirit of the rule laid down by Lord Mansfield, and adopted in many other cases. I think, therefore, that Hunt would have been entitled to remove these fixtures and that consequently the plaintiff is entitled to judgment.

In *Ellis* v. *Glover & Hobson, Ltd.*, [1908] 1 K.B. 388, the authorities are reviewed by Fletcher Moulton, L.J., and, at p. 396, his Lordship sums up the result as follows:

> I am therefore of opinion that these cases decide that in general a mortgagor in possession has the right to permit trade fixtures to be fixed and unfixed on the premises, provided that they are unfixed before the mortgagee takes possession, but that the right to unfix them ceases when possession is taken by the mortgagees, and that the law so laid down is binding upon this Court.
>
> I desire to add that, apart from the fact that the decision in *Gough* v. *Wood & Co.* is binding upon this Court, I am of opinion that the decision was a right one.

Whether or not the protection afforded to a licensee would cease when a mortgagee takes possession, or only upon reasonable notice, we need not determine, for in this case the mortgagee had not taken possession as against the licensee. The *order nisi* which decreed that upon default of payment of the amount found to be due there should be foreclosure absolute as against the mortgagor and these claiming through or under her, also decreed that all persons claiming through or under the mortgagor in possession of the said premises should give up possession thereof to the plaintiffs within twenty days after service upon them of a copy of the final order. The final order contained a similar clause.

SASK

C. A.

CREDIT FONCIER v. LUDSAY WALKER, CO.

Lamont, J.A.

It was admitted that a copy of the final order was not served upon the defendants before they removed their hoarding. They were, therefore, yet in possession when they removed their property.

It was argued that the plaintiffs were constructively in possession when they received their certificate of title.

In my opinion, having taken an order upon which their title was issued, which order gave those in possession 20 days after service thereof to deliver up possession, the plaintiffs cannot be heard to say they are not bound by the terms of that order.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

IMP.

P. C.

ATT'Y-GEN'L FOR CANADA v. RITCHIE CONTRACTING AND SUPPLY CO.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, and Lord Dunedin, July 31, 1919

CONSTITUTIONAL LAW (§ IG—140)—PUBLIC HARBOURS.

English Bay, which forms the outer approach to Burrard Inlet which leads to the city of Vancouver, is not a "public harbour" within the meaning of the term as used in the third schedule of the B.N.A. Act and is therefore not the property of Canada, and the Dominion Government cannot restrain the removal of sand and gravel therefrom.

[*Holman* v. *Green* (1881), 6 Can. S.C.R. 707; *Fisheries* case [1898] A.C. 700, considered; 26 D.L.R. 51, affirmed.]

Statement.

APPEAL from the Supreme Court of Canada (1915), 26 D.L.R. 51, in an action to restrain the respondent from removing sand and gravel from the entrance to English Bay. Affirmed.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—The respondents, the Ritchie Contracting and Supply Company, were, with the license of the Government of British Columbia, whose Attorney-General is the second respondent, removing sand from a bank on the foreshore of the sea known as Spanish Bank, situated at the entrance to English Bay. English Bay is the bay which forms the outer approach to Burrard Inlet, which leads to the city of Vancouver. The appellants, the Att'y-Gen'l for the Dominion of Canada and the Vancouver Harbour Commissioners, brought this action to restrain the respondents from removing the sand. The main ground on which the action was based was that English Bay was a public harbour and Spanish Bank a part thereof; that in virtue of s. 108 of the B.N.A. Act the *solum* of the bank belonged to the Dominion; and that the operations of the respondents thereon were con-

IMP.

P. C.

ATT'Y-GEN'L FOR CANADA v. RITCHIE CONTRACTING AND SUPPLY CO.

Lord Dunedin.

sequently unauthorised and illegal. There was a second and subsidiary ground of action which will be more particularly specified hereafter.

The case was tried before Macdonald, J., who decided against the appellants and dismissed the action. Appeal being taken to the Court of Appeal of British Columbia, that judgment was affirmed unanimously by 5 Judges. Appeal again being taken to the Supreme Court of Canada, the judgment was again affirmed unanimously by 6 Judges. The appellants have, therefore, a most formidable weight of judicial opinion against them; but on appeal to this Board they contended that, although all the Judges were against them, the grounds of judgment of various of the Judges were different, and that the unanimity was more apparent than real. There are cases where opinions which agree in result yet differ so in substance as to be incapable, so to speak, of living together. On the other hand, if a plaintiff to obtain the relief he asks must prove affirmatively two or more propositions, it follows that a Judge who bases his opinion on the fact that, in his view, the plaintiff has failed to prove Proposition A is not necessarily in conflict with another Judge who bases his judgment on a failure to prove Propositions B or C. Their Lordships think that on examination the present case will be found to fall within this second category.

The first proposition which the appellants are bound to prove is that English Bay is a public harbour, for English Bay is admittedly situate within the Province of British Columbia, and, in virtue of s. 109 of the B.N.A. Act, which necessarily speaks as at the date of the admission of British Columbia to the Union, *viz.*, in 1871, belongs to the Province, unless it can be shewn to be transferred by some other section to the Dominion. The only section appealed to is s. 108, with its concomitant schedule No. 3, one item whereof is "Public Harbours."

It may be as well first to see how the decided cases which may be thought to deal with the question stand. There are many cases referred to in the opinions of the Judges in the Courts below where the subject has been more or less approached, but their Lordships think it necessary to refer to only two. They are *Holman* v. *Green*, decided in the Supreme Court of Canada (1881), 6 Can. S.C.R. 707, and the first *Fisheries* case before this Board,

IMP.

P. C.

ATT'Y-GEN'L FOR CANADA v. RITCHIE CONTRACTING AND SUPPLY CO.

Lord Dunedin.

[1898] A.C. 700. *Holman* v. *Green* had to do with Summerside Harbour. In that case it was contended that the term "public harbours" only extended to such harbours as had had public money expended on them and could not include natural harbours. That contention was repelled, but some expressions were used which would lead to the conclusion that each and every piece of land within the ambit of the harbour over which the tide flowed was transferred in property. Accordingly, when this Board came to deal with the subject in the *Fisheries* case, they said as follows, at p. 712:

> It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green* that if more than the public works connected with the harbour had passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark, being also Crown property, likewise passed to the Dominion. Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour; it may or may not do so according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour, but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

They had previously stated on the general question that it would be, they thought, extremely inconvenient that a determination should be sought of the abstract question: What falls within the description "public harbour"? They declined to attempt an exhaustive definition of the term applicable to all cases. It must depend they said to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour.

Their Lordships are bound to say that the expression, "What falls within the description of public harbour" used in that passage has been liable in some cases to misconstruction. In the case of *Holman* v. *Green*, *supra*, the Court was dealing with a harbour which was an admitted harbour. Accordingly, the expression, "What falls within the description of public harbour," used as it was in commenting upon the case of *Holman* v. *Green*, means—given the existence of a public harbour—what territory falls within it, and does not mean what class of harbour is meant by the expression "public harbour." None the less, however, the words used as to each case depending on its own circumstances may well, as is pointed out by Macdonald, J., be also used in

IMP.

P. C.

ATT'Y-GEN'L FOR CANADA v. RITCHIE CONTRACTING AND SUPPLY CO.

Lord Dunedin.

regard to the question of determining what is and what is not a public harbour. The extreme view one way, *viz.*, that a public harbour only meant such a harbour and such portions of it as had been the creation of public money, was rejected, and rightly rejected, in *Holman* v. *Green;* the extreme view the other way, *viz.*, that every indentation of the coast to which the public have right of access, and which by nature is so sheltered as to admit of a ship lying there, is a public harbour, has been argued by the appellants in this case and rightly, as their Lordships think, rejected by all the Judges in the Courts below. Potentiality is not sufficient; the harbour must be, so to speak, a going concern. "Public harbour" means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material. The date at which the test must be applied is the date at which the B.N.A. Act by its becoming applicable effects a division of the assets between the Province and the Dominion. That in this case is 1871. Applying this test to English Bay, their Lordships agree on the facts with the great majority of the Judges below, who hold that English Bay is not a public harbour. Nor, as already pointed out, are the remaining Judges of an opposite opinion. Some of them prefer to rest their decision on the view that, even supposing English Bay to be a public harbour, Spanish Bank, in accordance with the views of this Board in the *Fisheries* case, would be within the ambit, but not a part of it. As their Lordships hold that English Bay is not a public harbour, it is unnecessary to consider this question, though their Lordships indicate no opinion contrary to those of the Judges below.

This disposes of the main point of the case; but the appellants obtained leave to amend their original pleadings by adding this statement:—

> The Attorney-General of Canada moreover alleges and submits that, whether English Bay within the area hereinbefore described be or be not a public harbour, the defendants, the Ritchie Contracting and Supply Company, Limited, and Purvis E. Ritchie, have not, and never had, any title, right or authority to remove the sand, gravel or other material naturally forming the bed or foreshores of the said bay, and that the Attorney-General of British Columbia has not, and never had, any right, authority or jurisdiction to authorise the removal of any part of the said bed or foreshores or

interference therewith. The Attorney-General of Canada avers on the contrary, that, the waters of English Bay within the limits hereinbefore described being navigable waters of the sea, it was and is the duty of the Crown, in so far as it is represented locally, to maintain the bed and foreshores of the said waters in their natural state and to prevent waste of the sea. The Attorney-General of Canada claims a declaration of this honourable Court in the terms of this paragraph and, moreover, an injunction to restrain further waste.

The appellants argued that their title to object flowed from the fact that navigation is one of the subjects entrusted to the Dominion under s. 91 of the B.N.A. Act.

It has often been pointed out that the domain of legislation is quite a different matter from proprietary rights. It may, however, be assumed for the purposes of this argument that if what was being done could be shewn to be a danger to navigation the right of the Dominion to make navigation laws would give a sufficient title to object. The hypothesis of the situation is that the Province is, in taking away the sand, operating *in suo*. Any restraint upon that at the instance of the other party must consist of an injunction of the *quia timet* order. But no one can obtain a *quia timet* order by merely saying "*Timeo*;" he must aver and prove that what is going on is calculated to infringe his rights. In the present case there is no averment of a specific character, far less proof, that what is being done at Spanish Bank will affect navigation in the slightest degree. This point, therefore, also fails.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

JOHN MACKAY Co. v. CITY OF TORONTO.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin, Duff, J. August 6, 1919.

MUNICIPAL CORPORATIONS (§ III—286)—INSTRUCTIONS GIVEN BY MAYOR TO DO CERTAIN WORK—COUNCIL'S REFUSAL TO PAY—NO EXECUTED CONTRACT—RATIFICATION BY BY-LAW—MISCONCEPTION OF WORK REQUIRED.

The plaintiff, an accountant, was instructed by the Mayor of Toronto by letter to examine the books of the Toronto Electric Light Company "and give me a report of the company as an accountant shewing the probable financial results if the city takes over the company's business and operates at the present load of about 30,000 h.p." These instructions were afterwards extended to include also the Toronto Railway Company. No sum was agreed upon as remuneration. The negotiations for purchase having failed, the plaintiff sent in a bill for $42,546.50 which the council refused to pay, and the plaintiff then brought action

IMP.

P. C.

JOHN MACKAY CO. v. CITY OF TORONTO.

to recover this sum. Their Lordships held that there was no executed contract in the sense that the council, knowing the facts, had accepted or ratified the act of the Mayor. The work could only be authorized by the council itself, by by-law under seal upon full knowledge of the facts, and this had not been done.

[*Waterous Engine Works Co.* v. *Town of Palmerston* (1892), 21 Can. S.C.R. 556, applied, *Clark* v. *The Cuckfield Union*, 21 L.J.Q.B. 349, distinguished; 43 D.L.R. 263, affirmed.]

Statement.

APPEAL by plaintiff from the judgment of the Supreme Court of Ontario, Appellate Division (1918), 43 D.L.R. 263, in an action brought to recover $42,546.50 for professional services rendered to the City of Toronto at the request of the mayor. Affirmed.

The judgment of the Board was delivered by

Viscount Haldane

VISCOUNT HALDANE—The Appellate Division of the Supreme Court of Ontario has in this case affirmed a judgment of Middleton, J., which dismissed an action brought by the appellant to recover $42,546.50 for services alleged to have been rendered to the respondents and for disbursements in connection with such services. The appellant's firm carry on business at Toronto as accountants and advisers on business questions, and he claims to have been employed under a contract with the respondents, made by the mayor and duly adopted and ratified by the respondents themselves, to report on a proposed purchase of the undertakings of the Toronto Electric Light Co. and the Toronto Street Railway Co.

The respondents are a municipal corporation incorporated by the Municipal Act of Ontario, being c. 192 of the R.S.O. 1914. By s. 10 of the Act the powers of a municipal corporation are to be exercised by the council. By s. 249, except where otherwise provided, the jurisdiction of every council is to be confined to the municipality which it represents, and its powers are to be exercised by by-law. By s. 258 every by-law is to be under the seal of the corporation, and is to be signed by the head of the council, or by the presiding officer at the meeting at which the by-law is passed, and by the clerk.

Early in 1913 the then mayor of the city, Mr. Hocken, thinking it desirable that the city should acquire the undertakings of the Toronto Electric Light Co. and the Toronto Street Railway Co., took steps, but without preliminary authority from the council, to obtain advice and information as to the terms on which these undertakings could probably be acquired. In Toronto there is a Board of Control, established as provided by s. 209 of the Muni-

cipal Act, to which the affairs of the corporation are referred, but it cannot pass by-laws and can spend money only under the authority of the council. Mr. Hocken, having in the month of April stated to the Board of Control that he had reason to believe that the city might acquire the two undertakings on favourable terms, the council on June 18, 1913, upon the recommendation of the Board, resolved that $10,000 be appropriated to meet the cost of obtaining reports on the suggested transaction from 3 experts, named respectively Arnold, Moyes, and Ross. No discussion took place at this time about the employment of the appellant. But on July 22, the mayor saw the appellant and intimated that he would like him to examine the books of the Electric Light Co. and estimate the financial results if the city took over the company's business and operated it. He asked the appellant for an estimate of the cost of his work and the time it would take. The appellant, according to his own evidence, replied in conversation that he seldom gave estimates of the cost of such work, and that his charge usually depended on 3 elements, time taken in the inquiry, expense involved, and his responsibility and the result of the inquiry. He went on to say that, while grateful for the mayor's confidence, he was not an applicant for the patronage of the city, and that in a matter of such magnitude and importance, if the city had not sufficient confidence to entrust the inquiry to him without stipulating in advance what the fee should be, he did not want and would not accept the retainer. According to his account of the conversation the mayor replied that he saw the reasonableness of this, but that he had the Board of Control to deal with, and that if the city acquired the properties there would be no disposition to look too closely at the bill, but that if the transaction did not go through the bill would probably be thoroughly examined. The appellant's allegation is that he had stated the principles on which he fixed his charges, and that if the mayor thought that was sufficient with which to go to the Board of Control, it was all right, but if not he did not want the retainer, and that, if the matter was intrusted to him but did not go through, he was quite willing that any honest and capable man, for example the mayor himself, should fix the amount. His account of the mayor's reply is that the latter said that he was very anxious that the appellant should undertake the inquiry,

IMP.

P. C.

JOHN MACKAY CO. v. CITY OF TORONTO.

Viscount Haldane

and that his position as to terms would be satisfactory. According to the evidence of the mayor himself, whom the trial Judge accepted as a satisfactory witness, he told the appellant that he could not possibly fix an exact figure, but that the appellant must keep his costs within what the city was paying to Ross and Arnold, and that he, the mayor, protested against the notion that the charge for the work if completed should be greater than if it were not completed. The result of this evidence is to shew that the appellant and the mayor were not really *ad idem* as to the terms on which the appellant was to be remunerated, and that when the appellant went on with the investigation as, up to a certain point, he did, he must be taken to have done so at best on the terms of being paid on the footing of establishing a claim to reasonable remuneration. But even on this footing the question remains whether he could establish any contract at all for his employment against the council.

It appears that on May 6, 1913, an Act, 3-4 Geo. V. (Ont.), c. 125, had been passed enabling the City of Toronto to acquire by purchase all the rights and interests of the Toronto Railway Co. in the street railway system, as well as those of all other companies and persons operating electric or street railways lying within the city. By the Public Utilities Act of the same year (c. 41 Ont.) the city is said to have been empowered to acquire *inter alia* any electrical undertaking in addition. But their Lordships are of opinion that even if these statutes conferred sufficient powers on the respondents to enter upon and to carry out the transactions as to which the appellant was instructed, the powers conferred were powers akin to those which, under ss. 10, 249 and 258 of the Municipal Act already referred to, could only be exercised by the council itself, and by by-law under seal duly signed.

Their Lordships are further of opinion, on scrutiny of the minutes of the council which have been put in evidence, and of the oral testimony, that the trial Judge and the Court of Appeal were right in their finding that there was no by-law authorising the exercise of any power to employ the appellant. It is true that the appellant set to work, and that this work resulted in his furnishing an interim report, which was afterwards printed by direction of the council; but that report was never completed, and the acquisition

of the undertakings in question did not go through. Even if the appellant could be entitled to claim on a *quantum meruit* it does not appear that he could have claimed an amount approaching the sum which he claims in this action. On this point they see no reason to differ from what was said by the trial Judge, who put a contingent figure for his remuneration at $7,500.

The question which remains is whether the appellant has a legal claim to anything at all against the respondents. It is argued on his behalf that the contract in the present case was an executed contract, and that the principle enunciated by Wightman, J., in *Clarke* v. *The Cuckfield Union* (1852), 21 L.J.Q.B. 349, applies. What that Judge laid down in that case in 1852 was that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation and of which they have had the full benefit may be enforced by action of assumpsit, and the corporation will be liable, though the contract was by parol only and not by deed under seal.

But their Lordships are of opinion that the case before them is outside the principle of law so laid down. Putting aside the difficulty that it is far from clear that the contract here can be regarded as fully executed, it is obvious that the Corporation of the City of Toronto was not created for the particular purpose of acquiring the undertakings to which reference has been made. At best it was endowed with special powers, independent of and subsequent in date to those which it originally possessed, of taking steps to acquire them. Again this Corporation is not the creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of the Interpretation Act of Ontario (R.S.O., c. I, s. 27), which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by the Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal. Their Lordships do not desire to

IMP.
P. C.
JOHN MACKAY CO. v. CITY OF TORONTO.
Viscount Haldane

be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract. It can hardly have been intended by the Legislature that, for example, notepaper cannot be bought for daily use except by a special by-law under seal; it may well be that the power to engage a servant is not a power *ejusdem generis* with the powers with which the Municipal Act is dealing when it imposes restrictions on their exercise. The language of s. 398, which enables by-laws to be made for providing for such minor appointments and for the carrying into effect of the council's own by-laws, appears to indicate that the power to make such appointments is distinguished from the special powers as to which the statute imposes restrictive formalities. But it is enough to point out that the new powers to acquire the undertaking of the Toronto Railway Co. and the Electric Light Co., specially added by the two statutes of 1913 already referred to, assuming that they were sufficiently conferred, as an addition to those already in existence, belonged to the latter class. If so the judgments in the House of Lords in *Young* v. *The Mayor of Leamington* (1883), 8 App. Cas. 517, shew that the principle of *Clarke* v. *The Cuckfield Union* has no application, inasmuch as there is an express statutory enactment prescribing conditions for the exercise of all powers of this nature.

The decision of the Supreme Court of Canada in *Waterous Engine Works Company* v. *Corporation of Palmerston* (1892), 21 Can. S.C.R. 556, was cited at the bar, and their Lordships were invited to prefer the dissenting judgment of Gwynne, J., to those of the other Judges who took part in that decision. There a municipal corporation was given express power under the then Ontario Municipal Act to purchase fire apparatus. The Act provided that all the powers of the council should be exercised by by-law unless (which was not done by the Act) the exercise of a special power was otherwise expressly authorised or provided for. The defendant corporation, contracted with the appellants for the purchase of a fire engine and 550 feet of hose. No by-law was passed sanctioning the purchase. It was held by a majority in the Supreme Court, consisting of Strong, Taschereau and Patterson, JJ., that this contract was not enforceable in the absence of a by-law. As the power to purchase fire apparatus was one of the powers expressly conferred by the Act, this appears

IMP.
P. C.
JOHN MACKAY CO. v. CITY OF TORONTO.
Viscount Haldane

to have been right. Gwynne, J., dissented. He thought that it was firmly established that in the case of an executed contract which he held that before him to be, inasmuch as the fire engine had been delivered, it was established that the common law rule that corporations can only contract under seal, did not apply. He agreed that if a by-law was a statutory requirement the possibility of contracting informally would be excluded. But he considered that the provision requiring a by-law contained in the then Municipal Act applied only to the governing or legislative powers conferred by it, and not to the ordinary executive capacity to enter into contracts, which was an ordinary common law incident of a corporation.

Their Lordships see no reason to differ from the view taken by the majority of the Judges who decided the case, or to restrict the class of powers to which the statutory condition requiring a by-law applied to the class of legislative powers referred to by Gwynne, J. Nor do they find any reason to so restrict that class in the present case which is governed by the existing Municipal Act the terms of which have already been quoted.

For the reasons given they agree with the judgments in the Courts below, and will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

CANADIAN PACIFIC R. Co. v. HERMAN.

IMP.
P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Parmoor, Duff, J. July 10, 1919.

APPEAL (§ VII E—323)—FINDING OF JURY—EVIDENCE TO SUPPORT—APPELLATE COURT WILL NOT INTERFERE.

Where there was evidence upon which the jury might, if they thought proper, reach the conclusion which they did reach their Lordships will not interfere with the decision arrived at by the jury.

[*Herman* v. *Canadian Pacific R. Co.*, 44 D.L.R. 343, affirmed.]

Statement.

APPEAL by defendant company from the Saskatchewan Court of Appeal (1918), 44 D.L.R. 343, in an action by a train conductor for damages for personal injuries. Affirmed.

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

P. M. Anderson, for respondent.

The judgment of the Board was delivered by

Lord Chancellor.

THE LORD CHANCELLOR:—In this case the plaintiff, who was in the employment of the defendants as a train conductor, brought an action to recover damages for personal injuries. The case was

IMP.
P. C.
CANADIAN PACIFIC R. CO. v. HERMAN.
Lord Chancellor.

tried at length before a jury and many witnesses were called upon both sides. At the conclusion of the evidence the Judge put several questions to the jury. The second of those questions was in the following terms:—"Were the defendants guilty of negligence in placing the switch stand in question where it was located?" The jury answered that question affirmatively. The third of the questions was: "If so, was the defendants' negligence the direct and immediate cause of the misfortune?" That question was also answered affirmatively by the jury.

The question and the only question for their Lordships to determine is whether or not there was evidence upon which the jury might without perversity reach the conclusions which they did. Their Lordships have listened with close attention to the argument of Counsel for appellant and it is sufficient to say upon that argument that in the opinion of their Lordships there was evidence upon which the jury might, if they thought proper, reach the conclusion which they did reach, and their Lordships are not prepared to interfere with the decision arrived at by the jury.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

CAN.
S. C.

VEUILLETTE v. THE KING.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. April 9, 1919.

CRIMINAL LAW (§ IIB—40)—MIXED JURY—PROCEEDINGS IN ONE LANGUAGE ONLY—SUBSTANTIAL WRONG—CRIM. CODE, S. 1019—COMMENT BY JUDGE ON PRISONER'S EVIDENCE.

A prisoner on trial on an indictment for murder elected to be tried by a mixed jury and after the impanelling of such a mixed jury the trial proceedings were conducted in the English language and the trial Judge summed up the case to the jury in English but not in French. The trial Judge also had commented upon the failure of the prisoner (who was a witness on his own behalf) to testify that he had not actually committed the murder.

Held, that assuming that the failure of the trial Judge to charge the jury in both languages, French and English, brought the case within s. 1019 of the Crim. Code as "something not according to law done at the trial," the Court should not interfere being of the opinion that no substantial wrong or miscarriage was occasioned thereby; also that the prisoner having testified on his own behalf, his evidence was open to comment and observation by the trial Judge, in addressing the jury, the same as that of any other witness.

CAN.

S. C.

VEUILLETTE v. THE KING.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, 28 Que. K.B. 364, affirming the judgment of the trial Court, with a jury, at Bryson, District of Pontiac.

The accused, appellant, was found guilty of murder but he prayed for a case to be reserved for the Court of King's Bench.

The questions submitted in the reserved case stated by the trial Judge and the circumstances of the case are fully stated in the judgments now reported. The appeal was dismissed.

W. K. McKeown, K.C., and *A. J. McDonald*, for appellant; *Ernest Gaboury*, for respondent.

Davies, C.J.

DAVIES, C.J.:—I have carefully read and considered the reasons for their judgment in this case given by the Judges of the Court of King's Bench and weighed carefully the able argument presented at bar by Mr. McKeown on the prisoner's behalf.

The Chief Justice of the Court of King's Bench having dissented from the judgment of the majority of that Court on the first and fourth questions reserved, this appeal comes before us and is limited to those two questions.

Assuming for the purpose of the argument that the failure of the trial Judge to charge the jury in both languages, French and English, brings the case within s. 1019 of the Criminal Code as "something not according to law done at the trial," we are by that section expressly prohibited from setting aside the conviction or directing a new trial unless in our opinion "some substantial wrong or miscarriage" was occasioned thereby.

I am quite clear in my judgment that under the special facts and circumstances of this case no such "substantial wrong or miscarriage" was so occasioned at the trial to the prisoner either in the fact of the trial Judge not having summed up the case to the jury in French nor in the fact of his having commented "upon the failure of the prisoner" (who had elected to give evidence) "to testify to the effect that he had not actually committed the murders mentioned in the indictment."

I would, therefore, dismiss the appeal.

Idington, J.

IDINGTON, J.:—I agree so entirely with the reasoning of Cross, J., in his opinion given in the Court below that I adopt same so far as applicable to that part of the reserved case presented for our consideration. I only desire to add a few words thereto,

CAN.

S. C.

VEUILLETTE v. THE KING.

Idington, J.

suggested to my mind by the argument for appellant insisting upon everything said in evidence being translated and addresses repeated in two languages.

I not only dissent from the view expressed by the Chief Justice relative to the first question submitted, but also submit with great deference that the adoption of such a rule as he suggests in such a case as now in question, where everyone concerned assumed, throughout a long trial, that the jurors understood the English language used, might be fraught with injury to an accused. There is no other class of criminal trials which produces such a strain upon the minds of those concerned as does a trial for murder. There would inevitably result, from a repetition in two languages of all that was expressed, a prolongation of the trial tending to fatigue and inattention on the part of the jurors and possibly a confusion of thought which tiresome reiteration is apt to produce.

The just rights of an innocent man might be needlessly jeopardized in such a case.

The statutory right given an accused and now in question had originally a deeper import than the mere right to the use of the two languages. The latter right in substance is recognized in the due and proper administration of justice wherever and whenever, and so far as necessary; though not carried to the extent that the law in question does relative to the selection of a jury.

The right to a jury *de medietate linguae* is entirely of English origin, tracing back to Edward I., and so clearly formed part and parcel of English law that I imagine it was by reason thereof that it became law in so many of the United States, until abolished in all save Kentucky. If, instead of what happened by steps needless to dwell upon here, the English law had finally become the law of all Canada as result of the Conquest, it would have been as, of course, part thereof, but the final settlement of that vexed question carried with it modifications of the French law, of which this is one, and it, no doubt, was intended to protect the accused from racial prejudices in the jury panel. To impose upon the accused and thus protected the additional risks I have adverted to, when and so far as needless, might tend to force him to waive his privilege, when standing in need of its exercise, for no other reason than that he might desire and need the sympathetic hearing of those of his own or like origin to counteract the possible prejudice of those of another origin.

I do not think he should be driven to make such a choice. At the same time I must not be understood as implying any limitation upon his right to insist, if so advised, upon the two languages being used throughout the trial.

If well advised, common sense will generally govern him and his counsel in regard to the exercise of any such rights. And the Court must always be ready to accede to his wishes, as I have no doubt it did herein.

I cannot imagine that any wrong or miscarriage of justice ensued herein by reason of the course pursued at the trial; with the concurrence of all concerned.

The case was not one that, so far as we are informed, needed anything but the ordinary conversational skill in use of language to apprehend what was said.

Cases are conceivable in which terms might be used calling for more than that degree of skill. Then, of course, care must be taken that each set of jurors fully understands the import of what is said.

In cases of trial for murder, where there is a possible alternative, of the crime being reduced to one of manslaughter, it frequently happens that nice distinctions of law need to be observed and in explaining such distinctions it might be well for a Judge charging a jury to make such distinctions clearly understood by using both languages, lest a juror might not understand same when addressed in another than his mother tongue, even if he had acquired the facility of carrying on an ordinary conversation in another language. But in a murder trial such as this happened to be, where it was inevitably either murder or nothing, all the jurors had to understand was the statement of plain ordinary every-day facts.

I am of the opinion that the appeal should be dismissed.

ANGLIN, J.:—The facts of this case sufficiently appear in the judgments delivered in the Court of King's Bench. The appeal to this Court was confined to two of the four questions submitted by the reserved case—the first and the fourth—on which the Chief Justice of Quebec dissented from the majority view in the Court of King's Bench adverse to the prisoner.

Anglin, J.

The first question is as follows:—

Having regard to the facts, that the accused elected to be tried by a jury composed of one-half of persons skilled in the French language, and that

CAN.
S. C.
VEUILLETTE
v.
THE KING.
Anglin, J.

the jury in question was in fact composed one-half of persons skilled in the said French language, was there error of law on the part of the presiding Judge, occasioning substantial wrong or miscarriage, in not having summed up the case to the jury in the French language in addition to the summing up made in the English language?

On the reserved case submitted, it may properly be assumed that the appellant was entitled to be tried by "a jury composed for the one-half at least of persons skilled in the language of his defence" (in this case French), that upon arraignment he duly demanded such a jury (27 & 28 Vict. c. 41, s. 7, subs. 2), and that at least six members of the jury impanelled were "found in the judgment of the Court to be skilled" in the French language.

I am inclined to agree with the Chief Justice of Quebec that "after the election of the accused for a mixed jury, and after the impanelling of such a mixed jury, the case should have been conducted in both languages." That, in my opinion, was a right of the accused implied by the statute. If not, its object would be purely sentimental and no right real and substantial in character would be conferred by it. There is not a little in the record to indicate tacit consent by the accused to the trial being conducted entirely in English. The Chief Justice questions the sufficiency of this consent although apparently of the view that "the consent of the accused expressly obtained and recorded" would have justified that course being adopted. I find it unnecessary to pass upon this aspect of the case.

No question is presented as to the effect of the omission to translate into French the evidence given in English. The question submitted is confined to the failure of the trial Judge to repeat his charge or summing up in French.

Assuming in favour of the appellant that the omission to repeat, at least in substance, the charge or summing up was error in law, it would have constituted "something not according to law . . . done at the trial" and would justify setting aside the conviction and ordering a new trial only if "in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial." Crim. Code, s. 1019. I cannot accede to the contention of counsel for the appellant that, because the error complained of was one of omission and not of commission, it is not within the purview of s. 1019. The omission of that which should have been done, made that which was done "some-

thing not according to law," and, therefore, a matter to which the section applies. The question submitted properly so assumes.

The stated case informs us that "each and every one of the jurors stated to the Court at the time of their selection that they understood and spoke both languages. When the first witness speaking English gave his evidence, the French-speaking jurors were asked by the Court if they understood the evidence, and they all replied that they did. The Crown prosecutor, in explaining the case to the jurors spoke only in English, and Mr. McDonald, attorney for the accused, in addressing the jury after the evidence had been received, spoke only in English. He was followed by Mr. Gaboury, Crown prosecutor, who addressed the jury in English only and was followed by the presiding Judge who addressed the jury in English only. No objection was made by the defence and no request preferred that the charge of the jury be repeated in French." It was also stated at bar that the accused himself gave his evidence wholly in English.

Having regard to all these facts, I agree with Pelletier, J., that the accused suffered no prejudice—that no substantial wrong or miscarriage was occasioned on the trial—by the failure of the trial Judge to repeat in French his entire summing up or the substance of it.

The affidavits of some jurors tendered by the appellant are, in my opinion, inadmissible and I have not considered them for any purpose.

The fourth question reserved is as follows:—

Was there error of law occasioning substantial wrong or miscarriage in that the Judge who presided commented upon the failure of the prisoner to testify to the effect that he had not actually committed the murders mentioned in the indictment?

Although the dissent of the Chief Justice is in terms confined to the first and fourth questions the reasons which he assigns rather indicate that he was not entirely satisfied that the third question should be answered in the negative. Perhaps, however, broadly construed—and I so deal with it—the fourth question may cover the ground of objection which the Chief Justice had in mind when he said:—

In his address the Judge said to the jurors that the accused did not dare to swear that he did not kill the murdered man. Such a comment, in my opinion, is against the spirit of the law. It was not a fair comment and it was of a nature to cause a substantial wrong and miscarriage of justice.

CAN.

S. C.

VEUILLETTE v. THE KING.

Anglin, J.

The prisoner having testified on his own behalf his evidence was open to comment and observation by the presiding Judge in addressing the jury as was that of any other witness. Cross, J., disposed satisfactorily of this branch of the case. Dealing with the third question, he says of the portion of the charge to which the Chief Justice takes exception:—

> It is to be observed that the jurors were there to hear the evidence and that if there were inaccuracies upon the facts in what the Judge said they would not constitute misdirection unless it could be said that they had, or were likely to have, some such effect as to lead the jury to think that some question which they ought to consider was in law excluded from their consideration, or otherwise mislead them as to the law.

Whatever may be thought of the trial Judge's charge from other points of view, however open to criticism it may be as a departure from the standard of impartiality which Judges entrusted with the administration of the criminal law in the English Courts have thought it proper to adopt, I cannot find in it any error of law such as may properly be made the subject of a reserved case under arts. 1014 *et seq.* of the Crim. Code. I entirely agree, however, with Pelletier, J.'s observation:—"It is evident that the Judge employed vigorous language, to say no more, but there was throughout no erroneous direction upon any point of law, and I do not believe that that could upset the verdict."

The appeal, in my opinion, fails.

Brodeur, J.

BRODEUR, J. (dissenting):—The appellant Veuillette was found guilty of murder and applied to the Judge who presided at his trial to reserve certain questions for the decision of the Court of Appeal, and especially that of whether, in a case where there was a mixed jury, the Judge should make his charge in both languages.

The Judge having refused this application, Veuillette applied to the Court of Appeal for leave to appeal from this decision. He produced in support of his application the affidavits of four French jurymen who declared that they had only an imperfect knowledge of English, and one of them named Demers even stated:—"There are many things said during the trial of Veuillette and in Judge Weir's charge to the jury which I have not understood."

The Court of Appeal, upon this evidence, granted leave to appeal (Crim. Code, s. 1015).

Four questions were submitted to the Court of Appeal. The first is in the following words:—

> Having regard to the facts that the accused elected to be tried by a jury composed one-half of persons skilled in the French language, and that the jury in question was in fact composed one-half of persons skilled in the said French language, was there error of law on the part of the presiding Judge, occasioning substantial wrong or miscarriage, in not having summed up the case to the jury in the French language in addition to the summing up made in the English language?

Under the law in force in the Province of Quebec, where such a criminal trial takes place, the accused, whether French or English, may ask for, at the time of his indictment, a mixed jury

> and then he shall be tried by a jury composed for the one-half, at least, of the persons . . . skilled in the language of the defence (1864, 27-28 Vict., c. 41, s. 7, sub-s. 2).

As we see by the very text of the Act it is an absolute right for an Englishman or a Frenchman in the Province to be tried by six at least of his fellow citizens who speak the mother tongue. It is not left to the discretion of the Judge to decide whether or not this request of the accused for a mixed jury should be granted or not. It is an absolute and indisputable right. And from the moment that he manifests this desire the Judge is bound to take notice of it and to see that the jury is a mixed one.

This legislation is not new. It dates from the early days of English domination. In 1764 Governor Murray, in his ordinance of Sept. 17, declared that "in all tryals in this Court, all His Majesty's subjects in the Colony to be admitted on juries without distinction."

The English-speaking Canadians were very much displeased to see that this ordinance put the English and French upon the same footing, and, in the memorial dated Oct. 16, 1764, they said that "persons professing the religion of the Church of Rome . . . have been empannelled on Grand and Petty Jurys *even where two protestants were parties.*" They call to mind this profession of the law of James III., c. 5, s. 8, which declared that "no papist . . . shall practice the Common Law as a Chancellor, Clerk, Attorney or Solicitor, etc.," and they concluded by saying:—"We therefore believe that the admitting of persons of the Roman religion . . . as jurors is an open violation of our most sacred Laws and Libertys and tending to the utter subversion of the Protestant religion and His Majesty's power,

CAN.

S. C.

VEUILLETTE v. THE KING.

Brodeur, J.

authority, right and possession of the province to which we belong." (Constitutional Documents, Shortt & Doughty, p. 154).

Their complaints were referred to England, where the officers of the Crown decided that catholics might serve as jurymen. And in 1766, July 1, a new ordinance, intended to dispose of the complaint of the English who were liable to be tried by juries entirely French, was signed decreeing that in actions

between British-born Subjects and Canadians, the Juries are to be composed of an equal number of each, if it be required by either of the parties. (Shortt & Doughty, *idem.* p. 173.)

The mixed jury was established, and upon the representations and the request of English-speaking Canadians. We find the principle of this legislation in our Revised Statutes of Lower Canada, s. 31 of c. 84. This latter Act having been repealed in 1864, the provision in question was reproduced in the Act of 1864, 27-28 Vict., c. 41, s. 7. This latter remains in force.

Now, what is the extent of the right which was conferred on persons accused?

It has been claimed that this right only consists in the choice of juries and does not carry an obligation for the Court to see that all proceedings are conducted in both languages to be understood by the jurymen.

This, in my opinion, would be a very illusory right if, in spite of the right which an Englishman would have, for example, to choose a mixed jury, the Crown was allowed to hear the witnesses in the French language and not to translate their evidence into English so that the purport of their evidence was understood by the English jurors. That would constitute a grave denial of justice.

It would be equally so as to the Judge's charge. The latter should see that his charge is understood by the whole jury.

It is true that the law is silent as to the manner in which a case should be conducted before a mixed jury, but I do not desire any better interpretation of the law than this practice, continually followed for more than 150 years, that in the case of a mixed jury the evidence of the witnesses is translated into both languages, and the Judge's charge is equally given in or translated into English and French.

Governor Murray felt so strongly the necessity for the officers who had to do with the administration of justice knowing both

languages, that, in a report which he made to the Imperial authorities, he complained that "our chief Judge and Att'y-Gen'l are both entirely ignorant of the language of the natives." In fact, some months after, the Imperial authorities, without assigning their reasons, replaced the Chief Justice and the Att'y-Gen'l. (Shortt & Doughty, Constitutional Documents, p. 178.)

But it is said: No protest was made in the present case when the Judge omitted to speak in French, the prisoner gave his evidence in English, his attorney only spoke in English when he made his address to the jury, and further, the French jurors were asked if they knew English, and they answered that they did.

All these circumstances can only bear evidence that there was formal acquiescence in this illegality. I ask, indeed, if in a trial for murder a formal acquiescence would be sufficient? The criminal law requires that, in trials which might involve capital punishment, all precautions should be taken in order that the rules of procedure may be followed with the greatest rigour. (Russell on Crimes, vol. 3, p. 2156.)

We have on record evidence shewing that a certain juryman had not sufficient knowledge of English to understand everything that was said by the Judge and the witnesses.

We have also on record a fact which does not bear, it is true, upon the question that I am about to look into, but which shews indeed the importance of having all the evidence well translated. One of the witnesses gives his evidence in English, and relates the conversation of the accused which was, however, held in French. He was asked to repeat in French the exact words of the conversation. There is an important variance. It was pointed out to the witness and he was compelled to say:—"The way they rattle me up is in French and English. I have a little of both and all the words are mixed up."

This evidence is of the greatest importance in the case. We see that the English version given by the witness of this conversation incriminates the accused even more than the words which the latter employed according to this very witness when he gave the French version. This French version does not appear to have been translated into English to the jury, and we find on the record the fact that certain jurymen do not understand French.

All this shews the importance there is in conducting a case in both languages, and the danger there is in not doing so.

CAN.

S. C.

VEUILLETTE v. THE KING.

Brodeur, J.

To uphold the verdict the defendant relies also upon the fact that the defendant's attorney did not speak to the jury in French.

The accused was evidently a very poor young man, without family and without protection. He found in his young defender a very devoted man who evidently undertook his case without hope of receiving any fee, but, as this advocate says himself in his factum: "He was a very young member of the Bar, and had not then the advantage of the experience which he has since acquired, and was led into the error of following the action of the Crown counsel and of the presiding Judge."

I have come to the conclusion that under the circumstances the fact that the Judge not having made his resume in both languages constitutes a real wrong to the accused (Crim. Code, s. 1019); and in that I partake of the opinion of the Chief Justice of the Province.

The judgment *a quo* which has answered in the negative the question of which I have given the text above, should be reversed. The sentence should be set aside and a new trial should be had.

The appeal must be upheld with costs.

Mignault, J.

MIGNAULT, J.:—The appellant, who was found guilty of murder by a jury in the District of Pontiac, Province of Quebec, at the criminal assizes held there in 1918, presided over by Weir, J., obtained permission from the Court of Appeal for four questions of law to be reserved for the opinion of the said Court. After having heard the appellant's counsel and the counsel appearing for the Crown, the Court of Appeal answered in the negative the questions submitted and confirmed the verdict and the sentence of death pronounced against the appellant, the Chief Justice expressing his dissent as to the answers given to the first and fourth questions so reserved, which he would answer in the affirmative. This dissent having permitted an appeal before this Court, the appellant asks us to set aside the decision of the Court of Appeal, his appeal being restricted to the questions on the subject of which the Chief Justice expressed his dissent. I therefore confine myself to these two questions, the first and the fourth.

First Question. Having regard to the facts that the accused elected to be tried by a jury composed one-half of persons skilled in the French language, and that the jury in question was in fact composed one-half of persons skilled in the said French language, was there error of law on the part of the presiding

Judge occasioning substantial wrong or miscarriage, in not having summed up the case to the jury in the French language in addition to the summing up made in the English language?

The right of having a mixed jury in the Province of Quebec was recognized by the law passed by the Parliament of Canada in 1864, 27-28 Vict., c. 41, s. 7, sub-s. 2, which reads as follows:—"If any prosecuted party, upon being arraigned, demands a jury composed, for the one-half, at least, of persons skilled in the language of his defence, if such language be English or French, he shall be tried by a jury composed, for the one-half, at least, of the persons whose names stand first in succession upon the Panel, and who, on appearing, and not being lawfully challenged, are found in the judgment of the Court to be skilled in the language of the defence."

This legal provision is in full force, and it has been decided that the abrogation which the Legislature of Quebec purported to make by the Act, 46 Vict., c. 16, was outside of the competence of such legislature; the criminal law and the criminal procedure being within the exclusive jurisdiction of the Parliament of Canada. (*The Queen* v. *Yancey* (1899), 8 Que. Q.B. 252.)

In 1873, the Court of Queen's Bench, composed of Duval, C.J., and Drummond, Badgley, Monk and Taschereau, JJ., decided in the case of *Reg.* v. *Chamaillard* (1873), 18 L.C.J. 149: "that where it is discovered after verdict, in a case of felony, where half of the jury were ostensibly sworn as being skilled in the French language (being that of the prisoner), that one of such half was not skilled in the French language, the trial and verdict are unlawful, null and void, and will be vacated and set aside on a reserved case by the Judge in the Court below."

In 1897, Wurtele, J., held in the case of *The Queen* v. *Sheehan* (1897), 6 Que. Q.B. 139, that "when the accused asks in the Province of Quebec for a mixed jury, it must be granted as a matter of right; the abandonment, by the accused, of the order for a mixed jury is not, however, a matter of right, but may be allowed by the Judge."

Later, in the case of *The Queen* v. *Yancey*, 8 Que. Q.B. 252, the same Judge held that "the words 'language of the defence,' in subs. 2 of s. 7 of the statute of the Province of Canada, 27-28 Vict., c. 41, which is still in force in the Province of Quebec,

CAN.

S. C.

VEUILLETTE v. THE KING.

Mignault, J.

mean the language of the prisoner, and not the language in which his defence is to be conducted. The privilege of the prisoner is to claim a jury composed for one-half at least of jurors speaking or skilled in his language."

Lastly, in 1892, the Court of Appeal, composed of Chief Justice Sir Alexandre Lacoste, and Blanchet, Hall, Wurtele and Ouimet, JJ., held, in the case of *The King* v. *Long* (1902), 5 Can. Cr. Cas. 493, that "where an English-speaking prisoner in the Province of Quebec is represented at his trial by counsel speaking the French language, and no request is made for a translation of the testimony of French-speaking witnesses into English, for the benefit of the prisoner, the failure to so translate as to enable the prisoner to personally understand the evidence is not a limitation of his right to make 'full answer and defence' to the charge, and will not invalidate a conviction."

Wurtele, J., spoke for the Court of Appeal, and we see that it was not a question in that case of a criminal trial proceeding before a mixed jury, but of the freely accepted choice of a jury composed entirely of persons of the French tongue. The case was not presented under the operation of the Act, 27-28 Vict., c. 41, and the opinion of the same Judge in the cases of *The Queen* v. *Sheehan*, 6 Que. Q.B. 139, and *The Queen* v. *Yancey*, 8 Que. Q.B. 252, shews the distinction between these cases.

Lastly, I ought to mention a Manitoba case, where a mixed jury also is had, but in this case it does not appear to have proceeded before a jury so composed. It was there held (*Reg.* v. *Earl* (1894), 10 Man. L.R. 303):—

The fact that one of the jury sworn to try the prisoner did not thoroughly understand the English language is no ground, after trial and conviction, for holding that there has been a mistrial, or for granting a new trial.

It is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time.

Ignorance of the English language would not in this Province be a ground of challenge of a juror.

The provisions of s. 746 of The Crim. Code respecting the granting of a new trial, when it is imperative, and when discretionary, explained.

Returning now to the provisions of the Act, 27-28 Vict., c. 41, it is clear that this provision would be illusory if, in a trial had before a mixed jury, the evidence was not translated from French into English and *vice versa*, and if the address of the Judge presiding at the trial was not made, at least as to its essential portions, in

both languages. Such has always been the practice in the Province of Quebec, and the counsel for the respondent in the present case, Mr. Gaboury, replying to a question I put to him, admitted that this practice was also followed in the District of Pontiac. I am therefore of the opinion that a prisoner who asks for a mixed jury has a right to have the trial proceeded with in both languages, French and English, which also includes the Judge's address to the jury.

It is argued that, in the present case, the French jurymen stated, when sworn, that they understood English, that when the first witness gave evidence in English the French jurymen, being asked by the Judge, answered that they understood his evidence, that the prisoner's counsel had spoken English in his address to the jury, and that the prisoner himself had given his evidence in English, from which it is concluded that there was acquiescence by the prisoner in the trial proceeding in the English language.

I would much hesitate to conclude from the silence of the prisoner, or even from the fact that he gave his evidence in English, that he renounced an indubitable right which pertained to him of a choice of a mixed jury, that of having his trial proceed in both languages. But can I say that there is in this case what the question submitted terms "substantial wrong or miscarriage," without which, under the terms of s. 1019 of the Crim. Code, a new trial cannot be ordered?

Brodeur, J., calls attention to a very important point of the case, declarations of the prisoner as to his actions on the day of the murder, where a witness is credited with different words according as his expressions are related in English or in French, which seems to indicate that the witness did not take much account of the meaning of his expressions when he spoke a language other than his own.

However, in deciding whether a new trial should be granted, we are bound by the formal provision of s. 1019 of the Crim. Code. It is not sufficient, indeed, under the wording of this section "that something not according to law was done at the trial," it is necessary also that "in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned."

I am indeed of the opinion that something not according to law was done at the trial, namely, that the accused had a right to

CAN.

S. C.

VEUILLETTE v. THE KING.

Mignault, J.

have the trial carried on in both languages, and that the Judge's address to the jury should, in at least its essential portions, be given in or translated into both languages, but, seeing that the Crim. Code requires, in addition, that I be of the opinion that some substantial wrong or miscarriage was thereby occasioned, I cannot under all the circumstances of the case go so far.

I must, therefore, and not without regret, agree in the decision of the Court of Appeal upon this first question.

Fourth Question. Was there error of law occasioning substantial wrong or miscarriage in that the Judge who presided commented upon the failure of the prisoner to testify to the effect that he had not actually committed the murders mentioned in the indictment?

I will answer this question in the negative, for, seeing that the prisoner gave his evidence voluntarily, the Judge might make comments upon what he said or omitted to say. I fully agree with what Anglin, J., said as to these comments. I am, with great respect, brought to believe that they were extravagant, but there was not thereby an error of law. Upon this point, therefore, I partake of the opinion of the majority of the Court of Appeal.

I would dismiss the appeal.

Appeal dismissed.

IMP.

P. C.

GRANT SMITH AND COMPANY AND McDONNELL, Ltd. v. SEATTLE CONSTRUCTION AND DRY-DOCK Co.

SEATTLE CONSTRUCTION AND DRY-DOCK Co. v. GRANT SMITH AND COMPANY AND McDONNELL, Ltd.

Judicial Committee of the Privy Council, Lords Buckmaster, Parmoor and Wrenbury. July 24, 1919.

INSURANCE (§ VI C—357)—DRY-DOCK—LEASE OF—COVENANT TO INSURE—INSURANCE NOT OBTAINED BECAUSE OF METHOD OF USER—DESTRUCTION—MEASURE OF COMPENSATION—FRAUD.

By the terms of the lease of a dry-dock the lessee agreed to use it in its construction work on caissons and other similar work; and also to have it insured for the benefit of the lessor in some company or companies satisfactory to the lessor, against both marine and fire risks and to deliver it in good condition at the end of the term.

The dry-dock was used in connection with the construction of a breakwater and ocean pier, and such use was largely one of experiment, and owing to the method of user no insurance could be obtained although its seaworthiness was demonstrated by its weathering a gale while being taken to the place where it was to be used. The dock, during the work, collapsed and became a total wreck.

It was admitted that the dock was lost past recovery, that the rent due under the lease had not been paid and that the insurance had not been effected. Their Lordships held that these breaches gave the lessors the right to retake possession of the dock and terminate the lease, and the institution of proceedings with a clause for rent, up to the writ and sub-

sequent damages was sufficient evidence of the lessor's intentions in this respect, and the lessor was justified in bringing the action although the term of the lease had not expired.

The substance however to which their Lordships looked was a claim for the value of something that had been lost in circumstances rendering the lessee contractually responsible for its value and this could be maintained.

The covenant to insure "against both marine and fire risks" was construed to mean against the "hazards of the sea" during the term of the lease and not merely against risk in its journeys by sea, but if it had been effected it could not have covered a loss inevitable in the circumstances due to the unfitness of the structure and entirely dissociated from any peril by wind or water.

[*E. D. Sassoon & Co.* v. *The Western Assce. Co.*, [1912] A.C. 561; *Wilson* v. *The "Xantho"* (1887), 12 App. Cas. 503, applied; *Seattle Construction Co.* v. *Grant Smith*, 44 D.L.R. 90, affirmed; see also 45 D.L.R. 476.]

APPEAL from the British Columbia Court of Appeal, in an action for damages for loss of a dry-dock, or for breach of a covenant to repair. Affirmed.

The judgment of the Board was delivered by

LORD BUCKMASTER:—Two appeals are brought in this case: the one by the appellants, seeking to reverse the judgment of the Court of Appeal of British Columbia awarding against them and in favour of the respondents the sum of $44,500, as to $10,000 for rent of a dry-dock, and as to $34,500 as damages for breach of contract; the other by the respondents asking to increase the amount awarded to the sum of $85,000, thereby restoring the judgment of the trial Judge, who decreed that sum in their favour.

The appellants in the principal appeal are contractors in a large way of business, and, in May of 1914, they were engaged in the construction of a breakwater in the harbour of Victoria, B.C., for the Dominion Government. In order to carry out this work it was determined to construct the foundation by concrete caissons, the dimensions of which, according to the appellants' statement, were to be 30 ft. high, 80 ft. long, and 40 ft. wide, the weight being 2,300 tons. To place these in position the appellants proposed to employ a floating dry-dock on which the caissons were to be built, two at a time, the dry-dock being then submerged sufficiently to allow the caissons to float off, when the dry-dock would be raised and the operation re-commenced.

The respondents, the Seattle Construction Co., possessed a dry-dock which appeared suitable for the operation. It was 325 ft. long with 100 ft. beam and 14 ft. depth. Upon each side and running its full length were walls 10 ft. wide and 30 ft. high, with

IMP.

P. C.

GRANT SMITH AND COMPANY AND McDONNELL LTD. v. SEATTLE CONSTRUCTION AND DRY-DOCK CO.

Lord Buckmaster

machinery for admitting and excluding the water and operating the dock. It was made of wood and had been in use since the day of its construction in 1893, having been purchased by the respondents in July, 1913. Negotiations for the hire of this dock took place in April, 1914, between Paterson, the president of the respondent company, and the appellants' manager, Bassett. In the end, these negotiations resulted in the grant of a lease from the respondents to the appellants of the dry-dock for a period of two years at a rental of $15,000 per annum, payable monthly in advance. The lease was dated May 20, 1914, and as the whole dispute depends upon the measure of the obligation thereby accepted by the appellants, it is desirable to set out in full the relevant clauses. These are clauses numbers 2, 3, 4, 6 and 7.

2. The lessee will take delivery of said dry-dock at the plant of said lessor in Seattle, Washington, and for the purpose of this lease, the seaworthiness of said dry-dock, and its fitness for the work contemplated by said lessee, are hereby admitted by the lessee.

3. The lessee agrees to have said dry-dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than $75,000, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease, or of any extensions thereof.

4. Said dry-dock shall be used by the lessee in its construction work on caissons and other similar work, at or near Victoria, B.C. Said dry-dock shall not be used by said lessee, nor shall such use be permitted by it, in dry docking for ship repair work or other similar work in competition to the business of the lessor or other companies engaged in similar business.

6. The lessee further covenants to re-deliver said dry-dock to said lessor at its plant in Seattle, Washington, upon the termination of this lease, in as good condition as the same was in at the time of its delivery to said lessee hereunder, except for natural wear and tear.

7. In the event said lessee makes default in the payment of said rent, or any part thereof, as the same becomes due and payable under the terms hereof, or makes default in any of the other covenants or obligations of the lessee hereunder, then said lessor shall have the right to retake possession of said dry-dock and terminate this lease, but without prejudice to its right to recover from said lessee rentals for the entire term, and all damages sustained by the lessor by such breach or breaches of the covenants of the lessee herein.

It was intended to use the dry-dock in the Esquimalt harbour, part of the harbour of Victoria, but not in the Royal Roads. It is stated by the appellants, and not disputed, that this harbour is a harbour of particularly quiet water, and very favourable for the work that was contemplated.

Delivery was given of the dock at Seattle, it was successfully

navigated from Seattle to the harbour; but the contemplated insurance was never effected, and without its protection the appellants proceeded to use the dock in connection with their operations. For this purpose they built a further structure in the form of a gantry on each side of the walls of the dock, and placed upon this structure a travelling crane. The first two of the caissons were then built one on each side of the dock; owing to their weight, there were signs that the timbers in the centre of the dock were giving way and rising under the pressure—a difficulty which the appellants remedied by placing in the centre some 819 tons of gravel. Further difficulties seem also to have occurred owing to the sagging of the transverse struts in the hull. But it is unnecessary to consider these matters in detail. On Jan. 31, 1915, the process of submerging took place under the charge of Kennedy—an expert operator who had worked on the dock before its transfer to the appellants.

This operation appears to have begun successfully, but ended in disaster. For some reason that it is not easy exactly to define, the dock listed as it went down. The uppermost wall, which was thus inclined at an angle, broke off. The whole success of the operation was destroyed and the dock lost beyond hope of recovery.

In these circumstances the respondents, on Sept. 2, 1915, took proceedings to recover against the appellants the rent due under the lease, and claiming $150,000 damages for loss of the dock, or, alternatively, $75,000 for breach of the covenant to insure. They based their claim largely upon the alleged negligent use by the appellants, and they did not in terms rely upon the claim for re-delivery of the dock at the end of the term—an omission no doubt explained by the fact that the term had not expired by effluxion of time when the proceedings began.

The main answer of the appellants was based upon a charge of fraud against Paterson. They said that he had falsely and fraudulently represented the capacity of the dock and the use to which it had formerly been put, and further that with a dishonest purpose he concealed from them material facts which, in the circumstances, it was his duty to disclose. This charge was expressly negatived by the Judge who heard the evidence, and stated his opinion in these words:—

IMP.

P. C.

GRANT SMITH AND COMPANY AND McDONNELL LTD. v. SEATTLE CONSTRUCTION AND DRY-DOCK CO.

Lord Buckmaster.

I have no hesitation in saying that Mr. Paterson's statement about the dock's capacity and the likelihood of her doing the proposed work, were the honest statement of belief actually entertained by him at the time, and in fact strongly adhered to at the trial.

This question was again investigated by the Court of Appeal, who supported the finding in this respect of Clement, J.

Galliher, J., said:—

I am unable to find fraud. The evidence to establish fraud should be clear and convincing, and I cannot say that this is so.

and with his judgment Martin, J., agreed. McPhillips, J., took the same view, and expressed his conclusion as follows:—

The appellants laid fraud in the case, and evidence was laid to support this; but it was not found by the trial Judge, and I entirely agree with the Judge.

These opinions were not merely an echo of the judgment of Clement, J. They depended upon the complete review of the evidence and a careful and new investigation of all the circumstances. It would be contrary to the established practice of this Board—a practice based upon principles designed to secure finality in litigation and to promote the ends of justice—to reinvestigate a question of this description, when a man has successfully defended his honour and character before his own Courts.

The counsel for the appellants fairly recognised this difficulty, but sought to avoid it by asking their Lordships' attention to further evidence which was not placed in argument before either of the Courts. The concession of the respondents that this evidence might be seen enabled the appellants to avail themselves of its use. Apart from such concession, their Lordships would have been compelled to reject its admission. The concession, though generous in form, was of little value to the appellants in substance. The further evidence upon which he relied consisted merely of an entry in a book to the effect that an attempt made on March 13, 1914, to dock a vessel known as the "A. G. Lindsay" had failed. It had been stated at the trial that this record had been lost, and the appellants asserted that they had only discovered it in the respondents' office after the hearing. Whatever weight that assertion might have possessed had it been urged as a reason for re-hearing, it cannot influence their Lordships' mind in determining the value of the evidence which they are called upon to examine. It amounts to nothing beyond the fact that, for a reason unknown, under circumstances unexplained,

an attempt on a particular day to use the dock for the "A.G. Lindsay" had failed. Such a statement is wholly insufficient to cause a review of the charge of fraud. With the failure of this charge all complaint as to the stability and utility of the dock for its contemplated purpose ends, since clause 2 not only negatives any suggestion of a warranty of fitness, but makes the appellants themselves admit that it was fit.

The rest of the appellants' case depends upon the argument that, as the term had not expired, the time for re-delivery of the dock had not arisen at the date of the writ, and it was therefore impossible to claim damages for its loss. If the claim of the respondents depends merely upon a covenant to deliver at the expiration of the lease by effluxion of time this contention ought, in their Lordships' opinion, to prevail.

The statement of claim was not and could not have been based upon any breach of a covenant so construed, nor could amendment remedy this defect. But their Lordships do not think that it need be so regarded. It is admitted that the dock is lost past recovery; it is also established that the appellants have not paid the rent due under the lease, nor have they effected the insurance provided by clause 3. These breaches gave the respondents the right to retake possession of the dock and terminate the lease; and though no actual attempt to take possession was made, the institution of these proceedings, with a claim for rent up to the writ and subsequent damages, is in itself sufficient evidence of the lessors' intention in this respect.

The appellants have not, indeed, suggested that the lease is still on foot; nor, even if it were possible to establish that position, could it have been done without payment of the rent and repair of the breach of the broken covenant to insure. So regarded, the covenant for re-delivery has arisen and might have been properly included in the statement of claim though the form leaves much to be desired in this respect. The substance to which their Lordships look is, however, a claim for the value of something that has been lost in circumstances rendering the appellants contractually responsible for its value, and this can be maintained. Though McPhillips, J.'s judgment in the Court of Appeal is not, as reported, quite clear upon this matter, it appears that this was its true effect. He says:—

IMP.

P. C.

GRANT SMITH AND COMPANY AND MCDONNELL LTD. v. SEATTLE CONSTRUCTION AND DRY-DOCK CO.

Lord Buckmaster.

As to the rent, it cannot be allowed for a longer period than up to the time of the commencement of action, the respondent then electing to have damages assessed as of that date (the action was brought before the expiry of the demise). and with this conclusion their Lordships agree.

The judgment of Galliher, J., with which the Chief Justice agrees, is confined to the question of value and to the construction of the covenant to insure, and this can be better dealt with in considering the merits of the cross-appeal.

This cross-appeal challenges the judgment of the Appeal Court on two grounds: the one that the value of the dock, placed at $35,400, is insufficient; and the other that the covenant to insure was broken, and that its breach resulted in the loss of the total $75,000.

Upon the first point all the Judges in the Court of Appeal are in agreement as to the value. Their judgments depend upon the fact that Paterson, on behalf of the appellants, on May 1, 1914, made for the purpose of customs an affidavit as to the value, stating that to the best of his knowledge and belief the value of the floating dry-dock was $34,500. Attempts were made to explain that this affidavit was given for the purpose of customs, so that the value would consequently be only modestly estimated. Such arguments naturally found no favour before the Court of Appeal, and cannot prevail before their Lordships.

There remains only the question raised by the respondents as to the breach of the covenant to insure. That it is broken is common ground. The respondents say, first, that it was impossible of performance, and secondly, that had it been effected, it would not have covered the loss.

With regard to the impossibility of its performance, few words need be said. There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate, and indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule. But it is unnecessary to examine this matter, since no question of impossibility can arise in the present case. The appellants did indeed attempt to obtain a policy of insurance, and they failed to do so, largely owing to the fact that the additional structure which they added to the dock

caused the insurance company to decline; but there is nothing to shew that higher rates would not have effected the insurance, and the covenant contains no limitation to suggest that insurance is only to be effected at the current premium.

It is then urged that the policy was only intended to cover the risks by voyage from Seattle to Victoria and any other journeys by sea which, in the course of their use of the dock, the appellants thought fit to make. Their Lordships do not accept this view of the covenant. It must be read in connection with the subject-matter of the lease and the terms in which it is framed. The subject-matter of the lease was undoubtedly a dock, which it was contemplated by both parties was to be used in the Victoria harbour, and though it might have been possible that it could have been taken elsewhere, yet the terms of the covenant, which provide that the insurance shall be kept on foot throughout the whole period of the lease, and not merely effected from voyage to voyage, in their Lordships' opinion negative the view that it was only against risk in its journeyings by sea that the insurance was to be taken out. There is no statement in the covenant as to the form of policy that is to be used; it must, therefore, be assumed to be an ordinary policy applicable to such a structure both in course of transit and in course of use. It was to insure against "marine risk," which cannot be better described than as against "the hazards of the sea." If while in dock, either while the caissons were being built or while the dock was being submerged, owing to any marine risk the dock had been lost, this loss the policy would have covered; but in truth no such risk or peril caused its destruction. The harbour was peculiarly quiet, and it is plain that it was no conditions of wind or wave that caused the dock to capsize. It was destroyed because of its own inherent unfitness for the use to which it was put—an unfitness which the appellants have prevented themselves from raising by reason of their own covenant.

It is not desirable to attempt to define too exactly a "marine risk" or a "peril of the sea," but it can at least be said that it is some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have occurred. To use the words of Lord Herschell in *Wilson* v. *The Owners of the Cargo per the "Xantho"* (1887), 12 App. Cas. 503, at p. 509:—

IMP.

P. C.

GRANT SMITH AND COMPANY AND McDONNELL LTD. v. SEATTLE CONSTRUCTION AND DRY-DOCK CO.

Lord Buckmaster.

I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. . . . There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure.

The words there occurred in a bill of lading, and the claim arose with regard to the loss of goods covered by the document. But Lord Herschell points out (p. 510) that the phrase has no different meaning whether it occurs in the insurance of the ship or of the goods. In [1912] A.C. 561, in the case of *E. D. Sassoon and Co.* v. *The Western Assurance Co.*, a store of opium was lost in a hulk moored in a river by the percolation of water through a leak caused by the rotten condition of the boat. The decay was so covered by copper sheathing that, although the vessel was properly inspected, it was not and it could not be detected. It was held by this Board that the loss was not a loss within the phrase "perils of the sea and all other perils," and Lord Mersey, in delivering the opinion of the Board, states at p. 563:—

There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea.

Their Lordships can see no difference between the circumstances of this case and the principle there enunciated. It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be impossible. An insurance against "the perils of the sea or other perils" is not a guarantee that a ship will float, and in the same way in the present case had such a policy been effected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely dissociated from any peril by wind or water. The measure of the damage for breach of the covenant, therefore, is purely nominal and the cross-appeal must fail.

As, therefore, both the appellants and the respondents have failed in their independent appeals, their Lordships will humbly advise His Majesty that both should be dismissed, and that no costs should be granted in either case.

Appeals dismissed.

ALTA.

S. C.

Re THE EDMONTON HIDE AND FUR Co.

Alberta Supreme Court, Walsh, J. July 25, 1919.

STATUTES (§ II B—111)—PENAL STATUTE—INTERPRETATION—STRICT READING—GAME ACT, ALTA. (1907, 7 EDW. VII. c. 14.)

The power given to a Justice of the Peace to declare a forfeiture under s. 34 of the Game Act, 1907, 7 Edw. VII. Alta. c. 14) and amendments thereto is, by a strict reading of the Act, limited to "game," and under the interpretation given to that word by sub-sec. 1 of s. 2 of the Act "beaver" are not game. The Court will not read additional words into a statute for the purpose of extending a penal clause.

MOTION to quash an order of a Justice of the Peace purporting to act under the Game Act, Alta., and adjudging certain beaver pelts to be forfeited to His Majesty. Order quashed.

Statement.

H. R. Milner, for the motion.

J. M. Macdonald, K.C., for the Attorney-General.

WALSH, J.:—A Justice of the Peace purporting to act under s. 34, c. 14 of the Game Act, 7 Edw. VII., 1907 (Alta.) has adjudged to be forfeited to His Majesty for sale 28 beaver pelts which he found to be in the unlawful possession of the above named company. The company moves to quash this order. Only one of the grounds upon which it is attacked has as yet been argued, and that is that the provisions of s. 34 under which the Justice assumed to act do not apply to the pelt of a fur-bearing animal.

The section reads as follows:

Any guardian who has reasonable grounds to believe that an offence has been committed under this Act may seize any game, fur-bearing animal or pelt thereof in respect of which he believes such offence has been committed, and take the same before a Justice of the Peace, who shall notify the person in whose custody the game was found to appear before him at a certain time and establish the rightfulness of his possession of such game, and in the event of his failure to do so, the justice may declare such game forfeited, and it shall thereupon, except as hereinafter provided, be the property of such guardian:

Provided always that if in the opinion of the Justice such game is unperishable and exceeds in value the sum of $25, it shall be forfeited to His Majesty to be sold or otherwise disposed of as the Minister may direct; and the proceeds of any such sale shall be forthwith transmitted to the Provincial Treasurer to form part of the general revenue fund.

The section, as originally framed, referred only to game. By amendments made in the second session of 1910 and in 1915 the words "fur-bearing animal or pelt thereof" were inserted where they now appear, after the word "game." These words, however, were not repeated after the word "game" in any one of the

ALTA.

S. C.

RE THE EDMONTON HIDE AND FUR CO.

Walsh, J.

other four places in which it is used throughout the section. As a result the power thereby given to the Justice to declare a forfeiture is limited by its strict reading to game, and under the interpretation given to that word by subs. 1 of s. 2 of the Act beaver are not game. They are fur-bearing animals under subs. 4 of s. 2. Thus reading the section there was unquestionably no power in the Justice to order this forfeiture and sale.

It is said, however, that as by the amendment thus made the intention of the Legislature to extend all of the provisions of s. 34 to fur-bearing animals and their pelts is made so clear I should not nullify it by reading the section as it is printed, but that I should read into it after the word "game" wherever it subsequently appears or as often as may be necessary the words "fur-bearing animal or pelt thereof," and thus give effect to the manifest design that the Legislature had in view in so amending it. There is an abundance of precedent for the proposition that when the purpose of an enactment is plain a construction may be put upon it which, to quote Maxwell, "modifies the meaning of the words and even the structure of the sentence." C. IX. of the 5th ed. of Maxwell gives many instances in which words have been read into or out of statutes or given other than their ordinary meaning to make sense of the statute or to give effect to the obvious intention of Parliament in enacting it. In addition to the cases there cited reference may be had to *Rex* v. *Vasey* (1905) 2 K.B. 748, and *Rex* v. *Ettridge* (1909), 2 K.B. 24. This, however, is a penal statute and a different rule prevails in dealing with such matters in such a statute. In *Broadhead* v. *Holdsworth* (1877), 2 Ex. Div. 321, the Court said, at p. 323: "It seems to me that the legislation on this point is imperfect, and that this is a *casus omissus*, which we cannot supply in an enactment creating an offence." In *Coe.* v. *Lawrance* (1853), 1 El. & Bl 516, 118 E.R. 529, 22 L.J.Q.B. 140, Lord Campbell, C.J., at 141, said: "I cannot doubt what the intention of the Legislature was in passing this clause, but that intention has not been carried into effect by the language used. We must say *quod voluit non dixit*. To subject a party to a penalty there must be words sufficient to meet his case." Coleridge, J., said at p. 142: "The only mode of reading the clause so as to support the plaintiff's view is

to insert another nominative case into the sentence. I never knew of this being done for the purpose of bringing a party within a penal clause." And Crompton, J., said: "I quite agree as to the intention of the Legislature, but it would never do to insert words for the purpose of extending a penal clause." In *Thomas* v. *Stephenson* (1853), 2 El. & Bl. 108, 118 E.R. 709, p. 258, it was held that an Act which authorized inspectors to examine "weights, measures and scales," and if it appeared, upon examination, that "the said weights or measures" were light or unjust to seize them did not authorize a seizure of scales. In *Underhill* v. *Longridge* (1859), 29 L.J.M.C. 65, Cockburn, C.J., met the suggestion that he should read into a penal statute some words which were necessary to supply an obvious omission with the terse remark: "We cannot take upon ourselves the office of the Legislature. . . We cannot do so; it is a matter for the Legislature."

I must, for the same reason, decline the invitation extended to me to amend this section. The amendment has been twice before the Legislature, when it was first introduced in 1910 and when it was amended in 1915. One would have thought that if a mistake was really made in the first instance it would have been discovered and remedied on the second occasion, and this lends some strength to the view that it is really not a mistake at all but that the section as it stands represents the deliberate intention of the Legislature. My own view is that the failure to repeat these amending words throughout the section was due to an oversight on the part of the draftsman, but I may be mistaken in this, for the section as it reads is not futile, as it authorizes a guardian to seize and take before a Justice any fur-bearing animal and any pelt thereof with respect to which he has reasonable grounds for suspecting that an offence has been committed, and that may be the extent of the power the Legislature intended to confer. However that may be, I have a decided reluctance to usurp the functions of the Legislature especially in dealing with a penal statute, and so I decline to give this section the extended application of it which the Crown asks me to.

The order will be quashed, but without costs, and the Justice will have the usual protection. *Motion quashed.*

CAN.

Ex. C.

The TUG "JESSIE MAC" v. The TUG "SEA LION."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J., in Adm. March 8, 1919.

COLLISION (§ I—3)—ACT OF GOD—RESPONSIBILITY—BURDEN OF PROOF—INEVITABLE ACCIDENT—DEFINITION OF—NEGLIGENCE—COSTS—RULE 132, ADMIRALTY PRACTICE.

Held, 1. That where the action of tide and currents is so contrary to experience, that it could not be reasonably anticipated or foreseen it is to be regarded as an "Act of God," and collision due to such is an "inevitable accident."

2. That "inevitable accident" is that which the party charged with damage could not possibly prevent by the exercise of all reasonable precautions which ordinary skill and prudence could suggest.

3. That where "inevitable accident" is pleaded the onus is primarily on the plaintiff to shew that blame does attach to the vessel proceeded against, and a *primâ facie* case in this behalf must be established.

4. That, on an action being dismissed on the ground that the damage was due to inevitable accident, costs will follow the general rule, unless special circumstances exist requiring a departure therefrom.

The "Marpesia" (1872), L.R. 4 P.C. 212, referred to.

Statement.

This was an action for damage done to the tug "Jessie Mac" alleged to be owing to defendant tug having given her a foul berth in consequence of which she was forced upon the rock and suffered damage.

Hume B. Robinson, for the plaintiffs.

E. P. Davis, K.C., and *James H. Lawson*, for defendants.

Martin, L.J.A.

MARTIN, L.J.A.:—It appears, briefly, that owing to a strong westerly wind with resulting heavy swells, a number of tugs about ten in all, with their tows of booms of logs were forced to take shelter in Trail Bay under the lee of Trail Island off Sechelt, at various times between March 30 and April 1, 1918, inclusive, which small bay, it is common ground, is the customary and proper place in that locality to seek refuge in, though it is only of a limited area of safety and unsafe in easterly winds with the exception, probably, of the inside shore position between the southwest point of the island and a well-known rock, which was taken by the plaintiff tug upon its arriving first in the bay, which position is sheltered, to a considerable extent at least, from all winds.

After it had made fast its boom of 9 swifters to the shore by three wire ropes, it took up its position outside its boom, attached thereto by two lines, and later three other small tugs of a similar size, with booms, arrived at various times and took up outside positions in like manner, viz., the "Chieftain," the

"Stormer" and the "Vulcan" which last had a double boom and lay outside of it like the others.

This was the position when the "Sea Lion" a much larger tug, came in with a large triple boom on the early morning of March 31, and anchored at a spot about 1,000 feet from the rock which it is clear is the best and safest position for herself for a large tug to take, and up till the afternoon of the next day she lay with her boom out to sea towards the east and away from the "Jessie Mac" under the westerly wind, and I have no doubt that it was not considered an unsafe position by the masters of the other tugs, otherwise they would have warned the master of the "Sea Lion" as the master and pilot of the "British Trident" did in the "*Woburn Abbey*" case (1869), 38 L.J. Adm. 28, though this failure is, of course, not at all conclusive. But that afternoon, with the tide flooding and the wind dying down, the "Sea Lion's" boom swung round to the southwest till the end of it touched the shore inside the point which protected the "Jessie Mac" and lay there in a position of no danger on a rising tide, with the expectation that at the change of the tide it would float off with the ebb in the usual way. But, *contrary to expectation, and all experience in the case of a westerly wind*, the tide continued to set in towards the shore after the ebb, and at 9.30 the "Sea Lion's" anchor began to drag, which put her in a position of danger to herself and her boom, which, if it were not got off the shore, would be broken up by a change of wind to the east, and, therefore, she raised her anchor and, heading to the north of east, started to tow the boom off the shore, using the shore end of the boom (which being a triple one, was very stiff and would bend inappreciably) as a fulcrum in so doing.

This manoeuvre was, I am satisfied on the evidence, the most proper one to take in the circumstances, and if nothing had happened it would, it is clear, have been successfully carried out without any damage to the adjacent small tugs fastened to the shore. But in the course of it the inmost triple boom, which was made up of 2 sections of 9 and 6 swifters, broke its fastenings, leaving the inner section of 6 ashore, while the outer swung round and fouled the head of the "Chieftain's" boom, which in turn caused two of the 3 wire shore ropes of the "Jessie Mac"

CAN.

EX. C.

THE TUG "JESSIE MAC" v. THE TUG "SEA LION."

Martin, L.J.A.

boom to break, whereupon it swung out and round and forced the "Jessie Mac" upon said rock and damaged her as aforesaid. The breaking of the boom was later found to have been caused by a weak chain in one corner and a weak ring in another; the boom, or its chain or gear, were not owned by the "Sea Lion" nor had she made up the boom, but was simply towing it.

The defences set up are that the anchorage taken up by the "Sea Lion" was not a foul one; that there was no negligence because the extraordinary inset of the ebb tide in a westerly wind could not have been foreseen, and that the breaking of the boom gear was an inevitable accident.

As to the first and second, I am of opinion that, having regard to the circumstances, the anchorage was not a foul one and the "Sea Lion" was entitled to take it. Though her boom could, in a straight line, reach those fastened to the shore, yet it was prevented from so doing in the inevitable course of swinging round with the tide, by the point, in ordinary circumstances, and I am unable to find that her master failed to take any reasonable precaution which ordinary skill and prudence could suggest, founded on his intimate knowledge of the locality. He was entitled to rely upon the ordinary action of the tide and current. *The "Rhondda"* (1883), 8 App. Cas. 549, and as their Lordships of the Privy Council said in that case he "had no reason to anticipate" that the ordinary risk had been increased. This is not like the well-known case of *The "City of Peking"* (1888), 14 App. Cas. 40, wherein their Lordships held that the master should have kept in mind the "undoubted fact" known to mariners and to him, "that in certain states of the weather" the tide at Kowloon is "deflected out of its ordinary course," and "a cautious mariner, is, therefore, bound always to keep in view the possibility of these currents being met with." In the case at Bar, on the contrary, such a current as caused the boom to stay in-shore instead of floating off-shore, was unknown to anyone. See also *Lack* v. *Seward* (1829), 4 C. & P. 106.

On the question of foul anchorage I have this observation to make, that in certain circumstances where the question of safety to a ship, including her tow, is involved she is justified in taking

that degree of risk which the circumstances may justify, *e.g.*, the rigour of the elements may impose a common risk upon all who seek refuge in a common harbor—and constitute "a cause which (a ship) could not resist"; *The "Innisfail"* (1876), 3 Asp. M.C. 337; *The "William Lindsay"* (1873), L.R. 5 P.C. 338; *The "Maggie Armstrong"* v. *The "Blue Bell"* (1866), 14 L.T. 340, and see *The "Annot Lyle"* (1886), 6 Asp. M.C. 50, on the point of only one course open for safety. And in weighing these circumstances there must be considered the facts that tugs with tows of booms are of an unwieldy nature and the booms are easily broken up by rough water and they cannot face a state of weather which would present no damage to ordinary vessels; and in a haven require a considerable amount of space for a clear anchorage which may not be available in time of danger when many vessels are forced to resort to it for as much shelter as may be possible, in which circumstances it comes down to a question of good seamanship, *Bailey* v. *Cates* (1904), 11 B.C.R. 62, 35 Can. S.C.R. 293. As to the handling of a tug with scow in a channel, see *The "Charmer"* v. *The "Bermuda"* (1910), 15 B.C.R. 506; *The King* v. *The "Despatch"* (1916), 28 D.L.R. 42, 16 Can. Ex. 319, 22 B.C.R. 496, and of *Paterson Timber Co.* v. *The "British Columbia"* (1913), 11 D.L.R. 92, 16 Can. Ex. 305, 18 B.C.R. 86.

If, therefore, the anchorage was not, and I so hold, a foul one, then the case resolves itself into one of inevitable accident, and the onus is primarily upon the plaintiff when the defence is set up—*The "Marpesia,"* L.R. 4 P.C. 212; and it is beyond question here that the damage was primarily caused by inevitable accident, which means, as their Lordships of the Privy Council therein say at p. 220, that:

"We have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

This definition was adopted by the Court of Appeal in *The "Merchant Prince,"* [1892] P. 179, and *The "Schwan"* v. *"The Albano,"* [1892] P. 419.

CAN.

EX. C.

THE TUG "JESSIE MAC" v. THE TUG "SEA LION."

Martin, L.J.A.

Now it was not even alleged that the breaking of the boom fastenings could be attributed to any want of care on the part of the defendant, and more than was the case in the breaking of the mooring band or the jamming of the windlass in the "*William Lindsay*," *supra*, and therefore it follows that the action cannot be sustained and must be dismissed.

It is not, therefore, strictly necessary to consider the counter charges of negligence brought against the plaintiff for tieing up four booms together with their tugs inside except the "Vulcan" but it obviously is an act which might require justification in certain circumstances, though here the damage was done by fouling the second boom, the "Chieftain's."

But I think it proper to remark upon the strange fact that there is no evidence shewing exactly how the "Jessie Mac" got aground; no person off her was called to explain it; her master did not know as he was out working on the end of the fouled boom, trying to free it, and the mate was not accounted for; her master did not know where the mate was, according to his statement to the master of the "Sea Lion" and so far as the evidence shews, no watch was kept on her and no efforts made to take the necessary precautions to protect her after the danger from the fouled boom became apparent. This is a very unsatisfactory state of affairs and might seriously prejudice the plaintiff's right to recover in any event. See *The "Kepler"* (1875), 2 P.D. 40; *The "Scotia"* (1890), 6 Asp. M.C. 541; *The "Hornet,"* [1892] P. 361.

With respect to the costs, I shall allow them to be spoken to in the light of the practice respecting the same in cases of inevitable accident as set out in the "*Marpesia*," *supra*, wherein it is laid down at p. 221:

"Their Lordships, therefore, conceive that the general rule of the Court of Admiralty is in these cases to make no order as to costs, and that in order to justify an exception to that rule it must be shewn that the action was brought unreasonably and without sufficient *primâ facie* grounds."

See also *The "Innisfail,"* 3 Asp. M.C. 337. How far this practice may be affected, if at all, by the later decisions in England under the Judicature Act, as noticed in Williams and Bruce's Adm. Prac. (1902), 95, I shall then consider.

The question of costs was subsequently disposed of after argument in a judgment handed down by Martin, L.J.A., which is as follows:—

May 8, 1919. Martin, L.J.A., delivered further judgment:—

In 1889 it was decided by the Court of Appeal in "*The Monkseaton*" (1889), 14 P.D. 51, that, as under the Judicature Act the Court of Admiralty had become a division of the High Court of Justice, there should be a uniform practice in all the divisions of the Court on the subject of costs, and, therefore, the existing general rule, that in the absence of special circumstances costs follow the event, should be extended to cover cases of inevitable accident, where no special circumstances required a departure from said rule.

It is submitted by defendant's counsel, that such being the case the rule was introduced into this Court in common with other Colonial Courts of Admiralty by s. 2 of the Colonial Courts of Admiralty Act, 1890 Imp., passed on July 25, 1890, wherein it is enacted that: "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions o fthis Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England and shall have the same regard as that Court to international law and the comity of nations."

Such submission would therefore appear to be correct and furthermore there is the general rule No. 132 of this Court promulgated and approved under s. 25 of the Canada Admiralty Act, c. 29 of 54-5 Vict., brought into force on Oct. 2, 1891, as follows: "In general costs shall follow the result; but the Judge may in any case make such order as to the costs as to him shall seem fit."

In my opinion, therefore, the rule as to costs is the same in this Court as it is in the Admiralty division of the High Court in England, and so that costs here should follow the general rule because there are no special circumstances requiring a departure therefrom as I held, *e.g.*, there were in *McArthur* v. *The "Johnson"* (1913), 9 D.L.R. 568, 14 Can. Ex. 321, and as was held in England in *The "Batavier"* (1889), 15 P.D. 37.

Action dismissed with costs.

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S. C.

WHIMBEY v. WHIMBEY.

Ontario Supreme Court, Appellate Division, Magee and Hodgins, JJ.A., Middleton, J., and Ferguson, J.A. March 14, 1919.

ALIMONY (§ V—20)—ACTION FOR—ADULTERY UNSUCCESSFULLY PLEADED AS DEFENCE—NOT A GROUND FOR GRANTING.

Pleading adultery of the wife as an answer to an action for alimony, and attempting unsuccessfully to support this plea by evidence does not in itself constitute a ground for awarding alimony.

[*Russell* v. *Russell*, [1897] A.C. 395, followed; *Lovell* v. *Lovell* (1906), 13 O.L.R. 569, distinguished.]

Statement.

APPEAL by the plaintiff and cross-appeal by the defendant from the judgment of MEREDITH, C.J.C.P., at the second trial of an action for alimony, in favour of the plaintiff for the recovery of alimony at the rate of $15 a month from the date of the trial.

At the first trial, RIDDELL, J., gave judgment for the plaintiff. Upon the defendant's appeal, a new trial was ordered: *Whimbey* v. *Whimbey* (1918), 14 O.W.N. 128.

The plaintiff appealed from the judgment of MEREDITH, C.J.C.P., upon the ground that the allowance was inadequate, and that alimony should run from the date of the issue of the writ of summons; and the defendant appealed upon the ground that, upon the facts disclosed, the plaintiff was not entitled to alimony at all.

T. H. Lennox, K.C., and *C. W. Plaxton*, for the plaintiff.

Gideon Grant, for the defendant.

Middleton, J.

MIDDLETON, J.:—Appeal and cross-appeal from the judgment of the Chief Justice of the Common Pleas, pronounced at the trial on the 12th November, 1918. The action is for alimony.

By the judgment the plaintiff is awarded alimony at the rate of $15 per month from the date of the trial. The plaintiff appeals upon the ground that the allowance is inadequate, and that the alimony should be directed to run from the date of the writ. The defendant's appeal is upon the ground that, upon the facts disclosed, the plaintiff is not entitled to succeed at all.

The defendant by his defence charged the plaintiff with adultery. The trial Judge has found that this has not been proved. At the same time he finds that the making of this unfounded charge against the plaintiff in the action is the sole ground entitling her to alimony:—

"If the defendant had not taken the position which he has taken in this action, I should have considered the case one in

which separate maintenance would not be allowed to the plaintiff by this Court. I should have deemed it a case in which it was the duty of the woman to return and live with her husband, he undertaking, and living up to that undertaking, to treat her in all things as a husband should treat his wife. But for what has taken place in this action, I could see no reason why these parties might not live out the little span of their lives that is left in comfort and very much better than either can separate and apart from the other. That is assuming the woman to be a decent woman. But I cannot think that any Court should require a woman to return and live with a husband who has in open Court and in the most public manner possible to him charged her not only with infidelity to him but with being nothing better than a strumpet. If what he says is true, she has no claim against him; and, if it is not true, he has no right to compel her to live with him again, although he may be willing to take her back and to live with a woman that he has spoken of under oath in the manner in which he has spoken of the plaintiff."

The contentions advanced on the part of the defendant are two: first, that upon the evidence adultery was abundantly proved; second, that the making of an unsuccessful attempt to establish adultery, as an answer to a claim for alimony, is not in itself a ground for granting alimony; at any rate unless it is shewn that the plaintiff's health is thereby jeopardised.

Dealing first with this second contention—*Russell* v. *Russell*, [1897] A.C. 395, constitutes a landmark. It was there held that a false charge of having committed an unnatural criminal offence, made and persisted in without belief in its truth and published to the world, was not in itself sufficient cruelty to justify a decree for judicial separation.

The legal situation is admirably summarised by the learned Judge whose opinion is now under review, in the case of *Lovell* v. *Lovell*, (1906), 13 O.L.R. 569, at p. 579: "The plaintiff has no good ground of action unless her husband has been guilty of what the law considers 'cruelty' towards her. And, according to the source from which all inspiration upon the question of cruelty is almost invariably derived, '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;' and, 'in the older cases of

ONT.
S. C.
WHIMBEY
v.
WHIMBEY.
Middleton, J.

this sort which I have had an opportunity of looking into I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation; this doctrine has been repeatedly applied by the Court in the cases that have been cited; the Court has never been driven off this ground, and I have heard no one case cited in which the Court has granted a divorce without proof of reasonable apprehension of bodily hurt.' Attempts to drive the Court off that ground have been made, the last in the *Russell* case, which has authoratively and firmly settled the law that the question, what is cruelty, is not answered by an answer to the question, has the conduct complained of been such as to make continued cohabitation impossible, but is answered by an answer to the question, has the conduct complained of been such as to cause danger, or reasonable apprehension of danger, to life, limb, or health; and which therefore includes impossibility of cohabitation. Can it reasonably be said that there was any real danger to life or health in this case?"

Although this is found in a dissenting judgment, the statement of the law does not differ from that of the majority of the Court. The majority adopt the view that relief will be granted to a wife in the absence of personal violence where the conduct is of such a kind as to undermine health. "The present case . . . resolves itself into 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 endanger her reason, and that there is a reasonable apprehension that the same state of things would continue:" *per* Moss, C.J.O., at p. 571.

In the view of the majority, this question in that case was resolved in the affirmative. In the view of the minority, the wife's neurotic condition was not shewn to be real or permanent or a serious menace to her health and happiness.

This case has gone farther in favour of the wife than any other case since *Russell* v. *Russell*, but it falls far short of establishing the proposition that pleading adultery as an answer to an action for alimony, and attempting unsuccessfully to support this plea by evidence, in itself constitutes a ground for alimony.

In the present case no endeavour whatever was made to shew

that the defendant's conduct in this respect in any way affected the plaintiff's health. There was an unsuccessful endeavour to establish by the evidence of the woman herself, uncorroborated by any medical testimony, that other conduct had interfered with her well-being.

The plaintiff was 58 years old when she married the defendant in 1916. He was then 66. The defendant advertised for a wife, and the plaintiff applied for the position.

Although she knew that the defendant was suspicious of one Alderson, a former friend of hers, she had Alderson stay all night with her alone in the house. She falsely stated and swore to the statement that her son by her former marriage was with her in the house on this occasion. A letter is produced written by her some time previously to another man devoid of delicacy and most suggestive in its terms. This letter she at first denied and then admitted and explained.

Manifestly the plaintiff is not a woman whose health is at all likely to be affected by the proceedings in this action. She has not said so, nor do I understand the learned trial Judge so to find.

In this view of the case the action fails and should be dismissed. It is, for this reason, unnecessary to deal with the other questions raised, and I do not desire to be taken as in any way concurring with the finding of fact that the adultery has not been adequately proved by the admissions of the plaintiff and her witness Alderson, quite apart from the defendant's testimony.

MAGEE, J.A.:—I agree. Magee, J.A.

HODGINS, J.A.:—I agree. I express no opinion as to whether adultery was proved. Hodgins, J.A.

FERGUSON, J.A.:—It is, I think, well established by authority that a false charge of having committed adultery made by a husband against a wife is not without more sufficient to support a claim that the husband has been guilty of *legal* cruelty: *Lovell* v. *Lovell*, 13 O.L.R. 569; *Russell* v. *Russell*, [1897] A.C. 395. Had it been shewn that such a charge had had the effect of impairing the health of the plaintiff, or was likely to endanger her health, we might, on the authority of *Jeapes* v. *Jeapes* (1903), 89 L.T.R. 74, find *legal* cruelty, but the circumstances of this case do not permit of any such finding—the plaintiff has failed to Ferguson, J.A.

ONT.
S. C.
WHIMBEY
v.
WHIMBEY.
Ferguson, J.A.

make out the other charges, and it is not necessary to deal with the truth or falsity of the charge of adultery. I would allow the appeal.

Defendant's appeal allowed.

N. B.
S. C.

Ex parte JOHN FOGAN.

New Brunswick Supreme Court, Hazen, C.J. May 9, 1919.

COURTS MARTIAL (§I—1)—DISTRICT COURTS MARTIAL—INTERFERENCE OF CIVIL COURT—CIVIL RIGHTS AFFECTED.

A civil Court will interfere only where the rights affected by the judgment of a district court martial of a person in military service are civil rights and the Court is acting without jurisdiction.

Statement.

APPLICATION for a writ of *habeas corpus* and a writ of *certiorari* in aid to bring up the proceedings of a district court martial and the conviction of the applicant with a view to having the same set aside. Refused.

D. Mullin, K.C., in support of application.

Fred R. Taylor, K.C., *contra*.

His Honor the Chief Justice, having taken time to consider, delivered judgment as follows:

Hazen, C.J.

HAZEN, C.J.:—The applicant is a resident of New Brunswick who enlisted in the Canadian Expeditionary Forces and served overseas, and was at the time of his trial by court martial, stationed at Fredericton. He was an acting lance-corporal and a member of the military police force. His conduct sheet shews that when overseas he had been invalided to England, wounded in September, 1918; that he had been twice found guilty of drunkenness, the last occasion being on August 1, 1918, when he was given 14 days' imprisonment. The offence does not seem, however, to have been regarded as a very serious one by his commanding officer, as subsequent to this date he was made a lance-corporal and placed on the military police force. On March 10 he was tried at Fredericton before a district court martial, being charged, as stated in the charge sheet, "with drunkenness" in that he on Feb. 26, 1919, having been duly warned by Part 1, Daily Orders for Patrol Duty, was drunk.

In my opinion there was a reasonable doubt as to his having been drunk at the time charged. He swore himself that he had

had nothing to drink during the day with the exception of some 2% beer, and Coles Kitchen, a respectable citizen of Fredericton, in whose livery stable he was 20 minutes before he was arrested, stated that there was nothing in his appearance at that time that would indicate a state of intoxication. The accused had gone to his livery stable and hired a horse, and Kitchen distinctly stated that he would not have hired him a horse at that time had he been drunk. When arrested 20 minutes afterwards he was in a private house. He was not in any way disturbing the peace, but the house was described by one of the witnesses as one of ill repute. Had I been trying the case, I am disposed to think I would have given the prisoner the benefit of the doubt, and acquitted him of the charge of drunkenness, more especially in view of the fact that he had enlisted, gone overseas, and fought and been wounded in the defence of his country and was therefore entitled to special consideration. However, the military tribunal which tried him came to a different conclusion, and I do not feel that I have any right to interfere with the decision on that ground, for if the court martial had jurisdiction its action cannot be reversed by reason of error. For the offence charged against him and of which he was found guilty, Fogan was sentenced to undergo 9 months' imprisonment with 9 months' hard labor. It is said in justification of this sentence that the fact that he was a military policeman and acting as lance-corporal, justified its severity. I cannot, however, regard the sentence as other than an unduly severe one and one entirely out of keeping with the offence which he had committed, and I do not think there is a civil Court in Canada that would have awarded so severe a sentence for a similar offence. Had he been before a civil Court he would probably have been given a fine of a few dollars with the option of a gaol sentence of about 30 days. Viewing it from every possible standpoint I cannot help concluding that the sentence was unjustifiably severe and one that should never have been imposed. However, having regard to the law on this subject, I would not feel justified in ordering the release of the prisoner on this ground, although I think that representations should be made to those who are in authority, with a view of having the sentence commuted, more especially

N. B.

S. C.

EX PARTE JOHN FOGAN.

Hazen, C.J.

in view of the fact that he has already been imprisoned for a period of nearly two months, and that should be quite sufficient punishment for the offence of which he has been convicted. These grounds were both urged very strongly upon me by the counsel for the applicant, but, as I said, I do not feel justified, even though I entertain the views I do on the subject, in ordering the prisoner's discharge for those reasons.

Before dealing with what I regard as the substantial point in connection with the case, I might refer to the principles upon which a civil Court should act on appeals from the decision of military tribunals. The members of court martial are undoubtedly amenable to the superior civil Courts for injury caused to any person by acts done without jurisdiction or in excess of jurisdiction, although there is not in the ordinary sense of the word an appeal from an ordinary court martial or from the order of an officer, if the injury affects only the military position of the person affected. The dismissal of an officer from the service, the deprivation of rank or the deprivation of military pay will not be remedied by a Court of law. If a court martial convicts the accused of an offence which is not an offence under the Army Act (see R.S.C. 1906, c. 41, s. 74, 75), or of an offence with which he was not charged, it acts without jurisdiction, and where the offence is not properly charged the accused may be held not to have been charged with an offence at all. It has been held, however, that the proceedings of military courts will not be scrutinized with the same strictness as those of inferior civil Courts. The result of acting without jurisdiction is that the Act is void, and the conviction and proceedings may very properly be set aside by a superior civil Court. It was held in *Re Mansergh* (1861), 1 B. & S. 400, 121 E.R. 764, that a writ of *certiorari* will issue only when the rights affected by the judgment of the Court are civil rights and the Court is acting without jurisdiction, and will not issue when the rights affected are dependent upon military status and military regulations. In giving judgment in that case, Cockburn, C.J., said that he agreed that when the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the military tribunal had either acted without

jurisdiction or had exceeded its jurisdiction, the Court ought to interfere to protect those civil rights, *e.g.*, where the rights of life, liberty or property are involved. In Fogan's case the right of liberty was undoubtedly involved.

The substantial question is as to the jurisdiction of the court martial. As I stated at the outset, the charge sheet stated that the accused John Fogan, a soldier of No. 7 Detachment Canadian Military Police Force, a unit of the C.E.F., part of the active militia of Canada on active service, is charged with drunkenness in that he, on February 26, 1919, having been duly warned by Part 1 of Daily Orders for Patrol Duty, was drunk, and it was on this charge that he was found guilty. It is claimed by Fogan's counsel that there is no such offence—that he was tried for an offence that does not exist in military law, and that therefore the court martial acted wholly without jurisdiction. It is laid down in the manual of Military Law, published by the War Office in 1914, that s. 19 of the Army Act creates only one offence—drunkenness—and in all cases whether the act was commited on duty or not on duty the charge should be drunkenness. If the offence was committed when on duty or after the accused had been warned for duty, the fact that the offence was so committed and the nature of the duty should be specified in the particulars of charge. S. 46 of the Army Act provides that where the charge is against a soldier for drunkenness, the commanding officer shall deal with the case summarily unless the offence was committed on active service or on duty, or after the offender was warned for duty, or unless by reason of the drunkenness the offender was found unfit for duty, or unless the soldier has been guilty of drunkenness on not less than four occasions in the preceding 12 months, but it is provided that nothing in the sub-section shall affect the jurisdiction of any court martial. The language in this section is "or after the offender was warned for duty," and in the foot-note to Form "C," on p. 709 of the Military Manual, it is said that an offence should be stated in the words of the charge on which the soldier was convicted, but if modified by the finding, as so modified; omitting the statement of particulars containing the details of time, place and circumstances. Form No. 2 of a charge sheet

N. B.

S. C.

EX PARTE JOHN FOGAN.

Hazen, C.J.

in the Military Manual, at p. 669, uses the words "is charged with drunkenness having been warned for duty." The contention based on these references is that if the prisoner had been charged with drunkenness after he had been warned for duty or having been previously warned for duty he would have been charged with a legal military offence, but there is no such offence as that of drunkenness having been duly warned for duty.. In other words that to constitute the offence aimed at the drunkenness must have occurred after he had been warned for duty, and that the language of the charge in this case is quite consistent with the idea that he was drunk at the time he was so warned, and that if such was the case he is guilty simply of the offence of drunkenness and not of the greater offence of getting drunk, having previously been warned for duty, and that reading the language of the charge as a whole it does not describe any offence known to military law. On the other hand the counsel for the military authorities contended that the offence charged and for which Fogan was found guilty was drunkenness alone, and that the other words were particulars designed to shew the defendant what he was charged with, or what it was intended to prove against him, or that in any event they might be regarded as surplusage. It is laid down in the Military Manual that every charge sheet should begin with the name and description of the person charged, and should state in the case of a soldier his number, rank, name and corps. Each charge should state one offence only, and the offence should be stated in the words of the Army Act, and the particulars should state such circumstances respecting the alleged offence as would enable the accused to know what act, neglect or omission was intended to be brought against him as constituting the offence. If in this case the charge is drunkenness, do the words "having been duly warned by Part 1, Daily Orders for Patrol Duty" constitute such circumstances as would enable the accused to know what act, neglect or omission it was intended to be proved against him as constituting the offence? Leaving out those words the charge is distinctly that of drunkenness. These words do not in my judgment make the charge one for drunkenness after being warned for duty or having been previously warned

for duty, as they are entirely consistent with the supposition that the man was intoxicated at the time that he was so warned. Neither in my opinion can it be said that they state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission was intended to be proved against him as constituting the offence; for as in a charge of drunkenness it would appear to me that no such circumstances would need to be stated beyond the date upon which he is accused of the offence of being intoxicated, I am disposed to think these words should be treated as surplusage and that the contention of the counsel for the military authorities that the charge and conviction were for drunkenness alone should prevail.

In arriving at this decision I am influenced to some extent by the fact that the proceedings of military courts will not be scrutinized with the same strictness as those of inferior civil courts, a doctrine which is founded on the idea that those presiding at trials in the military courts are not trained in legal matters. In view of the circumstances of this case and the extremely severe sentence that was imposed I have come to this conclusion with a great deal of hesitation, and from the fact that I have sustained the contention as put forward on behalf of the military authorities that the charge was simply one of drunkenness, there appears to be every reason why those who have power to do so should consider the propriety of granting commutation of the sentence without any delay.

I find that the court martial had jurisdiction and I refuse the application. *Application refused.*

CENTRAL VERMONT RAILWAY Co. v. BAIN.
GRAND TRUNK RAILWAY CO. OF CANADA v. BAIN.

CAN.
S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. April 9, 1919.

MASTER AND SERVANT (§ III A—286)—RAILWAYS—TRAIN RUN JOINTLY BY TWO COMPANIES—NEGLIGENCE OF ENGINEER—INJURIES—DAMAGES—CONTROL OF SERVANT AT TIME OF ACCIDENT—LIABILITY OF COMPANY.

An agreement was entered into between the Central Vermont R. Co., which was operating a line between St. Albans, U.S.A., and St. Johns, P.Q., and the Grand Trunk R. Co., which was operating a line between St. Johns and Montreal whereby they were to run a train jointly between St. Albans and Montreal.

CAN.

S. C.

CENTRAL VERMONT RAILWAY CO. v. BAIN.

The same train crew was to remain in charge during the trip, but each company were to pay the crew while running over its own line and each company was to assume all liability for loss or damages sustained in operating trains on its own line.

The Court held that the Central Vermont R. Co. could not be held liable for damages for injuries caused by the negligence of the engineer while running on the Grand Trunk R. Co.'s line between St. Johns and Montreal. As the engineer was at the time of the accident under the control of, and paid by the Grand Trunk R. Co., it alone was liable.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side (1918), 28 Que. K.B. 45, affirming the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action and the action in warranty, with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported. The respondent's husband, while attending to his duties as locomotive fireman in the service of the Grand Trunk Railway Co., was killed on this company's line, near Montreal, by an engine belonging to the Central Vermont Railway Co. The respondent obtained before the Superior Court at Montreal, from the G.T.R. Co., a sum of $2,025 under the Workmen's Compensation Act, 9 Ed. VII. 1909 (Que.) c. 66, but she took another action, under the common law for $25,000 as damages, against the Central Vermont R. Co., which then formed an action in warranty against the G.T.R. Co. in pursuance of an agreement to that effect between both companies. The G.T.R. Co. intervened in the principal action and pleaded *inter alia* that, having paid already to the respondent the sum of $2,025, all her claims had been extinguished. The Central Vermont R. Co. also contested the action declining any liability. The trial Court awarded $10,000 to the respondent and maintained the action in warranty. The Court of King's Bench affirmed this judgment.

Eugene Lafleur, K.C., and *A. E. Beckett*, K.C., for appellant, Central Vermont R. Co.

Henri Jodoin, K.C., for appellant, Grand Trunk R. Co.

E. Fabre Surveyer, K.C., and *C. G. Ogden*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—At the close of the argument in this case, I entertained no doubt that the appeal of the Central Vermont Railway Co. should be allowed and the action against it dismissed.

The accident which caused the death of the plaintiff's husband was due to the negligence of the engineer Frost and the question to be determined was whether at the time of the accident he was

in the employment of the Central Vermont R. Co. or that of the G.T.R. Co.

The former company is a foreign one, and its powers within Canada are limited to running its trains from the international border line to St. Johns, in the Province of Quebec.

An agreement had been entered into between that company and the G.T.R. Co. to run a train jointly between St. Albans, U.S.A., and Montreal, via St. Johns, with provisions, amongst others, that the Central Vermont R. Co. should pay the wages of train crew as far as St. Johns, and the G.T.R. Co. should pay them from that point to Montreal. The Central Vermont R. Co. was the engineer's employer till the train reached St. Johns. From that point on to Montreal, the G.T.R. Co. became his employer, paid his wages, and he was under their direct control. The operation of running the train between St. Albans and Montreal was referred to in the agreement between the two companies as a joint one, but in the light of the facts and the limited powers of the Central Vermont R. Co., it can only be construed as joint in the sense of being a continuous service, one part being controlled by one company and the other part by the other company.

Having reached the conclusion that Frost's employer at the time of the accident was the G.T.R. Co., which alone had power to run trains on that part of the railway track and which company alone paid and was liable to pay his wages, I am of the opinion that the appeals must be allowed and the action against the Central Vermont R. Co. dismissed with costs throughout if the companies insist upon collecting them.

Idington, J.

IDINGTON, J.:—The question raised by this appeal must turn upon whether or not the engine driver, Frost, was at the time and place of the accident in question under the control of the Central Vermont Railway Co. or that of the Grand Trunk Railway Co.

It seems to me (with deference to those holding otherwise) impossible to say that either in law or in fact he was under the control of the Central Vermont R. Co., which had no authority in law to run a train to Montreal.

These companies simply entered into an agreement for interchange of traffic on a basis which would enable them to constitute a through train and through traffic by means of lending men and

CAN.

S. C.

CENTRAL VERMONT RAILWAY CO. v. BAIN.

Idington, J.

cars and engines to the other when the train ran over the other's line.

The agreement as drawn seems to shew clearly that such was the purpose had in view. And to put that beyond doubt, it expressly provided that the pay of men engaged in the service, and incidental expenses, and the consequent damages claimed by third parties, arising from the carrying on of the business, should be borne by that company over whose road said men and material travelled.

More than that, the rules and regulations of the company owning the road used were to be those governing the traffic carried over it, and could not in law be otherwise.

All the stress laid upon the descriptive expressions "joint line" and "to operate jointly" used in the agreement do not change its character. And if we could make them the governing factors in determining the nature of what the agreement really is, we might find a partnership which would not help the respondent's cause, but defeat it. Indeed, when we consider the contract as a whole we find these expressions are not entirely inapt if correctly applied.

I think the appeal should be allowed with one set of costs throughout.

Anglin, J.

ANGLIN, J.:—Having regard to the limitations upon the charter powers of the Vermont Central Railway Co. and to the terms of the agreement between that company and the Grand Trunk Railway Co., I am clearly of the opinion that the engineer Frost was, at the time of the collision which resulted in the death of the plaintiff's husband, in the employment and under the sole control of the latter company. Far from being inconsistent with this view, the weight of the oral evidence, I think, supports it. The operation of the route from St. Albans to Montreal was "joint" only in the sense that the service to be provided was continuous. Each railway company retained full control of the traffic over its own line of railway and, so far as appears, over the earnings of that traffic. The case of one company exercising running rights over the tracks of another is entirely different. North bound trains, while running between St. Albans and St. Johns, were Vermont Central trains in the sense that they were run by and under the exclusive control of that company. At St. Johns, they became Grand Trunk trains in the same sense

and so continued until they reached Montreal. The members of the train crews, to whichever company they owed general allegiance, while operating on the G.T.R. Co. were its employees and under its control. That, as Cross, J., says, "is the decisive element which engenders responsibility." The Vermont Central R. Co., though Frost's original employer, cannot be responsible for the consequences of his negligence in the discharge of his duties while the servant of the G.T.R. Co., as his *patron momentané*.

I would, therefore, with respect, allow these appeals and dismiss the action—with costs throughout, if asked.

Brodeur, J.

BRODEUR, J.:—The question in this appeal is whether the engineer Frost was under the control of the Central Vermont R. Co. or of the Grand Trunk R. Co. when he caused the accident which resulted in the death of the respondent's husband. The appellants contended that he was under the G.T.R. Co.'s control. On the other hand, the respondent claims that he was the Central Vermont R. Co.'s servant.

The Judges below, with one exception, maintained respondent's contention.

The accident occurred on the G.T.R. Co.'s line near Montreal. The train in charge of the engineer Frost runs between St. Albans and Montreal by virtue of an agreement between the two appellant companies, the Central Vermont R. Co. and the G.T.R. Co.

The line between St. Albans, Vermont, and St. Johns, P.Q., is the property of the Central Vermont R. Co.; and the G.T.R. Co. is the owner of the line between St. Johns, P.Q., and Montreal. In the ordinary course of business, the Central Vermont trains and engines should not go further than St. Johns, and there the passengers would have to change cars and board Grand Trunk cars for Montreal. The crews and engines should also be changed.

Those interchanges of trains, crews and engines would entail losses of time, inconvenience for the passengers and larger costs of operation. In order to obviate that, the two companies made in 1896 an agreement "to operate jointly and as one line" the railway from Montreal to St. Albans for both freight and passenger business. Each contracting party was to furnish a mileage proportion of engines, cabooses and train crews, and was to pay the train and engine men for the services performed by the latter on its own line,

CAN.
S. C.
CENTRAL VERMONT RAILWAY CO. v. BAIN.
Brodeur, J.

and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party.

The following stipulations were also found in the agreement:—

That each of the parties hereto shall assume all liability for loss or damages sustained in operating said trains on its own line,

and that

the rules and regulations of the G.T.R. Co. shall apply while the trains are upon the lines of that company.

The employees were paid on the mileage basis by each company, and they were receiving rates of wages when working on the Central Vermont line different from those paid for working on the Grand Trunk line.

The train which caused the accident was a passenger train composed of crews originally engaged by the G.T.R. Co. or by the Central Vermont R. Co. The engineer Frost, whose negligence caused the accident, had been originally engaged by the Central Vermont R. Co.; but in order to take charge of that through train he had to pass an examination before the G.T.R. Co.'s authorities. The train was composed of a Central Vermont engine and of Grand Trunk cars.

Once that train had reached the Grand Trunk line at St. Johns, it became for all intents and purposes a G.T.R. train. The crews came under the orders of the latter company and under its control. The movements of the train and the actions of its employees were under the orders of the Grand Trunk, and the Central Vermont lost all control over its own original employees, who received their salaries from the company on whose line they were running. Those employees were liable to be dismissed by the latter company and, in fact, that engineer Frost was dismissed by the G.T.R. Co.

Art. 1054 C.C. says that a person is responsible for the damage caused by the fault of persons "under his control." At the time of the accident, Frost had ceased to be under the control of the Central Vermont R. Co., but he was then in the pay of and was employed by the G.T.R. Co.

The liability stipulated by our Code in art. 1054 C.C. against the employer rests upon the right of the latter to supervise and direct the work (Sirey, 1900-1-56).

It was, under the contract in question, the duty of the G.T.R. Co. and not of the Central Vermont R. Co. to supervise Frost's

work and to give him the necessary directions. It has been suggested that he was under the influence of liquor. If that suggestion be correct, then the G.T.R. Co. was at fault to have had an engineer in that condition while in charge of the train.

Now the fact that Frost had been hired by the Central Vermont R. Co. does not alter the situation. As it had been decided by the Court of Cassation, in a case reported in Sirey, 1903-1-104:—

The responsibility decreed by art. 1384 C.N.
(which corresponds to s. 1054 C.C.)
applies, in the case of an accident arising through the fault of his servant, not to the usual employer, but to the employer at the moment who had such "servant" under his orders, and over whom he had exclusive authority at the moment of the accident. Consequently it is the employer of the moment who should be declared civilly responsible.

Applying that principle in the present case, I say: The *patron habituel* of Frost was the Central Vermont R. Co., but his *patron momentané* at the time of the accident, was the G.T.R. Co.

It was said by the Judge of the Superior Court that the contract between the Central Vermont R. Co. and the G.T.R. Co. was with regard to the plaintiff and her husband *res inter alios acta* and could not bind the employees of the respective companies. Of course, in the case of Frost, he could refuse to work for the G.T.R. Co., since he had been engaged by the Central Vermont R. Co.; but he was willing to work for the G.T.R. Co. since he was paid by the latter company.

As to the plaintiff herself or her husband, she was bound, in order to recover, to prove and to establish that the servant who caused the accident was employed by the Central Vermont R. Co. She proved that he was originally hired by the latter company, but it was shewn also that, by virtue of an agreement between the two railway companies and accepted by the employee himself, the latter became a temporary employee under the control of the Grand Trunk Railway Co. It is not a contract *inter alios acta*; but it is a contract which determines the contractual relations of the parties and which affect also the relations of third parties with those employers and employees.

A person is a victim of an accident arising out of the construction of a building. The owner of the building has made with an independent contractor an agreement to carry out that construction. That contract is binding upon all those who would

CAN.

S. C.

CENTRAL VERMONT RAILWAY CO. v. BAIN.

Brodeur, J.

suffer from an accident in the course of that contract. If the victim could sue the owner of the building, then the latter could very well decline any liability on the ground that the servant who caused the accident was the contractor's servant; and the contract which he would invoke for that purpose could not be considered as *res inter alios acta*.

For all those reasons I have come to the conclusion that the accident was caused by the negligence of Frost, and when the latter was under the control of the G.T.R. Co.

As to the costs, I am of opinion that the filing of two contestations by the appellants and the taking of two appeals was unnecessary in view of the intimate relations of the appellants and that there should be granted to them the costs of one contestation and of one appeal.

The appeal should be allowed with costs of one contestation and of one appeal.

Mignault, J.

MIGNAULT, J.:—In this case there is a question of law and a question of fact. The question of law presents less difficulty, because the Court of Appeal appears to have fully recognized the doctrine upon which I rely, and, if there is error in the judgment which is referred to us, it is not upon the question of fact.

The action of the plaintiff is founded upon the last paragraph of art. 1054 of the Civil Code:—

> Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

There is no difference, unless it may be one of expressions, between this provision and art. 1384 (3) of the French Civil Code. We can therefore follow the French doctrine. I find this doctrine very well explained in a note of Dalloz: 1909-1-135. The decision commented on by the compiler had held that

> the civil responsibility decreed by art. 1384 having for foundation simultaneously the free choice which the employer makes of his employees and the right of giving them instructions or orders in the carrying out of their duties, a decision can find an employer to be civilly responsible for the faults of his employees, put at the disposal of a third person, when it is declared that he had preserved over them the right of supervision and authority.

Commenting upon this decision of the Court of Cassation, the compiler, the reference to whom I omit, remarks that

> this decision logically follows from the recognized basic principle of law as to the responsibility of the employer with respect to his servants. The law decides, in effect, that the responsibility of employers does not only take for

granted that they have chosen their servants, but also that they have the right to give them instructions and orders; that they have a right of supervision and direction. One must conclude that when the employer puts his servant at the disposal of a third person, in order to know whether the employer or the third person is responsible for the faults of the servant, it is necessary to ascertain who had the right to give instructions to the servant. If the third person acquires this right, it is he who is responsible. But if, on the other hand, as in the above case, the employer preserved his authority and the right to give instructions, he alone is responsible for the faults committed by the servant; there is no shifting of responsibility.

I have cited the decision which gave rise to these comments, and where one has decided that there was no shifting of responsibility because, in fact, the employer had preserved his authority and right to give instructions.

In another decision of the Court of Cassation, on the other hand, and where the employer had not preserved his authority and right to give instructions, it was held that

the responsibility decreed by art. 1384 of the French Civil Code applies, in the case of an accident happening through the fault of a servant, not to the usual employer but to the employer at the moment, who had such servant under his orders, and over whom he had exclusive authority at the moment of the accident (Cassation, 26 Jan., 1901. Sirey, 1903, 1-104).

The definition is therefore very clear, and, as I have said, it is not contested by the Court of Appeal. All depends, indeed, upon the solution given to the following questions: which of the two employers, the Vermont Central Co. or the Grand Trunk Co., had the man Frost under its orders, and had exclusive authority in that respect at the moment of the accident which cost the life of the husband of the respondent?

Up to this point I find myself in full accord with the Court of Appeal, but, in answering this question of fact, I regret that I am unable to partake of the opinion of the Superior Court and of the Court of Appeal.

In order to determine which of the two companies, the Central Vermont or the G.T.R., had Frost under its orders at the moment of the accident, we must look at the agreement made between the two companies. This agreement is not, as the Judge of the Superior Court thinks, *res inter alios acta* with respect to the respondent. At the very foundation of any action which can be brought under art. 1054 C.C. (Que.), there is the question of whether Frost was the servant of the Vermont Central Co. at the moment of the accident. Now, the agreement produced between

CAN.

S. C.

CENTRAL VERMONT RAILWAY CO. v. BAIN.

Mignault, J.

this company and the G.T.R. Co. shews that, as soon as the train of the Vermont Central reached St. Johns going in the direction of Montreal, all the employees of the train came under the exclusive orders and authority of the G.T.R. Co. It matters little that this arrangement designates the trains as "joint trains" or the service of the trains as "joint service." Each company remains absolute master on its own line, it pays its employees for the work done upon its line, and these employees, although upon the line of one of the two companies, take orders from such company alone. Arts. 6 and 12 of the agreement shew:—

6. That each party hereto shall pay the train and engine men employed in the joint service for the service performed by them on its own line, and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party hereto.

12. That in operating the said joint service, the rules and regulations of the G.T.R. Co. shall apply while the trains are upon the lines of that company, and the rules and regulations of the Central Vermont R. Co. shall apply while the said trains are upon the lines of that railroad company, but it is understood that the regulations of both companies shall be such as to facilitate the prompt and safe operating of said joint trains.

Cross, J., raises the objection that the Vermont Central Co. should have instructed Frost not to go beyond such or such station between St. Johns and Montreal. There is nothing in the evidence which shews that this company might, in fact, give such an order to Frost, and if it had done so, it would have violated its agreement with the G.T.R. Co. Moreover, we must consider this case according to the evidence on record; and such evidence, both oral and documentary, shews that Frost was at the time of the accident under the exclusive orders and authority of the G.T.R. Co.

I am therefore of the opinion that the appeal of the Vermont Central Co. should be upheld.

But the G.T.R. Co. is an appellant against the judgment of the Court of Appeal which has confirmed the judgment of the Superior Court in that respect. The latter judgment has set aside its defence to the principal action and ordered it to indemnify the Central Vermont Co. against the judgment pronounced against that company. Since, in my opinion, the principal action of the respondent should be dismissed, the action in warranty of the Vermont Central Co. against the G.T.R. Co. fails (*Archbald* v. *DeLisle* (1895), 25 Can. S.C.R. 1, and authorities there cited.)

CAN.

S. C.

CENTRAL VERMONT RAILWAY CO. v. BAIN.

Mignault, J.

It remains, then, to decide as to the defence made by way of intervention by the G.T.R. Co. to the principal action and which was filed the very day the Central Vermont Co. filed its plea. This defence, upon which the respondent has joined issue, should be maintained, and it follows that the appeal of the G.T.R. Co. should equally be maintained.

As to the action in warranty, I am of opinion that it should be dismissed.

In the matter of costs, I cannot but believe that there was a useless multiplication of proceedings in contesting the action of the respondent by these two companies, who appear properly joined. Two distinct defences were filed the same day by the Central Vermont Co. and by the G.T.R. Co., when a single defence by one of the companies would have been sufficient. Moreover, there were two appeals before the Court of Appeal, and two appeals before this Court. Making use of the discretion which belongs to a Judge in the matter of costs, I think that the respondent should pay the costs of a single action in the Superior Court and of a single appeal before the Court of Appeal and before this Court. I would not give costs to the appellant in warranty.

Appeal allowed.

CORPORATION OF RICHMOND v. EVANS.

IMP.

P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin and Duff, J. August 6, 1919.

1. NEGLIGENCE (§ I C—49)—DRAWBRIDGE—SITUATION DANGEROUS—FLIMSY BARRIER ACROSS BRIDGE—LIABILITY OF CORPORATION FOR DAMAGES—NEGLIGENCE OF DRIVER OF MOTOR—PASSENGER NOT CHARGEABLE WITH DRIVER'S NEGLIGENCE.

A corporation which, by the situation of a drawbridge, the approach thereto, and a flimsy barrier across the bridge when open, makes such bridge a trap for the unwary and an invitation to accident, is liable for damages, due to a jitney breaking through the barrier and plunging into the river, notwithstanding that the highway was known to the driver, and that he was reckless and disregarded the danger.

If the corporation has provided funds for defraying half the cost of constructing the bridge and has in fact exercised control over it, *primâ facie* it is the duty of the corporation to take suitable measures for protecting the public against the dangers incidental to the working of the draw span, and it is incumbent upon the corporation if it desires to dispute this responsibility to prove that the officials who had in fact exercised control were exceeding their lawful powers.

2. TRIAL (§ II B—46)—NEGLIGENCE—EVIDENCE SUFFICIENT TO GO TO JURY—VERDICT—NO ERROR IN LAW—APPEAL—FAMILIES COMPENSATIONS ACT, (B.C.)

If in an action under the Families Compensation Act (B.C.), R.S.B.C. 1911 c. 82 the finding of the jury is that there was negligence, and if upon the facts there was sufficient evidence to admit of the question being passed upon by it, the verdict will not be disturbed unless some error in law has taken place.

IMP.

P. C.

CORPORATION OF RICHMOND v. EVANS.

Duff, J.

APPEAL from the British Columbia Court of Appeal (1918), 43 D.L.R. 214, in an action for damages for injuries received by a jitney breaking through the barrier across a drawbridge and plunging into the river. Affirmed.

The judgment of the Board was delivered by

DUFF, J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia by the Corporation of the Township of Richmond in an action in which the respondents recovered against the corporation judgment for $5,000. The action was brought under the Families Compensation Act against the appellant corporation as well as the Corporation of South Vancouver by the surviving husband and children of Annie Evans, whose death was alleged to have been caused by the negligence of the defendant corporations. On the night when she met her death, the deceased Annie Evans was a passenger in a jitney motor passing over a bridge which crosses the north arm of the Fraser River. In this bridge there is a span which when necessary is swung open to allow the passage of craft upon the river, and on the occasion in question, the span being open, the car in which the deceased Annie Evans was driving plunged through the opening and all the occupants but three were drowned. The respondents alleged that the bridge on the occasion in question was, and for some years before had been, in the possession and under the control of the defendant corporations; that they were responsible for seeing that when the swing span was open adequate warning should be given to persons using the highway, and proper safeguards provided for the protection of highway traffic; and the negligence charged was the failure to perform this duty.

The jury found that the accident was due to the negligence of the defendant corporations and of the driver of the automobile. The trial Judge gave judgment against the appellant corporation, but dismissed the action as against South Vancouver on the ground that there was no evidence establishing that the persons in control of the bridge were persons for whose acts that corporation was answerable. The appellant corporation appealed to the Court of Appeal, and that Court being equally divided in opinion, the appeal was dismissed.

The appellant corporation raises two contentions. First, that since there was no evidence shewing the situs of the bridge

to be within the territorial limits of the Township of Richmond, there is no foundation for the proposition that the appellant corporation is legally responsible for maintaining it in safe condition for travel, or for the negligent acts of the persons in control of it; and, secondly, that assuming the corporation to be so responsible, the finding of the jury ascribing the death of Mrs. Evans to the negligence of the corporation is not supported by evidence. The first of these contentions was advanced at the conclusion of the trial, and their Lordships have no doubt that the Judge was right in declining to give effect to it. It was admitted that the corporation had provided the funds for defraying half the cost of constructing the bridge; that it had in fact exercised control over it; and that the bridge-keeper was its servant. *Primâ facie* therefore it was the duty of the corporation to take suitable measures for protecting the public against the dangers incidental to the working of the draw span; and it was incumbent upon the corporation if it desired to dispute this responsibility to prove that the officials who had in fact exercised control were exceeding their lawful powers.

As to the second contention, there is, their Lordships think, no ground for question that the facts before the jury were sufficient to sustain a finding that the precautions taken for the protection of persons passing over the bridge at night and approaching the gap created when the swing span was open were not adequate for that purpose.

A lantern was hung at the centre of the span about 100 feet beyond the brink of the opening containing an ordinary coal oil lamp which exhibited a red light towards the highway when the span was open; and about 20 feet in advance of the opening gates were placed as a barrier for the protection of cattle. The presence of the light and the barrier it was alleged constituted sufficient notice to drivers of vehicles of the fact of the bridge being open for navigation, and in making this provision it was asserted the corporation did all that was reasonably required in such circumstances.

One of the witnesses who was a passenger in the jitney with Mrs. Evans, and survived the disaster, says that although as the motor crossed the bridge his eye was following the road ahead, he saw no red light; and it seems to be plain enough that when

IMP.
P. C.
CORPORATION OF RICHMOND v. EVANS.
Duff, J.

the span was in process of swinging the red light would not come clearly into view for an appreciable time after a gap had been created.

Moreover, it appears there were other lights on the bridge, calculated, by reason of their position and colour, to confuse and mislead. It was also stated that on bridges in the neighbourhood the gates placed across the approaches to such openings were surmounted by lights, and it was suggested in evidence that the distance between the opening and the gates ought to have been greater. The trial Judge was manifestly right in holding that on this issue as to the sufficiency of the safeguards provided it was his duty to submit the case of the plaintiffs to the jury.

The chief argument advanced in support of the contention that the finding of the jury is not sustained by evidence is that the facts proved failed to connect the disaster with the fault of the corporation as its cause; and the testimony of the bridge-tender to the effect that the swing span had been completely open and the red light shining full upon the roadway for a minute or two before the vehicle reached the gates is relied upon as establishing conclusively that the real cause of the accident was the negligent or reckless inattention of the driver. The trial Judge, however, in pointed terms instructed the jury to consider how much weight should be attached to the statements of the bridge-tender, and although this evidence was not directly contradicted by any witness who could speak from actual observation of the position of the swing span as the motor approached the opening, their Lordships nevertheless entertain no doubt as to the propriety of the observations of the Judge on this point; and especially in view of the evidence of the passenger already alluded to, their Lordships cannot accept the suggestion that for the purpose of deciding this appeal they should evaluate this evidence themselves. To do so would be to assume a responsibility which it was within the exclusive province of the jury to discharge.

It only remains to observe that this case does not fall within the principle that a highway authority is not as a general rule answerable in an action by an individual for nonfeasance in respect of the maintenance of the highway. Their Lordships have no doubt that the opening of the span coupled with the negligent omission to take the precautions necessary for the

protection of the public from the supervening danger constituted a wrong falling within the category of misfeasance, and actionable at the suit of persons suffering harm in consequence.

Their Lordships are therefore of opinion that the decision appealed from is right, and that this appeal should be dismissed with costs, and they have humbly advised His Majesty accordingly. *Appeal dismissed.*

IMP.

P. C.

CORPORATION OF RICHMOND v. EVANS.

Duff, J.

The "ANDREW KELLY" v. The "COMMODORE."

CAN.

Ex. C.

Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J. in Adm. March 8, 1919.

SALVAGE (§ I—2)—DEFINITION OF—PROOF—"OFFICIAL LOG"—AMENDMENT TO LOG—MERCHANT SHIPPING ACT, ART. 239 AND FOLLOWING.

During a heavy easterly gale, the "Commodore", towing the barge "St. David", and bound from Valdez to Anyox, B.C., had her rudder carried away and two of her four propeller blades broken, and was rendered practically helpless. She was drifting and leaking fast and was flying distress signals. The plaintiff managed to make fast a line to the "Commodore" and after twice breaking away succeeded in towing defendant into safety.

Held, that the services rendered were skilful, considerable and meritorious, and, while not in a strict sense unusually hazardous, were in the nature of salvage services and not merely of the nature of towage.

Vermont Steamship Co. v. *The "Abby Palmer"* (1904), 8 Can. Ex. 446, and 9 Can. Ex. 1, referred to.

2. That the "log" kept in this case was an *"ordinary ship's log"* and not *"official"* within the meaning of sec. 239, *Merchants Shipping Act*, 57 & 58 Vict., 1894, c. 60, and statements therein should not be accepted in evidence *for* the ship, but might be used *against* it to correct a statement made at a subsequent time.

3. One year and four months after the accident, it is asked to add sheets of manuscript notes to the log, alleged to have been made by the master, but not proved to have been made at the time nor for the purposes of incorporation in the "log".

Held, that permission to so amend the "log" will be refused.

Bryce v. *C.P.R. Co.* (1907), 13 B.C.R. 96 (affirmed by P.C. 15 B.C.R. 510), referred to.

THIS is an action for salvage services rendered by the plaintiff trawler against the tug "Commodore." Statement.

E. C. Mayers, for plaintiff; *E. P. Davis*, K.C., for defendant.

MARTIN, L.J.A.:—This is an action for salvage services rendered by the steam trawler "Andrew Kelly" (95 registered tons), to the tug "Commodore" (216 registered tons), in the North Pacific Ocean on the Alaskan coast off Yakutat Bay, in October, 1917. Briefly, it appears that the "Commodore" bound from Valdez to Anyox, B.C., having in tow the barge "St. David" laden with copper ore, while about 60 miles southwest of Yakutat during a heavy easterly gale, had her rudder carried away and two of her Martin, L.J.A.

CAN.

EX. C.

THE "ANDREW KELLY" v. THE "COMMODORE."

Martin, L.J.A.

four propeller blades broken about 4 o'clock a.m. on Oct. 28, which rendered her practically helpless, and she continued to drift, leaking fast through a damaged stern post or stern bearings, and sending up and flying distress signals, with the leak increasing and the pumping gear damaged so that the hand pump had to be resorted to, till about noon of the 29th, when the "Andrew Kelly" came to her assistance and finally made fast about 2.15 and began to tow her to Yakutat, but she broke adrift in about half an hour. The "Kelly" made fast again and towed the "Commodore" and barge for about nine hours at a speed of about 3 knots towards Cape Spencer, Cross Sound, in an east by south direction, which was the safest course in the existing heavy sea and wind, which had been moderating before 6 p.m. but increased thereafter, and by midnight the wind had hauled back to the eastward and was blowing a gale. Shortly after midnight, on Oct. 30, the tug and barge again broke adrift owing to the tug's chain cable having parted. After some inevitable delay in picking up the fouled gear in the darkness, the trawler went after the tug, and picking up her search light, reached her about 4.30 o'clock on the 30th and stood by her till daylight (at which time the wind had dropped but the sea was still high) and after sending a life boat at the request of the tug, this letter, thrown into the boat in a tin can, was sent by her master to the master of the trawler:—

Dear Captain:—

We are leaking badly, propeller and rudder gone, our main discharge pipe broken and only able to give very little assistance with our engines.

Weather conditions very unfavourable; we are scared to get a lee shore and have to abandon the two ships, in our opinion we think it advisable to abandon the barge, whilst you can get the crew off and proceed to some safety with "Commodore."

After reading this please pass it on to the barge captain, also state your opinion on this paper and let Capt. Bistrom add his and bring the paper back.

A. J. BJORNE.

The master of the trawler decided to make a final effort to tow both the tug and the barge, and made fast again about 8.30 but after towing about 25 minutes towards Yakutat, then distant about 30 miles, they broke adrift again, so he decided it was impossible to tow both and sent a life boat to the barge and took the master and seven men off her in two trips and then made fast again to the tug for the fourth time about 2.30, and succeeded in towing her safely into Yakutat that same night about 9 o'clock,

after having to heave-to outside owing to a heavy squall of snow which started about 5.30 off Ocean Cape.

Later the barge with her valuable cargo, worth about $370,000, was picked up by the tug "Daniel Kern" then in Yakutat, in moderate weather, but was lost for some strange reason in coming into Yakutat on a calm night. The 12 fishermen on the "Andrew Kelly" had refused to consent to look for the barge the next morning, Oct. 31, no more lives being in danger; on the "Kelly" there were 24 souls all told. The injuries sustained by the "Commodore" were various and serious and were adjusted by the underwriters at $15,934.

The value of the "Commodore," exclusive of the barge, is agreed to be $75,000. A dispute arose as to the value of the "Andrew Kelly." I am of opinion that at the time of the salvage a fair valuation would be $100,000. She had also 40,000 lbs. of halibut on board, her full load being 160,000 lbs.

It is not, and could not be disputed on the facts that salvage services had not been rendered, but it was suggested that they were more in the nature of towage. I am unable, however, to take that view; they were, while not in the strict sense unusually hazardous, nevertheless skilful, considerable, and meritorious, and after a careful consideration of all the circumstances I fix the sum of $4,000 as my view of a just reward therefor.

It was truly submitted by the defendant's counsel that the services here were not of so dangerous or deserving a nature as those before me in the *Vermont Steamship Co.* v. *The "Abby Palmer,"* 8 Can. Ex. 446, 9 Can. Ex. 1, wherein the leading authorities are cited, and in which the sum of $5,500 was ultimately awarded (after an appeal caused largely, I may say, by an oversight of counsel in omitting to put forward certain items of loss to the salving ship which were not in dispute) the salving ship and cargo valued at $350,000 having been placed in a hazardous position, yet they were of the nature indicated and the times are considerably more expensive, money, consequently, not having the same value; so I feel that if I have erred it has been on the safe side. Of course if the barge had been salved a large sum would have been well earned.

The award I apportion, in the exercise of my discretion, as follows, on the principles cited in *The Vancouver Tugboat Co. Ltd.*

CAN.

EX. C.

THE "ANDREW KELLY" v. THE "COMMODORE."

Martin, L.J.A.

v. *The "Prince Albert"* (1913), Mayers Adm. Law 543, and Kennedy on Salvage, 2nd ed. (1907), 168 *et seq.*

To the owners (¾ of total award)	$3,000
To the master (⅓ of the balance)	334
To the pilot, the mate, and the chief engineer, each $90	270
To the 2nd and 3rd engineers, each $65	130
To 3 firemen, 1 coal passer, 1 cook, 1 deckhand, and Robert W. Thompson, a fisherman, who went in the life boat and appeared as a witness, in all 7 men, each $38	266
	$4,000

A claim in writing has been put in signed by seven of the twelve fishermen (other than said Thompson) who were not members of the crew, asking for $75 per man, not alleging any assistance in salving but simply that they were prevented from fishing for the time occupied in salving, but no one has come forward in support of it and I am left in the dark as to whether or not, during that more or less stormy period fishing could have been carried on at all, or to what extent. It does not appear that any of these claimants did in fact give any assistance in the salvage service, which passengers must do before their claims can be recognized, *the Coriolanus* (1890), 15 P.D. 103, and moreover they refused to go out to assist in the salvage of the barge as above noted though a large reward would have been reaped if successful, as was most probable. In the absence of any further facts being put forward on their behalf in the usual way, Kennedy on Salvage, *supra*, which would give these claims a meritorious complexion I do not feel warranted in taking action thereon.

There remains a question of evidence regarding the log. No "official log" in the proper sense of the word in the Merchant Shipping Act, ss. 239-243 (see 8 Enc. L.E. 395, 26 Hals. 82, Marsden's Digest 850), was kept but simply the "ordinary ship's log," s. 239 (3); Maclachlan on Shipping, 5th ed. (1911), 211; which is not evidence for the ship for which it is kept but against it, though being "a statement made by the master at a time being contemporaneous with the event and therefore more likely to be correct it may be used for the purpose only of correcting a statement made at a subsequent time."—*The "Singapore"* (1866),

L.R. 1. P.C. 378; *vide* also the "*Henry Coxon*" (1878), 3 P.D. 156; *The "Earl of Dumfries"* (1885), 10 P.D. 31, and cases cited in Marsden's Dig., *supra*. In the ship's log in question, entitled "Pilot House Log Book," kept by the master, the only entry relating to the salvage is as follows:—

"Oct. 29th, 10 a.m. Sited (sic) tow.
10.30 a.m. Sited tow boat with barge St. David (sic) in tow with flag at her foremast head for help.
Oct. 31st, 2.45. Left Yakutat."

There is no blank space, between said dates, the entries following on thus omitting any reference to any occurrences between the sighting and leaving Yakutat. The plaintiff's counsel applies to have three sheets of manuscript notes, produced by the master in the witness box, admitted in evidence as part of the ship's log on the ground that they were notes made at the time by the officer on the ship who kept the log (here the highest officer, the master) and therefore ought to be incorporated with it.

In *Bryce* v. *C.P.R. Co.*, 13 B.C.R. 96, affirmed by the Privy Council, 15 B.C.R. 510, I had to deal with the case of changes in a rough or scrap log of a nature similar to the one in question, made at the time, but what I am now asked to do is to sanction changes, by way of addition, after a lapse of more than a year and four months. Apart from all other aspects of the matter on this ground alone I must refuse the application being of the opinion that it would be too dangerous to open such a door. The master has not even ventured to say that he made these notes at the time for the purpose and with the intention of adding them to the log at the earliest opportunity and the way in which the entry is made would discourage such a view of the matter, and this is not a case of rough notes having been mislaid and the entry being left consequently incomplete. Apart, therefore, from other questions raised on the application of the Act and ss. 260, 263-4, I think the said notes cannot be admitted in evidence as part of the log, but only to refresh the witnesses' memory apart from the same.

Let judgment be entered in favour of the plaintiff for $4,000 and costs.

Judgment accordingly.

IMP. P. C.

WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RAILWAY Co.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Parmoor, and Duff, J.
August 5, 1919.

STATUTES (§IC—20)—WORKMEN'S COMPENSATION ACT—PAYMENT OF COMPENSATION—ACCIDENT TO SAILORS ON SHIP IN FOREIGN WATERS —CONSTITUTIONALITY.

That part of the Workmen's Compensation Act of British Columbia (6 Geo. V., 1916, c. 77) which purports to warrant the payment of compensation to seamen or their dependents for accidents or death by accidents upon ships in foreign waters is in no way *ultra vires* the Provincial Legislature.

[*Bank of Toronto* v. *Lambe* (1887), 12 A.C. 575, referred to; *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, distinguished; 47 D.L.R., reversed.]

Statement. APPEAL by defendant from a judgment of the British Columbia Court of Appeal in an action to restrain the defendants from paying compensation to the dependents of sailors who lost their lives when their ship sank in foreign waters. Reversed.

The judgment of the Board was delivered by

Viscount Haldane. VISCOUNT HALDANE:—This is an appeal from a judgment of the Court of Appeal of British Columbia dismissing, McPhillips, J.A., dissenting, an appeal from the judgment of Clement, J., in an action. That judgment declared that the enactment of the Workmen's Compensation Act of the Province, 6 Geo. V., 1916, c. 77, insofar as it purported to warrant the payment of compensation by the defendants, who are the appellants here, to the dependents of certain members of the crew of the steamship "Princess Sophia," which foundered with all hands in waters outside British territory on a return journey from Skagway in Alaska to Vancouver, was *ultra vires* of the Legislature of the Province. By the judgment an injunction was also granted. The respondents are a railway company incorporated by Dominion statute. Their line runs through several Provinces, including British Columbia, and they own and operate steam vessels sailing between ports in that Province and ports in the territory of the United States. The appellant Board, of which the other appellants are the members, is a body corporate constituted by the workmen's Compensation Act referred to, for the purpose of administering the Act. The members of the crew who were lost, and to whose dependents

the appellant Board claims the right to pay compensation, were engaged within the Province to do work and perform services which in part had to be done and performed within the Province.

It will be convenient in the first place to turn to the provisions of the Act in question. It was passed in 1918, and its primary purpose is to confer on workmen, out of an accident fund which it established, compensation for personal injury by accident arising out of and in course of their employment. The right of the workman does not, so far as Part I of the Act, with which alone their Lordships are concerned in this case, applies, depend on negligence on the part of the employer, as in ordinary Employers Liability Legislation, but arises from an insurance by the Board against fortuitous injury. The insurance money is not, as in the case of the British Workmen's Compensation Act of 1906, to be paid by the employer directly, but is provided by the Board from a fund which it collects from certain groups of employers generally. Part II of the Act is separate, and deals with Employers Liability of the ordinary type, as a different subject.

The Act defines dependents as meaning such members of the family of a workman as were dependent on his earnings at the time of his death or incapacitation, and no person is to be excluded as a dependent because he is a non-resident alien. Employer is defined to mean any person having in his service under a contract of hiring or apprenticeship any person engaged in any work in or about an industry. Part I is applied by s. 4 to employers and workmen (other than persons casually employed) in a large number of enumerated industries, including railways and shipping. S. 6 enacts that the compensation is to be paid by the Board out of the accident fund.

S. 8 is important for the present purpose. It provides (subs. 1) that where an accident happens while the workman is employed elsewhere than in the Province which would give a title to compensation if it had happened in the Province, he or his dependents are to be so entitled:—(*a*) if the place of business of the employer is situate in the Province and the residence and the usual place of employment are within it, and the employment out of the Province has immediately followed the

IMP.

P. C.

WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RAILWAY CO.

Viscount Haldane.

employment by the same employer within it and has lasted less than six months; or (*b*) if the accident happens on a steamship, ship, or vessel, or on a railway, and the workman is a resident of the Province, and the nature of the employment is such that in the course of the work or service which the workman performs it is required to be performed both within and without the Province. (2) Except as provided by subs. 1 no compensation is to be payable under Part I of the Act where the accident happens elsewhere than in the Province. (3) In any case where compensation is payable in respect of an accident happening elsewhere than in the Province, if the employer has not fully contributed to the accident fund in respect of all the wages of workmen in his employ who are engaged in the employment or work in which the accident happens, the employer shall pay to the Board the full amount of capitalized value, as determined by the Board, of the compensation payable in respect of the accident, and the payment of such amount may be enforced in the same manner as the payment of an assessment may be enforced.

By s. 9, where by the law of the country where the accident happens the workman or his dependents are entitled to compensation in respect of it, they are put to their election between claiming under that law or under Part I of the Act. Under s. 10 the Board is subrogated to the rights of the workman or dependent against persons other than the employer if compensation is claimed under Part I, and the workman is debarred from bringing an action against an employer in case of his claiming compensation under Part I. S. 11 substitutes the provision made under that part for all common law or statutory rights of action against the employer in respect of accident.

Ss. 15 to 24 provide for the scale of the compensation. S. 25 classifies the industries to be assessed for the maintenance of the accident fund into groups, one of which includes the respondent railway company *nominatim*. By s. 28 each employer is to furnish to the Board an estimate of the probable amount of the pay-roll of each of his industries for the following year, but in computing the amount regard is to be had only to such portion of the pay-roll as represents workmen and employment within the scope of Part I.

S. 29 directs the Board to create and maintain the accident fund by assessing the employers in each class according to the pay-rolls. The assessments may be general, as applicable to any class or sub-class, or special, as applicable to any industry. By s. 30 every employer assessed is to retain from the wages of each workman a cent a day as a contribution towards medical aid, and to pay the amount to the Board. By s. 31 the Government of the Province may contribute to the accident fund an annual sum not exceeding fifty thousand dollars. By s. 51 the Board is given power to inspect premises and to introduce regulations and safeguards for the prevention of accidents.

It is not in dispute that the persons employed by the respondent company with reference to whose dependents the present question is raised, come within the conditions under which the enactment purported to be applicable to them. Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for Provincial purposes. In *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion Statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business. The tax was held to be valid, notwithstanding that the burden might fall in part on persons or property outside the Province.

It is, however, argued for the respondents that the Act is *ultra vires* in other respects. It is said that the purpose is not a provincial one, inasmuch as it is to insure the dependents against accidents to the workmen which may happen, as in the present case, outside the limits of the Province. But in their Lordships' opinion this is not a case in which it is sought to enact any law giving a right to arise from a source outside the Province. The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the Province, for his personal

IMP.

P. C.

WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RAILWAY CO.

Viscount Haldane.

benefit and for that of members of his family dependent on him. Where the services which he is engaged to perform are of such a nature that they have to be rendered both within and without the Province, he is given a right which enures for the benefit of himself and the members of his family dependent on him, not the less that the latter may happen to be non-resident aliens. This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province. When he enters into this contract, it also appears to them to be within the power of the Province to enact that, if the employer does not fully contribute to the accident fund out of which the payment is normally to be made, the employer should make good to that fund the amount required for giving effect to the title to compensation which the workman acquired for himself and his dependents. The scheme of the Act is not one for interfering with rights outside the Province. It is in substance a scheme for securing a civil right within the Province. The case is wholly different from that from Alberta which was before the Judicial Committee in *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, where it was held that the Provincial Statute was inoperative insofar as it sought to derogate from the rights of persons outside the Province of Alberta who had subscribed money outside it to recover that money from depositaries outside the Province with whom they had placed it for the purpose of a definite scheme to be carried out within the Province, on the ground that by the action of the Legislature of Alberta the scheme for which alone they had subscribed had been altered. The rights affected were in that case rights wholly outside the Province; here the rights in question are the rights of workmen within British Columbia. It makes no difference that the accident insured against might happen in foreign waters. For the question is not whether there should be damages for a tort, but whether a contract of employment made with persons within the Province has given a title to a civil right within the Province to compensation. The compensation, moreover, is to

be paid by the Board and not by the individual employer concerned. No doubt for some purposes the law sought to be enforced affects the liberty to carry on its business of a Dominion Railway Co. to which various provisions of s. 91 of the B.N.A. Act of 1867 apply. But for other purposes, with which the Legislature of British Columbia had jurisdiction to deal under s. 92, it was competent to that Legislature to pass laws regulating the civil duties of a Dominion Railway Co. which carried on business within the Province, and in the course of that business was engaging workmen whose civil rights under their contracts of employment had been placed by the Act of 1867 within the jurisdiction of the Province.

It was further contended for the respondents that s. 503 of an Imperial statute, the Merchant Shipping Act, 1894, invalidated the provision in question made by the Provincial Legislature, on the ground that the Imperial statute had conferred a civil right from which the Province could not derogate. Upon this they desire to point out that whether the expression "damages" in the section applies to a liability such as that under consideration, a liability not of the shipowner, but of the Board, is more than doubtful. For the taxation complained of in the present case is imposed with the object of establishing an institution which shall provide insurance benefits for persons whose contract of employment arises within the Province, and it is not directed to the very different purpose of making the employer directly compensate his workman by way of damages for injury arising out of what has not the less to be proved as a tort because it may have happened, in the language of s. 503, without his actual fault or privity.

It was also argued that s. 215 of the Canada Shipping Act, passed by the Dominion Parliament and forming c. 113 in the R.S.C. 1906, was inconsistent with the right of the Province to legislate as it has done. That section provides that if the master or any seaman or apprentice of any Canadian foreign sea-going ship receives injury in the service of his ship, the owner is to defray *inter alia* the expense of providing the necessary surgical and medical advice, with attendance, medicines, and subsistence, until the person injured is cured or dies, or is brought back to a

IMP.

P. C.

WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RAILWAY CO.

Viscount Haldane.

home port. The only observation which it is necessary to make about this section is that it does not purport to cover the same field as does the British Columbia statute. It may conceivably give rise under that statute to particular questions of election. There are no materials before their Lordships upon which they can pronounce on this point, but it in no way renders *ultra vires* the scheme of the statute under consideration.

For these reasons their Lordships will humbly advise His Majesty that the judgment appealed from should be reversed, that the action should be dismissed, and that the appellants should have their costs of this appeal, and in both Courts below.

Appeal allowed.

SASK.

C. A.

CALGARY BREWING & MALTING Co. v. WILLIAMS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. July 9, 1919.

LANDLORD AND TENANT (§IID—33)—LEASE—COVENANT—FORFEITURE—RE-ENTRY—IMPROVEMENTS—LIABILITY.

A lease contained a covenant that upon default in the payment of rent, etc., the lessor should have the right to immediately determine the tenancy and re-enter. On June 30, 1915, the lessor (the respondent) addressed a letter to the Mayor and Council of Regina, the important part of which is as follows:

Gentlemen:—As time changes legislation should be enacted to suit conditions to meet demands that are required to cope with the situation. As you are quite well aware that the people who are running the Metropole Hotel are practically out of business, and as this property belongs to me, and as it is almost opposite the City Hall, it would be rather unsightly to have the windows boarded up, as the city has been given power to assist and provide accommodation for the local and travelling public. I am not going to ask you for any assistance further than to allow me to put an addition to the present building in the way of a rest room, sample rooms and any other accommodation I may see fit in the interests of re-opening to the general public as an accommodation. . . .

Held, that this letter, coupled with actual possession of the premises by the respondent from an earlier day in June, and followed by building and repairs begun on July 12 pointed conclusively to a re-entry by the respondent in June or at latest within the first day or two in July, and that the respondent was, on July 8, liable to the lessee for improvements which, under the lease, he agreed to pay for at the expiration of the said term.

Statement.

APPEAL from the trial judgment in an action against a hotel company for goods sold and delivered, and a further sum claimed to be due under a clause in a lease.

W. F. A. Turgeon, K.C., for appellant.

F. L. Bastedo, for respondent.

HAULTAIN, C.J.S.:—On May 15, 1912, the respondent Williams leased to the Metropole Hotel Co., Ltd., a certain parcel of land in the City of Regina for a term of 10 years, at a yearly rental of $14,400. The lease contained a covenant that upon default being made in payment of rent, etc., the lessor should have the right to immediately determine the tenancy and to re-enter.

There was also a covenant by the lessee to erect a building on part of the demised premises, subject to the approval of the lessor or his architect.

It was also a term of the lease

That all improvements which shall be put on the demised premises by the lessees shall become the absolute property of the lessor, subject to this lease, but at the expiration of the said term the lessor agrees to purchase from the lessees the building erected on the most easterly 45 feet of said lot 42 after an annual reduction of 5% of the cost value thereof, per year, is made for the depreciation in value of the said building erected on the easterly 45 feet of the said lot 42.

The lessee went into possession under the lease, and, in fulfilment of the above agreement, erected a building at a cost of $7,801.55.

In June, 1915, the respondent distrained for rent then due.

On the sale of the chattels seized for rent, an amount of $231.50 over and above the amount due for rent was realized and retained by the lessor, the respondent.

The chattels seized for rent were removed from the premises before being sold, but the lessor put a man in charge of the premises when the distraint was made, who remained in sole possession of the premises from some date in June until July 12. The lessee, the Metropole Hotel Co., closed up the hotel and abandoned the premises late in June.

Williams in his evidence stated that he had a man in the building from the time of the seizure for rent in June, and that the lessee was never in possession after that time.

On June 30, 1915, the respondent addressed the following letter to the Mayor and Council of Regina:

To the Mayor and City Aldermen,
Regina, Sask.

Gentlemen:—

As time changes legislation should be enacted to suit conditions to meet demands that are required to cope with the situation. As you are quite

SASK.

C. A.

CALGARY BREWING & MALTING CO. v. WILLIAMS.

Haultain, C.J.S.

well aware that the people who are running the Metropole Hotel are practically out of business, and as this property belongs to me and as it is almost opposite the City Hall, it would be rather unsightly to have the windows boarded up, as the city has been given power to assist and provide accommodation for the local and travelling public. I am not going to ask you for any assistance further than to allow me to put an addition to the present building in the way of a rest room, sample rooms and any other accommodation I may see fit in the interest of re-opening to the general public as an accommodation.

I intend to use the south wall of the present building and put in a front on Rose St. to correspond with the present building. For the balance of the structure I want to be permitted to use lumber, iron on the outside with gravel and tar roof, and lath and plaster throughout.

I have no plans to submit to you for approval as it is very hard to procure money, and I cannot afford to engage an architect, but I have, as usual, my plans all prepared within myself, and they are in keeping with other buildings that I have been connected with in the city.

If necessary, I can explain the whole matter to you. Now, gentlemen this is a matter that lays within your own power, whether you will grant me a permit to go on with these additions for the purpose I have stated above, for re-opening the building that is now closed to the public.

I must have your answer at once, as this matter is urgent.

Yours respectfully,

R. H. WILLIAMS.

Per (Sgd.) R. H. WILLIAMS.

Certified a true copy.

(Sgd.) GEO. BEACH,

City Clerk. (Seal).

On July 12 the respondent began work on the alterations and additions to the building.

On July 8 the appellant company brought an action against the Metropole Hotel Co. for the price of goods sold and delivered, and served a garnishee summons on the respondent Williams. The respondent paid the sum of $231.50, mentioned above, into Court. The appellants claimed that a further sum was due by the respondent to the Hotel Co. under the clause in the lease quoted above, and an issue was directed by the Master in Chambers.

On the trial of the issue the trial Judge found in favor of the respondent, holding, in effect,

(1) That the respondent was not indebted to the Hotel Co. for the cost price of the building on July 8, because he did not re-enter and put an end to the tenancy until July 12.

(2) That in any event there was no debt due or accruing due by the respondent, because, on the true construction of the covenant in question, the respondent, the lessor, was not to pay for the building unless and until the full term of the tenancy was completed.

The first finding is not, in my opinion, supported by the evidence. The letter of June 30 set out above, coupled with actual possession of the premises by the respondent from an earlier day in June, and followed by building and repairs by the respondent, begun on July 12, points conclusively to a re-entry by the respondent in June, or at latest within the first day or two in July. The respondent was in exclusive possession and occupation of the premises from and after, at latest, June 27. On July 1st the rent for July become due, and the respondent remained in possession of the premises but did not distrain for the July rent.

Possession and occupation by the respondent on and after June 27 were quite inconsistent with an existing tenancy, and in my opinion the respondent must be held to have re-entered and put an end to the tenancy, either on June 27 or, at latest, on July 2.

As to the second finding, I would, with all deference, follow the decision in *Bevan* v. *Chambers* (1896), 12 T.L.R. 417, rather than the decision in *Finkelmeier* v. *Bates* (1883), 92 N.Y. R. 172, relied on by the trial Judge. The fact that the clause in question makes provision for an annual reduction of 5% for depreciation in the value of the building, suggests that an earlier determination of the tenancy was within the contemplation of the parties. If it had been intended to postpone payment for the building for ten years without regard to the tenancy, it would have been simpler and more natural to have provided for a 50% reduction. The reasoning of the Master of the Rolls in *Bevan* v. *Chambers*, *supra*, as to the proper course to follow in the case of two possible constructions, seems to me to apply with equal force to the facts of this case.

The appeal should, therefore, be allowed with costs. The judgment below will be set aside and the appellant will have judgment declaring that on July 8, 1915, the respondent was indebted to the Metropole Hotel Co. in the sum of $7,801.88, less an amount represented by 5% per annum on that sum from Nov. 1, 1912, to July 2, 1915, in addition to the amount paid into Court.

NEWLANDS, J.A.:—In an issue directed on a garnishee summons it was contended by the plaintiff that the defendant, the Newlands, J.A.

SASK.

C. A.

CALGARY BREWING & MALTING CO. v. WILLIAMS.

Newlands, J.A.

lessor of certain premises, was indebted to the lessee under a covenant in the lease to pay for certain improvements made by the lessee.

The following provisions were contained in the lease:

(d) That the lessees shall build, but not later than Nov. 1, 1912, subject to the approval of the lessor or his architect, a building, or buildings, located on the easterly forty-five (45) feet of said lot number forty-two (42), 25 feet by 45 feet and extending to the lane in the rear of said lot No. 42 according to the plan thereof, . . .

(o) That all the improvements which shall be put on the demised premises by the lessees shall become the absolute property of the lessor, subject to this lease, but at the expiration of the said term, the lessor agrees to purchase from the lessees the building erected on the said easterly 45 feet of said lot 42 after an annual reduction of 5% on the cost value thereof, per year, is made for the depreciation in value of the said building erected on the easterly 45 feet of said lot 42.

The lease was for the term of 10 years, from Aug. 31, 1912. The trial Judge held that the lessees abandoned the premises in June and the lessor re-entered on July 12, 1915.

This abandonment and re-entry would be a surrender of the lease, and the question is, whether the surrender is such "an expiration of the term" as would entitle the lessees to recover the value of the building erected by them under the above provisions of the lease.

The word "term" may apply to either the time for which an estate is run or to the estate itself. In this case I think it refers to the estate, because although the lease is for 10 years and the building in question is to be built before Nov. 1, 1912, the price to be paid at the end of the term is to be the value of the building less 5% for each year. A provision of this kind would only be necessary if the estate might terminate in an indefinite time. I therefore think the covenant on the part of the lessor is to pay for the building at the termination of the estate and not at the end of ten years.

That being the case, does the termination of the lease in this case by the abandonment of the tenant and the re-entry by the landlord, make the landlord liable under the above covenant? This part of the agreement was not to come into effect until the termination of the lease. I cannot see therefore how an abandonment and re-entry which terminates the tenancy has any effect upon the liability of the landlord to pay for a building when the tenancy is terminated.

Being of the opinion that the liability of the landlord dates from the termination of the estate, and it having been proved that the estate was terminated, I think the plaintiff is entitled to recover, and the appeal should be allowed with costs.

LAMONT, J.A.:—I concur in the conclusions of the Chief Justice, whose judgment I have had an opportunity of reading, and have just one remark to add.

The trial Judge held that the lessees, the Metropole Hotel Co., had abandoned the demised premises, and it was argued before us that they must therefore be taken to have abandoned all the advantages which were theirs under the lease, including compensation for the building erected by them. Whatever force there might be in this argument in a case where the making of the improvements is optional with the lessees, it cannot, in my opinion, be given effect to where, under the terms of the lease the lessees are compelled to set up the building for which the lessor agreed to pay. Clauses (d) and (o) of the lease read as follows:

(d) That the lessees shall build, but not later than Nov. 1, 1912, subject to the approval of the lessor or his architect, a building, or buildings, located on the easterly forty-five (45) feet of said lot number forty-two (42), 25 feet by 45 feet and extending to the lane in the rear of said lot No. 42 according to the plan thereof, which for the purpose of identification is subscribed by the lessor and the lessee, said building to have a concrete foundation and be built of solid bricks, and there shall be a light wall 9 feet by 6 feet where it adjoins the main building now on the said premises, said building shall be either one story or two stories above the ground, at the option of the lessees, and shall be roofed with such material as shall conform to the building regulations of the City of Regina.

(o) That all the improvements which shall be put on the demised premises by the lessees shall become the absolute property of the lessor, subject to this lease, but at the expiration of the said term, the lessor agrees to purchase from the lessees the building erected on the said easterly 45 feet of said lot 42 after an annual reduction of 5% on the cost value thereof, per year, is made for the depreciation in value of the said building erected on the easterly 45 feet of said lot 42.

It will be observed that all buildings are to become the absolute property of the lessor, but only this particular improvement is to be paid for. All improvements erected at the option of the lessees, the lessor gets without compensation, but he agrees to pay for the one which he compels them to erect. The lessees erected the building at a cost of $7,801.88. The consideration

SASK.

C. A.

CALGARY BREWING & MALTING CO. v. WILLIAMS.

Lamont, J.A.

Elwood, J.A.

for the lessor's agreement to pay was the erection of the building. That consideration was executed.

Under these circumstances, I am of opinion that the fact that the lessees left the premises when the landlord and chattel mortgagees had taken away all the furniture, without which the hotel could not continue in business, is not evidence that they were impliedly agreeing that the landlord could retake the property without re-imbursing them for the cost of the building.

ELWOOD, JJ.A., concurs with HAULTAIN, C.J.S.

Appeal allowed.

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S. C.

SIMPKIN AND MAY v. TOWN OF ENGLEHART.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford and Middleton, JJ. March 19, 1919.

MUNICIPAL CORPORATIONS (§ II F—175)—PUBLIC WATER SUPPLY—BY-LAW MAKING REASONABLE CHARGE FOR—COMPELLING USE BY CITIZENS—CONSUMERS.

By the Municipal Act, R.S.O. 1914, c. 192, s. 399, "by-laws may be passed by the councils of local municipalities . . . (70) for making reasonable charges for the use of public water and (72) for compelling the use within the municipality or any defined area therein for drinking and domestic purposes of water supplied from the waterworks of the municipality. Where a by-law has been passed under the above Act a ratepayer within the defined area cannot escape payment of the assessed rates on the ground that he does not use the water supplied. He is in the eyes of the law a consumer, and cannot escape payment by setting up that he is an offender against the law.

Statement.

APPEAL from the judgment of Logie, J., in an action by a municipal corporation to recover water rates assessed. Reversed.

The judgment appealed from is as follows:—

At the trial the following admissions were made by counsel:—The plaintiff Simpkin lives on lot 311 on Seventh avenue, according to the plan of the Town of Englehart, and the plaintiffs the Mays live on lot 227 on the same avenue, according to the said plan.

The Mays' property is approximately 600 feet from the nearest water supply of the town, and Simpkin's property is 800 feet away.

There is no water supply pipe along Seventh avenue from the intersection of First street and Seventh avenue—nor along First street from the waterworks situated thereon to Seventh avenue.

The plaintiffs are supplied with water only in the sense that the nearest non-freezable tap at which they may draw water is 600-800 feet away, viz., on First street opposite the waterworks.

The plaintiffs have never used the town water, but are being assessed for water rates under sec. 27 of the Public Utilities Act, R.S.O. 1914, ch. 204.

They are not being subjected to a special tax or rate under sec. 15 of that Act.

The plaintiffs do not attack the by-law as to its legality generally, but contend that sec. 56 of by-law 88 is illegal and invalid.

There are only 22 owners or occupants in the town of Englehart directly connected with the water mains.

Over 500 draw off water from public hydrants placed on the streets for the purpose.

By-law 88 of the corporation purports to be a by-law for the management, maintenance, and regulation of the Englehart waterworks, made by the Municipal Council of the Town of Englehart, under the provisions and by the authority contained in the Municipal Waterworks Act* and amendments thereto, and thereby the council established under schedule "A" thereof the rates complained of.

By sec. 51 of this by-law, the corporation was divided into five districts, as shewn in schedule "B," the consumers in each district carrying water from the town hydrants to be responsible for the maintenance and upkeep of these hydrants.

The plaintiffs are in area 1 as shewn in schedule "B."

The original by-law No. 77 of the corporation, authorising the construction of the waterworks and sewerage system and providing for the issue of debentures to pay for the construction of the same, and also by-law No. 88, were put in.

The waterworks and sewerage system were installed by the defendants at the instigation and following an adverse report of the Provincial Board of Health as to the sanitary condition of the town.

Under the circumstances above set forth, the plaintiffs contend that they are not liable to pay any water rates whatever.

By sub-sec. 1 of sec. 26 of the Public Utilities Act, applying

*The statutory provisions relating to Municipal Waterworks are now found in Part I. of the Public Utilities Act, R.S.O. 1914, ch. 204.

ONT.

S. C.

SIMPKIN AND MAY v. TOWN OF ENGLEHART.

to all municipal corporations owning or operating public utilities, "the council may pass by-laws for the maintenance and management of the works . . . and for the collection of the rates or charges for supplying the public utility . . . and for fixing such rates, charges and rents . . .;" and, by sub-sec. 2 of the same section, "in fixing the rents, rates or prices to be paid for the supply of a public utility the corporation may use its discretion as to the rents, rates or prices to be charged to the various classes of consumers and also as to the rents, rates or prices at which a public utility shall be supplied for the different purposes for which it may be supplied or required." By sub-sec. 3 of the same section, the corporation may shut off the supply, in default of payment; but the rents or rates in default shall, nevertheless, be recoverable.

By sec. 27 of the same Act, "the sum payable by the owner or occupant of any building or lot for the public utility supplied to him there, or for the use thereof and all rents, rates, costs and charges by this Act to be collected in the same manner as rents or rates for the supply of a public utility, shall be a lien and charge on the building or lot and may be levied and collected in like manner as municipal rates and taxes are recoverable."

By sec. 45, the corporation may inspect any premises to which any public utility is supplied.

By sub-sec. 3 of the same section, "where a consumer discontinues the use of the public utility, or the corporation lawfully refuses to continue any longer to supply it, the officers and servants of the corporation may . . . enter the premises in or upon which such consumer was supplied with the public utility for the purpose of removing therefrom any . . . pipes . . . . being the property of the corporation* . . ."

By the Municipal Act, R.S.O. 1914, ch. 192, sec. 399, "by-laws may be passed by the councils of local municipalities . . . (70) . . . for making reasonable charges for the use of public water;" and (72) "for compelling the use within the municipality or any defined area therein, for drinking and domestic purposes, of water supplied from the waterworks of the municipality . . ."

The plaintiffs are admittedly not consumers or users of municipal water.

(*See Amendment, Ont. Stats. 1917, 7 Geo. V., c. 47 s. 4.)

Are they "supplied" within the meaning of secs. 26 and 27 of the Public Utilities Act, or sec. 399 of the Municipal Act? I think not.

The word "supplied" in para. 72 of sec. 399 of the Municipal Act, and the word "supplying" in sec. 26, and "supplied" in sec. 27, of the Public Utilities Act, must be read in their ordinary meaning.

The Standard Dictionary defines the word "supply" as "to furnish with what is needed or desired; provide."

I find that the defendants have not supplied the plaintiffs with water within the meaning of the Acts above in part set out; and are not, under the circumstances admitted by counsel, entitled to assess, levy, or collect any water rates from them.

This result is strengthened, I think, by the wording of secs. 27 and 45 of the Public Utilities Act, which clearly contemplate a supply of a public utility to premises where it may be consumed.

To reach a conclusion in this case it is not necessary for me to pass upon the validity of sec. 56 of by-law 88 of the defendants, and I do not make a decision as to this.

The plaintiffs have paid no water rates and have suffered no damage.

If this judgment stands, there will be no necessity for an injunction.

There will be judgment for the plaintiffs declaring that the defendants cannot assess, levy, or collect any water rates from the plaintiffs or any of them in connection with the lands set forth in the pleadings.

The plaintiffs are entitled to their costs of action.

J. M. Ferguson, for appellants.

R. T. Harding, for respondents.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—In the interests of public health the law permitted the municipality to require that all ratepayers, tenants, and occupants residing in the limits of the corporation should use for drinking and domestic purposes the water supplied by the corporation and no other: and the municipality did so, by by-law, providing also for the punishment of any contravention of such by-law.

The plaintiffs admittedly come within the provisions of the by-law.

ONT.

S. C.

SIMPKIN AND MAY v. TOWN OF ENGLEHART.

Meredith, C.J.C.P.

The municipality also required by by-law, as they had power to do, that all consumers of water, not directly abutting water mains or services, should pay certain low water rates, and that all persons abutting the water mains or services should pay a higher rate.

The plaintiffs are persons not "directly abutting water mains or services," and were rated as such.

But they say they are not "consumers," and so cannot be rated.

The by-law, however, compels them to be consumers: they are by law "compelled to 'use' . . . the water supplied by the corporation" and no other; and so are plainly intended to be included in the word "consumers," whether they actually consume much or little or none. They are in the eye of the law consumers, and cannot escape from paying for their rights in this public benefit, by setting up that they are offenders against the law: if in truth they really are.

The case is not one in which it would be practically impossible for the plaintiffs to obey the law; if it were, rates would not be imposed until the water should be brought near enough to be used as the law requires.

The appeal is allowed; and the action must be dismissed.

Appeal allowed.

IMP.

P. C.

CREELMAN v. HUDSON BAY INSURANCE Co.

Judicial Committee of the Privy Council, Lords Buckmaster, Parmoor and Wrenbury. June 27, 1919.

COMPANIES (§ IV E—96)—PROPERTY ACQUIRED FOR PURPOSES NOT AUTHORISED BY CHARTER OF INCORPORATION—INDEFEASIBLE TITLE GRANTED—AGREEMENT FOR SALE—VALIDITY.

A company incorporated by Act of Dominion Parliament having obtained an indefeasible title to real property acquired for purposes not authorised by the incorporating Act, may properly enter into an agreement for sale of such property and recover arrears due under such agreement. The certificate of title, while it remains unaltered or unchallenged upon the register, is a certificate which every purchaser is bound to accept.

Statement.

APPEAL by defendant from the British Columbia Court of Appeal (1918), 40 D.L.R. 274, in an action to recover arrears due under an agreement for sale of land. Affirmed.

The judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—On Dec. 30, 1911, the appellants entered into an agreement to buy from the respondents certain land in

Vancouver. The agreement is said to be antedated, but into this and the other circumstances which led to the agreement being made their Lordships do not think it is necessary to enquire. The terms of the agreement provided for payment of the purchase price in certain instalments, and threw upon the appellants the duty of discharging an existing mortgage upon the property. Default was made by the appellants in their obligations, and the proceedings out of which this appeal has arisen were taken by the respondents against them for the purpose of obtaining the relief to which they were entitled by the terms of their bargain. Morrison, J., before whom the case was heard, dismissed the action, but his judgment was reversed by the Court of Appeal of British Columbia, who gave judgment in favour of the respondents. As to the form of that judgment no complaint is made. The complaint is against the substance, upon the ground that the respondents in fact had no title whatever to dispose of this land, and that the contract which they sought to enforce was null and void and incapable of being made the subject of legal proceedings. That contention depends upon these circumstances:—The respondents are a company incorporated by a Dominion Statute of 1910, and their powers of holding and disposing of real estate are subject to restrictions and limitations imposed by s. 14 of that statute, which is in these terms:—

> The new company may acquire, hold, convey, mortgage, lease, or otherwise dispose of any real property, required in part, or wholly, for the purposes, use, or occupation of the new company, but the annual value of such property held in any Province of Canada shall not exceed $5,000, except in the Province of British Columbia, where it shall not exceed $10,000.

It is not suggested that the property acquired by the company in this case exceeded in annual value the sum of $10,000. It is said that it was not in fact acquired wholly or in part for the purposes of the use or occupation of the company, and that therefore they had no power to hold or to dispose of it. Their Lordships do not propose to consider whether or not the circumstances in which this property was acquired were circumstances which would justify this contention, but upon the assumption that the property was not so acquired the appellants are still faced with this difficulty:—There is a statute of the Province of British Columbia which regulates the registration of title of property bought and sold within its territory, and that statute

IMP.

P. C.

CREELMAN v. HUDSON BAY INSURANCE CO.

Lord Buckmaster.

provides that where registration takes place a certificate shall be issued, and that a certificate of indefeasible title issued under the statute shall so long as the same remains in force and uncancelled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is seised of an estate in fee simple in the land therein described against the world, subject to certain reservations and exceptions which are not material for the purposes of the present case. Such a certificate of registration was obtained by the respondent company on Feb. 5, 1913, and the appellants, realising that on the words of the section they are unable to dispute the title which the certificate confers, attempt to escape from the difficulty by asserting that the circumstances render such certificate wholly void. They assert that the fact that the land was not acquired for the purposes of the company prevents the company being registered, and that as they are unable to be registered, it is impossible that the certificate can grant any title. The appellants further contend that unless this view be accepted, it would necessarily follow that by means of this Registration Act it would be possible for a Provincial Statute to defeat and override Dominion legislation. Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in s. 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the Statute of Registration. Nor, in their Lordships' opinion, will the rights of the Dominion Legislature be in any way interfered with by this conclusion. It is impossible to assume that the officer in charge of the registration will not do his duty in investigating titles before he issues the certificate, and if in this case the certificate was issued inadvertently it would still have been competent for the Attorney-General of the Dominion, while the company remained upon the register, to have taken steps, had he thought fit, to have had the register rectified. It might also have been competent for a shareholder of the company to take similar proceedings, but upon this it is unnecessary for the

Lordships to express any decided opinion. The register remains unaltered and unchallenged, and the only question for decision now is as to the effect of the certificate which the company have held from Feb. 5, 1913, down to the present time. In their Lordships' opinion, the appellants are bound to accept that certificate, and consequently to comply with all their obligations under the contract. Their Lordships agree with the view expressed by McPhillips, J., that it appears to be beyond all controversy that the appellants can have conveyed to them an absolutely indefeasible title to the land which they have contracted to purchase, and they are unable to see why the Judge expressed any hesitation as to the necessary consequences following from that clear and definite statement of opinion.

IMP.
P. C.
CREELMAN v. HUDSON BAY INSURANCE CO.
Lord Buckmaster.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Re PUBLIC INQUIRIES ACT.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. June 12, 1919.

CONSTITUTIONAL LAW (§ I E 2—126)—COMMISSIONS—PREROGATIVE POWERS OF LIEUTENANT-GOVERNOR—ENCROACHMENT ON JUDICIAL POWERS—PROHIBITION ACT—PUBLIC INQUIRIES ACT—ADMINISTRATION OF JUSTICE.

The appointment of a commission by the Lieutenant-Governor in Council to inquire whether intoxicating liquor had been unlawfully imported into British Columbia since the passing of an order of the Governor-General prohibiting such importation and also whether sales of intoxicating liquor had been made in the Province contrary to the provisions of the British Columbia Prohibition Act, is within the powers enumerated in the Public Inquiries Act, R.S.B.C. 1911, c. 110, which empowers the Lieutenant-Governor in Council to appoint a commissioner to inquire into matters connected with the administration of justice in the Province.

The Public Inquiries Act, R.S.B.C. 1911, c. 110, which empowers the Lieutenant-Governor in Council to appoint a commissioner to inquire into matters connected with the good government of the Province, the conduct of public business and the *administration of justice* is within the provincial legislative powers, under sec. 92 of the B.N.A. Act.

APPEAL by the Crown from a judgment of Hunter, C.J.B.C., in an action to prohibit an inquiry under the Public Inquiries Act, R.S.B.C. 1911, c. 110. Reversed.

Statement.

C. W. Craig, K.C., for appellant; *Charles Wilson*, K.C., and *Symons* for respondent.

MACDONALD, C.J.A.:—The Public Inquiries Act, c. 110, R.S.B.C. 1911, empowers the Lieutenant-Governor in Council to

Macdonald, C.J.A.

B. C.

C. A.

RE PUBLIC INQUIRIES ACT.

Macdonald, C.J.A.

appoint a commissioner to inquire into matters connected with the good government of the Province, the conduct of public business and the administration of justice in the Province.

Pursuant to the Act an order-in-council was passed on Dec. 21, 1918, appointing Clement, J., a commissioner to inquire, to put it briefly, whether intoxicating liquor had been unlawfully imported into the Province since the passing of an order of the Governor-General in Council prohibiting such importation, and also whether sales of intoxicating liquor had been made in the Province contrary to the provisions of the British Columbia Prohibition Act.

Action was commenced on behalf of a witness to prohibit the inquiry, but this action was dismissed on technical grounds, whereupon the Lieut.-Governor in Council referred these questions of law for the opinion of this Court:

Is the said Act *intra vires?* Is the inquiry within the powers conferred on the Lieut.-Governor in Council by the Act?

In my opinion the Act is *intra vires*. Whether the order-in-council appointing the commissioner goes beyond the Act is a more difficult question. I may say, at the outset that I have no doubt his appointment for the purpose of inquiring into breaches of the B.C. Prohibition Act is not open to objection, and to that extent at least the order-in-council appointing him is valid; but is that valid which directed him to inquire into breaches of the criminal law of Canada? The inquiry in this respect is not I think one connected with good government, or the conduct of public business, and must be supported, if at all, as being connected with the administration of justice in the Province, as that phrase is used in No. 14 of s. 92 of the B.N.A. Act. The making of the criminal laws of Canada is assigned exclusively to the Dominion, so is the regulation of procedure in criminal matters. "Criminal matters" are, in my opinion, proceedings in the criminal Courts, and "procedure" means the steps to be taken in prosecutions or other criminal proceedings in such Courts. The commission in question here is extra-judicial. The commissioner is not a Court, and his proceedings are not proceedings in a criminal matter, or in any matter in the legal sense of the term. Provincial legislation authorising his appointment is therefore not in conflict with the exclusive legislative authority assigned to the Dominion

Parliament by s. 91, No. 27 of the B.N.A. Act. This however does not conclude the matter, since what was done may be in conflict with the residuum of power vested in the Dominion Parliament by s. 91 beyond that specified in No. 27. It becomes necessary then to ascertain the scope of the words "administration of justice" as used in s. 92 of the B.N.A. Act, No. 14. There is no authority bearing directly on the question now under consideration. In *Kelly* v. *Mathers* (1915), 23 D.L.R. 225, 25 Man. L.R. 580, the decision turned upon the fact that the inquiry was concerning provincial public business. *Att'y-Gen'l for Australia* v. *Colonial Sugar Co.*, [1914] A.C. 237, is not in point. The Commonwealth had no legislative power in respect of the matter to be investigated. Here the legislature may have such power depending on the interpretation and scope of the language aforesaid.

Under its powers in respect of administration of justice when crime has been committed, the Province puts the machinery of the criminal law in motion. This undoubtedly is one branch of the administration of justice, but the discovery of crime when it is merely suspected may, I think, also fall into that category. Provincial peace officers are charged with that duty amongst others. A provincial detective force might, I think, be organized under provincial laws for the very purpose for which the commissioner was appointed. Now, if I am right in thinking that investigations, extra-judicially, into the commission of crime for the purpose of discovering if and by whom committed are within the subject matters assigned to the Province under the words "administration of justice," is there anything to prevent the Province from making the investigation effective by imposing on individuals an obligation to give evidence under penalty for refusal. I think not. Such a power is not inconsistent, but consistent with the jurisdiction of the Province to legislate concerning property and civil rights.

No doubt to concede the power to the Province to make investigations into breaches of Dominion laws would appear at first blush to be an anomaly, and it might well be argued that the powers conferred upon the Province in respect of the administration of justice ought to be interpreted as conferring merely the duty or obligation to put the machinery of the Courts in motion, and to take the requisite steps to prosecute persons

B. C.

C. A.

RE PUBLIC INQUIRIES ACT.

Macdonald, C.J.A.

accused of crime. That narrow construction would, I think preclude what has been generally recognised as one of the functions of government in the administration of justice, namely, the ferreting out of crime and identification of criminals. There is nothing novel in compelling a witness to give evidence which may tend to incriminate him. That is done in the civil Courts and is the practice in one of the oldest criminal Courts of the Realm, the Coroner's Inquest. With the justice or expediency of inquiries into crime by an extra-judicial provincial commission I have not to concern myself. The power to appoint such rests somewhere. It is either with the Dominion or the Province, or with each, and hence it is idle to urge as a reason against the validity of the order-in-council that it is inimical to the rights of the subject.

I would answer the first and third questions—those mentioned above—in the affirmative, from which it follows that the other two require no answers.

Martin, J.A.

MARTIN, J.A., would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I am of the opinion that questions 1 and 3 should be answered in the affirmative for the reasons given by the Chief Justice.

I have been unable to find in the authorities or in any judicial dictionary any reference to procedure in matters other than procedure in a Court.

By s. 91 (No. 27) of the B.N.A. Act, procedure in criminal cases is reserved exclusively to the legislative authority of the Parliament of Canada.

I think the procedure there referred to must be taken to be against some person charged with a crime and called upon to answer.

The commission acting here is not a Court.

The scope of the commission never reaches the stage where anyone is called upon to answer a charge although the evidence adduced may lead to a charge being preferred, and until that charge is preferred there is no prosecution initiated and as I view it, no interference with the exclusive right of Parliament to regulate procedure. The laying of an information has been held not to be the commencement of a prosecution, as the magistrate may refuse a warrant: see *Yates* v. *The Queen* (1885), 14 Q.B.D. 648.

Whatever authority there is to hold this inquiry must I think be under the head of Administration of Justice in the Province which by s. 92 (No. 14) of the B.N.A. Act is exclusively given to it.

As I concur with the Chief Justice, there is little that I can usefully add to his views on this branch of the matter.

McPHILLIPS, J.A.:—In my opinion the Act, the validity of which is called in question, is *intra vires*, *i.e.*, within the powers of the Legislative Assembly of the Province of British Columbia and the commission, the validity and scope of which is called in question, has been properly issued and is *intra vires* of the powers conferred upon the Lieutenant-Governor in Council and within the purview of the Act.

Att'y-Gen'l for Australia v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, has been greatly relied upon to establish the *ultra vires* nature of the Act and the commission issued thereunder. With deference to all contrary opinion I do not consider that that decision is at all conclusive or determinative of the question now before this Court. The constitution of the Commonwealth of Australia greatly differs from the constitution of Canada and the Provinces of Canada as defined by the B.N.A. Act (30 and 31 Vict. c. 3 Imp.)—the luminous judgment of Viscount Haldane well portrays this—and it is not a safe course to deduce principles and expositions of the law as contained in the judgment of their Lordships of the Privy Council and apply them to the matter here to be determined. Upon this point it is well to remember what Lord Parmoor said in *Corp. of the City of London* v. *Associated Newspapers Ltd.*, [1915] A.C. 674, at p. 704:—

> I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends.

The commission in terms may be shortly stated as being a commission directed to enquire into matters relative to the unlawful importation into British Columbia of intoxicating liquor contrary to Dominion orders-in-council made and passed supplementary to the local law, the disposition of such liquor and the unlawful sales of intoxicating liquor generally within the Province of B.C. wherein the same may be contrary to any local law.

It cannot be questioned—it is not in fact contended that the "British Columbia Prohibition Act" (6 Geo. 5, 1916, c. 49), is in any way legislation beyond the powers of the Legislative

B. C.

C. A.

RE PUBLIC INQUIRIES ACT.

McPhillips, J.A.

Assembly of the Province of B.C. and this Court has already given its opinion that the passage of the Dominion orders-in-council is merely supplementary to the local law and the effect has not been to displace the local law, therefore the enquiry cannot be said to be *ultra vires* in its nature. It is in furtherance of and in aid of the peace, order and good government of the Province, that is, the taking of all such measures as will ensure the government of the Province in accordance with the expressed views of Parliament (see Perdue, J.A., now Chief Justice of Manitoba in *Kelly* v. *Mathers* (1915), 23 D.L.R. 225, 25 Man. L.R. 580, at pp. 606, 607, 608, 609.

Further, in my opinion the commission is sufficiently supported by sub-s. 14 of s. 92 of the B.N.A. Act which reads as follows:—

(14) The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

The *administration of justice* unquestionably may conceivably be furthered by the labours of the commissioner in the exercise of the powers conferred upon him and to deny the exercise of those powers would be the placing of fetters upon the Provincial authority in plain denial of a conferred and exclusive jurisdiction, granted by the Sovereign Parliament to the Legislative Assembly, under the terms of the B.N.A. Act.

It cannot be successfully contended that the legislation is in any way "criminal procedure" or that the commission is of that nature.

The *ratio decidendi* of the Manitoba case, *Kelly* v. *Mathers*, *supra*, is in my opinion capable of being referred to as applicable to the opinion here expressed and can be rightly and usefully referred to and falls within the language made use of by Lord Parmoor in *Corp. of the City of London* v. *Associated Newspapers Ltd.*, *supra*, at p. 704 (following immediately after that previously quoted):—

So far, however, as it is allowable to be guided by decisions in analogous cases I agree with Swinfen Eady, L.J.

The analogy of the Manitoba case is in my opinion so complete upon the points here submitted that I do not feel it to be at all necessary to further enlarge upon the law governing in the matter, it being so ably set forth by the Judges of the Court of Appeal for

Manitoba (*Kelly* v. *Mathers* (1915), 23 D.L.R. 225, 25 Man. L.R. 580).

In the result my opinion is that questions 1 and 3 should be answered in the affirmative. Answering these questions in the way I do, renders it quite unnecessary to answer or refer to questions 2 and 4.

EBERTS, J.A., would dismiss the appeal.

Appeal allowed.

B. C.
C. A.
RE PUBLIC INQUIRIES ACT.
McPhillips, J.A.

CANADIAN PACIFIC RAILWAY Co. v. PYNE.

IMP.
P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Parmoor, and Duff, J. August 6, 1919.

CARRIERS (§ II G—114*a*)—PASSENGER—DERAILMENT OF CARS—CAR DEFECTIVE—NEGLIGENCE—PROOF.

The plaintiff was injured by the derailing of a passenger coach in which he was riding as a passenger on defendants' railway; the cause of the derailment was the breaking of an equalizing bar. Their Lordships concurred in the finding of the Manitoba Court of Appeal that the maxim *res ipsa loquitur* applied and that by proving that the car in which he was riding ran off the track the plaintiff made a *primâ facie* case of negligence and that the duty then devolved upon the defendant to shew that the accident was not due to any fault or carelessness on its part. There was evidence to support the jury's conclusion that the defendant had not acquitted itself of this burden of explanation.

As carriers of passengers the defendants' undertaking was to exercise a high degree of care, and to carry safely as far as reasonable care and forethought could attain that end. The verdict of the jury that the negligence of the defendant consisted "in not having proper inspection or testing of equalizing bars" was justified on the evidence.

APPEAL by defendant from the judgment of the Manitoba Court of Appeal, in an action for damages, for injuries received by a passenger on defendant's train. Affirmed.

Statement.

The judgment of the Board was delivered by

DUFF, J.:—The respondent on Jan. 25, 1916, was a passenger on the appellants' train proceeding from Regina to Brandon by way of Bulyea and Kirkella; when passing over a switch near Kirkella the coach in which the respondent was travelling left the rails and capsized, and in consequence the respondent was severely injured.

Duff, J.

The action was first tried before a jury in 1917, when a verdict was given against the appellants. A new trial was ordered on the application of the railway company, and the respondent again succeeded in obtaining a verdict and judgment in his favour. The appeal of the company from that judgment was dismissed by the Court of Appeal for Manitoba, and leave to appeal to this

IMP.

P. C.

CANADIAN PACIFIC RAILWAY CO. v. PYNE.

Duff, J.

Board was given by that Court in exercise of the discretion vested in it by subs. (b) of s. 2 of the order-in-council of Nov. 28, 1910.

Carriers of passengers are, of course, not insurers of the safety of the persons whom they carry, nor does their contract of carriage imply an absolute warranty that the vehicles and their equipment are perfectly sound and sufficient. They do, however, incur an obligation to use due care, and as far as due care and competent forethought can secure that end, to carry their passengers with safety. Moreover, the accident in which the plaintiff suffered was due to something which does not as a rule occur except through default in the performance of the carrier's obligation to see that proper care and skill are used, and the action is therefore one of a class in which the Courts have repeatedly held that the maxim *res ipsa loquitur* applies, and that, in the absence of explanation by the carrier, proof of the accident itself affords some evidence that what happened did in fact arise through the failure to discharge this obligation.

The immediate cause of the derailment of the coach is not in dispute. One of the "equalising bars" supporting the body of the car was broken; one of the parts was caught by the outer rail of the diverging track as the coach passed over the switch; and the truck in consequence was wrenched from the rails. The Court of Appeal for Manitoba unanimously held that there was evidence to support the jury's conclusion that the company had not acquitted itself of the burden of explanation cast upon it by proof of the fact of derailment, and their Lordships concur in that view.

The evidence adduced by the company shewed that the broken bar was forged of suitable steel and by a proper process conformably to the pattern in general use; that theoretically, after allowing a proper margin of safety, it was of sufficient strength for sustaining the weight it was designed to support and resisting any strain which it was likely to undergo in the course of railway operation; that it had been in actual use since 1912; and that, although it had been examined carefully a few months before the accident, no defect in it and no evidence of its inadequacy had in fact come to the knowledge of the company's servants. It is admitted that the capacity of the bar to withstand pressure had not been put to proof by experiment; but it was alleged

IMP.

P. C.

CANADIAN PACIFIC RAILWAY CO. v. PYNE.

Duff, J.

that the process of forging itself would have disclosed any flaw in the material then existing.

On the other hand, it was admitted that this accident was by no means the only occasion in the experience of the company on which a bar of the same design, produced by the same process and of the same material, and serving a like purpose, had proved inadequate to resist the strains to which it was subjected.

The company's witnesses referred to several cases of the collapse of such bars, the earliest case specifically mentioned having occurred six or seven years before the date of the trial. It was not suggested that these fractures were due to conditions involving any test more severe than the company's engineers might fairly be expected to anticipate. The broken bar itself was not produced for inspection by the jury, and there is no evidence of latent defect in the metal. There was evidence from at least one of the company's witnesses as well as from witnesses called by the respondent to the effect that nothing connected with the process of forging would in itself supply a satisfactory criterion of capacity to resist pressure; and, moreover, that tests by actual pressure and shock affording adequate criteria of such capacity could with no great difficulty or inconvenience be devised and applied, and indeed that in practice such tests are employed for the purpose of ascertaining the sufficiency of the steel used for the manufacture of other parts of the equipment of railway cars. It is, in their Lordships' opinion, impossible to contend that it was the duty of the jury to disregard this evidence.

It is true that the testimony is a little indefinite upon the point whether any of the instances of the breakdown of equalising bars, specifically mentioned by the company's witnesses, occurred before the forging of the bar in question. But one at least of these instances took place as early as 1912, the year in which the bar was forged; and as there was no evidence that no such fractures had occurred earlier than that date, the jury, in considering whether they were in possession of all the relevant available information touching the experience of the railway company, were entitled to weigh the fact that such evidence was not produced. Moreover, an opportunity for the testing of the particular bar under investigation had been presented only a few months

IMP.

P. C.

CANADIAN PACIFIC RAILWAY CO. v. PYNE.

Duff, J.

before the accident, when, as already mentioned, the truck to which it was attached was dismantled and examined.

Before their Lordships' Board the principal contention of the appellants was that a reasonable explanation of the derailment was to be found in a cause for which it could not be held responsible: on the day of the accident and for several days before the weather was intensely cold, and steel under the action of extreme cold may become frangible under impacts which it could resist without injury in ordinary temperatures. In very low temperatures unaccountable fractures of steel frequently occur; and it was alleged that there is no known practicable precaution by which such fractures can be prevented in such circumstances.

If the facts in evidence pointed to something beyond the control of the appellants' company as the cause of the accident with a probability equal to that attaching to the inference which ascribes it to the default of the company, then, of course, a verdict against the company ought not to have been given. But the jury were not conducting a scientific investigation. "Courts," as Lord Loreburn said in *Evans* v. *Astley*, [1911] A.C. 674, at p. 678, "like individuals, habitually act upon a balance of probabilities;" and it was within the province of the jury to estimate the comparative degrees of probability ascribable to the rival explanations advanced by the parties. Their Lordships agree with the Manitoba Court that the probabilities were not so precisely balanced as to justify the conclusion that the jury acted unreasonably in preferring the hypothesis presented by the respondent.

Their Lordships are of opinion that there is another and independent ground on which the judgment of the Court of Appeal ought to be supported. The jury attributed to the company default in respect of the duty of inspection as well as in respect of the duty of testing. Their Lordships see no reason for differing from the view of Galt, J., that this finding referred to the obligation of the company to inspect its trucks from day to day *en route*: and the jury might well have thought that after the incident (about to be mentioned) of Jan. 24, the day before the accident, this obligation called for an examination of exceptional rigour, especially in view of the evidence of the company's officials, already mentioned, touching the action of the weather.

On the day before the accident the train had been brought to a stop in a snowdrift, and it became necessary to bring up a more powerful locomotive to push it through.

The evidence given by one of the company's divisional superintendents indicates that such an operation was calculated in the ordinary course to subject this particular equalising bar to a shock of some severity, and the jury found in answer to the fourth question that it was a shock then received which caused the bar to break.

Assuming in favour of the railway company that the bar had become abnormally brittle through the effect of the weather, their Lordships agree with the Court of Appeal that the jury were not without solid grounds for rejecting the suggestion advanced by some of the company's officials that the fracture might with equal likelihood be ascribed to a jar occasioned by a wheel encountering a pebble or an uneven joint in a rail or by the ordinary oscillation of the coach.

It was for the jury, having come to this conclusion respecting the result of the incident of the 24th at Kirkella, to consider whether in all the circumstances the failure of the company's officials to discover evidence of the injury in time to repair it was satisfactorily explained.

The contention was advanced that ocular inspection would be the only practicable method of examination for detecting a fracture, and that the most rigorous ocular inspection could avail nothing, because the fracture, if it existed when the truck was examined at Regina and Neudorf, would be concealed from view. In weighing this explanation of the failure to discover the condition of the bar the jury would, of course, consider the character of the examination made at the places mentioned, and they would also consider with what degree of accuracy the position of the break had been determined by the oral testimony of the railway company's witnesses.

It was for the railway company to satisfy the jury upon these points; and having regard particularly to the inconclusiveness of the testimony as to the position of the break, and to the non-production of the broken parts of the bar, the conclusion at which the jury arrived cannot, their Lordships think, be successfully impugned as without reasonable foundation.

IMP.

P. C.

Duff, J.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

N. B.

S. C.

FAIRBROTHER v. FEGLES BELLOWS ENGINEERING Co., Ltd.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. June 13, 1919.

MASTER AND SERVANT (§ II A—67)—ENGINEERING WORK—GUY ROPE—NECESSITY OF KEEPING CLEAR FROM PASSING TRAINS—NEGLIGENCE—INJURY—DAMAGES.

Where conditions are such that it is impossible to secure an anchorage for a guy rope used to afford the necessary resistance to the strain put upon tackling in raising bents in connection with the erection of a grain conveyor, such as would hold the rope clear from passing trains, it is the contractor's duty to see that the work is made safe for his employees either by following a different system of erecting the bents, or by providing some adequate means to safeguard the guy wire from contact with passing trains, or to warn or stop passing trains while it was so attached.

Failure by the railway employees to take sufficient care to avoid contact by the train with the guy wire was something which the contractor was bound to anticipate and guard against and negligence on the part of the company's employees would not affect his liability.

[*Ainslie Mining & Railway Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420, *Brooks Scanlon O'Brien Co.* v. *Fakkema* (1911), 44 Can. S.C.R. 412; *Wilson* v. *Merry*, L.R. 1 Sc. & Div. 326, applied.]

Statement.

APPEAL by defendant from the trial judgment in an action for damages for injuries which caused the death of plaintiff's intestate. Affirmed.

F. R. Taylor, K.C., for appellant; *D. Mullin*, K.C., for respondent.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—This case was tried before Crocket, J., and a jury, at the St. John November Circuit, and resulted in a verdict for the plaintiff for $10,000.

It appears that on Nov. 15, 1917, the defendant was constructing a grain conveyor in connection with the elevator situated near the south end of Prince William St., St. John. One section of this conveyor, referred to in the evidence as sect. No. 4, is built for some 300 ft. of its length over the Government branch railway track, which, coming in from the main line by way of Courtenay Bay, rounds Reed's Point, and thence runs for several hundred feet northerly over and along wharves lying to the west of Water St. The gallery of the conveyor where it runs along the harbour front is sustained at a height of some 53 ft. or so above the wharf surface by bents. The legs of these bents are formed

of 12-inch timber, and at the wharf's surface, rest upon foundations specially prepared to sustain them, and to which they are bolted.

Speaking particularly of that portion of sect. 4 where, as stated, the conveyor runs above and along the railway, each bent straddles the railway track so as to leave a space of 15 ft. between its legs at the surface of the wharf. This space narrows as the legs approach the cross timber which forms the cap of the bent, so that where they are bolted to this cap the legs of the bents are only some 6 ft. or so apart.

The bents are so constructed that while the leg which is nearest the harbour front rises with a very slight incline inwards from the perpendicular, the other, or eastern leg, leans inward over the railway track at an angle much more pronounced.

The bents are so placed that, where practicable, there is a distance between each of them and the one next it of 35 ft. This distance is bridged at the top of the bents by 4 stringers running from cap to cap, and resting upon, and bolted to, 5-foot corbels attached to the cap timber at right angles thereto.

At the time the plaintiff's intestate received the injury which caused his death, 5 bents of No. 4 sect. had been erected and bolted at the foot in position; and 3 of them, that is to say, Nos. 1, 2 and 3, had been connected at the top by stringers in the manner described. The mode employed in constructing sect. 4 of the conveyor, or at least that portion thereof which is supported by the 5 bents referred to, was to build each bent prone upon the ground and then to raise it into its final standing position by means of a block and tackle of which one end was attached to the cap of the bent to be raised, and the other secured to the cap of the bent last erected. To afford the necessary resistance to the strain put upon this tackling in raising the bent into place, a wire rope about $\frac{3}{4}''$ in diameter was attached either to the cap of the standing bent to which the tackling was secured, or directly attached to the tackling itself, and from there this wire rope was carried backwards and down to one of the mooring posts which stand along the front of the wharf at intervals of some 30 to 40 feet apart, and at a distance of 3 to 4 feet back from the cap which crowns the face of the wharf. These mooring posts are about 22" in diameter, and about $4\frac{1}{2}$ ft. in height above the wharf's surface. Throughout the distance of 300 ft. or so referred to where the

N. B.

S. C.

FAIRBROTHER v. FEGLES BELLOWS ENGINEERING CO. LTD.

White, J.

bents straddle the railway track, the western leg of each bent is placed within about a foot and a half of the wharf cap referred to. The result is that if a line were drawn from the foot of one bent to the foot of the bent next to it, the mooring post there would fall from one to two feet within, that is to the eastward, of the said line.

The evidence is that when a box car was standing on the track opposite any of the mooring posts referred to, sufficient space was not left between the car and the post for a man to pass through.

About ten o'clock of the morning of said Nov. 15, 1917, the plaintiff's intestate and three other men were engaged in fastening into place the stringers connecting the cap of No. 4 bent with the bents on either side of it. The frame-work of No. 6 bent was lying upon the ground nearly completed and ready for erection. The wire guy rope, intended, as above mentioned, to afford resistance to the pull of the tackling by which it was proposed to raise No. 6 bent, had been fastened to, or at the top of, No. 5 bent and thence carried back over the cap of No. 4 bent, and from there ran down at an angle to the mooring post which stood near the foot of No. 3 bent, and was there secured to that mooring post. There is evidence that this wire anchorage rope, where it hung between the top of bent 4 and the mooring post referred to, was so slack that it bellied somewhat and was perceptibly swayed by the wind.

During the progress of the work it was customary to run trains in and out over that portion of the track where the work was being done, twice a day, once at or about ten in the morning, and again at or about four in the afternoon, and in addition to what may be termed these regular trips, trains were liable to be run in and out at other times of the day on special trips. The evidence is that the wharf structure itself was not sufficiently substantial to prevent a perceptible movement of its timbers in places when the train was passing over it. Partly, as I infer, for that reason, and partly to make sure that no materials employed in the construction work being carried on obstructed the railway, one of the railway employees usually walked ahead of the train.

On the morning on which the injury complained of occurred, one of the railway employees, named Mowry, walked ahead of the

N. B.

S. C.

FAIRBROTHER v. FEGLES BELLOWS ENGINEERING CO. LTD.

White, J.

train as it came in on the siding past where the plaintiff's intestate was at work. He failed to notice the guy rope running from the top of bent No. 4 down to the mooring post, as mentioned, but both the engine-driver and the cab-man saw it. The train on its passage does not appear to have touched this guy rope, but on backing out, some ten minutes later, with some box cars, the train, so the jury have in effect found, caught the guy rope and before the train could be stopped had carried it sufficiently far to cause bent No. 4 to be drawn forward so as to fall against bent No. 5, thus causing both bents to collapse and come to the ground. The plaintiff's intestate fell with the bents, thereby sustaining the injury which some two days later resulted in his death.

Eleven questions were submitted by the trial Judge to the jury, and these with the answers were as follows:—

1. Q. Was the death of the plaintiff's intestate caused by the guy wire which was used by the defendant in the raising of the conveyor bents being caught by the C. G. shunting train? A. Yes.

2. Q. Was adequate protection provided for the defendant's workmen employed in the construction of the conveyor above the railway track against such a danger? A. No.

3. Q. If not was such inadequacy due to negligence on the part of the defendant company or its employees? A. Defendant company.

4. Q. If so did such negligence lay in one or more and in which of the following particulars: (a) Failure to provide proper and competent superintendence. A. Yes. (b) Failure to provide a reasonably safe place for the employees to work in? A. Yes, lack of supervision. (c) Failure to adopt a reasonably safe system of work in the erection of the bents and construction of the conveyor over the railway tracks? A. Yes.

5. Q. If you find there was negligence in the particulars (b) and (c) as stated in the preceding question, or in either of said particulars, state in what respect the place and system or either of them as the case may be was not reasonably safe? A. (b) Yes. (c) By not having a proper device to safeguard the guy wire when cars were passing.

6. Q. Was the death of the deceased the direct result of the lack of adequate protection for the safety of himself and other employees while working over the C.G. Railway tracks? A. Yes.

7. Q. Were any of the employees of the C.G. Railway guilty of negligence in connection with the running of the shunting train over the conveyor bents on the morning of Nov. 15, 1917? A. No.

If so, name them and state in what such negligence consisted.

8. Q. At what sum do you assess the pecuniary loss of Mrs. Fairbrother and her two children by reason of the intestate's death? A. $10,000.

9. Q. How do you divide the damages so found as between Mrs. Fairbrother and her two children, Arnold and Darrell? A. $6,000 to Mrs. Fairbrother and $4,000 to her children Arnold and Darrell, $2,000 each.

N. B.

S. C.

FAIRBROTHER v. FEGLES BELLOWS ENGINEERING CO. LTD.

White, J.

10. Q. Did the accident which caused the death of the plaintiff's intestate arise out of and in the course of his employment? A. Yes.

11. Q. At what sum do you place the damages under the Workmen's Compensation Act? A. $2,500.

The defendant's counsel contends that the answers of the jury to all of these questions except Nos. 8 and 11 are against the evidence and weight of evidence. As to No. 8 he claims the damages are excessive.

With reference to Q. 1, I think there was ample evidence to warrant the jury in finding as they did. The same I think is true of Q. 2.

Taking Q. 3, 4 and 5 together, I think it is fair to assume that the jury in finding as they did, that the defendant was guilty of failure to provide a reasonably safe place for the employees to work in had particular reference to the plaintiff's intestate.

Had the evidence established due care upon the part of the defendant in providing proper superintendence of the work and that the method followed in erecting the bents upon sect. 4, by constructing the same upon the ground and raising them to place in the manner described, was the safest method which was reasonably practicable under the circumstances, and that the injury which resulted in the death of the plaintiff's intestate arose wholly through the failure of McWilliams, the assistant superintendent of the defendant, to see that the wire which caught in the train was attached to a proper anchorage, then I think the case would have fallen within the principle enunciated in *Wilson* v. *Merry* (1868), L.R. 1 Sc. & Div. 326, and the defendant would not have been liable. But the testimony of Flood, who was the only witness called on behalf of the defendant, is such that the conclusion might, I think, very reasonably be drawn from it that owing to the proximity of the conveyor bents to the wharf front, it was not possible to secure any other anchorage than that afforded by one of the mooring posts referred to. Adopting that conclusion it would then, I think, follow that the defendants would be guilty of negligence because they must be taken to have known, or if they did not know it was their duty to have informed themselves, of the local conditions under which the work was being carried on.

If these conditions were such that it was impossible to secure an anchorage for the wire rope in question such as would hold the rope clear of passing trains, or permit of its being so held, then

I think the defendant was under a duty, which it could not escape by delegating it to an employee, to see that the work was made as safe for their employees as was reasonably possible, either by following a different system of erecting the bents (such for instance as was pursued on No. 3 where the bents were erected over sheds and built from the ground up) or by providing some adequate means to safeguard the guy wire from contact with the car when a train was passing; or, at least, by taking all care reasonably possible to insure that the guy rope was not left attached to the mooring post for any longer period than was absolutely necessary in connection with the raising of such bent, and that while it was so attached, proper steps were taken to warn and stop passing trains.

That view I think is supported by *Ainslie Mining & Railway Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420; and *Brooks Scanlon O'Brien Co.* v. *Fakkema* (1911), 44 Can. S.C.R. 412.

It is true that Flood testified that in his opinion the erection of the bents in the manner adopted on sect. No. 3, by building them from the ground up, would have been more dangerous to the employees than that used in raising the first five bents of sect. No. 4, assigning as a reason for this belief, that where the bent was built from the ground up, the men had to work upon narrow staging. But the jury were not bound to adopt Flood's view upon that matter, and I do not hesitate to say that had I been trying the case without a jury I do not think I myself would have adopted it, having regard to all the circumstances disclosed by the evidence. Flood was an engineer then about twenty-five years of age, a graduate of one year's standing of the U.N.B. School of Engineering. He was employed as time-keeper, although he did some engineering work in connection with the construction, such as furnishing lines, etc.; and he says that in one or two instances he advised with the superintendents as to the best and safest method of erecting bents on No. 2 portion of the conveyors. He had, however, nothing to do with superintending the actual work of construction, and admits that he had no previous experience in the construction of work of that character.

While the jury by their answer to Q. (c) No. 4 found that the defendant was guilty of negligence in failing "to adopt a reasonably safe system of work in the erection of bents for the construction of the conveyor over the railway tracks," by Q. 5 they have stated

N. B.

S. C.

FAIRBROTHER v. FEGLES ENGINEERING CO. LTD.

White, J.

that this negligence consisted in not having a proper device to safeguard the guy rope when cars were passing. If, as I take it, by the words "proper device" is meant some mechanical appliance to hold the guy wire, when fastened to the mooring post, clear of passing cars, there is no evidence to shew that such a device was feasible. On the other hand, Flood, in the course of his testimony, being asked as to the feasibility of providing such a safeguard said that he did not know how it could be done, as the bents stood so near the edge of the wharf. Had the defendant been found guilty of negligence by the jury upon no other ground than that they, the defendants, had failed to provide such proper device, I would have doubted very much whether the verdict could be supported upon that ground. But the jury have also found that the defendants were guilty of negligence, in failing to furnish proper supervision of the work. The superintendent employed by them was a man named Raymond. According to the evidence of Flood, Raymond was general superintendent of the whole work, and it was his duty to superintend not only the construction of the conveyors but of the elevator itself. The assistant superintendent was a man named McWilliams, and under him was a man by the name of Ellsworth, who was carpenter foreman, and a man named Nicholson who was foreman of labourers. Flood testifies that it was the duty of McWilliams to select from time to time, as required, the mooring post to which the anchorage wire should be attached, and to superintend the riggers who were employed in fastening such wire to the forward bent and in carrying the same back to the mooring post and attaching it there. He further states that by telephone the railway officials had been requested to notify defendant when trains were to be sent over the section of the track where the defendants were engaged in erecting the conveyor; that the railway officials had promised to give this notice, but prior to the injury which resulted in the death of the plaintiff's intestate had failed to carry out such promise. It further appears that on the day before that on which the plaintiff's intestate was injured as described, the train would have collided with the anchorage rope where it was then attached to another mooring post (for the purpose, as I infer, of raising bent No. 5) had not one of the train hands discovered the danger in time and notified the defendants who thereupon had the anchor rope

removed. It further appears that while the rope was attached to the mooring post where it was liable to come into contact with a passing train, no guard was placed by the defendant to notify the train hands that such rope was so attached, and to insure as far as possible that the train did not come into contact with the same; and to my mind the evidence further shews that proper care was not exercised to see to it that the rope attached to the mooring post, or anchorage, did not remain so attached for a longer time than was reasonably necessary.

In short, without attempting to review in detail all the evidence bearing upon the question as to the defendant's failure to provide adequate and proper superintendence for the work, I think there is ample in the testimony to warrant the jury in coming to the conclusion that both Raymond and McWilliams were negligent in failing to take proper precautions to prevent a collision of the train with the wire anchorage rope; and this too, not only on the one occasion when the plaintiff's intestate was injured, but on other occasions during the progress of the work on that part of sect. 4 where bents were being erected over and astride of the railway track.

I further think the fact that, not in one instance alone, but in several, the defendant's superintendents failed to take proper care to provide for the safety of the employees in their charge, is at least *primâ facie* evidence of incompetency; and that when once incompetence of the employer's superintendent is shewn the burden rests upon the employer to prove, if he can, that he took proper care to select a competent person or persons to superintend the work, when, as is the case here, the question of proper superintendence is placed in issue by the pleadings.

In *Wilson* v. *Merry*, L.R. 1 Sc. & Div. 326, Lord Colonsay in the course of his judgment takes care to point out that no question was raised there as to the competency of the superintendent employed by the defendant. It is true that Flood testified that in his opinion both Raymond and McWilliams were men competent to discharge the duties of superintendence entrusted to them by the defendant. But again the jury were not bound to accept his opinion upon that point; and in view of the evidence in the case, might, I think, very reasonably take a different view, as they

N. B.

S. C.

FAIRBROTHER v. FEGLES ENGINEERING CO. LTD.

White, J.

unquestionably appear to have done from their answers to Q. (a) No. 4.

I therefore think there is sufficient evidence to warrant the answers of the jury to Q. 1 to 6 inclusive, except, possibly, as stated, their answer (e) to Q. No. 5.

The defendant further claims that the injury to the plaintiff's intestate was the direct result of negligence of the railway's servants. The jury have directly found against this contention by their answer to Q. 7, and their finding upon this point is one which I think they might reasonably make under the evidence. But even assuming the evidence had established, that despite the negligence of the defendant, the injury would not have occurred without the concurring negligence of the railway's employees, I think the defendant would have still been liable to the plaintiff for the full damage sustained; because failure by the railway employees to take sufficient care to avoid contact by the train with the guy wire in question was something which, under the circumstances disclosed by the evidence, the defendants were bound to anticipate and guard against. *Burrows* v. *March Gas & Coke Co.* (1872), L.R. 7 Exch. 96.

The defendant further claims that the Government was the employer of the plaintiff's intestate, and that therefore he and the train hands were fellow servants engaged in a common employment. To establish this he relies upon testimony of Flood given subject to the objection, that the contract between the defendants and the Government, being in writing, could only be proved by production of the written document. From the evidence of Flood thus given, it appears that the defendant was employed by the Government to construct the elevator and conveyors in question according to plans and specifications furnished to them by the Government; that the Government supplied the defendants, from time to time, with money to pay their employees, and furnished them with materials and supplies for the work, whenever requested so to do by the defendants; that Morrow, an engineer in the employ of the Government, was available at all times to give the defendants, when asked by them, such engineering advice as they might require, and that it was his duty to see that the work was completed according to the Government plans and specifications. But, further than as stated, Morrow was not

charged with the duty of superintending the actual construction of the work, and had nothing to do with the supervision of the men. The defendant employed its own men and was paid by the Government 10% upon the cost of the work.

I think it clear from the evidence that the plaintiff's intestate was employed by the defendant and was engaged in doing work for them under their direction at the time he was injured, and was not at such time in any sense an employee of the Government.

The defendant further claims that the damages allowed by the jury were excessive and unwarranted by the evidence. The question of damages, however, is one particularly for the jury, and as I think there is sufficient in the evidence to warrant the jury in fixing the damages as they have at $10,000, I do not think their assessment should be disturbed.

In the defendant's factum, as also during the argument before us, a number of objections were taken by counsel for the defendant to the charge of the Judge. As to some of these objections, I have already dealt with the grounds upon which they are based. To take up all the remaining objections *seriatim*, and deal with them in detail, would protract this judgment to a burdensome length and would I think serve no such useful purpose as would justify that course. It is in my opinion sufficient to say that I have read the charge of the Judge, and taking it as a whole, I do not think that it is fairly open to the objections made to it by the defendant's counsel. It is not, I think, necessarily a sufficient ground for a new trial that the charge of the Judge does not state legal principles with all such limitations and restrictions as are requisite to make them not only an accurate but a complete abstract statement of the law he is expounding. His charge is to be construed with reference to the facts of the case; and it is sufficient if his charge properly instructs the jury upon the law so far as it affects those facts. He is not, for instance, in an action for negligence, bound to give the jury a full, accurate and complete definition, and one applicable under all circumstances of what constitutes negligence. It is sufficient if he explains to the jury what constitutes negligence as applied to the facts before them. Construing the charge of the Judge in view of the evidence and of the questions which the jury were called upon to determine, I

N. B.
S. C.
White, J.

think it gave them a proper and sufficient instruction as to the law.

For the reasons I have stated I think this appeal should be dismissed with costs.

Appeal dismissed.

IMP.
P. C.

HUDSON'S BAY Co. v. RURAL MUNICIPALITY OF BRATT'S LAKE.

MARTIN v. RURAL MUNICIPALITY OF SNIPE LAKE.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Parmoor, and Duff, J. August 1, 1919.

TAXES (§ I D—40)—RURAL MUNICIPALITY ACT (R.S.S., c. 87)—DIRECT TAXATION FOR RAISING REVENUE FOR MUNICIPAL PURPOSES—POWERS OF PROVINCIAL LEGISLATURE.

Sec. 323 (*b*) of the Rural Municipality Act (R.S.S., c. 87; see Amends. 1912-13, c. 31, sec. 4) imposes a direct tax for the purpose of raising a revenue for municipal purposes, and is therefore legislation within the powers of the Provincial Legislature. A tax imposed on the appellant company under the provisions of s. 323 (*b*) of the Act is not an "exceptional tax" within the meaning of clause 11 of the deed of surrender between the appellant company and the Crown under the provisions of the Rupert's Land Act, 1868.

TAXES (§ V D—207)—COLLECTION OF—"SURTAX" PROVISIONS—DEFENCES—REGULARITY OF PROCEDURE NOT IN QUESTION.

The fact that a municipality is using the taxes collected under the "surtax" provisions of the Rural Municipality Act (R.S.S., c. 87) and amendments (see stats. 1912-13, c. 31, s. 4), for municipal purposes is no defence to an action for recovery of such taxes if the regularity of the procedure for the levy and assessment is not called in question. The ultimate use or destination of such taxes is a matter to be settled between the Province and the municipality after the collection has been made by the municipality.

The provisions of the Act respecting the assessment and levy of municipal taxes are applied to the surtax in the same manner and to the same extent as if the surtax were part of the general municipal levy, and for this purpose the surtax roll is to be deemed to be and to be taken as a part of the assessment and tax roll of the municipality.

Statement.

APPEALS by defendants from the Saskatchewan Court of Appeal (1918), 44 D.L.R. 445 and 44 D.L.R. 442. Affirmed.

The judgment of the Board was delivered by

Lord Parmoor

LORD PARMOOR:—These are appeals from the Court of Appeal for the Province of Saskatchewan. In the Hudson's Bay Company's appeal, there are 6 respondents, but the same main questions arise in each case. It is, however, argued on behalf of the appellants that somewhat different considerations are raised in the case of those rural municipalities in which the burden of the surtax falls exclusively, or almost exclusively, on the appellants.

In the year 1670 Letters Patent were granted by King Charles II. to certain persons incorporated by the name of the appellant

company, whereby certain lands and territories, rights of government and other rights, privileges, liberties, franchises, powers and authorities, were granted to the company in His Majesty's Dominion in North America. By the B.N.A. Act, 1867, provision was made for the admission of Rupert's Land and the North-West Territories or either of them, into the Union on certain specified terms and conditions. In 1868 the Rupert's Land Act was passed, and, for the purpose of that Act, the term Rupert's Land was defined to include the whole of the lands and territories held or claimed to be held by the appellants. Under the provisions of this Act a Surrender was made and duly accepted by Her Majesty Queen Victoria by an Instrument under Her Sign Manual and Signet, on June 22, 1870. On the following day an order-in-council was issued declaring that Rupert's Land should from and after the said date be admitted into and become part of the Dominion of Canada upon the terms and conditions therein specified. It is not necessary to follow the further history, except to state that Saskatchewan and Alberta were created as Provinces of the Dominion in the year 1905. Clause 11 of the Deed of Surrender is as follows:—

> The company is to be at liberty to carry on its trade without hindrance in its corporate capacity, and no exceptional tax is to be placed upon the company's land, trade or servants, nor any import duty on goods introduced by the said company previously to such acceptance of the said Surrender.

The appellants submit that the tax, sought to be imposed upon them, is an exceptional tax within the meaning of the said clause, both in its nature and in its incidence, and that they are therefore exempted from liability to such taxation. They further submit that in any case the tax is not effectively imposed, as there was no specific application or appropriation of the moneys when levied and collected, and further that the moneys were not required for municipal purposes, since all the requirements of the municipality were met by the ordinary taxation to be levied under the Rural Municipality Act, R.S.S., 1909, c. 87.

The Rural Municipality Act constitutes municipalities which, so far as practicable, comprise an area of 18 miles square, and the respondents are the councils of various rural municipalities in Saskatchewan. The council of each municipality is constituted a body corporate, and is directed to appoint an assessor, whose duty it should be to make an assessment of the municipality in

IMP.

P. C.

HUDSON'S BAY CO. v. RURAL MUNICIPALITY OF BRATT'S LAKE.

Lord Parmoor.

the manner provided. The appellants rely on s. 250A which enacts that "all municipal taxes shall be levied equally upon all ratable land in the municipality, according to the assessed value of such land." This section contains a declaration of the principle of equality where rates are levied on the assessed value of land, and has no direct application to the tax in question in this appeal. S. 294 provides for the preparation of estimates of the probable expenditures of the municipality for the year; s. 295 for the levy of the rate, and s. 296 that the uniform rate of taxation to be authorised by the council shall not in any one year exceed 1% of the assessed value of the land. The tax from which the appellant company claim exemption is levied as a surtax, under a series of sections headed Surtax Provisions. S. 323B enacts that in addition to the tax assessed under the provisions of 252 hereof it shall be the duty of the council of every rural municipality, and it shall have power to annually assess, levy and collect a tax of 6¼ cents per acre, called a "surtax," on all lands within the municipality made subject to the same as thereinafter set forth. It was urged on behalf of the appellants that the words "in addition to" implied that the surtax should not be levied except so far as was necessary to supplement the ordinary taxation on assessed values, but, for reasons hereafter given, their Lordships cannot accept this construction. There is a provision that the land of any person who owns or occupies not more than 40 acres in the municipality shall be exempt. Subject to this exemption, the land of any owner or occupant exceeding 1,920 acres, and the land of any owner or occupant of a less quantity which does not comply with specified conditions as to the area under cultivation, or residence, is subject to the tax, which is at a flat rate uniformly imposed on acreage. The provisions of the Act respecting the assessment and levy of municipal taxes are applied to the said surtax in the same manner, and to the same extent, as if the surtax were part of the general municipal levy, and for this purpose the said surtax roll is to be deemed to be and to be taken as a part of the assessment and tax roll of the municipality.

In 1914, when the surtax was first levied, there were 294 rural municipalities in Saskatchewan, of which 274 were in the fertile belt. The surtax was levied in 271 of these rural municipalities. In the case of the rural municipality of Chaplin the

IMP.

P. C.

HUDSON'S BAY CO. v. RURAL MUNICIPALITY OF BRATT'S LAKE.

Lord Parmoor.

appellants own 8,839 acres. There were 549 taxpayers on the assessment roll, but all other land, except that of the appellants, was exempt from tax either through residence or cultivation. There are 12 other rural municipalities in which the appellants' land is the only land subject to the surtax. In the case of Nipawin the appellants own 10,818 acres. There were 561 taxpayers on the assessment roll but only one other person, besides the appellants, was charged with a surtax. In the rural municipality of Craik there were 565 taxpayers on the assessment roll, and 4 other persons, besides the appellants, were charged with the surtax. In the rural municipality of Abernethy there are 457 taxpayers on the assessment roll, but only 22 persons on the surtax roll. In Redburn there are 592 owners on the roll, and 21 are charged with surtax. In the rural municipality of Bratt's Lake the appellants are charged as the owner of 480 acres. There are 483 persons on the assessment roll and 49 on the surtax roll. The conditions in the respondents' councils as selected are said to be fairly illustrative of the general conditions in all the rural municipalities in Saskatchewan. In the aggregate, 1,778,844 acres of land belonging to the appellants are charged with the surtax. There is no doubt, therefore, of the importance of the questions raised in this appeal by the appellants.

The question mainly argued on behalf of the appellants before their Lordships, was whether the appellants are exempted from the surtax under the terms of Clause 11 of the Deed of Surrender. The first provision of this clause is that the "company is to be at liberty to carry on its trade without hindrance in its corporate capacity." It was argued that this provision shewed the wide character of the intended exemption but, apart from any bearing that this provision may have in determining the general construction of the clause, it is not possible to say that the surtax, in itself, is any interference with the liberty of the appellants to carry on its trade in its corporate capacity. The second provision is the important one, "No exceptional tax is to be placed upon the company's land, trade, or servants." It is claimed that the surtax is exceptional either in its nature or in its incidence or both in its nature and incidence. No doubt the surtax was not a tax in force when the Deed of Surrender was executed, but at that date there were no taxes levied in the territory of Saskat-

IMP.

P. C.

HUDSON'S BAY CO. v. RURAL MUNICIPALITY OF BRATT'S LAKE.

Lord Parmoor.

chewan, and, if the test of novelty is applicable, it would mean that the appellants would be exempt from all taxes rendered necessary by progressive advance within the territory. In other words, the clause would give exemption from all taxes. Their Lordships are unable to accept any such wide interpretation of the terms of the deed, or to hold that the language denotes any such far-reaching exemption. It was, however, further argued that if novelty in taxation was not sufficient to bring the surtax within the term "exceptional," as used in the Deed of Surrender, yet that such surtax was of so unusual a character, either in its nature or incidence or both in its nature and incidence, as to be fairly comprised within that term. It was urged that the surtax was neither uniform nor equal, and that its non-compliance with the principles either of uniformity or equality, brought it within the category of an exceptional tax. No doubt there is discrimination between owners and occupants who are residents or non-residents, between owners and occupants of a large or small acreage, between owners and occupants who do, or do not cultivate a certain proportion of their holdings, and this discrimination does, on the facts as they exist, throw in an especial manner the burden of the surtax on the appellants. At the same time, the surtax may be said to be both uniform and equal having regard to the fact that it is imposed not on value but on acreage. There is a uniform flat rate of 6¼ cents per acre, subject to exceptions of a uniform character to which all owners and occupants are entitled without discrimination, provided that they fulfil the specified conditions. The conditions imposed have the effect of throwing a heavy burden on the appellants as compared with other ratepayers, in rural communities such as Chaplin and Nipawin, but this is the result of the large acreage of the holdings of the company and not of any distinction between the position of the appellant company and that of any other company or person. The real complaint appears to be to any system of taxation not based on assessed values, and in which the principle of discrimination is sanctioned, but their Lordships are of opinion that such a system of taxation is within the powers and discretion of the councils of the rural municipalities, and that if such a system is adopted and applied generally, the appellants cannot claim to be entitled to special exemption under the terms of the

deed. Different considerations would arise if it could be said that the appellants had been singled out to bear a special burden of taxation from which other members of the community in a similar position are exempt, but the surtax in question is not open to this criticism and no such case has been established. Mr. Nesbitt used an additional argument. He said that the term in the deed was intended to protect the appellants against any system of taxation which would place it at a disadvantage in competition with small retail dealers. To adopt this construction would be to introduce words into the exemption clause which are not there, and to open a wide range of discussion in each case. As a matter of fact a purchaser of land from the appellants would, as regards the surtax, stand in exactly the same position as a purchaser from any other company or person, whether such other company or person is a small or large owner of land. It is further of importance to note that the exceptional tax is a tax applicable not only to the company's land but also to the company's trade and servants. It could not be said that a servant of the company, if also an owner or occupant of land within a rural community, and subject as such to the surtax in common with other owners or occupants in a similar position, was subject to an exceptional tax. The last provision in the exemption clause, which prohibits any import duty on goods introduced by the company previously to the acceptance of the surrender, has no application to the surtax in question, and does not affect the construction of the preceding provisions. Their Lordships are of opinion that the appellants have not established the case that the surtax in question is an exceptional tax from which they are exempt under the terms of the Deed of Surrender.

In the second place, the appellants contended that the surtax was not validly imposed as there was no application or appropriation of the moneys to be levied, and further that the moneys were not required for municipal purposes, as all the requirements of each municipality were or should be met by moneys levied by ordinary municipal assessment and taxation under Part VII. of the Rural Municipality Act, R.S.S., 1907, c. 87. In the absence of evidence to the contrary it must be presumed that the surtax is levied for legal purposes. S. 323 (i) in the statute applies all the provisions of the Rural Municipality Act respecting the assess-

IMP.

P. C.

HUDSON'S BAY CO. v. RURAL MUNICIPALITY OF BRATT'S LAKE.

Lord Parmoor.

ment levy and collection of municipal taxes to the surtax in the same manner and to the same extent as if such surtax were part of the general municipal levy, and for these purposes the surtax roll is to be deemed to be taken as part of the assessment and tax roll of the municipality. It is not suggested that there has been any irregularity in procedure, and under these circumstances it is difficult to see in what way the question of the use of the proceeds of the surtax by the municipal council has any bearing on the case of the appellants, or takes away from the municipality any right of action which apart from this consideration it would otherwise possess. The whole case, however, of the appellants on this point rests on a misunderstanding of the scheme of taxation comprised in the taxing Act. The surtax is a tax which it is the duty of the council of any rural municipality annually to assess, levy and collect on all lands within the municipality subject to the tax, and is to be in addition not to any amounts levied or collected under the provisions of s. 252, but to the tax itself. This does not mean that the surtax is to be regarded as a supplementary source of revenue and only to be levied so far as there may be deficiency in the amount levied under s. 252, but that it is to be an additional tax levied annually, so that the amount raised so far as it is applicable, may be paid into the general municipal account on the credit side. The estimates to be prepared under s. 294 are simply normal estimates of probable expenditure of the municipality for the year, and the levy under s. 295 upon all lands entered on the assessment roll at a uniform rate on the dollar is of such an amount as shall be deemed sufficient to meet the estimate of expenditure. The sufficiency of the amount would depend on the extent to which any moneys had been placed to the credit of the municipality from whatever source, and one source would be any monies which had been so credited as the result of the collection of the surtax. S. 296 provides that the uniform rate of taxation to be levied under s. 295 shall not exceed 1% of the assessed value of land, an indication that this source of taxation might not in all cases meet the municipal expenditure. There is no warrant for the assumption that all the requirements of a municipality are to be met by the power to tax on assessed values contained in the assessment roll, and unless this assumption can be maintained the argument of the appellant company fails.

S. 250A only applies to taxes levied upon the ratable value of lands according to the assessed value of such lands, and does not affect the duty of the council of the municipality to annually assess, levy and collect a surtax under s. 323B. In the opinion of their Lordships the contention of the appellant company under this head of its appeal fails, and the appeal must be dismissed.

The appeal of *Martin* v. *The Council of the Rural Municipality of Snipe Lake*, raises the contention, raised in the appeal of the Hudson's Bay Company, that the surtax legislation did not effectively impose the surtax. The same considerations arise and the same result follows. The appeal must be dismissed.

Their Lordships will humbly advise His Majesty that both of the above appeals should be dismissed with costs.

Appeals dismissed.

REX v. HARRY.

Alberta Supreme Court, Walsh, J. September 4, 1919.

1. CRIMINAL LAW (§ II C—51)—CONVICTION—SUFFICIENCY OF.
A conviction which accurately relates the facts should not be held to be bad simply because the description of the offence varies slightly from the language of the enactment creating it if the offence as described is really one within the meaning of such enactment.

2. CRIMINAL LAW (§ II A—34)—ENACTMENT PROVIDING HEAVIER PUNISHMENT FOR SECOND OFFENCE—SETTING OUT PREVIOUS CONVICTION IN INFORMATION—CONVICTION FOR FIRST OFFENCE ONLY IF NOT DONE.
Where an enactment provides that an accused shall be subject to a heavier punishment for a second or subsequent infraction of the law, the accused is entitled to know that he is being tried for a second offence and the previous conviction should be set out in the information and summons, and if this is not done the accused can only be convicted for a first offence.

Statement.

MOTION upon two grounds to quash a conviction of the defendant under a city by-law governing the closing of drug shops.

J. McK. Cameron for the motion; *M. Marcus, contra.*

Walsh, J.

WALSH, J.: (1). The by-law enacts that all drug shops "shall be closed for the admission of customers *at* 10 o'clock p.m. on each and every day of the week." The information is that the defendant did not close his shop *after* 10 p.m. on a named day and the conviction follows the information. This it is argued is no offence, for what the by-law directs is a closing of the shops at and not after the prescribed hour. This by-law means,

ALTA.

S. C.

REX v. HARRY.

Walsh, J.

I think, that they are not to be opened again on that day for it cannot be said that they are closed for the admission of customers on a given day if the key is turned at 10 p.m. and the door thrown open again a few minutes later. A subsequent re-opening on the same day of a shop which is closed at 10 p.m. constitutes, in my opinion, a breach of the by-law, which is described with literal accuracy in a charge worded as this is. The evidence clearly discloses that that is what happened in this case. While it is always better to describe an offence in the language of the enactment creating it I do not think that a conviction which accurately relates the facts should be held to be bad simply because its description of the offence slightly varies from that of such enactment if the offence as so described is really one within the meaning of it.

2. The conviction is for a second offence though neither the information nor the summons issued upon it charged it as such. It is argued that there was no power to convict for a second offence in the absence from the information and the summons of notice to the defendant that he was being so proceeded against. The by-law limits the penalty for a first offence to $25 and costs, for a second offence to $50 and costs and for a third offence to a heavier fine or imprisonment or both. Though taken in the notice it was not argued before me that there was no power to thus grade the penalties.

The only question argued before me was the need for setting out the previous conviction in the information and summons. There is nothing bearing upon it either in the by-law itself or in the statute under which it was passed or in any other statute governing it that I am aware of and the point arises for decision now for the first time to my knowledge in the case of a summary conviction. There is both Federal and Provincial legislation on the subject under statutes which do not govern this case. The Criminal Code for instance provides in at least three instances under ss. 386, 465 and 568 for a heavier punishment upon a conviction following an earlier one and under s. 851 it is made very clear that in any case in which it is sought to impose this heavier punishment the fact of the previous conviction must be alleged in the indictment. The Manitoba Court of Appeal in *Rex* v. *Edwards* (1907), 13 Can. Cr. Cas. 202, held that this section applied

to a summary trial of an indictable offence before a Police Magistrate and that by analogy the previous conviction must have been alleged in the information, there being no indictment under that mode of trial. These provisions cannot of course be invoked against this conviction for they only apply to indictable offences. They simply shew the mind of Parliament on the subject. There is no corresponding provision in Part XV. of the Code, doubtless because the Code does not authorize the imposition of a heavier penalty for the repetition of an offence punishable by summary conviction. The Liquor Act grades the penalties as does this by-law. I have been unable to find in it anything which provides expressly for the recital of a former conviction in an information charging a subsequent offence but s. 59, subs. 1, which sets out the procedure in such a case directs that after the subsequent offence has been dealt with the magistrate shall ask the accused "whether he was so previously convicted as alleged in the information," a very plain intimation that the previous conviction must be so alleged. I merely cite these instances to shew that Parliament and the Legislature think it only fair that if it is sought to make the accused subject to a heavier punishment because of an earlier infraction of the law he should have notice of that fact. It seems to me that that is the proper view of it. If he is simply charged as a first offence and he knows that he is guilty of that offence he may let the conviction go against him without defence resting secure in the knowledge that the worst that can happen to him is the imposition of the maximum of the penalty prescribed for a first offence. It seems hardly fair that the prosecution should then be allowed perhaps in his absence to prove a previous conviction when if he had had notice of such intention he might have been able to shew that it had been quashed or set aside on appeal or that it was not against him but against another man of the same name. So far as the penalty is concerned the previous conviction is an essential element in the later charge. It is imposed as a punishment for his incorrigibility in not learning the lesson taught him by that conviction. I think that he is entitled to just the same notice of the intention of the prosecution to prove a former conviction as he is to have particulars of the charge on which he is being tried before he can be made subject to a more severe penalty because of it. If this was a third instead

ALTA.
S. C.
REX v. HARRY.
Walsh, J.

of a second offence the defendant would be liable to imprisonment and it does not seem right that he should be so subject unless charged with something for which imprisonment could be imposed. As a conviction therefore for a second offence I do not think that this can stand. I do not feel justified, however, in quashing it. The depositions shew conclusively in my opinion a breach of this by-law and I have power to amend the conviction so as to make it what in my opinion it should have been. In *Rex* v. *Edwards*, *supra*, the Court reduced the term of imprisonment imposed upon the accused from ten years to two. Mr. Marcus points out that the fine imposed is really within that authorized for a first offence, namely $25, which is quite true but it is very plain from what the Police Magistrate said that he made the fine as heavy as he did only because of the former conviction; judged by what he did on the former occasion I fancy that he would but for this have made it $10.

I direct therefore that the conviction be amended by eliminating from it all reference to the former conviction and by reducing the fine from $25 to $10. There will be no costs of the motion.

Conviction amended.

IMP.
P. C.

CITY OF ARMSTRONG v. CANADIAN NORTHERN PACIFIC R. Co.

CITY OF VERNON v. CANADIAN NORTHERN PACIFIC R. Co.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin, and Duff, J. August 6, 1919.

TAXES (§ I F—80)—RAILWAY POPERTY—EXEMPTION FROM TAXATION—EVIDENCE AS TO USE AND OCCUPATION.

By an agreement between the Government of British Columbia and the Canadian Northern R. Co. exemption was granted to the railway company in the following terms: "The Pacific Company and its capital, stock, franchise, income, tolls and all properties and assets *which form part of or are used in connection with the operation of its railway* shall be exempt from all taxation," etc. Their Lordships held that the approval by the Minister of Railways of a plan of proposed line designated as company's "right of way" deposited under the provisions of the B.C. Railway Act, did not bring such right of way within the meaning of the exemption clause where there was nothing in the uses to which the lands were devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in process of construction.

The reason for the remission of taxation was the benefit to the public from the railway, and did not arise when the public were neither getting the actual railway nor having it in process of construction for their benefit.

[*Canadian Northern Pacific R. Co.* v. *New Westminster Corporation* 36 D.L.R. 505, [1917] A.C. 602, applied; (1919), 44 D.L.R. 319 and 44 D.L.R. 317, reversed.]

APPEALS from (1919), 44 D.L.R. 319 and 44 D.L.R. 317. Reversed.

The judgment of the Board was delivered by

DUFF, J.:—This appeal raises a question concerning the construction and application of Clause 13 (E) of an agreement dated January, 1910, between the Government of British Columbia and the Canadian Northern R. Co. which was ratified by a statute passed by the Legislature of the Province (10 Edw. 7, c. 4). By this clause, exemption from taxation is granted to the respondent (a provincial company promoted and controlled by the C. N. R. Co.) in these terms:—

> The Pacific Company and its capital, stock, franchise, income, tolls and all properties and assets which form part of or are used in connection with the operation of its railway shall, until July 1, 1924, be exempt from all taxation whatsoever or however imposed by, with or under the authority of the Legislature of the Province of British Columbia or by any municipal or school organisation in the Province.

By an Act passed in 1912 (c. 32 of the statutes of that year) the respondent was authorised by the Provincial Legislature to construct a line of railway in a southerly direction from Kamloops; and by s. 6 of that statute the exemption stipulated for in the agreement of 1910 was, with a modification having no relevancy in the present connection, made applicable to the railway thereby authorised.

By the same enactment the company was required to commence construction by Aug. 27, 1912, and to complete its line by Feb. 27, 1915.

It was the duty of the railway company under the provisions of the Railway Act of British Columbia (ss. 17, 18 and 27, c. 194, R.S.B.C.), before commencing construction to deposit with the Minister of Railways a plan of the proposed line with a profile and book of reference; and these documents were deposited on Oct. 9, 1912, and the plan was sanctioned in the following March. The period within which construction was to be completed under the provisions of the Act of 1912 was by an Act passed in 1913 extended until Aug. 21, 1915.

In April, 1916, the company commenced the action out of which this appeal arises claiming a declaration that certain lands in the city of Armstrong were exempt from taxation in virtue of the agreement of 1910.

IMP.
P. C.
CITY OF ARMSTRONG v. CANADIAN NORTHERN PACIFIC R. CO.
Duff, J.

At the last mentioned date no work had been done south of Kamloops in actually constructing the railway authorised by the statute of 1912. A branch of about 2¼ miles in length running from Kamloops Junction, a station on the company's main line, to the north bank of the South Thompson River opposite Kamloops, was constructed in 1912 or 1913; but this although referred to in the evidence as part of the Kamloops Vernon Railway was apparently not built under the authority of the Act of 1912.

At the trial the respondents obtained a judgment declaring the "strip of land forming the plaintiff's right-of-way" as shewn upon the plan deposited with the Minister of Railways to be exempt from assessment and taxation by the appellant, and the appeal of the corporation to the Court of Appeal of British Columbia from this judgment was dismissed.

Before their Lordships' Board counsel for the respondent contended that the lands described in the judgment of the trial Judge, that is to say the lands designated in the plan sanctioned by the Minister of Railways as the company's "right-of-way," became, by virtue alone of being so designated, part of the company's "railway" within the meaning of the exemption clause of the agreement of 1910, and that in respect of them the exemption provided for took effect and continues to have effect until the line of railway so designated is shewn to have been abandoned.

In support of this contention counsel relied upon the judgment of this Board in *Canadian Northern Pacific Railway* v. *New Westminster Corporation*, 36 D.L.R. 505, [1917] A.C. 602, in which their Lordships had to consider and apply the clause of the agreement of 1910 which is now before them. It appeared in that case that the plan of the line of railway in respect of which the exemption was claimed had not yet been approved by the Minister of Railways; and the railway company advanced the contention that all lands held by the company as a railway company and intended ultimately to form part of its railway or ultimately to be used in connection with the operation of it were included in the subjects embraced within the description "railway" as used in that clause; and the actual ground of the judgment was that the decision of the company that given lands were to be part of the railway or to be used in connection with the operation of the

railway was not in itself sufficient to bring such lands within the category of lands "which form part of or are used in connection with" the railway to which by the terms of the clause the exemption extends.

Sir Arthur Channell who delivered the judgment of the Board naturally emphasized the fact that the plans of the railway company had not received the sanction of the Minister, and that consequently the precise position of the railway track could not yet be known; but the observations to be found in the judgment do not sustain the proposition to which their Lordships are now asked to give their assent. On the contrary, the observations which express the principle of the judgment when correctly apprehended point to a conclusion which is decisive of the present controversy in a sense adverse to the contention relied upon.

The words of the clause relating to things forming part of the railway or used in working it are, it is observed, in the present tense; and the word "railway," it is said, is used as denoting a physical thing, something of which something else can form part and one which can be "operated." It may be added that as applied to the undertaking authorised by the Act of 1912, it means the railway or railways constructed under the authority given by that statute.

This is not to say that as regards lands alleged to form part of the railway the stipulated exemption only comes into force in respect of lands upon which the railway is completely constructed and in operation; but on the other hand their Lordships in the judgment referred to observe that the consideration for the remission of taxation is "the benefit to the public from the railway," and that the reason for the subsidy does not arise where "the public are neither getting the actual railway, nor having it already in process of construction for their benefit."

In their Lordships' opinion, effect would not be given to these considerations by adopting the rule that the approval of the plan given by the Minister under the Railway Act is in itself sufficient to bring within the sweep of the exemption all lands designated as part of the railway upon that plan when there is nothing in the uses to which the lands are devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in process of construction.

IMP.

P. C.

CITY OF ARMSTRONG v. CANADIAN NORTHERN PACIFIC R. CO.

Duff, J.

For these reasons their Lordships think the appeal should be allowed and the action dismissed with costs here and in the Courts below, and they will humbly advise His Majesty accordingly.

Appeal allowed.

The disposition of the appeal in the case of *The Corporation of the City of Vernon* v. *The Canadian Northern Pacific Railway Company* is governed by the above judgment.

Their Lordships will accordingly advise His Majesty to allow the appeal and dismiss the action with costs both here and in the Courts below.

CAN.

EX. C.

BEHARRIELL v. THE KING.

Exchequer Court of Canada, Cassels, J. August 29, 1919.

EXPROPRIATION (§ III D—167)—VALUATION OF COMMERCIAL ENTERPRISE.

Suppliant alleged that the sand and clay to be found on the property expropriated had special quality and merit for manufacture of high-class brick and brick-tile, and, that with the small quantity of land left to him after the expropriation of the property it was impossible to carry on his proposed enterprise.

The suppliant became owner of the property in 1912, paying $10.00 an acre; the Crown offered $30.00 an acre, and it was admitted that this amount was ample if there was no special merit in the clay. He never commercialized it, there has been no established business on the premises and the supposed profits are conjectural. The suppliant in sending material to experts for test did not deem it necessary to send clay, but sent sand *alone*. The land taken is but a small piece of the whole, the Crown having abandoned part of the land first expropriated and agreed to reconvey the part taken by the Canadian Northern, and moreover, the land is to a certain extent swamp land not suitable for the alleged purposes, and other clay is available in the vicinity.

Held.—That, in as much as there was no special or peculiar merit in the clay and sand found on the expropriated land, and furthermore that, as suppliant has suffered no injury to any feasible commercial undertaking, by reason of the amount of land taken or of the works constructed by respondent, there was no ground for increasing the amount of compensation tendered to suppliant by respondent.

Statement.

PETITION of right to recover the alleged value of land expropriated by the Crown and claiming special damages because of the valuable deposits of sand and clay on the property expropriated suitable for manufacture of very high-class brick and analogous articles and also because the lands so taken were of such extent and so situate with regard to the remainder that the lands were rendered of no value for the purposes for which the suppliant intended them.

The case was first tried at Toronto on January 15 and 16,

1917, but before judgment the Crown abandoned certain portions of the land previously expropriated and subsequently made application for new trial on the ground of surprise at the former trial, and because the abandonment entirely changed the nature of the action. This application was granted and a new trial was had on January 14, 15, 16, 17, 18, and April 29 and 30, 1919, before the Honourable Sir Walter Cassels at Toronto.

The respondent tendered $30 an acre before action, and in its defence renews the same.

At the opening, suppliant asked and was permitted to amend by reducing his claim to $100,000. A great deal of evidence was adduced, but the essential points in issue were 1st, whether the clay and sand in the property in question had any special or peculiar merit for the making of brick or brick-tile; and 2nd, whether the taking of the piece expropriated by the Crown prevented the suppliant from carrying on the enterprise or undertaking he alleged he intended to do.

The main facts are discussed in the reasons for judgment.

W. C. Mackay, K.C., and *W. R. Wadsworth*, K.C., for suppliant; *Hon. Hugh Guthrie*, K.C., and *R. V. Sinclair*, K.C., for respondent.

Cassels, J.

CASSELS, J.:—On March 24, 1916, Beharriell, the suppliant, filed a petition in which he claimed that on September 28, 1912, he entered into an agreement for the purchase of the westerly 50 acres of the east half of lot No. 11, in the 14th concession of the Township of N. Orillia, and that on November 21, 1912, he obtained a conveyance of the said lands.

There is no dispute as to the title of the suppliant. It is conceded that when the suppliant became the owner of the said lands the line of railway of the Canadian Northern crossed the said 50 acres and was in operation as a railway.

The Canadian Northern Railway had expropriated 7.25 acres of the said 50 acres, and Beharriell's title to the 50 acres was less the property of the Canadian Northern, reducing the title of the suppliant to 42.75 acres instead of 50 acres as alleged.

The lands of the suppliant are at Washago about eleven miles from the Town of Orillia, and about 89 miles from Toronto.

The suppliant alleges that for the purpose of a Public Work of Canada, viz., the Trent Canal, His Majesty on August 13, 1914, and by a further subsequent expropriation, expropriated about

CAN.
EX. C.
BEHARRIELL
v.
THE KING.
Cassels, J.

24 1-10 acres of the 42.75 acres, the property of the suppliant, leaving him the owner of only about 18¾ acres.

The claim of the suppliant is that at the time he became the owner of the said lands there were situate thereon valuable deposits of sand and clay suitable for the manufacture of a very high class of brick-tile and analogous articles.

His claim is that the parts of his lands so taken are of such extent and so situate north with regard to the remainder thereof, and the remainder of his lands are so affected by the works and operations of the Trent Canal and the Canadian Northern Railway Co., as to render the same of no value for the purposes of the suppliant.

The suppliant's claim is, that the value of the lands to him at the time they were expropriated was the sum of $300,000, and he claimed the sum of $300,000, as damages and compensation.

At the opening of the case at the trial counsel for the suppliant asked for and obtained leave to amend by reducing his claim to the sum of $100,000.

The Crown offered and still offers the sum of $30 per acre as full compensation for the lands expropriated, and any damages, and counsel for the suppliant admits that this amount is ample compensation if the claim for special damage is disallowed. The suppliant had paid $10 per acre for the lands.

The trial of the petition was before me at Toronto on January 15 and 16, 1917.

A considerable amount of evidence was adduced, and written arguments were to be furnished.

Subsequently, and prior to any arguments being filed, the Crown pursuant to the provisions of the statute in that behalf abandoned certain portions of land previously expropriated.

It should be stated that owing to the construction of the Trent Canal it became necessary to divert the line of the Canadian Northern Railway, and for this purpose 3.73 additional acres of the property owned by the suppliant were expropriated by the Crown.

The effect of this abandonment by the Crown was to entirely change the nature of the claim put forward by the suppliant in his original pleadings and of the evidence adduced at the trial.

The Crown made an application for a new trial based on

allegations of surprise at the former trial and other reasons, and after considering the facts alleged and taking into consideration the complete change effected by the abandonment, an order was made granting the application for a new trial, the Crown paying the costs of the suppliant up to that date between solicitor and client.

After this abandonment the position of matters was as follows: Out of the 42.75 acres owned by the suppliant, 9.63 acres were expropriated for the area of the canal, and 3.73 acres for the new line of the Canadian Northern Railway, in all 13.36 acres of the 42.75 acres, leaving the suppliant 29.39 acres.

The Crown is the legal owner of the former right of way of the Canadian Northern Railway, and by the amended statement of defence, and also through counsel at the trial has offered to convey to the suppliant in fee simple that portion of the lands formerly owned by the Canadian Northern Railway containing 5.91 acres which added to the 29.39 acres of the suppliant, would increase his holding to 35.30 acres as against the 42.75 acres originally owned by the suppliant, or in other words reducing his ownership by 7.45 acres.

I may mention that the land taken for the canal is to a very great extent swamp land, not suitable for the alleged purpose for which the suppliant alleges the lands were adapted, viz., brick, etc.

In the amended reply of the suppliant filed after the amended defence of the Crown, it is stated, as follows:—

5. In the process of the manufacture of brick tile and analogous articles which the suppliant proposed to carry on upon the said east half of said lot eleven as alleged in the petition of right herein, the sand and clay were to be used generally in the proportions of about 92 per centum of sand to about 8 per centum of clay, and the deposits of these materials on his said land were originally in nearly these respective proportions.

6. There was no other available deposit of clay suitable for the suppliant's said purposes known to exist in Ontario up to the time of the first expropriation of the suppliant's said lands or since and so much of the deposit of clay aforesaid to wit: Area 90 per centum thereof was on lands still retained by the respondents thus being lost to the suppliant that this loss to the suppliant of his supply of clay makes it impossible to successfully carry on the proposed enterprise.

7. So great a quantity of the said deposit of sand has been lost to the suppliant by reason of the matters set out herein and in the petition of right aforesaid that there is not sufficient thereof remaining even after the said abandonment to justify the expense of the construction of the works which the suppliant proposed to place upon the said lot as the engaging in the suppliant's proposed enterprise.

CAN.
Ex. C.
BEHARRIELL
v.
THE KING.
Cassels, J.

I quote these paragraphs from the suppliant's amended reply as to my mind they are of considerable importance in considering the case presented by him. He has been represented through the case by very able counsel who has been indefatigable in the labour bestowed upon the conduct of the case and in the very exhaustive and able argument furnished to me. The allegations are made after an opportunity of considering the evidence adduced at the first trial.

At the first trial the case put forward was that the materials were suitable for the manufacture of face brick of a very high quality requiring 92 per centum of sand and 8 per centum of clay. On the second trial the manufacture of tiles was introduced, which would require about 80 per centum of clay.

The case came on before me at Toronto on January 14, 1919, and subsequent days, and subsequently additional evidence was adduced at Ottawa.

It was agreed by counsel that all the evidence adduced at the first trial should be received as if given at the second trial.

This mass of evidence and the voluminous arguments of counsel I have carefully considered and analyzed.

It is impossible for me to set out in detail these reasons and to pass comments on each exhibit produced.

It must be borne in mind that there has been no established business carried on upon the premises in question.

The evidence of supposed profits to be derived from the premises by the manufacture of brick, etc., is purely conjectural.

Evidence was tendered by the suppliant to shew what the value of the property might be to him if he were able to manufacture the quantity of brick estimated, and of the quality claimed by him, and saleable f.o.b., at Washago at the enormous profit claimed.

It would not be difficult to procure numerous investors such as Eckhardt to advance large sums of money towards the formation of a company if they were guaranteed the large profit claimed.

In my opinion, however, after hearing all the evidence and again carefully considering the same the hopes of the petitioner are purely nebulous.

The Solicitor-General in his argument refrained from accusing the petitioner of any intent to defraud. He charitably character-

ized the petitioner as being obsessed with his idea. This may be so. I refrain from expressing any more unfavourable view.

At the trial the petitioner claimed that there was a sufficient quantity of sand and clay upon the premises prior to the expropriation to enable him to produce from 245,000,000 to 250,000,000 bricks sufficient to carry on the enterprise for a period of 35 years.

His contention is that for a million bricks 4000 cubic feet of clay would be required. If this were so for 245,000,000 bricks there would be required 980,000 cubic feet of clay.

Dealing with the state of matters after the amended defence of the Crown, and the offer to convey the greater portion of the lands primarily occupied by the Canadian Northern Railway, there remains notwithstanding the allegation in the suppliant's amended reply more than a sufficient quantity of sand.

At the opening of the case Mr. Mackay, counsel for the suppliant, stated as follows:—

> The question which will arise now is this. The Crown will say we have abandoned to you a large part of the land on which are your materials. We will say, you have abandoned to us sufficient sand or almost sufficient for our purposes.

As to the clay, at the trial Beharriell states that he is left with only 300,000 cubic feet of clay.

Connor, a witness for the suppliant, places the clay available now at 20,000 cubic yards, equal to 540,000 cubic feet, instead of 300,000 cubic feet as stated by the suppliant, a supply sufficient for over 20 years.

Connolly, a witness for the suppliant, places the clay available at 580,000 cubic feet.

John S. McLeod places the available clay at 34,000 cubic yards of clay amounting to 918,000 cubic feet of clay.

I am of opinion that the evidence of Mr. Hice should be accepted. He is a gentleman of very high standing and of great experience, and his statement that there is no peculiar value in the particular clay from these premises is, I think, correct.

Beharriell, the suppliant, in his evidence at the first trial, was questioned as follows:—

> HIS LORDSHIP.—Did you send samples of the sand to Toledo?—A. I did, Sir.
>
> Q. Did you send samples of the sand alone?—A. I made shipments of sand and clay.
>
> Q. Did you send shipments of sand alone?—A. I may have done that.

CAN.

EX. C.

BEHARRIELL v. THE KING.

Cassels, J.

It is a long time ago. I can scarcely remember that. I have some bills of lading here.

Q. I would like to know if you can remember whether you sent these shipments of sand alone without the rock and clay or whether you always sent samples of sand rock and clay together.—A. I did not send clay, there was so little required but I have sent sand alone.

If there were any peculiar merit in the clay as the suppliant contends, at the enormous profits he hopes to realize, he has enough clay to realize a fortune and if short could always supplement it.

Of sand he has abundance. In addition to the statement of counsel to which I have referred, I quote from the suppliant's evidence:—

Q. Then you have an abundance of sand?—A. A fair amount of sand.

Q. More than you will ever use in a number of lives to come?—A. You are quite right.

The contention of the suppliant that a mixture of sand of 92 per centum with clay of 8 per centum would form a commercial brick is absolutely disproved by the evidence.

There would be no bond without the admixture of other ingredients such as lime, etc.

This is demonstrated by the experiments of the suppliant himself.

On the whole case I am of opinion that the suppliant has failed entirely to prove that he has suffered any injury to any feasible commercial undertaking by him.

The offer of the Crown is ample.

The suppliant must pay the costs of the action subsequent to the filing of the amended defence of the Crown. These costs should not include any of the evidence or costs of the first trial.

The suppliant is entitled to a conveyance of the lands offered by the Crown.

The quantity of land expropriated can no doubt be arrived at by counsel. *Judgment accordingly.*

ESQUIMALT AND NANAIMO RAILWAY Co. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER Co., LTD.

IMP.
P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Atkinson, and Duff, J. August 5, 1919.

LAND TITLES (§ I—10)—LIS PENDENS—CROWN GRANT TO LAND ATTACKED—CLOUD ON TITLE—REGISTRAR OF TITLES—DISCRETION AS TO REGISTERING TITLE.

A certificate of *lis pendens* registered against lands, in an action in which the Crown grant of such lands is attacked, is not a charge within the meaning of the Land Registry Act (R.S.B.C. 1911, c. 127) but is a cloud on the title to such land, and the Registrar of Titles properly exercises the judicial discretion conferred on him by the Land Registry Act in refusing to issue an indefeasible title until such cloud is removed.

Statement.

APPEAL from the judgment of the British Columbia Court of Appeal, reversing the judgment of the trial Judge. Reversed and judgment of the trial Judge, (1918) 41 D.L.R. 335, restored.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal from the order dated April 1, 1919, of the Court of Appeal of British Columbia, allowing an appeal from an order dated June 17, 1918, of Macdonald, J., whereby he ordered that the petition of the respondents should be dismissed.

The legal proceeding out of which the appeal arises was a petition presented upon May 23, 1918, by the respondents under ss. 108 and 114 of the Land Registry Act, 1906, B.C. Stats. c. 23, to the Supreme Court of British Columbia, praying that the Registrar-General, having theretofore refused to register the respondents' title to a piece of land, about 160 acres in extent, situate in the Cranberry District of the Province of British Columbia, and described on the official plan of said district as s. 2, and the east 60 acres of s. 3, Range 7, he might be ordered by the Court to do so.

These lands may be conveniently referred to in this judgment as the lands in suit.

On the other side the appellants, under the provisions of s. 110 of the aforesaid Act, applied by summons to the said Supreme Court for an order inhibiting any dealing with or registration in connection with the above-mentioned lands or for the issue of a *caveat* in respect of them.

The petition and the motion came on for hearing together before Macdonald, J., who, thinking that the District Registrar had acted properly in the course which he took, dismissed the

IMP.

P. C.

ESQUIMALT AND NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER CO. LTD.

Lord Atkinson

petition, thereby rendering it unnecessary for him to make any order on the appellants' motion for an inhibition. The reasons given by the District Registrar (who was also an examiner of titles under the aforesaid statute of 1906) for so refusing to register the respondents' interest in the lands in suit, as an indefeasible fee, as was demanded, were stated by him in writing to be, that three *lites pendentes* which had been registered against the lands must first be released. Of these three, two had been registered by the appellants under the circumstances hereafter mentioned.

The respondents appealed from the order of Macdonald, J., and the Court of Appeal, by order dated April 1, 1919, allowed the appeal.

The crucial and relevant part of this order runs as follows:—

THIS COURT DOTH ORDER that the appeal of the Granby Consolidated Mining, Smelting and Power Co., Ltd, be and the same is hereby allowed.

AND THIS COURT DOTH FURTHER ORDER that the Registrar-General of Titles do register the title of the appellant, the Granby Consolidated Mining, Smelting and Power Co., Ltd., to the lands mentioned in the petition of the said appellant, dated May 23, 1918, in the Register of Indefeasible Fees, in accordance with the provisions of the Land Registry Act.

AND THIS COURT DOTH FURTHER ORDER that the application of the Esquimalt and Nanaimo R. Co. for an order prohibiting any dealing with or registration in connection with the above-mentioned lands be dismissed and that the costs of and incidental to such application be paid by the Esquimalt and Nanaimo R. Co. to the appellant, the Granby Consolidated Mining, Smelting and Power Co., Ltd., forthwith after taxation thereof.

To enable one to judge of the legality and propriety of the Registrar's action, it is essential to consider what was the precise nature of each *lis pendens* which the appellants had filed, and in order to do that it is necessary to trace shortly the respondents' title from its root downwards.

The Government of the Dominion of Canada, in exercise of the powers conferred upon it by the 48 Vict. c. 6, made on April 21, 1887, a Crown grant to the appellants of a large tract of land which came to be known as the Esquimalt Railway Land Belt. The lands in suit lie within this belt and form part of it. On Dec. 24, 1890, the appellants granted to one Joseph Ganner, since deceased, the surface rights, as they are styled, in these latter lands, the lands in suit. That is to say, they granted the land in fee, excepting and reserving to themselves the mines and minerals thereunder. Joseph Ganner died upon Jan. 26, 1904, having by his last will appointed Angus Mackenzie and Chas. Wilson his

IMP.

P. C.

ESQUIMALT AND NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER CO. LTD.

Lord Atkinson

executors and trustees of his estate. By divers mesne assignments which it is unnecessary to particularise, these so-called surface rights became on Oct. 6, 1917, vested in the respondent company. The Vancouver Island Settlers' Rights Act, 1904, came into operation on Feb. 10, 1904. By s. 2 (*bb*) it defined a settler as "a person who prior to the passing of the Act occupied or improved lands situated within the Railway Land Belt with the *bonâ fide* intention of living thereon." It is not disputed that Joseph Ganner, deceased, came within this definition.

By the third section of this statute it is enacted that upon application being made to the Leiutenant-Governor in Council within 12 months from the passing of the Act, *i.e.*, within the 12 months terminating on Feb. 10, 1905, shewing that if any settler occupied or improved any parcel of land within the said Railway Land Belt prior to the enactment of 48 Vict. 14, with the *bonâ fide* intention of living on the same, accompanied with reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple of such land should be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when the said lands were first so occupied or improved by the said settler.

It was not suggested that had Joseph Ganner lived till after Feb. 10, 1904, he would not have been entitled to have had a Crown grant made to him of the lands in suit if he had applied for it. Though the word representative is used in the singular, their Lordships are of opinion, that for the purposes of this section, the two executors and trustees of Ganner's estate together constitute his representative.

The operation and effect of a Crown grant of the fee simple of any land within the Railway Land Belt under this section is apparently to supersede and defeat all existing interests in the same, no matter in whom vested.

The executors of Ganner, deceased, or over 13 years from the passing of the Act of 1904 never made any application for a Crown grant of the lands in suit. The Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, however, was passed upon May 19, 1917. By it the words "On or before the first day of September 1917" were substituted in the Act of 1904 for the

IMP.

P. C.

ESQUIMALT AND NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER CO. LTD.

Lord Atkinson

words "within twelve months from the coming into force of this Act," used in the third section of the latter Act. The trustees and executors of Ganner thereupon apparently resolved to bestir themselves. They applied for and on Feb. 15, 1918, obtained a grant in fee simple from the Crown of the lands in suit. On Feb. 18, 1918, they conveyed all their estate and interest in the land so acquired to one Harry Whitney Treat, who by a deed of equal date conveyed the same to the respondents.

This company, on May 22, 1918, applied to the Land Registry Office to be registered as the owners of an indefeasible fee in the said lands in suit, which is the application with which the District Registrar refused to comply. It is unnecessary to deal with the *lis pendens* filed by one Bing Kee. Those filed by the appellants are the matters of importance.

On May 30, 1918, the said Vancouver Island Settlers Act 1917, was disallowed by the Governor-General in Council. The operation and effect of this disallowance and consequent annulment under the provisions of ss. 56 and 90 of the B. N. A. Act of 1867, upon the Crown grants of land in the Railway Land Belt made while it was operative is a serious question. The appellants contend that these Crown grants all became void, inasmuch as they were not made within the time originally fixed by the Act of 1904. On Feb. 14, 1918, the latter company, thinking that the Crown grant applied for by Ganner's executors had in fact been made, instituted an action against these executors, claiming amongst other things a declaration that the Crown grant made to them was null and void so far as it purported to grant to them the mines and minerals under the lands in suit, or that part of the surface of the said lands to which or upon which the present appellants were entitled to exercise acts of ownership, purchase or rights of easement, and also claiming an injunction to restrain the said executors from working the mines, and from registering or applying to register any title to the said mines and minerals under the Crown grant, or from exercising any ownership in respect thereof, or from registering or applying to register any title to the surface of the said lands adverse of the appellants' rights therein. On the same day the appellants filed this action as a *lis pendens*. Finding that they were premature in their proceedings, they on Feb. 18, 1918, three days after the issue

of the Crown grant to the said executors, instituted a second action against the said executors in precisely the same form and claiming the same relief as the first, and on the same day filed a second *lis pendens* in respect of it in the proper Land Registry Office.

The point the appellants thus raise may be good or may be bad. Their Lordships express no opinion as to its soundness. The Chief Justice apparently thought it bad. But he is the only Judge who expressed that opinion. If it be good, then the Crown grant made to the executors of Joseph Ganner being null and void, the respondents took nothing by their conveyance from these executors, and have not now, and never had, by virtue of the same, any estate or interest in, or any right or title to, or any claim upon the lands in suit. They could not, therefore, be properly registered as the owners under this grant of an indefeasible fee in these lands. The point goes to the very root of their title. The suit in which it is raised and insisted upon is not brought to fix any charge, liability or encumbrance upon this indefeasible fee, or to establish a right to any estate or interest in it. It is on the contrary brought to establish that never at any time was such an estate owned by or was vested in the respondents.

It appears to their Lordships to be contrary to common sense to hold that an interest in land, which may, as the result of a pending lawsuit, be found to-morrow to be non-existent, should be treated to-day, by one who knew of the existence of this suit, as an indefeasible fee, since that term means an estate in fee simple held under a good safe holding and marketable title. A *lis pendens* may be described by any name the Legislature chooses to bestow upon it, whether appropriate or inappropriate. But the giving of the name does not stay the action which constitutes the *lis*. That, however miscalled, may go on to its appointed end. It appears to their Lordships that while the title of the respondents was being actively assailed by this pending suit, the Registrar, who in this case is also the examiner of titles and therefore a judicial officer, would be acting entirely within his powers in refusing, as he has refused, to register the respondents' title as an indefeasible fee. S. 14 of the Land Registry Act prescribes how he is to act when a person claiming to be registered as owner in fee simple of land applies to him in Form A in the first Schedule to the Act, for registration, depositing with him at the same

IMP.

P. C.

ESQUIMALT AND NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER CO. LTD.

Lord Atkinson

time all the applicant's title deeds. He, the Registrar, is then, upon being satisfied that a good safe holding and marketable title in fee simple has been established by the applicant, to register the title of such applicant in a book called the Register of Indefeasible Fees. He is not to register a title as an indefeasible fee for the asking. It is provided by S. 114 of the Act that if a person be dissatisfied with any refusal, etc., of the Registrar or examiner of titles, he may, as was done in this case, apply by petition to a Judge in Chambers, setting forth the particulars and grounds of dissatisfaction, and this Judge may then make such order in the premises as the circumstances of the case may require and as he may direct. Under s. 115, whenever upon the examination of the title to any land, the Registrar or examiner of titles, after hearing all the evidence procurable, entertains a doubt, he may state a case for the opinion of a Court or Judge. S. 116 provides for the reference by the Registrar or examiner to a Judge in Chambers for his decision or in some cases for his direction of any one of a number of different matters. Among others the following: the true construction, legal validity or effect of any instrument or as to the persons entitled. And then s. 116*a* provides that, except as in s. 50 (which does not apply) provided, the Registrar shall not issue a certificate of indefeasible title under or in pursuance of any order of the Court or Judge unless such order declares that it has been proved to the satisfaction of the Court or Judge upon investigation that the title of the person to whom the certificate is directed to issue is a good safe and marketable title. The order of the Court of Appeal does not contain any such declaration. That order merely directs the Registrar-General to register in the Register of Indefeasible Fees the title of the present respondents to the lands mentioned in their petition. It is, however, suggested that this is a mere slip in the order and may be rectified. The Chief Justice, as has been already pointed out, expressed the opinion that the point raised by the appellants, arising from the disallowance of the Act of 1917, was a bad point. The Court of Appeal did not base their judgment on that, they base it on the fact that a *lis pendens*, which must mean any *lis pendens* whatever its nature, is, by s. 71 of the Land Registry Act, when registered against land a charge upon that land. The words of the section are:—

Any person who shall have commenced an action or being a party thereto as making a claim in respect of any land, may register a *lis pendens* against the same as a charge and there shall be embodied in the certificate of the Registrar of the Court a copy of the endorsement upon the writ or a copy of the plaint.

No doubt "charge" is defined to mean and include any less estate than the fee simple or any equitable interest whatever in real estate and shall include any incumbrance, Crown debt, judgment, mortgage or claim to or upon any real estate. Now it is clear that in the present case the action instituted by the appellants has not been brought to establish that the plaintiffs in it are entitled to some estate less than a fee simple in the fee simple estate which the respondent desires to have registered. Neither is it brought to establish that they are entitled to an equitable interest in that fee simple, nor that it is subject to any incumbrance, Crown debt, judgment, mortgage, or have any other claim upon it. It is brought to establish that the respondents who claim to be owners of the lands in suit, are not now and never were the owners of the fee simple in these lands. The plaintiffs claim nothing in the suit of a proprietary or pecuniary nature for themselves. The relief they ask is purely negative, namely, to prevent the illegal creation in the respondents of an interest in the lands in suit which would supersede and destroy their own estate and interest in the same.

It would appear to their Lordships that the action of the appellants does not come within s. 71 at all. The action with which that section deals is one in which the plaintiff is making a claim in respect of land, and that action may be registered as a *lis pendens* against this land as a charge, obviously to prevent the person having dominion over the land defeating the plaintiffs' claim by alienating or encumbering it. S. 71 is the last of a fasciculus of eleven sections, touching *caveats* and *lis pendens*. The first ten sections deal with *caveats*. They refer to lands already registered, in which the *caveator* claims to have an interest under any one of the several instruments named. He is empowered by leave of the Registrar to lodge a *caveat* to prevent any disposition of the land being made without notice to him.

The land referred to in s. 71 may or may not be registered, but there is this similarity in the position, of the *caveator* and of the plaintiffs dealt with in s. 71, that they are both asserting

IMP.

P. C.

ESQUIMALT AND NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER CO. LTD.

Lord Atkinson

a claim to land or any interest in it. The means of protecting their interests are no doubt different.

It is also quite true that s. 22 of the Act provides that every certificate of indefeasible title issued under the Act shall be conclusive evidence, while it remains in force against everybody, that the person named in such certificate is seised of an estate in fee simple in the lands therein described, against the whole world, subject to a number of things enumerated, and amongst others to:—

Any *lis pendens*, mechanic's lien, judgment, issue or other charge, or any assignment for the benefit of creditors registered since the date of their application for registration.

There may be some question whether these latter words do not apply to all that has gone before, and are not confined in their application to assignments for the benefit of creditors. If not, the Registrar would be obliged to register as indefeasible a title which a judgment already recovered would shew did not exist.

The contention of the Granby Consolidated Mining, Smelting and Power Co. in this appeal is that the Registrar should register the respondents as having a good estate in fee simple to the land in suit, subject to a pending action instituted to establish that they have not and never had any fee simple or estate or interest in the land at all. It is a misuse of terms to call a title threatened as the respondent company's is as either a safe holding title or a marketable title. By the defeat or discontinuance of the appellants' action and by that alone can the title of the respondents to the lands in suit be made either the one or the other at least, where the would-be purchaser had notice of, or was aware of the existence of the pending suit.

The questions the appellants have raised in their action are not such as the Registrar was called upon or required to decide. The Court of Appeal have not decided them. The Registrar took the course s. 14 of the Land Registry Act authorises him to take when he is not satisfied that the title shewn by the person applying for registration was a good holding and marketable title. In their Lordships' opinion he was completely justified by the facts of the case in so doing. They think that a *lis pendens* of the nature of the appellants' action is not "a charge" within

IMP.
P. C.
Lord Atkinson

the meaning of the Land Registry Act, that the decision appealed from, based entirely, as it was, on the ground that it was "a charge," was erroneous and should be reversed, that the decision of Macdonald, J., was right and should be restored, and that this appeal should be allowed, with costs here and in the Courts below, and they will humbly advise His Majesty accordingly.

Appeal allowed.

MACKENZIE v. BING KEE.

IMP.
P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Atkinson, and Duff, J. August 5, 1919.

CONTRACTS (§ II D—173)—COAL RESERVATIONS IN AGREEMENT FOR SALE OF LAND—NOT SET OUT IN DEED—INTENTION OF PARTIES—EVIDENCE OF SOLICITOR.

In an action to obtain a declaration that the plaintiff was the owner of the surface rights of certain lands, and of the mines, beds of coal and other minerals lying thereunder, the Court of Appeal for British Columbia held that as nothing was said during the negotiations about the coal reservations the true inference was that there was no reservation of the coal.

Their Lordships reversed this judgment on the evidence of the solicitor who acted for the plaintiff during the negotiations, which shewed conclusively that the respondent had got all he bargained for or that it was intended to sell, which was the land minus all minerals lying thereunder.

Statement.

APPEAL by defendant from (1919), 47 D.L.R. 43. Reversed.

The judgment of the Board was delivered by

Lord Atkinson

LORD ATKINSON:—This is an appeal from the decision of the Court of Appeal of the Province of British Columbia, dated April 1, 1919, reversing the decision of Gregory, J., of the Supreme Court of that Province, dated May 30, 1918.

The action out of which the appeal has arisen was brought by the respondent to obtain a declaration that he is the owner of the surface rights of certain land and premises described as "s. 2 and 60 acres of s. 3, range 7, Cranberry District" on Vancouver Island, containing about 160 acres, and of the mines, beds of coal and other minerals lying thereunder, and also to obtain an order vesting the same in him, and also vesting in him all the right, title and interest thereto and therein of the appellants. He further claimed an injunction restraining the appellant company from sinking three shafts through the aforesaid beds of coal, from removing the coal thereby won, and from interfering with the surface rights in the aforesaid lands. The respondent in his statement of claim set forth as the root of his title to the above-mentioned lands and minerals a certain deed dated March 13,

IMP.
P. C.
MACKENZIE
v.
BING KEE.
Lord Atkinson

1905, whereby the appellants, Angus Mackenzie and Charles Wilson, as executors and trustees of the estate of one Joseph Ganner, deceased, under his will, conveyed to him the aforesaid lands in fee simple, of which lands he was on April 3, 1905, duly registered by the District Registrar of the City of Victoria in the aforesaid Province, as owner in fee.

In truth this deed was not the true root of the respondent's title to the land the subject of the suit, in the sense that the said Joseph Ganner deceased had himself acquired these lands in fee simple from the Esquimault and Nanaimo R. Co. by a deed dated Dec. 24, 1890, which contained the following clause:—

> And saving and reserving to the said company their successors and assigns all coal, coal oil, ores, mines and minerals whatsoever in or under the land hereby granted or expressed so to be,

with full power to the company, their successors and assigns to enter upon the said lands, search for, work, win, and carry away the minerals so reserved.

The word "excepting" would, in this connection, be no doubt a more appropriate word to use than the word "reserving," but the effect of the deed clearly was that the railway company, the grantors, continued to own these mines and minerals, and that Joseph Ganner, deceased, did not by virtue of this deed acquire any right or title to or interest in them of any kind or nature whatsoever.

The said Joseph Ganner died on Jan. 26, 1904. It was contended, however, by respondent, that the right and title to and interest in the aforesaid lands which Joseph Ganner acquired under and by virtue of this deed of Dec. 24, 1890, was not the only interest in them to which he and his executors as his representatives were entitled, but that distinct from what was granted to him by the railway company, he and his executors in his right became possessed of or entitled to an interest in the said lands in addition to, but altogether different from any interest conferred by the aforesaid deed, under the provisions of a statute passed on May 4, 1903, by the Legislature of the aforesaid Province entitled "The Vancouver Island Settlers' Rights Act," and the Acts amending the same. The words "Railway Land Belt" were by this Act defined, as was also the word "settler." This latter was defined to mean "a person who prior to the passing of the said

Act took up land situate within the said Railway Land Belt with the *bonâ fide* intention of living thereon."

And it was by the third section of the statute enacted that:—

3. It shall be lawful for the Lieutenant-Governor in Council, upon satisfactory proof being furnished by any person that he is a settler within the meaning of this Act, or that he has derived his title through a settler, to issue to such person, free of charge, a grant of all the rights vested in the Crown (save and except as to gold and silver) in respect of the lands taken up by the settler.

It is admitted that the land, the subject of the suit, is situate within this Railway Land Belt as defined, and that Joseph Ganner was a settler within the defined meaning of that term. This Act was the next year followed by another dated Feb. 10, 1904, bearing, save as to the difference of date, a title similar to the last, by which the expression "Railway Land Belt" is similarly defined, and the word "settler" defined as a person who prior to the passing of the Act occupied or improved land situate within the said Railway Land Belt with the *bonâ fide* intention of living thereon.

Its third section ran as follows:—

Upon the application being made to the Lieut.-Governor in Council within twelve months from the coming into force of this Act, shewing that any settler occupied or improved land within said railway land belt prior to the enactment of c. 14 of 47 Vict., with the *bonâ fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler.

Joseph Ganner was a member of the class for whose benefit the Vancouver Island Settlers' Rights Act was passed, but neither he nor his trustees availed themselves of it within the time limited in that behalf. Many other settlers for various reasons also failed to take advantage of the Act, and for their relief the Legislative Assembly of the Province of B.C., on May 19, 1917, passed an Act entitled the "Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917," s. 2 of which provided as follows:—

2. Section 3 of the Vancouver Island Settlers' Rights Act, 1904, being c. 54 of the statutes of 1904, is hereby amended by striking out the words "*within twelve months* from the coming into force of this Act," in the second and third lines of said section, and inserting in lieu thereof the words, "on or before the first day of September, 1917."

IMP.
P. C.
MACKENZIE
v.
BING KEE.
Lord Atkinson.

It will be observed that the period of twelve months mentioned in s. 3 of this Act had expired before the deed of March 13, 1905, was executed, so that at that date at all events and for the thirteen years succeeding, the executors of Ganner, deceased, could not have applied under the above quoted section of the Act of 1904, for a grant of the kind therein mentioned. It is alleged, however, and not apparently disputed that in the early part of the year 1904 the aforesaid executors agreed verbally and in writing with the respondent for the sale to him of the estate and interest of the said James Ganner, deceased, in these lands, this agreement being subsequently carried out by the deed of March 13, 1905. The executors, therefore, could, had they been so minded, have applied for a grant under the abovementioned s. 3 of the Act of 1904 up to Feb. 10, 1905, but they did not do so. It may be that these executors and trustees as they were could, at this period, have legally agreed to assign, and had they acted before Feb. 10, 1905, to have legally assigned to the respondent the rights which as Ganner's representatives this section conferred upon them. It is not necessary for their Lordships to decide that question, for as will presently be shewn they never attempted to do anything of the kind.

It is not disputed that the respondent by deed dated Oct. 6, 1917, granted the lands in suit as therein described to the appellants, Harry Whitney Treat acting on behalf of the appellant company, saving and reserving thereout and therefrom all mines, minerals, and beds of coal whatsoever in, under or beneath the lands thereby granted or expressed to be.

That exception, as it should be styled, was a perfectly natural one to introduce if the grantor in the deed, the respondent, was himself the owner of the excepted mines and minerals. But the conveyance was accompanied by an instrument in writing of equal date whereby, after reciting that the party of the first part, *i.e.*, the respondent, had applied—under the aforesaid Act of 1904, and the amending Act of 1917 for a Crown grant of fireclay and under-surface rights in the aforesaid lands, it was agreed between the respondent and the appellant, Harry Whitney Treat that the latter in consideration of the sum of $2,000 payable in two instalments of $1,000 each, one on or before the execution of the instrument, and the other upon the respondent obtaining

IMP.
P. C.
MACKENZIE
v.
BING KEE.
Lord Atkinson.

said Crown grant, the said H. Treat was granted the option of purchasing the under-surface rights given by Crown grant of which the respondent had applied at the rate of $200 per acre. In this instrument it is further provided that in the event of the respondent failing in his application for a Crown grant of the minerals underlying the lands in suit the agreement should become null and void, and all monies paid under it should be forfeited to the respondent. According to the respondent's case on this appeal, as their Lordships understand it, he was, and believed himself to be from March 13, 1905, the owner of the mines and minerals underlying the lands in suit. He did not require any Crown grant to entitle him to them. This agreement is entirely inconsistent with that case. These mines and minerals are treated not as something he already owned, but as something he might thereafter acquire.

The appellant Treat, in his defence filed May 10, 1918, states in reference to the last mentioned agreement that he, on behalf of the appellant company entered into negotiations with the respondent towards the end of June or beginning of July, 1917, in reference to the mines and minerals under the lands in suit, that the respondent then informed him that he, the respondent, had no title to these mines and minerals, never having bought them from the appellants Mackenzie and Wilson, and that for greater caution the appellant Treat had entered into this agreement of Oct. 6, 1917, and a somewhat similar agreement of July 3, 1917, whereby the respondent agreed to sell to the said appellant the said mines and minerals if he should ever acquire a good title to them. That it was an implied term of this agreement that the respondent should make a good title to the said mines and minerals, but when by letter dated April 23, 1918, he was called upon by the appellant Treat to furnish an abstract of title to the same he declined to do so. The respondent in his reply to this defence and counter-claim joins issue upon it, but his only specific answer to it is that the option given was forfeited owing to the non-payment of 50% of the purchase price within the stipulated time, and that the appellant Treat was fully aware of the respondent's title to the aforesaid mines and minerals. Nothing could be more inconsistent with the respondent's present case.

IMP.

P. C.

MACKENZIE v. BING KEE.

Lord Atkinson.

On Oct. 6, 1917, the appellant Treat conveyed to the appellant company the surface rights in these lands, which he had by deed of equal date acquired from the respondents.

On Feb. 15, 1918, the trustees and executors of Joseph Ganner, under and by virtue of the before mentioned Vancouver Island Settlement Acts obtained a Crown grant in fee simple of the lands granted by the deed of March 13th, 1905. They, by a deed of Feb. 18th, 1918, conveyed the same to the appellant Treat, who by deed of equal date conveyed them to the appellant company. Now in this statement of facts the respondent contends that as the aforesaid executors of Ganner purported by their deed of March 13, 1905, to convey to him the fee simple of the lands in suit, when in fact they were only entitled to the surface right therein, and had no title to the mines and minerals thereunder, they were bound by estoppel on acquiring under the Crown grant the fee simple of the lands they so purported to convey to him, and as he, the respondent, had parted with the surface rights on these said lands, to convey to him the mines and minerals underlying them.

It is obvious that the cogency of this contention depends entirely upon the nature of the estate and interest which by the agreement leading up to the deed of March 13, 1905, was intended to be conveyed, and was purported to be conveyed by the latter instrument. If the surface rights in the lands in suit were all that was agreed to be or purported to be conveyed to the respondent by these instruments, then the entire foundation upon which this contention rests disappears. Most unfortunately both these instruments have been lost. The deed itself, not the agreement, was duly registered on April 3, 1905, but owing to the very defective manner in which the registry was at that time kept (now happily changed) little, if any, help is afforded by it to ascertain the contents of the registered instrument. The exceptions or reservations are either not set forth at all or not set out at length in the certificate of title in the registry.

Accordingly what one finds in the Land Registry Office is the document of which the following is a copy:—

CERTIFICATE OF TITLE.

No. 11001 C. 3rd April, 1905.

Name of Owner.	Absolute Fees Book.	Date of Registration.	Parcels Short Description.
Bing Kee.	Fol. 268 Vol. 22	3rd April, 1905 2.30 p.m.	Section 2 and East 60 acres of Section 3, Range 7 (less the right-of-way of the Esquimalt and Nanaimo Railway). Cranberry District.

LIST OF INSTRUMENTS.

Transfer: See Absolute Fees Book, Vol. 12, Fol. 291, No. 11371A. 10th July, 1899. Will of Joseph Ganner. Filed No. 4459. 13th March, 1905. Angus McKenzie and Charles Wilson.
(Trustees of the said Will)
to Bing Kee. Conveyance in fee.

(SEAL) LAND REGISTRY OFFICE,
CANCELLED
24-1-18
J. C. Gwynn, Reg. Gen.
per C.M.
VICTORIA, B.C.
S. Y. WOOTTON,
Registrar-General.

Upon this question as to what was intended by all the parties concerned should be conveyed, and what was in fact conveyed by the deed of March 13, 1905, the evidence of Young, now a Judge of a County Court, is all important. He was the solicitor of the respondent in this matter. The executors of Ganner had not apparently any solicitor. On p. 29 of the Record this witness says: he knew that the lands about to be purchased by the respondent were in the Coal Belt. He was asked by counsel, "I suppose you discussed the purchase with Bing Kee on some occasion?" and he replied:—

I must have done so, I was running a law office and was looking after Bing Kee's interests. I must have discussed the whole transaction with him. It was my duty to explain to my client what he was getting. I did my duty. I did tell Bing Kee at some stage of the negotiation that he was not getting coal, that the Ganners did not own the coal. What I presume I did was to

IMP.
P. C.
MACKENZIE
v.
BING KEE.
Lord Atkinson.

explain that the coal was reserved to the E. and N. Railway Company. He (Bing Kee) was apparently satisfied with it.

In addition Young had in his practice become quite well acquainted with the title of the E. and N. Company. At p. 37 he says it was a matter of common knowledge that this company always reserved everything except the surface, that when he prepared the agreement from Mackenzie and Wilson to Bing Kee he, Bing Kee, knew that all Mackenzie and Wilson had to sell was the title they had from the E. and N. R. Co., and again he says it was quite clear that all they were selling was the E. and N.'s title, which they had, and again at p. 28 he says that the only matter of purchase and sale was the E. and N. title, that this was all that passed through his hands; that he was aware of no other title, that the question of coal rights or settlers' rights or any claim of that nature did not come up at all. On p. 30 he is asked whether the proper practice was not to tell Bing Kee what he was getting when he signed the agreement. And he replies, "that would be a duty of a solicitor to his client:" that he was satisfied he did his duty, "but I don't pin myself down to any time." The Court then remarks, "It has been suggested that it was at the time the agreement was being made," and Young replied, "Yes, that would be the logical time to do it."

Their Lordships find nothing whatever in the case to induce them not to accept this evidence, and considering Young's experience, position, the mode in which he has, apparently, given his evidence, and the natural probability of the occurrences he deposes to, they regard it as accurate and trustworthy. There is no need to rely upon the principle that the facts of which a solicitor has notice or knowledge touching a matter with which he is retained to deal is attributed to the client. They are thoroughly convinced that Young made to his client, Bing Kee, the communications he says he made to him, and they think it is clear that all that the executors of Ganner had to sell to the respondent and did sell, and all the latter intended to buy and did buy from them, was what had been conveyed to Ganner by the E. and N. Co. by their deed of Dec. 24, 1890, that is the lands in suit minus all "coal, ores, mines and minerals lying thereunder." The doctrine of estoppel has therefore no application to the case. The respondent got all he bargained for, the appellant

IMP.
P. C.
MACKENZIE v. BING KEE.
Lord Atkinson.

gave all he had a title to give, and all he sold. At p. 31 Young, in reply to Court, suggested that he, in preparing the deed of conveyance to Bing Kee, may have used the short form of deed, a printed form, stating that this was the ordinary form used in his office, but he did not pledge his word that he had used it. He stated, however, that if he did use it he would have had to write in the E. and N. reservations if he wanted to introduce them into the deed.

A specimen of the short form of a deed of conveyance is to be found at p. 78 of the Record. In it the clause as to "reservations" runs thus:—"Subject nevertheless to the reservations, limitations, and conditions expressed in the original grant thereof from the Crown." Their Lordships are therefore of opinion that the decision of the Court of Appeal dated April 1, 1919, was erroneous, and should be reversed, and that the judgment of Gregory, J. was right and should be restored, and that this appeal should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Appeal allowed.

AMERICAN SURETY Co. v. CALGARY MILLING Co.

IMP.
P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Shaw. July 11, 1919.

BUILDING CONTRACTS (§ I—1)—AGREED PRICE—PAYMENT BY INSTALMENTS —RETENTION OF CERTAIN AMOUNT BY OWNER—CONSTRUCTION.

A building contract for the erection of an elevator, for an agreed price provided for payment by the owner to the contractor, in instalments, of all wages, for labour done and performed and sums paid for materials supplied, upon certified vouchers and "Provided that the total amount so paid by the owner during the progress of the work, shall not exceed a sum equal to 80% of the amount of work done, and materials furnished on the premises at the contract price. And . . . the owner shall be and is hereby authorised to retain out of the moneys payable to the contractors the sum of 20% of the amount of the contract. . . .

Their Lordships held that the proper interpretation of the proviso was that the owner was entitled to make payments for all work certified as actually done, and materials as actually supplied provided that the total of such payments did not exceed 80% of the total contract price.

A clause in the contract providing for the entry of the owner upon the work in default of the contractors, in order to finish it, in which case the contractors should not be entitled to receive any further payment under the contract until the work was wholly finished . . . did not disentitle the owner from paying orders which effected given assignments of moneys due to the contractors up to the limits within which the contractors were entitled to be paid, although such payments were actually made at a date subsequent to the owners taking over the work in default of the contractors.

IMP.

P. C.

AMERICAN SURETY CO. v. CALGARY MILLING CO.

Lord Dunedin.

Appeal by the surety from a judgment of the Supreme Court of Alberta (1917), 37 D.L.R. 589, in an action on a building contract. Affirmed.

The judgment of the Board was delivered by

LORD DUNEDIN:—The respondents in this appeal, who are grain millers, were in need of a new elevator to replace one which had been destroyed by fire. With a view to its erection they entered into a contract on July 18, 1910, with a firm of contractors called "Tromanhauser and Mooers." By clause 1 the contractors were bound to:—

Provide for all materials and perform all the work mentioned in the specifications and shewn on the drawings and plans prepared by the contractors . . . for the construction, erection, and completion of a grain elevator situate on the C.P.R. right of way in the City of Calgary, to the north of the C.P.R. and to the east of Fourth Street West in the said City of Calgary, furnishing and supplying all the material, lumber, and plant of every description required in conformity with said specifications, drawings, and plans. All the work shall be done and said material and plant furnished to the satisfaction of William Henderson, acting for the purpose of this contract as agent of the owner.

The time for the completion was fixed to be October 15, 1910, a date which by subsequent agreement was altered to June 30, 1911; penalties were fixed for non-completion. Provision was made for the case of abandonment of the contract in a clause which it will be convenient to quote at length at a subsequent stage of this judgment, but which may be at present sufficiently described as giving power to the respondents to enter upon and finish the work, and to charge the contractors for any difference between the cost so incurred and the unpaid balance of the lump sum of $65,000.

The clauses which are material to the questions raised in this appeal are 14, 15, 16 and 20, which are as follows:—

14. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractors for said work, materials, and machinery shall be $65,000 subject to deductions as herein provided and that such sums shall be paid in current funds by the owner to the contractors in instalments as follows: (1) All wages for labour done and performed in and about the works from the commencement of operations until such time as the contractors furnish the bond hereinafter provided upon production of the time sheets and for wages, accounts duly certified and approved by the agent of the owner. (2) The sum of $5,000 to the contractors upon production of the bond hereinafter provided. (3) On and after the production of the bond hereinbefore provided all wages for labour done and performed and sums paid for materials supplied upon production of the time sheets and for wages accounts and for vouchers duly certified as aforesaid.

Provided that the total amount so paid by the owner during the progress of the work as aforesaid shall not exceed a sum equal to 80% of the amount of work done and materials furnished on the premises at the contract price. And the contractors hereby agree that the owner shall be and is hereby authorised to retain out of the moneys payable to the contractors under this agreement, the sum of 20% of the amount of the contract and to expend the same in the manner following, namely: To retain such 20% until 31 days after the completion of the works and to pay thereout the claims of all persons who have done work or furnished material in the execution of any part of this contract to or for the contractors and in repairing the said works or finishing any work left unfinished by the contractors.

15. And it is agreed that the owner may hold and retain the sum above mentioned as a guarantee that the said work has been faithfully performed and as an indemnity against all and any claims and demands against the owner by reason of said work.

16. The final payment shall be made 31 days after this contract is fulfilled and completed to the approval of the owners. All payments shall be made upon the written certificate of the said William Henderson or any other agent appointed for the purpose by the owner as hereinbefore provided to the effect that such payments are due. Before the issue of the final or any certificate except the first, the contractors shall, if required, produce to the owner a clearance from the various supply men and pay sheets duly signed by the various employees and shewing that all wages have been paid.

20. The contractors hereby covenant and agree to furnish to the owner a good and sufficient bond to the satisfaction of the owner in the sum of $30,000 for the faithful performance of this contract conditional to indemnify and save harmless the owner from all suits or actions of every kind and description brought against the owner for or on account of any damages received or sustained by any party or parties by or from contractors or their servants or agents in the construction of the said works or by or in consequence of any negligence regarding the same or by reason of any improper material furnished by the contractors in the construction thereof, or by or on account of any act or omission of the contractors, and further conditioned for the faithful performance and completion of this contract by the contractors.

The work was begun and the contractors procured the bond stipulated for under s. 20. This bond is in the form of a contract between the contractors (denominated as the principal) the appellants, the American Surety Company of New York, (denominated as the surety), and the respondents (denominated as the obligee). By it, under certain terms and conditions presently to be specified, the appellants promised, to the extent of $30,000, to guarantee the performance of the contract.

The contractors carried on the work so far and received certain payments, as will be subsequently more particularly stated, but a disagreement having occurred between the partners, Mooers retired, and the firm assigned the interest in the contract to

IMP.

P. C.

AMERICAN SURETY CO. v. CALGARY MILLING CO.

Lord Dunedin.

Tromanhauser. Tromanhauser continued the work for a time, but found himself unable, for want of financial support, to go on with the contract. This fact he intimated to the respondents by a letter of date Nov. 26, 1910. The respondents then entered upon the work and finished it themselves. The expenses incurred and the damage for delay having amounted, as alleged, to more than $30,000 more than the portion of the $65,000 still unpaid, they raised this action against the contractors and against the surety on their bond.

The facts above stated were not substantially controverted, and judgment was entered against the contractors, as to which there is no question. The Surety Company, however, defended themselves on the ground that the conditions of the bond had not been fulfilled by the respondents. This view was upheld by the trial Judge, but on appeal his judgment was reversed by the Court of Appeal, who gave judgment in favour of the respondents. From that judgment the present appeal is taken to this Board.

It now becomes necessary to set forth the terms of the bond so far as material. As already stated, it binds the surety (the appellants) to indemnify the obligee (the respondents) against loss in the contract owing to the default of the contractors. It then proceeds:—

> Provided, however, and upon the express condition the performance of each of which shall be a condition precedent to any right of recovery hereon: . . .
>
> *Fourth:* That the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed: and shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than 10% of such value) until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed. . . .

The appellants argue that the respondents have broken this condition in two respects. It will be convenient to deal with the two grounds separately.

They urge first that the respondents infringed the condition as to retaining 20% out of payments made. What happened was as follows:—

Prior to the granting of the bond the respondents paid the contractors the full amount of their wages bill as certified by their

agent Henderson. Upon the bond being granted they paid the $5,000 as provided by clause 14 (2) of the contract. They then wrote the following letter to the appellants:—

Dear Sirs,

Referring to your $30,000 surety bond, Tromanhauser and Mooers, principals, and ourselves, obligee, dated Aug. 10, 1910, and our agreement with these contractors in connection with the same dated July 18, 1910—a copy of which we presume you have retained—would say that the contractors claim that section 3 of clause 14 of this agreement binds us to pay them after our acceptance of the bond, 100% or in full for all paid vouchers produced for work done and material supplied on the building; up to a point where we have paid them 80% of the contract price or $52,000; after which all payments cease until 31 days after the completion of the contract to our satisfaction, when final payment will be due them.

Now, it appears to us that the wording of this section of clause 14 is rather ambiguous, and you may have interpreted it as binding us to pay them not more than 80% of the amount of such paid vouchers; up to a point where we will have paid them $52,000 or 80% of the contract price after which all payments cease, until they are entitled to their final payment. It is agreeable to us to make these payments in accordance with the interpretation of the contractors, providing we will not thereby be invalidating your bond. Kindly let us know how you have interpreted this clause, and what, in your opinion, is our obligation to you in respect to same . . .

to which they received the following reply:—

Dear Sirs,

Supplementing our letter of the 10th instant, which was an acknowledgment of your letter of the 30th ultimo in *re* the above entitled matter, I desire to state that, after carefully reading over the contract, our company is of opinion that payments to be made to the contractors should be on an 80% basis, that is, 20% of every payment should be retained until the final completion and acceptance of the work. . . .

Acting on this they paid to the contractors 80% of the certified accounts for labour and materials up to and inclusive of Nov. 15. On Nov. 17 they received a further certificate for $4,061. Previously, however, to this date they had received 2 assignments by Tromanhauser to 2 persons, Prince and Kerr, for $5,000 and $3,500 respectively. They therefore refused to pay the contractors more than the sum which, with the sums assigned and the sums already paid, amounted to 80% of the whole contract price. The respondents, therefore, did not infringe the contract if the true construction is that they were entitled to pay till the limit of 80% of the whole contract was reached. On the other hand, if they were only entitled to pay 80% *toties quoties* as the certificates were issued, then, inasmuch as the total amounts paid amounted to 80% of the whole contract price and the whole contract had not been

IMP.

P. C.

AMERICAN SURETY CO. v. CALGARY MILLING CO.

Lord Dunedin.

finished, there had not enough been retained. This question depends entirely upon the true construction of the proviso above quoted. Now it is to be observed that the 80% which is to be paid is expressed as a supplement of the 20% which is to be retained. The 20% which is to be retained is expressed as 20% "of the amount of the contract," and that necessarily refers to the total price. It would, therefore, seem to follow that the 80% must be based on the same calculation. The other interpretation would necessitate a calculation which would be practically impossible except by a sort of rough and ready guess-work, for it would be necessary for the giver of the certificate to calculate the amount of work done and materials furnished from time to time "according to the contract price." Now the contract here had no schedule prices, and such a calculation would, therefore, be practically impossible according to any reliable standard. In view of these considerations, their Lordships agree with the learned Chief Justice that the proper interpretation of the proviso is to hold that the respondents were entitled to make payments for all work certified as actually done and materials as actually supplied, provided that the total of such payments did not exceed 80% of the total contract price.

The Counsel for the appellants put forward an alternative argument on this head. He said that, if the above were the true construction, the payments to the contractors had not been really enough, inasmuch as after Sept. 2 they were only paid 80% of each account rendered. Their Lordships are of opinion that this argument is not open to the appellants in respect that they are estopped by their letter of Sept. 13, 1910. On what their Lordships have held to be the true construction of the contract, the contractors might, it is true, have insisted on the full certified payments up to the total limit, but inasmuch as the respondents put the matter fairly to the appellants, and in acceptance of their view only paid the 80%, it is impossible for the appellants to found on that as a breach of contract on the respondents' part.

The second point in which the appellants say the respondents broke the condition is founded upon the clause which provides for the entry of the owner upon the work, in default of the contractors, in order to finish it. It goes on to say:—

> And in case of such discontinuance of the employment of the contractors they shall not be entitled to receive any further payment under this contract

IMP.

P. C.

AMERICAN SURETY CO. v. CALGARY MILLING CO.

Lord Dunedin.

until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractors; but if such expenses shall exceed such unpaid balance, the contractors shall pay the difference to the owner. The expenses incurred by the owner herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be agreed upon between the contractors and owner, and failing such agreement, shall be settled by arbitration as hereinafter provided.

This provision, it is argued, was disregarded by the respondents, inasmuch as they paid Kerr and Prince the sum of $8,500 at dates subsequent to themselves taking over the work in default of the contractors.

Their Lordships agree with the Judges of the Court of Appeal that in the case of both Kerr and Prince there were orders which effected given assignments of moneys due to the contractors up to the limits within which the contractors were entitled to be paid. When the last certified account for $4,061 was presented, on Nov. 17, 1910, the respondents only paid $1,982, because the sum required to honour the assignments for $8,500, together with $1,982, brought the total payments up to the 80% of the contract price. In so doing they appropriated the $8,500 for payment of the intimated assignments, and their Lordships do not consider that the fact that the money was actually handed over to Prince and Kerr at a subsequent date constitutes any contravention of the clause quoted.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

BUSCOMBE v. WINDIBANK.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts. September 15, 1919.

ACTION (§ II B—45)—CONSOLIDATION—JUDGMENT ENTERED IN ONE CASE—OTHER CASE JUST COMMENCING—PRACTICE.

There is no practice which justifies a Judge in ordering the consolidation of an action in which judgment has been entered with one which has just been commenced, where such order makes it necessary to try the substantial question over again along with other questions, and in effect sets aside a judgment of the same Court.

[*Bake* v. *French*, [1907] 1 Ch. 428, distinguished.]

Statement.

APPEAL by defendant from an order of Hunter, C.J.B.C., consolidating two actions. Reversed.

E. C. Mayers and *C. Darling*, for appellant.

Douglas Armour, K.C., for respondent.

B. C.

C. A.

BUSCOMBE v. WINDIBANK.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff, in 1916, having obtained an *order nisi* for foreclosure of a mortgage, and having proceeded and obtained the Registrar's report, and after the day named for redemption had passed without payment of the mortgage moneys by the defendants, issued in 1918 a writ against the same defendants claiming a foreclosure of the same mortgage, together with other securities for the same indebtedness not referred to in the first action. After a defence was filed the plaintiffs made application to a Judge to consolidate the two actions. The order of consolidation was made, and provided that the consolidated action should proceed as upon the statement of claim filed in the second action.

It may be that the order is not *ultra vires* of the Judge to make: *Dominion Trust Co.* v. *New York Life Ins. Co.* (1918), 88 L.J.C.P., p. 30, but while it may not be *ultra vires* it may nevertheless be wrong. That case does not decide that an order which the Court has power to make must necessarily stand. The order made in this case is appealable, and while the judicial discretion of the Chief Justice who made it ought not lightly to be interfered with, yet as the order was made, as I think, in error, it ought to be set aside. To consolidate an action in which judgment has been entered, with one which has just been commenced would, apart from the anomaly created, give rise to confusion and injustice. What was sought here in a clumsy fashion could, I think, have been accomplished in another way, if any relief at all ought to have been granted, viz., by discontinuance by order of the Court. Such a course would have enabled the Court to save the just rights of the plaintiff and, at the same time, do justice to the defendants in the matter of costs and terms.

The authorities relied on by the respondent are not in point—*Bake* v. *French*, [1907] 1 Ch. 428—decided only that in a like case the defendant was not entitled to a stay of the second action. The consolidation which was made in that case was made by consent of the parties only, which is a very different thing to making an order of consolidation without consent. The effect of this order of consolidation is to set aside the judgment on the merits in the first action. The action was tried; the liability of the mortgagor was found; the mortgagee's right to foreclosure declared. In other words, the substantial question in the action was tried and

disposed of. Under this order it has to be tried again, along with other questions. That means that the judgment of the Supreme Court is in effect set aside by a Judge of the same Court, something entirely contrary to law, but even if it were not so, there is no practice, either here or in England, to justify such an extraordinary exercise of the power of consolidation.

The appeal should be allowed.

Martin, J.A.

MARTIN, J.A., would dismiss the appeal.

Galliher, J.A.

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

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—One action has been carried to an *order nisi* for foreclosure. It is then found that other collateral mortgage securities are held and it is desired to proceed in like manner in respect of them, *i.e.*, for foreclosure. An application was made to the Chief Justice of British Columbia (Hunter, C.J.B.C.) and he consolidated the action later brought with the first in which the *order nisi* for foreclosure had been made and it is from this order this appeal is brought. In my opinion the matter is a very simple one and the order was made with jurisdiction and further was in my opinion a very proper order to make. The opening of even the *foreclosure absolute* is a matter wholly in the discretion of the Court. That there should be any doubt about the power to reopen the *order nisi* rather puzzles me when one considers the long course of practice in dealing with all foreclosure proceedings "with liberty to apply" so well understood. It was laid down in *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, that the order for foreclosure absolute being final in form only can be reopened in the discretion of the Court, having regard to all circumstances of the case. In passing it may be said that a judgment for foreclosure does not discharge other collateral securities which the mortgagee may have but in realizing on collateral securities after foreclosure the foreclosure is reopened and a new right of redemption is given the mortgagor. Now, upon the facts of the present case, as the other securities are being enforced it is just and convenient that there should be consolidation (see *Lockart* v. *Hardy* (1846), 9 Beav. 349, 50 E.R. 378; *Palmer* v. *Hendrie* (1859), 27 Beav. 349, 54 E.R. 136, (1860), 28 Beav. 341, 54 E.R. 397; *Walker* v. *Jones* (1865), L.R. 1 P.C. 50; *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636).

Further to see that the order of the Chief Justice was made

B. C.

C. A.

BUSCOMBE v. WINDIBANK.

McPhillips, J.A.

with jurisdiction it is only necessary to turn to order 656 (O.R. 49, 1) which reads as follows:—

1. Causes matters and appeals may be consolidated by order of the Court or Judge in such manner as the Court or Judge may seem meet.

If any authority is necessary to establish that an action which has proceeded only to *order nisi* for foreclosure comes within the meaning of "causes" I would refer to Annual Practice (1919) at p. 1179 and *Blake* v. *Summersby* (1889), W.N. (89) 39, where it was held in England (Kay, J.) that an order for foreclosure preceding final judgment is a "proceeding" within O. LXIV. 13 (B.C.R. 973) which reads as follows:—

13. In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule.

Kay, J. (afterwards Lord Justice Kay) in his judgment said:—

Anything that precedes the final judgment or order is, in my opinion, a "proceeding" in the action. You must give a month's notice to the defendant before moving for an order for foreclosure absolute.

Then we have had the recent pronouncement of their Lordships of the Privy Council as to the extent of the jurisdiction which has been committed to the Judge under the B.C. Rule 656 (also see *Bake* v. *French* (1907), 76 L.J. (Ch.) 299; *Stevens* v. *Theatres, Lim.* (1903), 72 L.J. (Ch.) 764; *Halkett* v. *Earl of Dudley* (1907), 1 Ch. 590; 76 L.J. (Ch.) 330).

I have no hesitation whatever in coming to the conclusion that the order of the Chief Justice was made within the discretionary authority conferred by the express language of r. 656 and was an order which in no way offended against the long course of practice well understood in like cases—further, it was an order rightly made under the circumstances.

I would therefore dismiss the appeal with costs here and in the Court below to the respondent.

Eberts, J.A.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

READ v. WHITNEY.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell, and Latchford, JJ. April 17, 1919.

MECHANIC'S LIEN (§ IV—15)—RIGHT TO LIEN—ASSISTANT ARCHITECT.

An assistant architect is entitled, under sec. 6 of the Ontario Mechanics and Wage-Earners Lien Act (R.S.O. 1914, c. 140), to a lien for his "work" and "service" in the drawing of plans and the supervision and the direction of the construction of the building.

Statement

APPEAL by defendant from the judgment of the Assistant Master in Ordinary in an action to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

The plaintiff's claim was for services as an assistant architect in the erection of a building. The defendant Crane was the principal architect and was employed by the defendant Whitney, the building-owner.

J. H. Cooke, for the appellant.

J. M. Ferguson, for the plaintiff.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The first question involved in this appeal is whether the respondent, an under-architect, employed by the architect for his own purposes, and not in any sense employed by the owner of the building erected, can have a lien, under the provisions of the Mechanics and Wage-Earners Lien Act, for the price of his professional services performed in that employment, upon that building.

The Act, sec. 6, gives to "any person who performs any work or service upon or in respect of . . . the . . . erecting . . . of any . . . building . . . for any owner, contractor or sub-contractor . . . a lien for the price of such work, service or materials upon the . . . building . . . and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed . . . limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner."

The words are quite wide enough to include the architect, who was employed by the owner, in regard to his work and services, as well upon the plans and specifications upon which the building was erected as for his work and services in superintending and directing the actual construction of it in accordance with them.

The general purpose of the Act, stated generally, is to give to those whose work or services or "materials" go, in the manner

ONT.
S. C.
READ
v.
WHITNEY.
Meredith, C.J.C.P.

provided for in the Act, to the owner, in enhancement of the value of his land, security, as far as is just and practicable, upon the land and its improvements for payment for such work or services or materials.

The work or services of an architect are generally necessary in the construction of buildings and other works; not as necessary, in one sense, nor at all of the same character, as the work of a hod-carrier, for instance, in buildings of brick; but often, if not always, profitable to the owner in the greater enhancement of the value of his property in the erection of a better building through the architect's skill and services; and, though his work is not of the afterwards visible mechanical character, it is none the less advantageous work done in erecting the building.

So too of the under-architect, if his work or services were performed for "owner, contractor or sub-contractor." They were not performed for the owner; but they were performed for a contractor: the word "contractor," as used in the Act, includes a person employed by or contracting with the owner "for the doing of work or service . . . for any of the purposes mentioned in this Act:" sec. 2 (*a*): and the architect was so employed; and the work and services of the under-architect were performed for him.

It would be different if the claim were for services or work done but not done in "*erecting*" the building, as, for instances, plans or specifications not used, a solicitor's costs for drawing contracts respecting the building, or advising as to legal points arising out of it, or, probably, for a watchman's services guarding the property.

It is not needful to refer to any of the cases upon the subject in the Courts of the United States of America, many of which are collected in the current omnibus legal work called "Corpus Juris;" and it is obviously dangerous to rely upon any of them without a thorough understanding of the statute-law upon which they are based.

Here we must start from these two grounds: at common law there was no such lien, and the fact that in the civil law there was, should only accentuate the point that the common law was against it: and that by statute-imposed injunction we are bound to give effect to the Act as a remedial enactment.

But one case in our own Courts has been referred to, and I

know of none other: and that is one in which an architect's claim to be within the provisions of the Act, in respect of his work as an architect, was, on demurrer, upheld: *Arnoldi* v. *Gouin*, (1875), 22 Gr. 314. That case was decided 44 years ago, and has, I believe, ever since been accepted as a well-decided case, whether one agrees, or does not agree, with all that was said in it. And since that decision the effect of the Act has been by legislation widened; that has been the whole trend of the various amendments of the Act.

The learned Master who tried this case ruled in favour of a lien for the price of the under-architect's supervision and direction of the construction of the building in question; but against his claim upon the value of the plans prepared by him. In my opinion, he was right in the former and wrong in the latter ruling. Practically there could be no supervision, indeed no building, without plans and specifications.

The question as to the proper amount of the lien was little, if at all, discussed upon this appeal, probably because the amount involved, about which there could be any doubt, is small: and the architect who is primarily liable has not disputed the claim of the plaintiff as made in, as well as before, this action. Made up, without interest, by the plaintiff, it is $1,340: made up according to the evidence which the letters which passed between the architects shews it is, without interest, $1,250.

In these circumstances, the amount found to be due to the plaintiff by the Master cannot very well be changed.

I would, therefore, dismiss the appeal.

Riddell, J.

RIDDELL, J.:—This appeal in a mechanic's lien action from the judgment of Mr. Roche, the Assistant Master in Ordinary, raises a very curious and important question as to the effect of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140—10 Edw. VII. ch. 69.

The defendant, a theatre proprietor, desiring to rebuild a theatre building in Toronto, employed one Crane, an architect of Detroit, to draw the plans, supervise the construction, etc., for 5 per cent. of the cost. The plain iff, a Toronto architect, was, according to the usual (if not universal) custom, employed by Crane to superintend the building and act as assistant architect, the remuneration being fixed at $1,500 if the building cost $125,000 and one and one-half per cent. of any excess cost.

ONT.

S. C.

READ v. WHITNEY.

Riddell, J.

The defendant Whitney and his manager knew that the plaintiff was so superintending the building etc. (at least in part), and knew that he was employed by Crane for that purpose.

A change being determined on in the front of the theatre, so that it would be two storeys instead of one, the plaintiff was instructed by Crane to draw the plans for the change. He did so, and these plans were used.

The building cost at least $133,000. The plaintiff rendered his bill for:

	$1,500.00
1½ per cent. of excess ($133,000—$125,000 = $8,000)	120.00
Plans	200.00
Travelling expenses to Detroit	20.00
	$1,840.00
The defendant Crane paid on account	500.00
Leaving unpaid	$1,340.00

Crane not paying the plaintiff, he filed a claim for a lien for $1,340. The Assistant Master in Ordinary allowed the claim, and the defendant appeals.

By the statute, sec. 6, it is provided that "any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting . . . or repairing of any erection, building . . . shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building . . . limited however" as in the said section set out.

The question is whether this can include the claim here made.

The present Act is rather wider than the original Act of 1873, 36 Vict. ch. 27—that, by sec. 1, gives a lien to "every mechanic, machinist, builder, miner, contractor, and other person doing work upon, or furnishing materials to be used in the construction," etc. But, even under that statute, it was held that one employed to act as architect and superintendent in the erection and construction of a building came within the protection of the Act: *Arnoldi* v. *Gouin*, 22 Gr. 314.

I think that case well decided. Whatever doubt there might have been had the language remained unchanged must, I think,

disappear when all pretext for applying the *ejusdem generis* doctrine has disappeared; and, moreover, the words are now "work" or "service." I can see no reason why superintending the building is any less "service upon" the building than carrying bricks and mortar to the bricklayers, and I agree with the Vice-Chancellor (22 Gr. 315, 316) that drawing plans etc. is an essential thing "to be done in the construction of the work," and that he who draws such plans for a building "actually does work upon it as if he had carried a hod."

The work and services of the plaintiff, then, are such as are contemplated by the Act.

Crane is a "contractor" under sec. 2 (*a*), contracting with the defendant Whitney for the "doing of work or service;" and the plaintiff is a "sub-contractor" under sec. 2 (*f*), "employed by" Crane, "a contractor:" and there is no reason why he should not have a lien limited as set out in secs. 6 and 10.

The only item as to which there is any doubt is the $20 expenses. The plaintiff says that Crane was to "pay expenses," and as to the $20 he says:—

"Q. '$20—expenses of trip to Detroit?' A. Yes, I didn't charge any time in going to Detroit, which I am entitled to.

"Q. You did go to Detroit? A. Yes.

"Q. At Mr. Crane's request? A. No, I don't think so.

"Q. Why did you go? A. Because I tried by writing and over the 'phone to get information in regard to the building, and I couldn't get it, and so I went to Detroit, and that is my expenses in regard to the matter."

It is difficult to make such a trip come under "service upon . . . a building;" and, while the plaintiff has a just claim against Crane for this sum, he should not claim it against Whitney —in this I agree with the Assistant Master in Ordinary.

But, as the Assistant Master in Ordinary says, when Crane paid the sum of $500 on the account generally, without specific appropriation, the plaintiff had the right to apply the sum on any of the claims made; he did apply it to pay the $20 (as well as the $200), and I think he had the right to do so.

I would dismiss the appeal with costs.

BRITTON and LATCHFORD, JJ., agreed with RIDDELL, J.

Appeal dismissed with costs.

ALTA.

S. C.

DENNY v. NOZICK and BRODY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Simmons, JJ. October 3, 1919.

VENDOR AND PURCHASER (§ II—30)—SALE—REAL ESTATE—VENDOR'S LIEN —SECURITY FOR DEBT—NEGOTIATION—EFFECT ON LIEN.

An unpaid vendor of real estate has a lien for the purchase money, which is wholly independent of any possession on his part, and it attaches to the estate as a trust, equally whether it be conveyed or only be contracted to be conveyed.

Such vendor's lien is not lost by the taking of security for the purchase money, in the form of a draft, promissory note, or bill of exchange, even though negotiated by the vendor.

[*Armstrong* v. *Farr* (1884), 11 A.R. (Ont.) 186; *O'Donohgue* v. *Hembroff* (1872), 19 Gr. 95; *O'Donohoe* v. *Hembroff* (1873), 20 Gr. 350, referred to.]

Statement. APPEAL from the judgment of Walsh, J., in an action brought by an unpaid vendor for a declaration that he has a lien and is entitled to maintain a caveat against the lands as unpaid vendor, and for judgment against the purchaser for the amount found to be due, and in default of payment sale or foreclosure. Reversed.

Edward Brice, for appellant.

C. C. McCaul, K.C., and *H. A. Friedman*, for respondents.

Harvey, C.J. HARVEY, C.J., concurred with Stuart, J.

Stuart, J. STUART, J.:—On January 27, 1914, the plaintiff by an agreement in writing sold to the defendant Nozick a certain hotel property, including land, building, furniture and license for the lump sum of $15,200. All but $2,600 of this was paid at the time of making the agreement either in cash or in other forms which it is not now material to refer to. The agreement stipulated that as to the balance of $2,600, it should be paid as follows: $500 on March 18, 1914, $500 on April 18, 1914, $800 on July 18, 1914, and $800 on Nov. 18, 1914.

On the day of the execution of the agreement Denny executed a transfer of the real estate to Nozick wherein the consideration was expressed to be $10,000. This transfer was registered on Feb. 11, 1914, and a certificate of title was issued to Nozick. On the day of the execution of the agreement Nozick also gave four promissory notes to Denny for the four deferred payments, the notes falling due on the days mentioned in the agreement. There had been a cash payment of $1,500 provided for in the agreement to be paid on Feb. 2, 1914, and for this no note was taken and it was paid before the transfer was registered.

The agreement provided that it was all conditional upon Nozick being able to secure a transfer of the hotel license in his own name,

and that if he failed to secure this, then the whole agreement should be null and void and all payments made should be returned and all things already done should be cancelled.

Apparently there was no difficulty about the transfer of the license as nothing was said about it at the trial and it does not even appear when that transfer was secured. Whether the execution, delivery and registration of the transfer to Nozick, when the purchase money had not all been paid, had anything to do with any anticipated difficulty in securing the approval of the license authorities to the transfer of the license also, does not appear.

Shortly after the receipt of the notes by Denny he endorsed them to the Royal Bank of Canada as part of some collateral securities which he was giving the bank in respect of some existing indebtedness as well as in anticipation of further advances.

Nozick paid to the bank the amount of the first two notes of $500 each, and also a portion of one of the $800 notes. On July 30, 1914, Denny filed a caveat against the land and in this caveat he said that he claimed "an interest as unpaid vendor."

On December 1, 1914, Nozick executed a transfer of the land to the defendant Brody, upon which transfer a certificate of title was, on Dec. 10, 1914, issued to Brody, subject to Denny's caveat. Later on one Westvick, not a party to the action, agreed to buy the property from Brody under agreement of sale and registered a caveat on May 13, 1918.

In the meantime, on June 1, 1916, the Royal Bank sued Nozick as maker, and Denny as endorser, of the last two promissory notes, and on June 29, 1916, a judgment by default was entered against them for the sum of $1,649.70, for principal and interest. This judgment was a great deal in excess of the amount due the bank from Denny, and it is rather difficult to understand why the bank entered such a judgment. In its own right it was entitled to no such sum from either of the parties. At least this is what appears in the evidence in this present case to which the bank however is not a party.

The judgment in any case still remains unsatisfied in whole or in part.

The bank, on January 31, 1917, filed a caveat against the lands based upon its writ of execution which it had issued against Denny and Nozick and apparently this caveat was filed for the purpose

ALTA.

S. C.

DENNY v. NOZICK AND BRODY.

Stuart, J.

of reaching some equitable interest of one or other of the execution debtors which it was thought would not be caught by the writ. However, on Aug. 29, 1917, a notice to proceed was served on the Royal Bank and as it failed to do so its caveat lapsed.

On Oct. 31, 1917, Friedman and Friedman, as solicitors for Brody, served a notice upon Denny to proceed upon his caveat. In pursuance of this notice the present action was begun by Denny on Dec. 28, 1917. Having begun the action, Denny, no doubt, got the usual order continuing his caveat.

Denny's statement of claim sets forth most of the above mentioned facts, and in the prayer for relief he claims:—

(1) A declaration that he has a lien and is entitled to maintain the said caveat against the said lands as unpaid vendor until payment of the amount ascertained to be due; (2) judgment against the defendant Nozick for the "said amount", *i.e.*, the amount of the Royal Bank's judgment against him and Nozick; (3) in default of payment, sale or foreclosure.

The trial Judge dismissed the action on the ground that Nozick owed the money to the Royal Bank, that he owed no debt to Denny, and that, therefore, Denny could have no lien upon the land.

The plaintiff appeals from this judgment.

The case brings up the whole question of the nature of a vendor's lien, how it arises, how it may be protected and how it may be lost. But before we come to this there is the initial question whether or not the promissory notes were taken in payment of the debt so that the latter was thereby extinguished. As to this the rule seems to be well established that the presumption is that the notes were not so taken and that the burden of proving that they were lies upon the maker of them. (See 30 Cyc., pp. 1194-96 and authorities there cited, including *Nordheimer* v. *Robinson* (1878), 2 A.R. (Ont.) 305.) In the present case the defendant Nozick certainly did not meet this burden and there was no finding by the trial Judge that he had done so. The respondent contended, however, that the plaintiff had admitted this in his pleading. In paragraph 2 of the statement of claim it is alleged that the plaintiff "took certain promissory notes totalling some $3,500 (admittedly an error for $2,600) made by the defendant to the order of the plaintiff in payment of the balance of the purchase price." And in his examination for discovery the plaintiff said, "Well I accepted the notes in payment, but he was to meet them

the same as the agreement." Upon his cross-examination at the trial the plaintiff was not questioned upon the point at all while the defendant was not called as a witness. I do not think these circumstances are sufficient to establish an agreement between the parties that the notes were to be given and taken in absolute payment of the debt. Payment may be either conditional or absolute and the clause in the statement of claim as well as the plaintiff's statement on discovery is open to either interpretation. I have no doubt that neither to the mind of the pleader, nor that of Denny when he was examined, was there present any definite intention to say or to admit that there was an agreement between the parties that the notes, and the notes alone, were what the vendor, the plaintiff, should rely upon and that the covenant in the agreement was to be superseded by the notes. The agreement of sale is under seal. There is a covenant to pay the four deferred instalments at certain dates. It would take far more than appears in the case to justify the Court in holding that the parties intended to substitute for the higher security of a covenant under seal the security of the simple contract contained in the notes. Indeed, I am not sure that any direct oral testimony to that effect might not have been objected to as contrary to the written agreement under seal.

We come, therefore, to the question of the existence of a lien. The subject is discussed very fully in Story's Equity Jurisprudence (2nd Eng. ed.), in paragraphs 1217 *et seq.* I extract some portions of these passages.

> 1218. This lien of the vendor of real estate for the purchase money is wholly independent of any possession on his part; and it attaches to the estate, as a trust, equally whether it be actually conveyed, or only be contracted to be conveyed. It has often been objected, that the creation of such a trust by Courts of equity is in contravention of the policy of the Statute of Frauds. But, whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts.
>
> 1219. The principle upon which Courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another, ought not in conscience as between them to be allowed to keep it and not to pay the full consideration money. A third person having full knowledge that the estate had been so obtained, ought not to be permitted to keep it without making such payment; for it attaches to him, also, as a matter of conscience and duty.

Story goes on in subsequent paragraphs to trace the origin of

ALTA.

S. C.

DENNY v. NOZICK AND BRODY.

Stuart, J.

the doctrine to the Roman law. He then proceeds to say, para. 1226:—

> The taking of a security for the payment of the purchase money is not of itself, as it was in the Roman law, a positive waiver or extinguishment, of the lien. It is, perhaps, to be regretted, that it has not been so held; as when a rule so plain is once communicated, if the vendor should not take an adequate security, he would lose his lien by his own fault.

And in a note he also says:—

> It is greatly to be regretted that the English jurisprudence, instead of dealing in nice distinctions, had not followed out the plain and convenient rule of the civil law that the taking of any security or giving any credit was an extinguishment of the lien.

I think the cases entirely justify the statement of Story that the unpaid vendor's right is in the nature of a charge or trust imposed upon the legal estate which has passed to the purchaser. There have been attempts to make a nice distinction between an interest or estate in the land and a mere equitable right to have the Court declare that there is a charge or lien upon the land. (See 39 Cyc., p. 1789). But it seems to me to be now too late even to attempt to make any such distinction. All the precedents in England and Canada do, I think, treat the vendor's right as something which is imposed directly upon the land as an interest whether it be called charge, lien or trust. Moreover, for myself I cannot assent to the view that the Courts of equity considered that they were on the occasion of each judgment *creating* a charge lien or trust to which a mere right existed before judgment. No doubt the lien or trust was the creation, in the first place, of the Courts of equity but in course of time they undoubtedly considered that in giving their judgments they were judicially declaring that the lien trust or charge existed antecedently to their judgment, and from the moment of conveyance without payment, and not merely that they were creating the lien or trust by means of the judgment. See *Quart* v. *Eager* (1908), 12 O.W.R. 735, at p. 739, *per* Riddell, J.

This being so it follows that Denny, at any rate prior to the endorsement of the notes to the bank, had a lien upon the property for his unpaid purchase money. It is true that there are cases in which it has been held that the taking of a security destroys the lien but this seems to depend entirely upon the circumstances of each case and particularly upon the nature of the security taken. And it is clearly stated by all the books that the mere taking of promissory notes or bills of exchange does not destroy the lien.

This indeed was admitted by respondent's Counsel and seems to be well settled. But the plaintiff did not file his caveat before the endorsement of the notes to the bank. Undoubtedly if what I have said is correct he would have had a right under the Land Titles Act to file a caveat before the endorsement.

Then comes the question: Did he lose his lien by the endorsement of the notes to the bank?

Some leading authorities undoubtedly say that he would not, Halsbury, vol. 19, p. 30, says, par. 47:—

> A vendor's lien is not, as a rule, lost by the taking of security for the purchase-money in the form of a draft, promissory note, or bill of exchange even though negotiated by the vendor.

In 39 Cyc., at p. 1810, it is said:—

> The lien of the vendor is not lost by the transfer of the purchase-money, debt, or note, as collateral security for a debt of the vendor,

and the author adds:—

> And the person to whom such debt or note is thus transferred is entitled to the benefit of the vendor's lien. This last assertion is perhaps open to question.

Dart on Vendors and Purchasers, 7th ed., vol. 11, at p. 733, says:—

> *Primâ facie*, the taking of a mere personal security for the purchase-money, *e.g.*, a promissory note, or a bill of exchange, even though negotiated, or a bond is not evidence of an intention to abandon the lien.

Neither Story nor Williams on Vendors and Purchasers nor Jones on Liens mention the case of the negotiation of the note, while the sole authority cited by Halsbury and Dart upon the point is the case of *Ex parte Loaring* (1814), 2 Rose 79, a report not available in any of our libraries. The authorities cited by Cyc. are from Alabama, Arkansas, Maryland, Oklahoma and Tennessee and none of the reports are available.

I have been unable to discover any other authority which expressly deals with the question of the effect upon the lien of the negotiation of a note or bill of exchange given for the unpaid purchase money.

Armstrong v. *Farr* (1884), 11 A.R. (Ont.) 186, was a case in which the right of lien was held to exist in favour of a third party to whom the vendor had at the moment of conveyance directed the purchaser to pay the money. In that case the case of *O'Donohgue* v. *Hembroff* (1872), 19 Gr. 95, is referred to. In this latter case Vice-Chancellor Mowat apparently directed a sale of the

ALTA.

S. C.

DENNY v. NOZICK AND BRODY.

Stuart, J.

lands upon a bill filed by a holder and transferee of some of the notes given by the purchaser. The vendor, Hembroff, had retained some of the notes. On all those transferred except one the plaintiff had got judgment against all the parties including Hembroff and on that one she had judgment against all but Hembroff. The judgment declared a lien to exist for the purchase money but the lien with respect to the transferred notes was seemingly declared in favour of the plaintiff the holder of the notes who had judgment, and she was given "priority of lien" over Hembroff for all notes with respect to which she had judgment against him.

It appears, however, from a subsequent report of a judgment in the same case dealing with a later application that what the plaintiff asked for in her bill was to be given the *benefit of the vendor's lien*, not a declaration that she was entitled to a lien in her own right. See *O'Donohoe* v. *Hembroff* (1873), 20 Gr. 350. From this it would appear that even if the Royal Bank had been in the first place, or had been made at the trial, a party plaintiff it would have been entitled to ask merely to be given the benefit of Denny's lien.

With much respect I am unable to discern why upon principle the plaintiff should lose his lien by the negotiation of the notes. It is true that by the negotiation of them the defendant Nozick became indebted to the bank and thereupon owed no debt to Denny. But Denny was still liable to the bank for the money. He became, as endorser, a surety to the bank for Nozick although of course also directly liable at least for a part of the amount of the notes. Now it is a common thing for parties by their contract to create a charge or mortgage to protect a surety, *i.e.*, to secure him against his liability as guarantor. In such case the debtor owes no debt to the surety. So I cannot see why a Court of equity should hesitate to recognize the existence of a species of security which Courts of equity have created even in a case where no debt may be due directly to the surety. It simply is reduced to this, equity recognizes the existence of a charge or trust in favour of an unpaid vendor who has taken notes. Is it at all inequitable or unjust that this charge or trust should continue to exist in his favour even if he has changed his position from that of a direct creditor to that of a surety of the debtor? I think every principle of equity is really in favour of continuing the protection to the unpaid vendor.

ALTA.

S. C.

DENNY v. NOZICK AND BRODY.

Stuart, J.

True he may have raised some money by endorsing the notes but he may have to pay it back and in this case has a judgment against him for it. If he had assigned the debt entirely without guaranteeing that it would be paid and had got his purchase price for the debt, whatever it was, one can well understand how he at least, whatever might be the position of the assignee, could no longer have a lien. But that is not the case here.

The appellant Denny filed his caveat two years before the bank got its judgment. If he was then entitled to file a caveat what has happened to make it invalid or to deprive him of his right to maintain it? I cannot see anything even in the judgment which can have that effect. The simple facts still remain that Nozick has not paid for the land and that Denny is still a guarantor to the bank that he will do so. Why then should he lose his security? (See also the case of *Re J. Defries & Sons Ltd.* [1909], 2 Ch. 423, at p. 429.)

It is of course suggested that he cannot enforce his lien. No doubt that is true as the matter now stands. But that is not a peculiar situation. No mortgagee can enforce his mortgage until it is in default. Neither can a surety enforce any security he may have taken until he has himself paid the debt. Nozick cannot complain of the continued maintenance of the caveat because all he has to do to get rid of it is to pay his debt.

The first prayer of the statement of claim is simply for a declaration that Denny has a lien and is entitled to maintain the caveat until payment. Subject to two other contentions raised by the respondent, it seems to me to be clear that Denny is entitled to this although he of course is not yet entitled either to the personal judgment or to the sale asked for.

It was contended that by the insertion of the sum of $10,000 in the transfer of the real estate as the consideration paid therefor, there was a separation of the debt into two separate debts, one of $10,000 for the real estate, and another of $5,200 for the chattels and the license and that, as the $10,000 was paid, there could no longer be a lien for anything unpaid on the real estate. But one can easily see that it was the requirements of the Land Titles Act with respect to valuation and fees payable that forced the vendor to put a separate value on the real estate and the statement of the consideration in the transfer was undoubtedly merely made to

ALTA.

S. C.

DENNY v. NOZICK AND BRODY.

Stuart, J.

correspond therewith. The transfer bears the endorsement "For title and assurance fund. Present value $10,000. Last value $10,000." Thus no assurance fund fee would be payable. It seems clear that the insertion of the consideration as $10,000 was a formal matter and was never intended and cannot be considered as a separation of the original purchase price as one lump sum for realty and chattels into two separate purchase prices, one for realty and the other for chattels. The total purchase-price still remained $15,200 for all the property sold and for the $2,600 remaining unpaid at the date of the transfer there would still be a lien on the real estate.

Another contention put forward by the respondent was that by virtue of the provisions of s. 42 of the Land Titles Act it is, under the Torrens system as embodied in that Act, no longer possible for a vendor's lien for unpaid purchase money to exist. It seems to me to be sufficient to say that s. 42 must be read along with the rest of the Act and that to give it the wide and absolute effect contended for would make it impossible to file a caveat for any purpose under s. 84. The very purpose of s. 84 is to allow persons interested in land by means of unregistered instruments (*i.e.*, instruments "not notified on the folio of the register") "or otherwise howsoever in any land" to file a caveat to protect that interest. This is all the right that the appellant really asks to be allowed to enjoy and for the reasons I have given I think he is entitled to it.

I would, therefore, allow the appeal with costs and direct the judgment below to be set aside and a judgment to be entered declaring that the plaintiff was entitled to file his caveat and is entitled to maintain the same until payment of the amount of the debt and costs of this action. There should be judgment also for the costs of the action and the appeal against both Nozick and Brody because it was clearly on behalf of the latter that the notice to proceed was served which forced the plaintiff to bring his action.

Perhaps a suggestion may not improperly be added that, in order to avoid costs and multiplicity of actions in case it becomes necessary to enforce the lien, the simpliest method would be for the bank to apply to be added as a party plaintiff if it desires to enforce the lien as a creditor of the vendor as was done in *O'Donohoe* v. *Hembroff*, *supra*, or if the plaintiff pays the debt he should be at

liberty to apply in the present action for an order for sale upon shewing that he has done so.

SIMMONS, J.:—The facts in this case have been set out fully in the judgment of Stuart, J., and I need not repeat them.

The vendor's lien such as is claimed in this action is the creation of the Court exercising equitable jurisdiction. If the purchaser has obtained the property and has failed in his obligation to pay the purchase price, then if the vendor has done nothing to interfere with the exercise of this equitable jurisdiction he will obtain relief by applying to the Court, and if the property is still in the hands of the purchaser the Court will make the property a security for the unpaid purchase money and if necessary direct a sale thereof to realize the deficiency.

The vendor may, however, do many things which will interfere with his right to this relief.

He may contract directly with the purchaser to waive such a remedy. He may do such acts as raise against him an implication that he intended the purchaser should be exempt from such a remedy, such as taking a mortgage from the purchaser upon the property sold as security for the balance. He may assign the balance of the purchase money and the right to receive it. The basis of his claim to equitable relief is the right to receive the purchase money and the obligation of the purchaser to pay him. This was the basic foundation as enunciated by Lord Eldon in 1808 in *Mackreth* v. *Symmons* (1808), 15 Vesey 329, 33 E.R. 778, and is the principle which has been followed since that time.

If he has of his own volition and for his own benefit parted with the right to receive the money even though as in this case he may have a beneficial interest in part of it when paid to the bank I fail to see how he can set up a valid claim for equitable relief of this kind. It is true the purchaser has not paid the balance of the purchase money although he has the property and should pay for it, but now at the time of application to the Court for relief the purchaser is not under any legal obligation to pay the money to the plaintiff.

Now the plaintiff can put himself in the relation which would entitle him to make an application to the Court for his remedy if he will pay his creditor, the bank, and get back his securities; he will then *primâ facie* at least have the proper foundation for his

ALTA.

S. C.

DENNY v. NOZICK AND BRODY.

Simmons, J.

application. In other words, equity expects the applicant to perform his honest obligations when the Court is asked to assist him in compelling others to do likewise.

In the alternative he could ask his assignee and trustee, the bank, to join him in making the application and in the event of its refusal he would be entitled to have it joined by the Court as the authorities are quite clear that the beneficiary is entitled to have his trustee joined where the right of enforcement is in the trustee, and the interest of the beneficiary will suffer if the trustee does not what is necessary to protect it.

If the plaintiff is given a declaration that he has at this moment an interest in the land this would necessarily carry with it the right to have his caveat maintained on the register.

The bank as assignee of the purchase moneys would apparently have a higher right as it is now entitled to the purchase moneys, in a portion of which it has an absolute property and for the balance of which it is a trustee for the plaintiff. Now if the bank placed a caveat upon the lands we would have this anomaly: that two parties are claiming an interest in the lands arising out of one and the same debt and have the right to place upon the register of titles as a cloud upon the title a notice that each is claiming for one and the same thing.

I am assuming of course that the bank has the right to file a caveat although there was no assignment of the vendor's *lien qua lien*, yet as I have observed the vendor's lien is after all a trust recognized and enforced by the Courts resting upon the premises that the purchase money is unpaid and the land should be held intact by way of security for the payment. On this principle I can see no reason for refusing the equitable relief to the bank as assignee of the moneys, if the right was in the assignor before the notes were endorsed to the bank.

The question is one of great importance in my view because the purpose of our Real Property Act, 6 Edw. VII., 1906, Alta. stats., c. 24, is to make title certain in so far as this can be done without prejudice to equitable estates and interests.

Where one voluntarily parts with the elementary substance and foundation of his claim to equitable relief although he may retain a contingent interest in the same it would seem to me to be more consistent with the scheme of our Real Property Act as well as in

accord with the principles upon which equitable relief is administered that the term "interest in land," where the same is only enforceable by way of the exercise of this equitable relief by the Court, should not be extended to such a contingent interest, which may conflict with higher interests which the applicant has himself created.

It may be argued however that since the caveat does no more than give notice on the register of whatever interest the applicant may have that it can do no harm to the bank or any one else who may be interested in the land.

The answer to this seems to be this, that the applicant had at the moment immediately before he parted with his securities, the absolute right to file and retain on the register his caveat as a notice of his vendor's lien. Voluntarily and for his own benefit he separated himself from the ownership in the purchase moneys represented by the purchasers' promissory notes. He is really asking the Court to put him back in quite as strong and secure a position as if he had not done this. He can put himself back in his original position by paying his just debt to the bank, and I fail to appreciate the force of the argument that the Court should do this for him.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

Re MASSEY-HARRIS Co. Ltd. and CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton Latchford, and Middleton, JJ. April 4, 1919.

TAXES (§ VI—220)—INCOME TAX—INTEREST ON WAR BONDS—ASSESSMENT. Interest received by a company on war bonds purchased from the Dominion Government constitutes "income" for purposes of taxation under the Ontario Assessment Act (R.S.O. 1914, c. 195, ss. 2, 11). In ascertaining the assessable amount, discounts for payments in cash, carrying charges, or loss on resale of the bonds cannot be considered by way of set-off.

Statement.

APPEAL by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board reversing the order of the Judge of the County Court of the County of York, upon an assessment appeal, and reducing the amount of the company's assessment in respect of income.

The order of the Board was as follows:—

This is an appeal by the Massey-Harris Company Limited

ONT.

S. C.

RE MASSEY-HARRIS CO. LTD. AND CITY OF TORONTO.

against its assessment for the year 1919 for income on Victory war bonds.

In December, 1917, the company purchased bonds of a par value of $1,780,700; these bonds were sold by the company as follows:—

(1)	April, 1918.....	$ 430,000	par value.
(2)	June, 1918.....	1,336,100	" "
(3)	March, 1918.....	14,600	" "
		$1,780,700	

While the bonds were held by the company, it received interest as follows:—

On $ 430,000	December, 1917, to April, 1918.....	$ 9,395.21
On 1,336,000	December, 1917, to June, 1918.....	39,963.95
On 14,600	December, 1917, to March, 1918....	34.31
		$49,393.47

The city corporation contends that the company should be assessed for this amount, $49,393.47, as income.

The company submits that it lost on the transaction of purchase and resale, and was at cost for carrying charges while the bonds were held, and that this loss and outlay should be deducted from the gross receipts by way of interest in determining the quantum of its assessment as income. The Board is of the opinion that the company's contention is right.

The company is engaged in the business of manufacturing agricultural implements, and as such is taxed in respect of real estate and also business assessment under sec. 10 of the Assessment Act, R.S.O. 1914, ch. 195. Under sec. 11, sub-sec. (1), para. (*b*),* the company is assessed in respect of income from the war bonds referred to, as income not derived from the business in respect of which it is assessable under sec. 10. Indeed it is not denied that the company bought the bonds for the purpose of assisting in floating the Government loan, and not as a permanent investment, but with the intention of disposing of them as soon as opportunity offered. In respect of this transaction of purchase

*11.—(1) Subject to the exemptions provided for in sections 5 and 10:—

. . . . . .

(*b*) Every person although liable to business assessment under section 10 shall also be assessed in respect of the income not derived from the business, in respect of which he is assessable under that section.

and sale the company is in no respect different from a financial company whose sole business is dealing in bonds and other similar securities.

"Income," for the purpose of assessment, has been defined authoritatively by the Judicial Committee of the Privy Council in *Lawless* v. *Sullivan* (1881), 6 App. Cas. 373. As summarised in the report, p. 374, "The question decided in this appeal was whether upon the facts stated in the special case the appellant bank was or was not liable to be assessed under the local Acts in the sum of $1,725 for taxes payable on the sum of $46,000 being the amount of alleged income derived from its business within the city of St. John, in the Province of New Brunswick, during the year before, without taking into account certain losses which had accrued during that period, and which exceeded the income." At p. 378, Sir Montague E. Smith, delivering the judgment of the Board, says: "The Courts in *Canada* have in effect decided that 'income' means all the items of profit on the transactions of a business during the fiscal year, without regard to any losses arising from the same business during that year. Their Lordships cannot think that this is a sound or reasonable construction of the enactment." Again, at pp. 378, 379, that learned Judge is reported as saying: "There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it." Again at pp. 383, 384: "Their Lordships have come to the conclusion, upon consideration of the Act in question, that there is nothing in the enactment imposing the tax, nor in the context, which should induce them to construe the word 'income,' when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss, and consequently they are of opinion that where no such gain has been made in the fiscal year, there is no income or fund which is capable of being assessed."

In *City of Kingston* v. *Canada Life Assurance Co.* (1890), 19 O.R. 453, a Divisional Court adopted the above definition of "income" for the purpose of ascertaining the assessable income of the defendant company, under the Assessment Act as it then stood.

ONT.

S. C.

RE MASSEY-HARRIS CO. LTD. AND CITY OF TORONTO.

The Assessment Act applicable here contains an interpretation clause: sec. 2 (*e*). This clause first defines "income," and then illustrates its meaning by concrete cases, and may for the purpose of this opinion be summarised thus: "Income" shall mean annual profit or gain: (1) whether ascertained as being wages, salary, or other fixed amount, or (2) unascertained, (*a*) as being fees or emoluments; or (*b*) as being profits from a commercial or financial business. The definition with illustrations ends at the semi-colon in the 10th line, and then proceeds with this declaratory clause: "And (income) shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source."

It is to be noted that "profit or gain" is the key-note of this interpretation clause. It begins by defining "income" to mean "annual profit or gain," and ends by declaring that "income" shall include "profit or gain from any other source," thus shewing that the Legislature had no intention to import into the word "income," as defined by it, a meaning at variance with that declared by the Privy Council in *Lawless* v. *Sullivan supra*. It seems to the Board that whichever member of the interpretation clause is held to be applicable in this case, the "income" assessable against the appellants is the quantum of gain or profit derived from this transaction of purchase and sale within the calendar year ending on the 31st December, 1918. If the income to be assessed is the profits of a financial, commercial, or other business, i is clear that any loss sustained must be deducted. If the income to be assessed is the return by way of interest or dividend received during the fiscal year from money at interest upon any security or investment, cognizance must be taken of losses sustained during that year in connection with the sale and disposal of that security or investment.

The appellant company has submitted a statement shewing a net loss of $16,634.73, made up as follows:

Loss of principal on resale.....	$ 5,481.87
Carrying charges, being interest paid to bank	38,861.00
	$42,342.87
Interest received on account bonds.....	$25,708.14
Net loss on bonds.....	$16,634.73

An order will issue in accordance with the view of the law above laid down. It is to be observed, however, that there is a discrepancy between the figures first set out as the interest claimed by the respondent to have been received—some $49,393.47—and the interest alleged by the appellant in the above tabulated statement to have been received, namely, $25,708.00. Not having the precise dates of sale of the several blocks of bonds, the Board is unable to determine which is the correct sum. The parties should check over the figures and so settle the amount, and, failing an agreement, they may speak to the Board further in the matter.

C. M. Colquhoun, for the appellant corporation.

J. M. Hossack, for the respondent company.

MEREDITH, C.J.C.P.:—Debatable questions sometimes arise —more frequently perhaps among politicians—whether a certain item should be treated as interest or income or as principal or capital; but no such question really arises in this case: upon the admitted facts there is really no ground for reasonable contestation.

The company, the business of which is the manufacture of agricultural implements, bought, as every other company and person able to buy also bought, "Dominion Victory Bonds of 1917:" there was the double inducement: an excellent investment and an aid to victory in the great war.

The company is assessed, for municipal taxation, as a manufacturing concern, in respect of its business as such: and is assessed also for income upon its investments in these Victory bond ; and necessarily so assessed in compliance with the provisions of sec. 11 (1) (*b*) of the Assessment Act; so that the only question there can be is as to the proper amount of such assessment.

The amount actually received as interest upon the company's investment in these bonds was found by the County Court Judge to have been $49,393.47; and that sum has been treated throughout as the proper amount.

But the company contends that a greater amount should be set off against it, rendering it not liable to assessment for any sum, though its actual income from the bonds was in fact the $49,393.47.

The bonds were purchased, under the common terms, from the Dominion: the terms, with which every one should be familiar,

ONT.

S. C.

RE MASSEY-HARRIS CO. LTD. AND CITY OF TORONTO.

Meredith, C.J.C.P.

were: all purchases at par, payment by instalments extending over the first six months of the life of the bonds; with, however, a right to pay the full price on the day fixed for payment of the first instalment, and to be allowed a discount on that payment, which would put the purchaser in the same position, in regard to the investment, as if he had paid by instalments: no better and no worse off in regard to income or interest.

The company paid for part of their bonds in one way and the rest in the other; and seem to me to have wasted a good deal of time, and many words, upon a contention that the discount received, for the payment in cash, should be credited to capital, not to income, and that, to that extent, the $49 393.47, actually received as income, should, as item number one, be reduced. But neither in form nor in substance was the discount anything but interest: interest paid by the Dominion in advance for the use of the company's money from the time it was paid until the time when it must have been paid under the ordinary, the instalment, plan.

Then, as item number 2, it was contended that there should be a deduction for "carrying charges" of $38,861, that is, for interest which might have been paid by the company if it had not the capital but was obliged to borrow the money to pay for the bonds: but there is no evidence of any such need or any such borrowing; if there had been, and especially if the bonds had been pledged for repayment of it, a necessary item of that kind might have been allowed, and might yet be allowed if there were any thing before us to shew that it could be proved. Borrowing by the company in carrying on its manufacturing business would not do; and it is hardly likely that this great concern had not capital of its own enough to carry the transaction.

Then, as item number 3, it was contended that a loss of capital on a resale of the bonds—said to amount to $5,461.97—should be also set off against the income actually received. Not because it was in any sense a loss of income, but because it was a loss on the whole transaction; a contention which would have some merit if the assessment was on capital as well as income, but entirely without merit and without weight, as it seems to me, when the power to tax and the assessment are, each, on income only.

It was said that, if the company were a financial concern

continually engaged in buying and selling bonds in this way, its net earnings on all transactions might be considered its income: but the first obvious answer to that is: it wasn't; and it may be added that for want of sufficient capital no company could be continuously engaged in such transactions: one was enough for this company: nor can I see how the nature or extent of the business done could turn a loss or gain of capital into a loss or gain of income. If this contention were right, all appreciation of value in stocks and bonds should be assessed as income; it could not make any difference whether they were sold or retained by the company—it was so much gain.

I would allow the appeal and restore the assessment made by the County Court Judge. The queiston is really one of interpretation of the Assessment Act.

Britton, J.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

Latchford, J.

LATCHFORD, J.:—The contention of the appellant is that as a matter of law the Ontario Railway and Municipal Board should have determined that the $49,393,47, received by the respondent as interest upon the Victory war bonds which it purchased, is income within the meaning of that term, as defined by sec. 2 (*e*) of R.S.O. 1914, ch. 195.

The decision of the Board was that in the purchase of the war bonds and their subsequent sale—both purchase and sale being effected in 1918—the company was in the same position as a financial institution whose sole business was dealing in bonds and similar securities, and that therefore only the quantum of gain or profit derived from the purchase and sale of the war bonds by the company during 1918 could be regarded as "income."

Apart from the value as an advertisement resulting from such a large subscription, widely published as made for patriotic purposes by a company whose chief if not sole business is admitted to be the manufacture and sale of agricultural implements, the investment was not very profitable, although, upon the ascertainment recommended by the Board, it has been found, as counsel agree, that instead of a loss of $16,634.73 there was a gain of $7,049.60.

But, in my opinion, not only this latter sum, but the total interest received, is "income" within the meaning of the Assessment Act, and, as such, subject to taxation.

ONT.

S. C.

RE MASSEY-HARRIS CO. LTD. AND CITY OF TORONTO.

Latchford, J.

As applicable to this case "income," by sec. 2 (e), "shall include the interest . . . directly or indirectly received from money at interest upon any security . . . or from any other investment . . ."

The company received $49,393.47 as interest directly received from money at interest upon the security of the Dominion of Canada, and from an investment—temporary, indeed, but still an investment.

I have perused the reports of the cases cited in the opinion of the Board, but, with great respect, I find them inapplicable.

I would allow the appeal with costs.

Middleton, J.

MIDDLETON, J., agreed in the result.

Appeal allowed.

CAN.

S. C.

CITY OF CALGARY v. JANSE-MITCHELL CONSTRUCTION CO.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1919.

CONTRACTS (§ V—376)—SPECIFIED WORKS—TIME SPECIFIED FOR COMPLETION—FINAL CERTIFICATES GRANTED BY ENGINEER—PAYMENT BY CORPORATION—POSSESSION—EXTENSION OF TIME.

A contract with a corporation for the execution of certain specified works, provided that the works should be completed by a certain day and contained a clause that: "If the contractor shall fail to complete the work by the time specified, a sum of $25 per day for each and every day thereafter as liquidated damages . . . shall be deducted from the money payable under this contract and the engineer's certificate as to the amount of this deduction shall be final."

Held, that the granting of certificates by the engineer without deduction, including one marked "final," such certificates being paid by the municipality without deduction, coupled with the circumstance of the municipality having taken possession, and with the correspondence, justified the Court in drawing the inference that the time for completion was extended until the date when the works were substantially completed by the contractor.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 45 D.L.R. 124, 14 Alta. L.R. 214, affirming, the Court being equally divided, the judgment of the trial Judge, Ives, J., in which he gave judgment for the plaintiff for $9,288.10 as the balance due on contract and dismissed the defendant's counterclaim for liquidated damages. Affirmed.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur, K.C., and *M. Marcus*, for appellant.

H. P. O. Savary, K.C., for respondent.

IDINGTON, J. (dissenting).—I am of the opinion that the provisions in the contract in question for liquidated damages fall as such well within the rules laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* [1915] A.C. 79, at pp. 89 *et seq.*, for testing whether the sum named is to be treated as a penalty or, as the express language of the contract designates it, as liquidated damages.

In the very nature of the things the parties were contracting about, it seems to me most appropriate that they should contemplate the loss to the appellant by a daily deprivation of the use of that which was being contracted for; and none the less so when in all probability there would have been paid by it ere the time for the clause in question becoming operative, the substantial part of the cost price of the work and hence intend to anticipate and decide what would be reasonable damages. Having regard to the sum involved and paid and the result of the deprivation of the use of the work, the daily payment fixed does not seem so harsh or extravagant as to suggest a mere penalty was only being considered.

The case of *Jones* v. *St. John's College* (1870), L.R. 6 Q.B. 115, seems to answer the objection in law relative to the construction of the instrument involved in the provisions for extra work as an excuse for relief.

And as a matter of fair dealing I think the engineer's allowance of time in that regard covers the ground, and I suspect was in fact intended to be in conformity with the expectation implied in the contract though not literally observing its terms.

And in the same sense I think the view of the Chief Justice below, as to the final estimate of the engineer being taken as substantial completion, should be adopted.

I fail to find any ground of waiver on which respondents should be permitted to rest.

I think the appeal should be allowed and judgment go in the manner the Chief Justice and Stuart, J., in the Court below, indicated, and with costs of appeal here and below.

DUFF, J.—The appeal turns in my judgment upon the construction and application of articles 11 and 12 of the contract. These articles are in the following terms:

Duff, J.

CAN.

S. C.

CITY OF CALGARY v. JANSE-MITCHELL CONSTRUCTION CO.

Duff, J.

11. If the engineer or corporation should at any time be of the opinion that the work is unreasonably or unnecessarily delayed, or that the contractor is not on his part fulfilling this contract, or that the force employed is not sufficient to complete the work within the time herein provided, the said engineer shall thereupon require said contractor to proceed within such delay as may be mentioned in the notice with such force as he shall direct, and in case of his refusal or neglect to comply with such requirements, or if at the expiration of the time specified for the completion of the works embraced in this contract such works are not fully completed, the said corporation may put on sufficient force as it may see fit or take possession of and complete said work at the expense of said contractor, as herein provided in case of failure or insolvency, and all money paid by the corporation in such case shall be deemed payment made on account of this contract. But in the event of delay to the works by reason of strikes or combinations on the part of the workmen employed, or by extra work, or by any act or omission of the corporation, such additional time as may be deemed fair and reasonable shall be allowed by the corporation: provided that the contractor notify the engineer in writing within 24 hours of the cause of such delay otherwise he shall have no claim.

12. The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties.

The sums payable under article 12 must, I think, be regarded as liquidated damages, and not as a penalty.

The judgment of Lord Dunedin in *Commissioner of Public Works* v. *Hills*, [1906] A.C. 368, at p. 375, furnishes the appropriate test. The question is, can the sums mentioned be considered as a genuine pre-estimate of the creditor's probable or possible interest in the performance of the contract? If so, it is immaterial that the parties may be reasonably supposed to have relied upon the clause as an "instrument of restraint." As Lord Robertson pointed out in the *Spanish Government's Case, Clydebank Co.* v. *Don Jose Ramos Yzquierdoy Castaneda*, [1905] A.C. 6, at pp. 19 & 20, the intention that such agreements shall so take effect in some degree may always be assumed to be present. That is nevertheless of no importance unless you come to the conclusion, to use Lord Halsbury's phrase in the same case, "that the parties only intended" the agreement "as something *in terrorem*."

I have no doubt that this article must be construed as a genuine appraisal of the value of a real interest of the municipality in the performance of the contractor's principal obligation.

Article 12 contemplates the deduction of the penalties as the primary method of recovery. It does not differ materially in this respect from the articles construed by the Exchequer Chamber in *Laidlaw's* case, 2 Hudson on Building Contracts 13, at pp. 15 and 16, in which it was provided that the penalty was to be paid to and retained by the company as ascertained and liquidated damages. The provision for drawback does not, I think, materially affect this point.

The power to extend time was given to the engineer, and the granting of certificates by him, from time to time, subsequent to the date fixed for completion, without deduction for penalties, was treated as overwhelming evidence of the intention to exercise this power. Here the power is given to the municipality. But article 11 does more than vest in the municipality the power to extend the time, it creates in the cases specified in article 11 an obligation to do so if the contractor shall reasonably be entitled to demand it.

In the case before us, certificates were granted by the engineer, without deduction, and paid by the municipality, without deduction. Coupled with the circumstance that the municipality had taken possession, and with the correspondence, these facts constitute, I think, sufficient ground for requiring us to draw the inference that the time for completion was extended until the date when the works were substantially completed by the contractor in July, 1913.

Anglin, J.

ANGLIN, J. (dissenting).—The facts of this case, so far as material, may be found in the opinions delivered by the Judges of the Appellate Division, 45 D.L.R. 124; 14 Alta. L.R. 214.

Several questions are presented on this appeal:—

(1) Whether a provision of the 12th clause of the contract that "if the contractor shall fail to complete the work by the time specified, a sum of twenty-five dollars per day for each and every day thereafter as liquidated damages . . . shall be deducted from the money payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final," should be regarded as a contractual pre-ascertainment of damages for delay or as in the nature of a penalty;

(2) Whether by directing an extension of the sewer for 700

CAN.

S. C.

CITY OF CALGARY v. JANSE-MITCHELL CONSTRUCTION CO.

Anglin, J.

feet at its lower end, from which the work was to begin, the city waived the provision of the contract making time of its essence and thus rendered the clause fixing the amount of damages for delay inapplicable;

(3) Whether certificates given by the city engineer for amounts payable to the contractor, and particularly his certificate of Jan. 12th, 1914, marked "final," in which no deduction was made for damages for delay in completion, preclude the city from claiming such damages;

(4) Did the city by making partial use of lower portions of the sewer as constructed waive the provision for damages for delay in completion of the entire work?

(5) If damages at the rate stipulated are recoverable, for what period should they be allowed?

The date fixed by the contract for completion was July 1, 1912. The additional 700 feet of sewer (the original length was 12,000 feet, for the construction of which the contract allowed eleven months); was authorized by the engineer a few days after the contract was signed and before actual work upon it was begun. The contract expressly provided that the engineer might "at any time while the works are in hand, increase, alter, change or diminish the dimensions . . . or vary the form of the dimensions of any part of the said work" (clause 7), and that extra work, changes, alterations, increases or diminutions should not lengthen the delay within which the works were to be completed but must themselves also be completed by July 1, 1912, as if originally in the contract (clause 13). I agree with the Chief Justice of Alberta that this latter provision distinguishes the case at bar from *Dodd* v. *Churton*, [1897] 1 Q.B. 562, at p. 567, relied on by the trial Judge and the two appellate Judges who affirmed his judgment, and brings it within the authority of *Jones* v. *St. John's College*, L.R. 6 Q.B. 115.

The works were "in hand" from the moment when the contract was executed. It stipulated that they should be commenced immediately. The contract further provided that should the works be delayed by extra work, if the contractor should advise the engineer of such delay and its cause, the corporation should allow such additional time for completion as might be deemed fair and reasonable (clause 11).

If, as I incline to think and as all parties seem to have treated it, the addition of the 700 feet was "extra work" within the meaning of the foregoing provisions, no notice of delay thereby occasioned or of its cause was given by the contractor. Nevertheless, the city engineer, either *proprio motu* or by direction of the municipal corporation, by letter of July 1, 1912, formally notified the contractor that two months' extra time would be allowed it for the completion of the work on account of the extra 700 feet. I think the city may fairly be held bound by this act of its official and that the time for completion should therefore as against it be regarded as having been extended to Sept. 1, 1912. Not having taken advantage of the provision in its favour made by clause 11, the contractor cannot complain that it has not been allowed for delay entailed by extra work. But, if it could, the allowance of two months for 700 feet additional seems eminently reasonable in view of the fact that the time for construction of the 12,000 feet originally contracted for was eleven months.

I agree with Harvey, C.J., that the city engineer's estimate of Jan. 12, 1914, certifying to work done up to Dec. 31, 1913, and marked "final" should also be taken to establish that the works were completed on that date so that the contractor's default should be computed as from Sept 1, 1912, to Dec. 31, 1913, or 487 days in all. There is no evidence in my opinion that would justify a finding that the works had been completed at an earlier date. Moreover, under clause 4 of the contract it was the function of the engineer to determine all questions as to its execution and his decision is made "final and conclusive and unimpeachable for any cause."

If, on the other hand, the additional 700 feet was not "extra work" which the contract allowed the engineer to direct, but should be regarded as an independent undertaking upon which the contractor was at liberty to enter or not as it might elect, its doing so did not affect its rights or obligations under the existing contract and would not entitle it to an extension of time for its completion.

Connecting with lateral sewers as sections of the trunk sewer were finished was quite a usual course and must from the first have been contemplated by the parties to the contract. Such partial user of the trunk sewer as these connections entailed would

CAN.

S. C.

CITY OF CALGARY v. JANSE-MITCHELL CONSTRUCTION CO.

Anglin, J.

not involve the waiver of the provision fixing damages for non-completion of the entire work.

The engineer's certificates of amounts due the contractor calculated without making any deductions for delay at first blush present a little difficulty. But when it is borne in mind that the city retained a drawback too of 20%, amounting to $36,489.22 on the final estimate of Jan. 12, 1914, that difficulty largely disappears. It was, no doubt, intended by the engineer that any damages the city should be entitled to for delay in completion and other matters should be taken from the sum so withheld on the final adjustment of accounts with the contractor. The omission of a deduction for delay from the certificates therefore does not imply any abandonment of the city's right to claim it or any judgment of the engineer adverse to such a claim. In his letter of July 31, 1912, granting the contractor the two months' extension "on account of the extra 700 feet of sewer laid at the lower end and sundry unforeseen and unavoidable delays" the engineer expressly notified them that after September 1, "the penalty clause in your contract will be enforced," adding "it would be to your advantage therefore to put on such extra force and appliances to ensure a speedy closing up of your contract."

The effect of this letter was to put matters in the same position as if the date originally fixed for completion of the works had been Sept. 1, 1912, instead of July 1, 1912. The contract conferred power on the corporation to make this change and it was exercised by its officer. From time to time we find letters to the contractor complaining of delay and urging the employment of more men—a night shift—more rapid progress. But no further extension of time was ever granted and I fail to find in the correspondence and certificates or in the conduct of the corporation and its engineer a waiver of the provisions making time of the essence or of the clause fixing damages for delay in completion.

We had in the comparatively recent case of *Canadian General Electric Co.* v. *Canadian Rubber Co.* (1915), 27 D.L.R. 294, 52 Can. S.C.R. 349, to consider with some care when a clause providing for the payment of a fixed sum for each day's delay in completing a contract should be regarded as "a genuine covenanted pre-estimate of damage," and when it should be deemed a penalty. The English authorities were there so fully discussed that further

reference to them is scarcely necessary. The parties in the present instance have themselves designated the sum fixed as "liquidated damages;" it is payable on only one event, not on the occurrence of one, or more, or all of several events, some of which may occasion serious and others trifling damage: it is not extravagant or unconscionable under the rule indicated by Lord Davey in *Clydebank Engineering & Shipbuilding Co. Ltd.* v. *Don Jose Ramos*, [1905] A.C. 6, at p. 17, being in fact slightly less than the equivalent of interest on the contract price at 5%: there were no adequate means of ascertaining either before or after the default the damage attributable to the breach of the contract. All these tests of "a genuine covenanted pre-estimate of damage" indicated by Lord Dunedin in the *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd*, [1915] A.C. 79, at pp. 87-8, are present here. It is in such a case that the parties might be expected to have intended to contract that they should estimate the damages for default at a certain figure and thus dispense with the extremely difficult, if not impossible, proof of the actual damage to which delay in completion of the work would subject the municipal corporation.

A reported case resembling this in its nature and circumstances is *Law* v. *Local Board of Redditch*, [1892] 1 Q.B. 127, where in default of completion by a specified date of sewerage works to cost £630 the contractor agreed to pay the sum of £100 and £5 for every seven days during which the work should be uncompleted after the date fixed as and for liquidated damages. It was held by the Court of Appeal that these sums were recoverable as liquidated damages.

On the whole case I think judgment should be entered as indicated in the opinion of the Chief Justice of Alberta, including the disposition of costs. The appellant is entitled to its costs of the appeal to this Court.

BRODEUR, J.—The question in this appeal is whether the appellant corporation is entitled to claim $25 a day from the respondent company for delay in the construction of the sewer the latter undertook to build. The trial Judge dismissed that claim and the Judges of the Appellate Division being equally divided the decision of the trial Judge stood confirmed.

It is not necessary for me to decide whether the clause upon

CAN.

S. C.

CITY OF CALGARY v. JANSE-MITCHELL CONSTRUCTION CO.

which the corporation based its claim was a penalty clause or constituted liquidated damages, because I have come to the conclusion that this clause was waived.

By the contract the engineer of the corporation is the sole judge to determine the amounts of work to be paid and to decide all questions which may arise relative to the interpretation and execution of the contract; and his estimates, directions and decisions are final and unimpeachable for any cause.

Brodeur, J.

Cash payments were to be made monthly on the written certificate of the engineer "apportioning same in accordance with the actual value of the work done in proportion to the contract as a whole."

The contract should have been completed on July 1, 1912: but an extension of two months was given by the engineer for some extra work. The engineer, from September, 1912, to October, 1913, gave very frequently progress estimates and in none of those estimates does he claim any damages for delay in the execution of the contract. It would have been, however, very easy to do that because a sum of $25 a day had been stipulated for such delay; but for reasons which appealed, I suppose, to the sense of justice of the engineer he did not find it advisable that the contractor should pay that penalty.

Now that the work is completed and accepted by the municipal authorities, the corporation of Calgary claims, when they are sued for the payment of the balance due on the contract that a penalty exceeding $12,000 should be paid.

It seems to me that the engineer had been satisfied that the work had been carried out properly or that the provision of the time limit had ceased to operate after the extension of the work. In that case, the city lost its right to demand the penalty or liquidated damages.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.—The principal question here is whether the appellant is entitled to claim from the respondent the sum of $25 a day for delay in completion of a sewer which the respondent contracted to build and built for the appellant. The contract allowed eleven months for its construction, and under clause 12 the appellant, when sued for the balance due the respondent, claimed the sum of $28,125 for liquidated damages at the rate of

$25 per day from Sept. 1, 1912, to Oct. 1, 1915. The trial Judge dismissed the appellant's counterclaim and allowed the respondent the sum of $9,288.10. He also found as a fact that the work was completed on July 5, 1913, while the date fixed by the contract for completion was July 1, 1912, the appellant admitting that it cannot complain of any delay prior to Sept. 1, 1912. Both parties appealed from the judgment of the trial Court, the appellant in order to get judgment on its counterclaim, the respondent because it was not satisfied with the rate of interest granted by the trial Judge. In the Appellate Division, the Judges were equally divided, so the judgment of the trial Court stands unless it is interfered with by this Court.

The first point to be considered is the nature of the right claimed by the appellant under clause 12 of the contract. Is it a penalty or liquidated damages? The trial Judge held that it was a penalty, while Harvey, C.J., and Stuart, J., were of the opinion that it was liquidated damages. Beck, J., (Hyndman, J., concurred with him but gave no reasons), held that the appellant had waived any right to this sum of $25 per day and did not think it necessary to discuss the nature of the claim.

This, however, is the first point to be dealt with. I will cite clause 12 of the contract between the parties:

PENALTY.

12. The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of a failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties.

The language of this clause is not aptly chosen, and very likely it was modified or added to in the drafting. It obviously opens the door to two constructions. Apparently, but of course this is only a surmise, the parties, as the title shews, started out with the idea of providing for a penalty in case of delay in completion, and then it was thought better to make it a stipulation for

CAN.

S. C.

CITY OF CALGARY v. JANSE-MITCHELL CONSTRUCTION CO.

Mignault, J.

liquidated damages. Possibly a doubt was felt whether some kind of damages should not be expressly provided for, so it was agreed that the sum of $25 per day of delay should be paid "together with all sums which the corporation may be liable to pay during such delays until such completion."

So the "liquidated damages" do not include these sums, which obviously are damages caused by the delay to complete the works during the time prescribed.

Then the clause says that "this sum shall be paid in addition to any penalties otherwise specified . . . and in addition to any other damages sustained."

Viewing the whole clause and the portions to which I have specially referred, I cannot say that the trial Judge was wrong in holding that this sum of $25 per day was a penalty and not liquidated damages, and if this be so, *cadit questio*, for no proof of damages for delay has been made.

It appears further that this sum was to be "deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final."

As a matter of fact, the engineer gave a certificate which he marked "final" on Jan. 12, 1914, and in this certificate no deduction of the $25 per day was made, and he certified that $2,740.86 was then due the respondent. It is true that the certificate shewed that 20% of the contract price was held back, amounting to $36,489.22, but this retention of 20% was governed by clause 20 of the contract, and its object was not to cover the $25 per day for delay in completion. It was to be held back until 33 days after the completion of the works, "to pay thereout the claims of all persons who have done work or furnished material in execution of any part of this contract to or for the contractor."

After the 33 days, 15% was to be paid to the contractor, and the appellant was to keep 5% for twelve months to cover repairs or the cost of finishing work. It therefore cannot be said that the retention of the 20% on the certificate of Jan. 12, 1914, was a reservation of the right of the engineer to deduct the $25 per day, the more so as the work, as found by the trial Judge, had then been completed for more than six months.

Mr. Craig, the engineer, first claimed this penalty in an estimate dated Nov. 30, 1917, nearly four years after his final estimate

of Jan. 12, 1914, and in his evidence says that he never rendered an account for the $25 per day before that time. I cannot help thinking that the claim first made by the appellant on Nov. 30, 1917, was an afterthought, to defeat the right of the respondent to be paid the drawback, and it does not commend itself to my mind as coming within any rule of fair dealing between the parties to such a contract.

I may add that immediately after the contract, the appellant ordered the respondent to begin the sewer at a point 700 feet further away from the point determined in the contract for its starting point. Without stopping to enquire whether this was an extra or an independent contract, it is obvious that this addition to the work changed all the time conditions of the contract. After this order of the appellant, I would think the parties were at large in so far as the penalty for delay in completion is concerned.

I would not interfere with the judgment of the trial Judge as to the interest he allowed the respondent, that is to say 5% which is the legal rate.

In the result the appeal should in my opinion be dismissed with costs here and in the Appellate Division. The respondent should not have the costs of its cross-appeal to the latter Court.

Appeal dismissed with costs.

BURTON v. HOOKWITH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford and Middleton, JJ. March 17, 1919.

MECHANICS' LIENS (§ VI—45)—CLAIMS OF MATERIAL-MEN—STATUTORY FUND—APPLICABILITY.

The Ontario Mechanics and Wage-Earners Lien Act (R.S.O. 1914, c. 140, s. 12), requiring the owner to create a fund by deducting 20 per cent. from any payment to be made by him in respect of a contract, for the protection of those who supplied materials to the contractor, does not apply to a contract under which nothing was payable by the owner to the contractor—as where during the progress of the work the owner had paid the contractor more than the value of the work done and the work as a whole was never completed: under such circumstances the claims of the material-men are not enforceable against the owner.

Statement.

APPEAL by the defendants, the owners, from the judgment of the County Court in three actions against the same defendants, brought to enforce the plaintiffs' respective liens under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914. ch. 140, and consolidated and tried together.

ONT.

S. C.

BURTON v. HOOKWITH.

The defendant Shaw contracted with the appellants to build a house upon two lots in the village of Courtright, for a lump-sum. The plaintiffs supplied materials to the contractor. The work which the contractor undertook was not completed. Payments were made by the owners to the contractor on account of the contract-price, to an amount exceeding the value of the work actually done.

The learned County Court Judge overruled the contentions made before him for the owners, viz., that it is only on contracts to pay on progress certificates that the owner is bound to hold back 20 per cent. under the Act, and that nothing was owing by the owners because the work was never completed.

A. Weir, for the appellants.

J. M. Bullen, for the respondents.

Middleton, J.

MIDDLETON, J.:—The material facts are not in dispute.

The contract-price was	$1,440.00	
Extras allowed	138.50	$1,578.50
Amount necessary to complete contract	$640.75	
Allowance for defective work	100.00	740.75
Amount payable to contractor if entitled on *quantum meruit*		837.75
Amount paid by owner		1,150.00
Amount to be refunded		$ 312.25

The contract is to do the entire work for the stipulated price, and the contractor, as he did not complete the building, in one view might not have the right to recover anything, but this is not of importance, as the owners have paid him more than would be recoverable in any event.

There seems to be a curious misunderstanding as to the effect of the decided cases.

Farrell v. *Gallagher*, 23 O.L.R. 130, and *McManus* v. *Rothschild* (1911), 25 O.L.R. 138, rightly emphasised the fact that the Mechanics and Wage-Earners Lien Act provides that the owner shall, save as provided by the Act, not be liable for more than the amount rightly payable by him to the contractor.

In *Rice Lewis & Son Limited* v. *George Rathbone Limited*, 9 D.L.R. 114, 27 O.L.R. 630, it was held that the 20 per cent. to be retained for lien-holders from any payments to be made was one

of the things excepted from this protection extended to the owner, and that *Russell* v. *French*, 28 O.R. 215, when "rightly understood," determined no more than this.

This is very plain both from the judgments of my Lord (then Meredith, J.A.) and of Mr. Justice Magee in the *Rice Lewis & Son* case, 9 D.L.R. 114 at p. 115.

"Under the contract in question, 80 per cent. of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractor; and a very considerable sum became thus payable to him; which, if it had not been paid, he could have recovered in an action, except as to '20 per cent.' of it, which the Act required the owner to retain for the benefit of others who were putting their labour and building materials into his building, and might have liens for them."

Different considerations would apply if there had been no contract to pay except on fulfilment of the contract on the contractors' part.

"The Act, thus understood, creates no hardship on the owner; . . . if he retain 20 per cent. out of every payment he has made himself liable for by his contract, he does that which the Act requires, and is as well off as if the Act had never been passed" (p. 116).

(These passages from the judgment of my Lord.)

"If an owner contemplating building chooses to say, 'I will not pay until completion,' I do not see that the statute has advanced the rights of the general lien-holders not being wage-earners, beyond the position of the plaintiff in *Goddard* v. *Coulson*, 10 A.R. 1, and they are still limited to the amount owing from the owner . . . if the owner chooses to agree to make payments to the contractor before completion, he cannot complain that a portion of that which he is willing to part with should be set aside, not for his security, but for the security of others whose labour or materials have gone to benefit his property" (p. 122).

"The charge is . . . upon money which has actually become payable, a payment which is to be made and is directed to be retained" (p. 123).

(These passages from the judgment of Magee, J.A.)

This demonstrates that in *Rice Lewis & Son Limited* v. *George*

ONT.

S. C.

BURTON v. HOOKWITH.

Middleton, J.

Rathbone Ltd. supra. it was considered that the principle established by *Farrell* v. *Gallagher*, that the Act does not make the owner liable for any greater sum than he has contracted to pay (save in the case of wage-earners), is sound; but that case determines that, where the owner has agreed to make interim payments to the contractor as the work progresses, he is required by the Act to hold 20 per cent. of such interim payments as a statutory fund available for all lien-holders, and this fund is not answerable for any sum which the owner may claim against the contractor upon the completion of the work.

When, as here, there is but one payment called for by the contract, general lien-holders must take the situation as it is found to be, for there is no provision requiring the creation of a "statutory fund" for the protection of the lien-holders.

This fund is to be created by the owner deducting 20 per cent. "from any payment to be made by him in respect of the contract."* When there is a lump-sum to be paid upon the completion of the contract and the work is not done, nothing is payable.

Where the case can be brought within the modern relaxation of the strict rule as to entire contracts now recognised in *H. Dakin & Co. Limited* v. *Lee*, [1916] 1 K.B. 566, and upon the taking of accounts upon the footing there recognised there is a balance due the contractor, the owner must retain 20 per cent. of this sum for possible lien-holders.

The appeal should be allowed and the actions dismissed with costs, to be taxed having due regard to the limitation found in the statute.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—I agree with my brother Middleton in the judgment which he has read: but I desire to state, so that there may be no room for misunderstanding, the facts upon which my opinion is based:—

*Section 12 (1) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, is as follows:—

12.—(1) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of 30 days after the completion or abandonment of the contract, 20 per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.

ONT.

S. C.

BURTON v. HOOKWITH.

Meredith, C.J.C.P.

The contract for the building of the house was in writing; the consideration for the doing of the work was single—one sum of money for the whole work; to be paid when the work was done: the work was never completed—in value over $600 worth was never done, the whole price being only $1,440; so that, under the special contract between contractor and owner, the contractor never became entitled in law to be paid anything; and it has long been the settled law of this Province, based largely upon the case of *Munro* v. *Butt* (1858), 8 E. & B. 738, 120 E.R. 275, that, under ordinary circumstances, in such a case as this, the builder cannot recover anything for the incomplete work done: nor does anything decided in the recent case of *H. Dakin & Co. Limited* v. *Lee*, 1916] 1 K.B. 566, conflict with that rule, though there may have been impressions that it did: on the contrary, the rule is recognised: what the Court of Appeal did in that case was: find, as a fact, that the work contracted to be done had been done, but defectively done in some details: so that, if fault could be found with that case, it should be with its finding of fact not its law.

The only question upon which my mind was not satisfied, at the argument of this appeal, was, whether the comparatively large payments made by the owner to the contractor, during the progress of the work, did not indicate a new agreement under which payments were to be made as the work progressed; but a careful examination of the whole of the proceedings, and of all the papers filed, since, has failed to discover any good ground for imputing any such subsequent agreement: see *Munro* v. *Butt*, *supra*.

So that the contractor could not now enforce, nor could he ever have enforced, in any legal proceedings, payment of any sum of money for the work done by him: but, during the progress of the work, the owner was subject to such pressure for payment as a threat to abandon the work if not supplied with some money to carry it on might have, if made: the Act, however, as it is, does not cover payments so made; payments which, if they had enabled the contractor to complete the work, would have made valid liens.

BRITTON and LATCHFORD, JJ., also agreed with MIDDLETON, J.

Britton, J. Latchford, J.

Appeal allowed.

ALTA.

S. C.

BANK OF COMMERCE v. EDMONTON LAW STATIONERS, Ltd.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 4, 1919.

ASSIGNMENT (§ III—35)—CONTRACTS—SECURITIES—SPECIAL WORDS—WHAT PASSES—RIGHT TO DISTRAIN FOR RENT.

An assignment was in the following words: "The undersigned hereby assign and transfer . . . as security for all existing or future indebtedness and liability of the undersigned, all the debts, accounts and moneys, due or accruing due, or that may at any time hereafter be due . . . and also all *contracts, securities, bills, notes,* and other documents now held, or which may hereafter be taken or held by the undersigned, or anyone on behalf of the undersigned in respect of the said *debts, accounts,* moneys or any part thereof."

Held, that the right of distress was not included in the assignment, and that rent reserved in a lease is not a debt secured by the lease, and an assignment sufficient to bring the rents within the stat. 4 Geo. II. must be an assignment of rents "*qua* rents."

Statement.

APPEAL from the trial judgment in an action claiming the right to distrain for rent under an assignment. Affirmed.

Harvey, C.J.

H. H. Parlee, K.C., for appellant; *S. W. Field*, for respondent

HARVEY, C.J.:—I agree with the view which I understand the trial Judge to have taken, viz., that even if by the assignment to the plaintiffs the rent passed, it did so as an ordinary debt and not as rent and that consequently, there being also no assignment of the right to distrain, no such right ever accrued to the plaintiffs they never being entitled to anything that might be deemed to be a rent seck.

Stuart, J.

I would, therefore, dismiss the appeal with costs.

Simmons, J.

STUART, J., concurred with Harvey, C.J.

SIMMONS, J.:—This appeal is confined to the question of law whether an assignment of rent due by the Edmonton Law Stationers Ltd. to the Canadian Bank of Commerce carried with it the right to distrain for arrears of rent under an assignment in words set out hereunder:

> The undersigned hereby assign and transfer to the Canadian Bank of Commerce as security for all existing or future indebtedness and liability of the undersigned to the bank, all the debts, accounts and moneys due or accruing due, or that may at any time hereafter be due, to the undersigned by Edmonton Law Stationers Limited, and also all *contracts, securities, bill, notes,* and other documents now held, or which may hereafter be taken or held by the undersigned, or anyone on behalf of the undersigned in respect of the said *debts, accounts, moneys or any part thereof.*

The judgment appealed from held that the right of distress was not included in the assignment, and that rent reserved in a lease is not *a debt* secured *by the lease*, and that an assignment sufficient to bring the rents within stat. 4 Geo. II. must be an

assignment of rents "*qua* rents." The lease contains the usual covenant as to distress in words as follows:—

and in case of default of payment of the rentals or breach of any of the covenants herein contained, the lessor shall be at liberty to enter in and upon the said premises and distrain the goods and chattels of the lessee and cause the same to be sold in the usual manner so as to realize the rentals then due hereunder, and the term hereby created shall at the option of the lessor cease and determine upon the breach of any of the covenants herein expressed.

Under the common law rule there must be a tenure between the grantor and grantee with reversion in the grantor to give the right of distress, and where no distress is incident to the rent it was called rent seek.

Rent seek was given the incident and right of distress by 4 Geo. II.

Distress was an incident of every rent service at common law.

If the assignment granted to the assignee the rents arising out of the lease or the rent service the statute 4 Geo. II. would enable the assignee to distrain. *Hope* v. *White* (1869), 19 U.C.C.P., p. 479.

The lease in question has incorporated in it as and by way of covenant that the right of distress is in the landlord.

The assignment could not be held to include this right reserved to the landlord and the bank could only restrain by way of rent seek under 4 Geo. II.

This statute does not detract from the rent its essential feature of an incorporeal hereditament arising out of a tenure of the land.

It confers upon a rent seek the same incidents of distress as at common law attached to a rent service. The claim for rent is of a higher degree than that arising out of a contract, or upon a promissory note and ranks in the same degree as a specialty debt. Lord Denham, C.J., in *Davis* v. *Gyde* (1835), 2 Ad. & El. 623, 111 E.R. 240, and Warrington, J., in *Re Defries & Sons Ltd*; *Eichholz* v. *Defries et al.*, [1909] 2 Ch. 423.

"It may be regarded as of a twofold nature, first as something issuing out of the land as a compensation for the possession during the term and secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure." Wharton's Law Lexicon, 9th ed., p. 641.

"The right to distrain for previous arrears of rent may be lost by severance of the reversion." Woodfall, Landlord and Tenant,

ALTA.

S. C.

BANK OF COMMERCE v. EDMONTON LAW STATIONERS LTD.

Simmons, J.

19th ed., p. 504, s. 4. *Stavely* v. *Allcock* (1851), 16 Q.B. 636, 117 E.R. 1024.

The demise carries with it a grant by the landlord of the right of possession to the tenant during the term.

The right of distress is a right preserved to the landlord however and qualifies the tenant's right of possession arising out of the tenure, to the extent that may be necessary for the landlord to levy upon the tenant's goods and chattels to recover the rent. This is something of a different character from debts, accounts or moneys and in respect of contracts, etc., taken or held in respect of said debts, accounts, moneys or any part thereof.

It is argued however that the tenant attorned to the bank because he made certain payments and can not be allowed to deny the tenancy. It appears from the appeal book, p. 6, that the tenant gave notes to the landlord for rent which notes were indorsed to the bank before the assessment and payments were made thereon by the tenant to the bank. The notes given for rent being a lower form of security than the right of distress would not be treated as payment of the rent and would not prevent the landlord from distraining before he endorsed them to the bank. *Eichholz* v. *Defries et al.*, *supra*. Payments made upon the notes would not therefore amount to an attornment.

I am of the opinion that the conclusion of the trial Judge was correct in that the assignment did not include rents *qua* rents that is to say, an assignment of that material incident of rent which carries with it the right to distrain for rent in arrears.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

ONT.

S. C.

WILLIAMS v. TORONTO & YORK RADIAL R. W. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Middleton, JJ. April 28, 1919.

STREET RAILWAYS (§ III B—25)—INJURY TO PASSENGER ALIGHTING—TERMINAL—RUSH—LIABILITY.

A street railway company is liable for an injury to a passenger while alighting from a street car at a terminal stopping place, occasioned by the on rush of passengers on both sides of the car, even though the terminus or stopping place was on land of a municipal corporation.

Statement.

APPEAL by the defendants from the judgment of LATCHFORD, J., in an action for damages for personal injury sustained by

ONT.

S. C.

WILLIAMS v. TORONTO AND YORK RADIAL R.W. Co.

the plaintiff by reason, as she alleged, of the negligence of the defendants. Affirmed.

The plaintiff, an elderly woman, when in the act of alighting from a car of the defendants, upon which she was a passenger, was jostled and thrown to the ground by passengers entering the car upon its arrival at the terminal stopping place of the defendants' cars at Sunnyside, in the city of Toronto.

The jury found that the plaintiff's injury was caused by the negligence of the defendants; that that negligence consisted in "allowing passengers to enter at both doors;" and that the plaintiff was not guilty of contributory negligence; and they assessed her damages at $500, for which sum and costs judgment was directed to be entered in her favour.

D. L. McCarthy, K.C., for the appellants.

H. H. Dewart, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—I am quite in accord with the learned trial Judge in all that was said by him, as to the law bearing upon this case, in the discussion which took place, at the trial of this action, after the case had gone to the jury, views of the law quite in accord with those expressed by Riddell, J., and expressed also in the cases referred to by him, in his comprehensive and lucid judgment written in the case of *Rex* v. *Toronto R.W. Co.* (1911), 23 O.L.R. 186, a judgment which upon an appeal to the First Appellate Divisional Court here met with the entire approval of that Court: *Rex* v. *Toronto R.W. Co.* (1915), 25 D.L.R. 586, 34 O.L.R. 589; and, though the case was overruled in the Privy Council, it was overruled upon a ground not in any sense involved in this case, and without anything being said in conflict with it in so far as it bears upon this case: *Toronto R. Co.* v. *The King*, 38 D.L.R. 537, [1917] A.C. 630.

It should not have been necessary to say more than that in dismissing this appeal, but for the contentions made by Mr. McCarthy, in which the rights of a street railway company were placed upon altogether too high a level and those of its passengers upon altogether too low an one, which contentions, it seems to me, should be met by expressed disapproval now, and for that purpose the circumstances of the case and the rights of the parties in them must be more fully stated.

ONT.

S. C.

WILLIAMS v. TORONTO AND YORK RADIAL R.W. Co.

Meredith, C.J.C.P.

The plaintiff was a passenger upon a street-car of the defendants, and under the contract between them they were bound to take reasonable means and care for her safety and comfort during the journey, of which boarding the car and alighting from it at her destination was each a part. That she had paid for in the price she paid for her ticket.

Her destination was at the terminal point of the defendants' passenger car service at Sunnyside, in Toronto; and there, when endeavouring to alight in a proper and the usual manner, she was crowded and jostled by persons from a crowd which was awaiting the car and anxious to board it for its return journey: the effect of the onrush of such persons was to dislodge her from her position on the steps of the car on her way out, and she then fell to the ground and was injured, before her journey ended and whilst her contract with the defendants was in full force and effect.

It was urged that, as the defendants have no stations such as greater railway companies have, their liabilities are less; that the end of the journey of the car in this case was on the property of the Municipal Corporation of the City of Toronto, over which the defendants had no control; and, therefore, are not answerable in damages in this case. But the question of title is not one in which passengers are concerned: under the contract for safe carriage, boarding and alighting were included in the journey. And wherever cars are stopped for boarding or alighting that is made a station for such purposes, so that if an unsafe place be chosen the company must be answerable for the consequences caused by negligence in stopping there. In this case the defendants had the owners' leave to stop where they did, but were not under any compulsion or even agreement to do so: and that leave carried with it license to do all things that were necessary or proper to be done at this street-car terminus in receiving and discharging passengers—that was the purpose of the leave and license.

And, if that were not so, the wrong was done on the car; and no kind of precaution or care was taken to prevent it. To say that the defendants were powerless to prevent it, is to say that the jury's findings are wrong, and to say that to which no one can give credence.

If the defendants had made an attempt of any kind to have prevented the inexcusable rush upon their car, one might hear

with more patience such excuse for misconduct which should not be tolerated anywhere. No attempt was made. There were two men—conductor and driver—in charge of the car, but neither made any attempt to enable the passenger to alight in safety; they seem to have vanished when their services were most needed; none of the witnesses were able to say where they were, and they were not called as witnesses for the defence at the trial; though the defendants were in great need of a satisfactory explanation of their absence, and the absence of any attempt to protect their passengers.

The jury thought that the simple, common method of receiving passengers at one door and discharging them at the other, was the proper method, and that it would have saved the plaintiff from injury: and I have no doubt other simple methods also would have been equally successful, such as one man at each door to see that there was safety in boarding and alighting: or, if it seemed necessary, the two men at the exit: less than two men have held a bridge. Indeed, however it is looked at, it was a case of gross neglect by the defendants of their duty towards their passengers, a neglect which was the proximate cause of the plaintiff's injury; and a neglect which they made no attempt to excuse or explain in evidence at the trial.

The contention that the jury's answers are not sufficient to support the judgment is already answered. The jury gave only one instance of negligence, when they might have given more; but one is enough if reasonable men could so find, and who can reasonably say that reasonable men could not find, upon the evidence adduced, that, if the defendants had adopted the common, simple, and easy practice of receiving at the back door and discharging at the front, on this occasion, when there were many passengers, if not always, that would not have given the plaintiff opportunity for alighting in safety? It is enough if reasonable men could so find, even though we might not agree in that finding; but I desire to add that I quite agree with the jury in it and should have added to it.

We all think that this appeal should be dismissed.

Appeal dismissed with costs.

IMP.
P. C.

STEEL COMPANY OF CANADA, Ltd. v. DOMINION RADIATOR Co., Ltd

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Parmoor, and Duff, J. July 8, 1919.

CONTRACTS (§ II D—150)—SALE OF GOODS—CONDITIONS—TIME FOR DELIVERY—BREACH—REPUDIATION—RIGHT TO RESCIND.

A contract for the sale of goods contained the following conditions: "Default in payment of any delivery will entitle seller to cancel contract. If after entering into contract the purchaser fails to execute any of his obligations thereunder, the sellers have the right to terminate the contract without prejudice to any claim for damages they may make.

"Seller gives the buyer the privilege of cancelling any one month's delivery, if such delivery is delayed more than 30 days beyond the expiration of the month in question, provided buyer notifies seller within 10 days after the expiration of the said thirty days' delay of their desire to cancel."

Held, that it was evident from these conditions that time was not of the essence of the contract and that no obligation was thrown upon the purchaser to demand or insist upon delivery, a demand on the part of the vendor that the purchaser should take delivery under the terms of the contract was a condition precedent to a claim on his part that the failure of the purchaser to take delivery had discharged him from his obligations under the contract.

Statement.

APPEAL by defendants from the Supreme Court of Ontario (1918), 44 D.L.R. 72, in an action brought to recover damages for alleged breaches of contract for the sale and delivery by the appellants of pig iron. Affirmed.

The judgment of the Board was delivered by

Lord Chancellor.

THE LORD CHANCELLOR:—In this case their Lordships find themselves in agreement with the view taken both by the trial Judge and by the Appellate Division. They hold the view that the case is particularly clear, and under those circumstances adopt the course of stating shortly, and without consideration, the reasons which have led them to that conclusion.

This is an appeal by the defendants in the action, from a judgment of the Appellate Division, delivered on July 15, 1918, dismissing an appeal from a judgment of Middleton, J., which was given on Oct. 26, 1917. The action was brought to recover damages for alleged breaches of two contracts for the sale of, and delivery by, the appellants to the respondents of pig-iron; the first dated Dec. 23, 1915, for 1,000 tons, and the second dated Sept. 25, 1916, for 1,200 tons. Their Lordships did not invite Sir Erle Richards to discuss the issues which arose or might have arisen under the second contract dated Sept. 25, 1916, because they had formed a view adverse to his contention upon the first contract, and no issue arose or could arise upon the second contract unless the appellants succeeded in their contentions on the earlier

IMP.

P. C.

STEEL COMPANY OF CANADA LTD. v. DOMINION RADIATOR CO. LTD.

Lord Chancellor.

contract. The dispute as to the second contract arose in the following way. It was claimed by the appellants that the first contract had automatically expired; it was consequentially claimed by them that any deliveries made by them after the date on which, according to their contentions, the first contract had so expired were made under the second contract and at a different price. This contention was repelled by the respondents, and thereupon the present litigation arose.

Their Lordships have formed the view that the appellants are wrong in the contention which they put forward in relation to the first contract and it is, therefore, unnecessary to consider any question in relation to the second contract. Their Lordships have carefully considered the argument advanced by the appellants. It is contained in a letter which will be found on p. 130 of the record.

The letter is dated Dec. 18, 1916, and is written by the appellants to the respondents and it contains the following passage:—

> We note what you say in reference to our invoices of the 1st and 5th December, and on investigation we find they are correct, as the contract they were applied against is the only pig iron contract we have with you at this date.

And these are the material words:—

> The contract you refer to was never in force, it having been automatically cancelled through your failure to recognise its conditions by exercising the privileges contained therein—to which you were entitled—prior to its expiration date, viz., 30th June, 1916.

That letter embodies and clearly states the contention upon which the appellants to-day relied before their Lordships. In other words, it is claimed that the contract contained a definite date by which deliveries were to be completed; that time was of the essence of the contract; that deliveries were not completed by that date and that, thereupon, the contract expired by effluxion of time. It is by necessary implication claimed that it was the duty of the respondents to have asked for or obtained deliveries by that date; and that in their failure to do so, the contract automatically came to an end. In order to examine that contention, it is necessary to consider the terms of the contract, which are to be found on p. 108 of the record. If the above contentions are to succeed it must be established that, under those terms, the respondents were obliged, assuming any initiative which might prove necessary, to require and to obtain delivery.

IMP.

P. C.

STEEL COMPANY OF CANADA, LTD. v. DOMINION RADIATOR CO. LTD.

Lord Chancellor.

The contract has been read. It contains in terms no such provision. The actual language which is used in reference to the time of delivery is as follows:—

"Time of delivery—between date of completion of current contract and June 30, 1916, in equal monthly instalments."

The conditions contain a clause which may be read:—

Default in payment of any delivery will entitle seller to cancel contract. If, after entering into a contract, the purchaser fails to execute any of his obligations thereunder, the sellers have the right to terminate the contract without prejudice to any claim for damages they may make.

A later paragraph of the conditions contains the following stipulation:—

Seller gives the buyer the privilege of cancelling any one month's delivery, if such delivery is delayed more than thirty days beyond the expiration of the month in question, provided buyer notifies seller within ten days after the expiration of the said thirty days' delay, of their desire to cancel.

It is evident from these conditions that time was not of the essence of this contract, and that it was not treated by the parties as being of the essence of the contract. It is not less clear that no obligation was thrown upon the purchaser to demand or insist upon delivery. The terms of this contract in no way relieve a vendor who was, equally with the buyer, bound to give effect to its terms, from the obligation of demanding, before seeking to avoid the contract, that the purchaser should take delivery under its provisions. A demand on the part of the vendor that the purchaser should take such delivery was, in their Lordships' opinion, a condition precedent to a claim on his part that the failure of the purchaser to take delivery had discharged him from his obligations under the contract.

It was stated by Sir Erle Richards that the case was conducted in the Court below by the parties on the footing that the appellants were only bound to deliver as and when requested to do so by the respondents. The method in which the case was conducted in the Court below could hardly, unless formal admissions were made, discharge their Lordships from the duty of construing and reaching a conclusion upon the actual terms of the contract, but it is a sufficient comment upon this particular submission of the appellants that if it be true that the case was conducted by the parties in the Court below on this footing, they must have been at one at least on this point, that the contract

had not automatically come to a conclusion at the relevant date in June.

It remains only to make an observation on the submissions advanced on the subject of damages. On this part of the case it was contended by Sir Erle Richards that in the first place the relevant date at which damages were to be measured was the date at which the last delivery ought, according to his contention, to have been made under the contract. That contention cannot be supported when once the view is taken, which their Lordships do take, that the contract was broken by the appellants and that, therefore, the relevant period for ascertaining the amount of the damages must be the date of the breach. But it is also said by the appellants in relation to at least one parcel that the respondents were supplied with a substituted commodity which if not identical in quality with what should have been supplied under the contract, was nevertheless suitable for and did in fact subserve the purpose for which the contract steel was required. It is contended that this parcel was purchased at a smaller rate and, therefore, that credit should have been given to the appellants for the difference in value. It is sufficient for their Lordships to say upon that point that the trial Judge, after hearing argument, formed a view upon the matter, that the view taken by the trial Judge was carefully considered by the Appellate Court, and that they too reached a conclusion hostile to the appellants.

It has not been the practice of their Lordships in such circumstances to disturb the conclusions reached in the Courts below, and their Lordships see no reason for adopting such a course in this case.

Under these circumstances and for these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. *Appeal dismissed.*

REAMSBOTTOM v. TOWN OF HAILEYBURY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell, and Latchford, JJ. April, 1, 1919.

TAXES (§ III B—110)—"LAND LIABLE TO ASSESSMENT"—BUILDINGS—ERROR.

Buildings are "land liable to assessment" under sec. 2(h) of the Ontario Assessment Act (R.S.O. 1914, c. 195), apart from the land itself; a clerical omission to separately value the buildings on the assessment roll may be amended in the next assessment roll in a manner provided by sec. 54 of the Act.

ONT.

S. C.

REAMSBOTTOM v. TOWN OF HAILEYBURY.

APPEAL by the plaintiff from the judgment of a District Court Judge dismissing an action to obtain a declaration that certain taxes imposed for the year 1913 were not owing and were not the subject of a charge or lien upon the lot.

The judgment appealed from is as follows—

The plaintiff, administratrix of the estate of William A. Reamsbottom, claims a declaration that certain taxes for the year 1913, in respect of lot 54, plan M. 54, Town of Haileybury, are not owing, chargeable, or payable, in respect of the said lot, and form no charge and no lien thereon.

The said lot, together with the buildings thereon, was assessed to one Jones, from whom the said Reamsbottom purchased, for the years 1910, 1911, and 1912. In the year 1913 the town assessor assessed the lot, but omitted through oversight to place in the assessment roll the amount at which he intended to assess the buildings thereon, which buildings had been assessed separately for the three previous years at $3,800. The omission came to the knowledge of the town clerk in preparing his collector's roll, and he entered therein, i.e., in his next roll, the value of the said buildings at $3,800. This assessment was brought to the knowledge of the then owner, and no petition or appeal was tendered to or received by the Court of Revision for the said town, relative thereto, at any time before or since the 1st July of the year following. The Assessment Act, R.S.O. 1914, ch. 195, sec. 40, provides that the value of the land and buildings shall be ascertained separately, and shall be set down separately in the roll, and the assessment shall be the sum of such values.

In this assessment the value of the buildings was not set down; and, although "land" includes buildings, the Act distinctly provides for a separate assessment of the buildings; and, this having clearly been unintentionally omitted, sec. 54* of the said Act

*54. If at any time it appears to the treasurer or other officer of the municipality that land liable to assessment has not been assessed for the current year or for either or both of the next two preceding years, he shall report the same to the clerk of the municipality, or if the omission to assess comes to the knowledge of the clerk of the municipality in any other way, he shall enter such land on the next collector's roll . . . as well for the arrears of the preceding year or years, if any, as for the tax of the current year; and the valuation of the land shall be the average of the three previous years . . . and the owner of the land shall have the right to appeal, as provided in section 112.

By sec. 8 of the Assessment Amendment Act, 1917, 7 Geo. V. ch. 45, the figures "112" in the last line of sec. 54 were struck out and the figures "118" substituted therefor.

requires the same to be done. I find that the assessment was regularly and properly made, and that no petition was received by the Court of Revision within the time allowed by sec. 118 of the said Act.

The roll was passed by the Court and certified by the clerk as passed (sec. 70); but an omission to assess is not included within the meaning of the words "defect" and "error" used in sec. 70, so as to preclude or bind the municipality from assessing the said buildings.

The action will be dismissed with costs.

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

J. M. Ferguson, for the defendants, respondents.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—We agree with the District Court Judge in considering that the facts of this case bring it within the provisions of sec. 54 of the Assessment Act: and, if so, admittedly the action was rightly dismissed, as this appeal also should be.

The Act (sec. 22 (3)) requires that the assessor shall set down in one column of the assessment roll the actual value of the real property assessed, exclusive of the buildings thereon; in another column, the value of the buildings as determined under sec. 40; in another column, the total actual value of the land; and in another, the total amount of taxable land.

The provisions of the Act had been complied with for several years before the year in question—1913: the buildings on the lot in question being assessed, and put down in the proper column, at $3,800, and the land at $400, and the total at $4,200; on which sum taxes had been paid without objection.

In the year 1913, through clerical error, or other obvious mistake, the value of the buildings—$3,800—was left out of the roll and out of the notice of assessment.

The mistake having been observed by the clerk of the municipality, he made an entry in the next collector's roll, in manner provided by sec. 54, and so, if that section is applicable, corrected the error.

Mr. McKay's one contention is: that the omission of the value of the buildings was not such a mistake as may be cured by sec. 54, which covers only cases of "land liable to assessment," which "has not been assessed." But, agreeing with the District Court

ONT.

S. C.

REAMS-BOTTOM v. TOWN OF HAILEY-BURY.

Meredith, C.J.C.P.

Judge, we are of opinion that it does. It is obvious that the buildings are "land liable to assessment," apart from any special provisions of the Act, as well as expressly under it: sec. 2 (*h*)*; and not only so, but land which must be separately valued; and it would be quite too narrow a view of the section to confine its beneficial operation to cases in which there has been a total omission to tax; neither its words nor its purposes warrant that.

Appeal dismissed with costs.

IMP.

P. C.

AUGER v. BEAUDRY.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Buckmaster, Lord Parmoor, and Duff, J. August 5, 1919.

WILLS (§ IV—200)—INTENTION OF TESTATOR—DETERMINATION OF.

The only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will.

Statement.

APPEAL from the Court of King's Bench (Quebec) (1918), 43 D.L.R. 65, in an action to determine the true construction of a will. Their Lordships did not deliver final judgment on the appeal in order that certain personal representatives might be added as necessary parties.

The judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—The resolution of this dispute depends upon the true construction to be placed on the will of Jean Louis Beaudry, who died on June 25, 1886. He left surviving 5 children, born in lawful wedlock, 4 daughters, viz., Corinne Herminie, who married, and is known as Mrs. R. Roy, Léocadie Clorinthe (*alias* Clorinde) Beaudry, who married Joseph Cyrille Auger, Victorine Beaudry, who married Lionel Gardiner, Malvina Beaudry, who married Edmond Starnes, and one son—Guillaume Napoléon Léonidas Beaudry. Guillaume Napoléon died without issue in 1887. Mrs. Auger died in 1894, leaving 10 children, and Mrs. Gardiner died in 1915 without issue.

The question that arises in this case is as to the disposition of the share which Mrs. Gardiner took, both original and accrued, in the testator's property.

The will in question was dated Dec. 29, 1881. It was divided into 18 articles or paragraphs. By arts. 4, 5, 6, and 7, the testator

*By sec. 2 (*h*), "land" includes, *inter alia*, "all buildings, or any part of any building . . . erected or placed upon . . . land."

made certain specific gifts in favour of all his 5 children, other than Mrs. Starnes, whose interest in the estate was by art. 8 defined and limited by the grant of an annuity, and whose name need not be considered further in connection with these proceedings. The other gifts were of specific properties, given in favour of his children and grandchildren. In each case the property was bequeathed in the same terms, and taking the case of art. 4, which contained the gift to Mrs. Roy, they were as follows:—"Je donne et lègue à Dame Corinne Herminie Beaudry épouse de Rouer Roy, la jouissance et usufruit, sa vie durant"—and then follows a full description of the property and the clause concludes by providing that the legatee is to enjoy the property "à titre de constitut et précaire, sa vie durant, et pour, après son décés, appartenir la pleine propriété de ces terrains et dépendances aux enfants nés et à naître d'elle en légitime mariage par souches."

Art. 18 of the will was divided into clauses; by clause 9 the testator conferred a power of appointment on each child in favour of their issue, and by clause 6 he provided what should happen in the event of the death of any of these four children without leaving children or living descendants. Upon this clause the whole dispute really depends; it is in the following words:—

> Qu'au cas de décés d'aucun des dits Corinne Herminie Beaudry, Guillaume Napoléon Léonidas Beaudry, Léocadie Clorinthe alias Clorinde Beaudry et Victorine Beaudry sans laisser d'enfants ou descendants vivants, sa part dans mes biens retourne aux survivants de mes quatre enfants, légitimes ci-dessus en dernier lieu nommés pour, par eux en jouir, à titre de constitut et précaire ou en jouissance, leur vie durant, et pour la propriété d'icelle part, appartenir à leurs enfants nés et à naitre en légitime mariage et par souches.

In its general form the question that arises is whether this gift over, upon the death of any one of the named children without issue, is a gift which includes in its provisions the children of a child who at the date of such death were surviving, although their parent was dead. Associated with this, there were two subsidiary points, the one which drew a distinction between that part of Mrs. Gardiner's estate which was due to her having shared with her sisters in the property left to her brother, and the other as to what was the true nature of Mrs. Roy's interest in the accrued share, and whether, in the event of her dying without issue, she would have power to dispose of it by will.

The case was originally heard before Monet, J., who declared

IMP.
P. C.
AUGER
v.
BEAUDRY.
Lord Buckmaster.

that Mrs. Roy was "unique propriétaire" of the whole of the share she took by reason of Mrs. Gardiner's death without issue, and that this included a share both in Mrs. Gardiner's original estate and in the share she took on her brother's death. On appeal this judgment was modified. Mrs. Roy was, as to Mrs. Gardiner's original share, declared entitled as

> Unique propriétaire à titre de constitut et précaire ou en jouissance sa vie durant à charge de substitution en faveur de ses enfants en vertu de la clause 6 de l'article 18 du dit testament.

And as to the property which Mrs. Gardiner had taken from Guillaume Napoléon it was declared to form part of Mrs. Gardiner's estate.

From this judgment the appellants, the children of Mrs. Auger, have brought the present appeal. So far as it relates to the share taken by Mrs. Gardiner in the property given to Guillaume Napoléon, it is impossible as this appeal is constituted to determine the matter, for the legal personal representatives of Mrs. Gardiner have not been made parties. Upon this, therefore, their Lordships will pronounce no opinion, but to avoid the expense of further proceedings, and to safeguard the appellant's rights of appeal, they will advise that this part of the appeal stand over in order that the appellants may have time to determine whether they think it desirable to add the necessary parties; if they so desire, and take the necessary steps within 6 months, their Lordships will then further consider that point which for the present will remain undecided. For the rest, the real question is as to the meaning of the substituted gift. There is no doubt much force in the appellants' contention that no reason whatever can be assigned for excluding from the benefit of the gift the children of a deceased child of the testator. The truth is that in the preparation of such gifts the draftsman is liable to fix his mind simply upon the death of the first of the children to die, in which case the gift over works without difficulty, and he does not concentrate his attention upon what will happen in the event of the death of a child without issue, who has been predeceased by another child leaving issue behind. The gift over, therefore, only too often does not carry out what if speculation were permitted, it would be reasonably certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the

words as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognised that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

Turning then to the words, we find that the clause provides for the death of any of the four children, each named in turn, without leaving children or living descendants, and in that case the share in the goods is given to the survivors of "de mes quatres enfants légitimes ci-dessus en dernier lieu nommés," to "enjoy the usufruct during their lives," and for the property of that part to belong to their children born, and to be born by stocks. Now, the survivors of the four named children can only be the survivors of the testator's own children, and it is only the property of that part which such survivors enjoy that is to belong to their children after their death. If, therefore, one of the children had died, leaving issue before a case occurred which brought the clause into operation, such child would not be one of the survivors to enjoy during life, and there would be no part of the property which could belong to his or her children after death.

This is in their Lordships' view, the plain and unmistakable meaning of the words, and it only remains to be considered whether there is an artificial rule of construction provided either by the French Code, or by similar cases in the English Courts which would justify another view of their effect.

So far as the French Code is concerned the argument depends on art. 980, which is as follows:—

Dans la prohibition d'aliéner, comme dans la substitution, et dans les donations et les legs en général, le terme *enfants* ou *petits enfants*, employé seul soit dans la disposition soit dans la condition, s'applique à tous les descendants avec ou sans gradualité suivant la nature de l'acte.

But in the present case there is a strong qualification of the

IMP.
P. C.
AUGER v. BEAUDRY.
Lord Buckmaster.

word "enfants," namely, the words which relate it in terms to the named children, and remembering how carefully the children and the grandchildren are separately dealt with, it is in their Lordships' opinion impossible to say that the word is intended to mean the families of the children when the gift that follows is a gift for life, wholly inapplicable if the word included descendants.

Certain English cases are then quoted for the purpose of supporting the view that under similar words in an English will, the Courts would hold that a survivorship might take place by the survivorship of the family, or as it is sometimes called, by stirpital survivorship. The case most nearly applicable is the case of *Hawkins* v. *Hamerton* (1848), 16 Simons Reports, page 410. In that case the testator gave the residue of his estate in trust for his son and 3 daughters or such of them as should be living at the death of his wife equally during their lives and after their death equally amongst all their children, and he provided that in case any of his said sons and daughters should die without leaving issue that the share of him, her, or them so dying should be divided amongst the survivor or survivors of his said children, and their issue in the like equal parts, shares, and proportions. The Judge said that it appeared plain that the testator by the words "survivor or survivors of my said children" did not mean such of his children as should survive his widow; and he added "my opinion is that though he has used the words 'survivor or survivors,' he meant others or other, and as he has added the words 'in like equal parts, shares, and proportions,' I think he meant the issue of deceased parents to take *per stirpes*."

It is important to observe the concluding words of this statement, for in truth it is upon them that the decision rested, and it was because the testator had added the final phrase that the Judge was able to place the construction he did upon the earlier words. It is unnecessary to pursue the English authorities further upon this case, though reference may profitably be made both to the statements of Lord Macnaghten in *King* v. *Frost* (1890), 15 App. Cas. 548, at p. 552, and to those of Cozens-Hardy, J., in *Harrison* v. *Harrison*, [1901] 2 Ch. 136, at pp. 141 and 143. The words which have enabled the Courts to give a benevolent construction to a gift over such as those used in *Hawkins* v. *Hamerton*, or in the case of *Waite* v. *Littlewood* (1872), L.R. 8 Ch.

IMP.

P. C.

AUGER v. BEAUDRY

Lord Buckmaster.

70, are not to be found in the present case. The gift here is a distinct gift to the survivors, and it is the share that is taken by such survivor that after his or her death is to go to his or her children. A child who does not survive can take no share, and there is consequently nothing that his or her children can take when he or she is dead. Their Lordships note with satisfaction that this opinion is not only in agreement with the judgment from which this appeal is brought but also with the decision in a case of some resemblance to the present—*Marie* v. *Bourassa* (1889), 18 R.L. 454. As to whether such share is taken so that on the failure of all Mrs. Roy's descendants at her death she can dispose of it, is a question which does not now, and never may arise. Their Lordships do not think that the Court of Appeal decided that it should be now determined, nor do they regard their judgment as having that effect. In their opinion it is only necessary to say that Mrs. Roy is entitled as life usufructuary to the original share which was enjoyed by Mrs. Gardiner, with substitution in favour of her children in accordance with cl. 6 of art. 18, and this is the actual judgment of the Court of King's Bench. They reserve the final advice that they are tendering to His Majesty upon this appeal until after the appellants have decided what steps, if any, they propose to take with regard to the question which is left open.

POHLMAN v. HERALD PRINTING Co. OF HAMILTON, Ltd.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford and Middleton, JJ. March 21, 1919.

LIBEL AND SLANDER (§ III A—95)—NEWSPAPER—SUFFICIENCY OF NOTICE —MISNOMER—SPECIFYING STATEMENTS.

A mere misnomer of the defendant in a notice to a newspaper under the Ontario Libel and Slander Act (R.S.O. 1914, c. 71, s. 8), the notice describing the defendant as a "publishing" instead of a "printing" company, is not so misleading as to vitiate the notice; but where the notice merely sets out the date of the issue of the newspaper containing the alleged libel, indicating the article by quoting its heading, without "specifying the statements complained of," as required by the Act, it is insufficient and the action will be dismissed upon the defence of want of notice.

Statement.

APPEAL from the judgment of Falconbridge, C.J.K.B., (1918) 15 O.W.N. 215, in an action for libel. The defendants were the publishers of a newspaper in the city of Hamilton. The same plaintiff brought actions also against the publishers of two other

ONT.

S. C.

POHLMAN v. HERALD PRINTING CO. OF HAMILTON LTD.

newspapers, in the same city, for similar libels. The three actions were tried together at Hamilton before FALCONBRIDGE, C.J.K.B., and a jury. The jury found a verdict for the plaintiff for $100 in each of the three actions.

The judgment appealed from is as follows:—The only point not covered or cured by the verdict of the jury is the question of the notice given by the plaintiff to the *Herald* defendants. That notice was given to the "Herald *Publishing* Company of Canada Limited," whereas the corporate name is the "Herald *Printing* Company of Canada Limited." I hold this to be mere misnomer, which could not mislead, and not a notice given to the wrong person, as in *Dingle* v. *World Newspaper Co.* (1918), 43 D.L.R. 463, 43 O.L.R. 218, and *Redmond* v. *Stacey* (1918), 14 O.W.N. 73.

But I do not give the plaintiff any leave to amend. And I give all the defendants leave to amend in terms of the notice of motion annexed to the record in the case against the *Herald* defendants.

Judgment for the plaintiff in each case for $100 and costs on the Supreme Court scale.

J. A. Soule, for the appellants.

T. N. Phelan, for the plaintiff, respondent.

The judgment of the Court was read by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is, whether the defendants are entitled to have the plaintiff's judgment in this action, recovered at the trial and based upon the verdict of a jury, set aside, and the action now dismissed, under, and by reason of, the provisions of sec. 8 of the Libel and Slander Act, R.S.O. 1914, C. 71.

The words of that section, in so far as they affect the question, are: "No action for libel contained in a newspaper shall lie unless the plaintiff has . . . given to the defendant notice in writing, specifying the statement complained of . . ."

The plaintiff gave notice in writing in these words:—

"Hamilton, July 25, 1918.

"The Herald Publishing Company of Hamilton Limited, 13-15 King Street West, Hamilton, Ont.

"Dear Sirs:—I beg to notify you that in your issue of the 'Hamilton Herald' bearing date the 26th day of April, 1918, you published an article bearing the heading:

"'Arrested for London

"'F. T. Pallman Will Face Forgery Charge There'

"which article is largely untrue and libellous.

"You will accept this notice as the notice required to be given under section 8, sub-section 1, of the Libel and Slander Act, being chapter 71, R.S.O. 1914."

The publication referred to in the notice was:—

(Heading as in the notice.)

"In arresting F. T. Pallman, of Milwaukee, believed, according to Chief Whatley, to be a German sympathiser, Detectives Shirley and Smith made an important capture here last night. Pallman, who was said to be of German nationality, was taken back to London this morning to face a charge of forgery, for which he is wanted by the police of that city. It is alleged by the local authorities that while in the Forest City Pallman wrote a letter, which, when opened by mistake by a mailing clerk in the employ of the company for which Pallman was working, was found to be strongly pro-German. He was promptly dismissed from the employ of that firm, and came to this city, where he has been under police surveillance for some time as a suspect."

It obviously contained several libellous statements if all the statements were untrue; but they were not; and the plaintiff does not, nor did he ever, complain of those which one might consider, even in wartime, the graver statements, as far as the plaintiff's character might be affected by them.

All that he has complained of, and recovered judgment for are those which relate to his nationality and matters connected with it.

How then can it be held that in his notice he "specified the statement complained of?" It is said that his notice may be read as a complaint of every statement contained in the whole of the paragraph published; but, apart from any other answer which might be made to that contention, the plaintiff's own words contained in the notice itself answer it: "which article is largely untrue and libellous," not altogether so.

The law requires us to treat the enactment as a remedial one; and we must do so, whether or not it be called class legislation, or be said that it was passed at the instance and through the influence of newspaper owners and publishers; and it is to be

ONT.

S. C.

POHLMAN v. HERALD PRINTING CO. OF HAMILTON LTD.

Meredith, C.J.C.P.

observed that in other like legislation as to giving notice, power to excuse want of notice and to aid faulty notice is sometimes given; none is given in this enactment; it is peremptory: "No action . . . shall lie."

Therefore, if the case is within the provisions of sec. 8, there is no means, of which I am aware, by which the faults of the notice can be cured or avoided; and this appeal should be allowed and the action should be dismissed, because it is not a case for a new trial. Reasonable men could not find that the notice specified the statement complained of, even if the words could be considered capable of such a meaning.

It was at first contended by Mr. Phelan that sec. 15 of the Act deprived the defendants of "the benefit of sec. 8."

The words of sec. 15 are:—

"(1) No defendant shall be entitled to the benefit of sections 8 and 14 of this Act unless the name of the proprietor and publisher and address of publication are stated either at the head of the editorials or on the front page of the newspaper.

"(2) The production of a printed copy of a newspaper shall be *primâ facie* evidence of the publication of the printed copy, and of the truth of the statements mentioned in sub-section 1."

But, upon the facts that the plaintiff's statement of claim alleged that the defendants were the owners and publishers of the newspaper in question, and that therefore it was not necessary that the defendants should prove such ownership and publishing, being called to his attention, and having regard to the ruling of the Supreme Court of Canada in the case of *Scown* v. *Herald Publishing Co.* (1918), 40 D.L.R. 373, 56 Can. S.C.R. 305, he eventually abandoned that contention.*

The only statement, at the head of the editorials of the newspaper in question, which could be treated as a compliance with the provisions of sec. 15 of the Act is: "Published every week day by the Herald Publishing Company."

Off-hand I should have said: that is not a compliance with the provisions of the section; that there should be a statement that the company are the "proprietors and publishers," in the very words of the enactment, or else in words plainly having the same meaning as "proprietors" and as "publishers:" and that telling

*See also *Dingle* v. *World Newspaper Co. of Toronto* (1918), 45 D.L.R. 226, 57 Can. S.C.R. 573.

the names of the publishers only could not be stating the names of the proprietors also, it would rather be concealing than stating their names.

But no such notion can now be given effect to, except, if at all, by or on the other side of the Supreme Court of Canada.

I would therefore allow this appeal, and direct that the action be dismissed upon the defence of want of notice only.

Appeal allowed.

FLETCHER v. LYONS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and McCarthy, JJ. October 4, 1919.

LANDLORD AND TENANT (§ III E—118)—AGREEMENT TO CROP LAND ON SHARES—TENANCY CREATED—RIGHT TO HARVEST CROP.

An agreement to crop land on shares without anything being agreed between the parties as to when the tenancy shall cease entitles the tenant to only such use and occupation as is necessary to put in and harvest crop, the share of the crop is not an annual rent, which makes the tenancy one for a year.

Statement.

APPEAL by plaintiff from a District Court Judge in an action to recover possession of a farm owned by plaintiff and occupied by defendant. Reversed.

Frank Ford, K.C., for appellant.

J. A. Ross, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—In 1916 the plaintiff employed the defendant to go on the farm and do some breaking and some other work for which the plaintiff was to pay him. Some time in the winter they arranged that for the year 1917 the defendant should crop the land on shares and again in the spring of 1918 it was arranged that he should crop it that year likewise on shares. In both 1917 and 1918 there were summer frosts and though there was some crop in 1917 there was no grain in 1918 and what crop there was was cut for green feed.

The plaintiff was trying to sell the farm and took different prospective purchasers to see it. He states also, and it is not denied, that the defendant at different times told him he had a buyer in view. In the summer of 1918 the plaintiff took one McLeod with his brother to see the land and a discussion was had with the defendant. McLeod subsequently purchased and went to take possession which was refused. A notice dated

ALTA.

S. C.

FLETCHER v. LYONS.

Harvey, C.J.

August 24, demanding possession was served on the defendant which was disregarded and this action was begun on September 18. The trial did not take place till March 27, 1919, and the judgment which was given on May 31, 1919, declared that defendant was a tenant of the plaintiff and entitled to possession until April 1. It is admitted that the plaintiff now has possession but I gather from the evidence of the defendant that at the time of the trial he was still in possession.

There was much argument as to whether the relationship between the parties was that of a tenancy at will or a tenancy for a year. The trial Judge held that it was a tenancy for a year which expired on April 1. He finds as the evidence seems clearly to establish that no time was fixed but the defendant says that in the latter part of March he arranged with Fletcher for that year. He was asked "And how long did you take if for?" and he answered "One year." And when asked "And when do you count your time up?" he said "The time is supposed to be up somewhere about the 15th of next month, that is when I went on to it first, but April 1 is, as a rule, when you go off." Later he says that plaintiff said "You will have to take it this year anyway" and again "Well there was no agreement for the date to get out; I was to go on because I was on." The trial Judge was of opinion that the share of the crop was an annual rent and that that made the tenancy one for a year. I cannot see any necessity for such a conclusion. It is clear that it was the cropping of the land that was in contemplation and in my opinion the defendant's right of use and occupation was not one which could be determined at the will of the plaintiff, nor was it on the other hand one which gave the defendant the right to remain on for a full year. In my opinion he was entitled to at least such occupation as was necessary to put in and harvest the crop for 1918 but I can see no reason for making a year's lease out of the occupation.

In defendant's examination for discovery we find the following:—

He wanted me to take the place; he said you can farm my place and yours too.

Q. And that is all that was said about it? A. No I told him I would take it.

Q. You told him you would take it? A. Yes.

Q. What did you say you would do to it? A. I told him I would furnish seed and give him one-third.

Q. And what would you do? Just put the crop in and take it off and give him one-third of the crop? A. Yes.

Q. He agreed to that? A. Yes.

Q. When were you to get off the place? A. Well now there was nothing said about that, about when I should get off the place.

As I have already stated, there was no grain in 1918 by reason of frost; consequently the harvesting operations would be completed early. Defendant says he stacked the crop for green feed. It does not appear when this was completed, but there appears from the evidence to be little doubt that it was before the action was begun and if I am right in my former conclusion the defendant would then have no greater right than that of a tenant at will even if he had that, having been already notified to give up possession. The plaintiff would therefore be entitled to a judgment for possession as well as for damages.

There is another ground upon which the plaintiff might be entitled to succeed. It is clear that in the discussion with McLeod in which the defendant took part it was assumed that if McLeod purchased he could have possession. The defendant was asked

Now assuming there was any kind of lease such as you claim why when Mrs. McLeod was there with Fletcher in July, 1918, after the frost, was this conversation permitted to go on in your presence without you notifying Mrs. McLeod that she could not have possession if the sale were made?

and answered

Because it was none of my business.

Q. Oh, but it was your business? A. It wasn't; it was none of my business.

As against the McLeod's it might well be contended that the defendant was estopped from denying the plaintiff's right to give them possession, and in view of the indefinite character of the arrangement with the plaintiff the estoppel might also work in the latter's favour.

It was proved that the plaintiff was compelled to pay the McLeod's $200 for feed as compensation for the failure to give them possession. A claim is also made for expenses and loss of time and trouble in trying to obtain possession. I am not satisfied, however, with the evidence of that nor do I think the penalty of double annual value can be allowed.

The defendant counterclaimed for $772.47 for labour and material and the trial Judge gave him judgment for $592.75. I cannot make the total what he does from the evidence and

ALTA.

S. C.

FLETCHER v. LYONS.

Harvey, C.J.

accounts, and it does appear that at least one item occurs twice in the accounts, once in its original place and once as an account rendered. However, it seems to me that all the evidence of the particulars of the account should be disregarded for it is perfectly clear that the plaintiff and defendant settled between them the amount of the account before action and there was no suggestion of there having been any mistake. A cheque for the amount was signed and could have been given to the defendant but he was asked to give an undertaking to give up possession as a condition of receiving it, which he declined to do.

In his examination in chief the defendant, speaking about this account, says: "We agreed there that day I and Fletcher," and after explaining some of the details he says: "then he agreed to go up town and settle and we sent to Russell's office and did it," and on being asked: "Do you remember the amount arrived at then?" he answered: "$469, close to there."

The plaintiff denies the liability in his defence to the counterclaim but in his examination for discovery he says: "I accepted the amount at $469; I wasn't satisfied it was a right amount but I was satisfied to pay it." The judgment for the defendant should be reduced to $469.

I would therefore allow the appeal with costs and direct that judgment be entered for the plaintiff declaring him entitled to judgment for possession with $200 damages and costs to be taxed in the scale of Column 2. There should be judgment for the defendant on the counterclaim for $469 with costs on the same scale but as far as the trial is concerned limited to proving the account as settled; the one judgment to be set-off against the other and execution permitted for the difference in favour of the one entitled.

McCarthy, J.

McCARTHY, J., being absent took no part in the judgment.

Appeal allowed.

ONT.

S. C.

SPROULE v. MURRAY.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 28, 1919.

1. EXECUTORS AND ADMINISTRATORS (§ IVC—100)—LEGACIES TO—DUTY AS TO PAYMENT.

An executor, who has been given a legacy payable at the death of a person to whom the bulk of the estate was devised subject to the legacy, owes no duty to those interested in the devisee's estate to see that sufficient assets were set apart to meet the legacy at the devisee's death.

2. EXECUTORS AND ADMINISTRATORS (§ IVC—100)—RELEASE OF LEGACY—CONSIDERATION—ESTOPPEL.

A release executed by an executor-legatee, to a devisee, for the purpose of enabling the latter to sell land upon which the legacy was a possible charge, though absolute in form, does not estop the executor from claiming the legacy or shewing the true state of affairs.

3. BANKS (§ IVA—45)—JOINT ACCOUNTS—INTENTION—CORROBORATION.

Money deposited by a testator in a joint account of himself and his niece, to be devoted to his support and that of his business establishment, including the support of the niece during his life, does not, in the absence of other corroborative evidence, shew an intention of establishing joint ownership of the funds, and they form part of the testator's estate.

4. EXECUTORS AND ADMINISTRATORS (§ IVC—100)—ACCOUNTING—CHEQUE—CORROBORATION—EVIDENCE ACT.

Where a cheque belonging to the estate was cashed by an executrix, but stated by her to have been paid over and accounted for, she cannot be required to again account for it in an administration of the estate under another will, and her testimony as to payment requires no corroboration under sec. 12 of the Evidence Act.

5. EXECUTORS AND ADMINISTRATORS (§ IVC—110)—COMPENSATION TO—REVIEW.

The amount allowed by the Surrogate Court Judge to executors for their services cannot be questioned in an action for an account, nor otherwise than upon an appeal from the order of that Judge.

6. COSTS (§ I—9)—ACTION AGAINST EXECUTOR—APPORTIONMENT.

Where an action against an executor is not unreasonable, and the plaintiff failed in the main issues both in the action and on appeal, the costs will not be apportioned, but each party will be made to bear his own costs both of the action and appeal.

Statement.

AN appeal by the plaintiff, a legatee under the will of Samuel McMillan, deceased, from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action without costs, on payment of certain amounts omitted from the accounts as passed.

The following introductory statement of the facts is taken from the judgment of HODGINS, J.A.:—

The action is one for an account, involving the dealings of the respondents as executors of the will of the late Edward McMillan, who died on the 15th August, 1914, and of the respondent Madill as executor of the will of the late Samuel McMillan, who died on the 13th October, 1915.

A legacy of $5,000 was given to the respondent Margaret Murray, by the will of Edward McMillan, payable at the death of Samuel McMillan, to whom the estate was devised, subject to the payment of that legacy and of two others, which have been paid in full. The respondent Margaret Murray was a niece of both the McMillans, their standby and housekeeper for many years, and held a power of attorney from both of them to do all their business, sign cheques and notes, etc., etc.

ONT.

S. C.

SPROULE v. MURRAY

Under the will of Samuel McMillan, the appellant and the respondent Murray took equal shares in the residue.

The $5,000 legacy not being payable until the death of Samuel McMillan, to whom the whole estate of Edward McMillan was devised, it was paid out of the assets of Samuel's estate by the respondent Madill.

J. E. Anderson and *A. M. Fulton*, for the appellant.

J. M. Ferguson and *M. H. Roach*, for the defendants.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J. A. (after setting out the facts as above):—Mr. Anderson argued with pertinacity and zeal for a proposition which I think is radically unsound. It was that, as the respondent Murray was an executrix under Edward McMillan's will and also a legatee, it was her duty to have seen that sufficient assets out of that estate were set apart by Samuel McMillan to meet the legacy at his death, in which case the Samuel McMillan estate would not have been called upon to pay it, so leaving a larger amount as the appellant's share. This duty, he argued was one owed not to herself, but to those who would become interested in Samuel McMillan's estate when he died, and that consequently they were entitled by reason of her neglect, to treat the legacy as having been paid, and to have an accounting on that basis. This would result in a division of Samuel McMillan's estate ignoring the true facts, and, if carried to its logical conclusion, would deprive the respondent Murray of her legacy if she had not insisted on Samuel McMillan setting it apart for her. I do not recognise any such duty in a legatee, who is also executrix, to insist on the earmarking of securities to meet a legacy, if the legatee does not desire so to do. It is her right, in doubt as to the outcome of the estate in the hands of the devisee, to require her legacy to be secured in some fashion, but that is a personal right, not a duty which can possibly be owed to those who may become interested in the devisee's own estate. They are volunteers and can only take what is left after the payment of debts; and, if the devisee of the estate has failed to retain, as he should, the amount payable to the legatee, his estate is chargeable with it as a debt arising from his neglect to provide

for payment. But it appears to be the fact that, when Edward McMillan died, he left assets of $5,519.61 so that this interesting question does not actually arise, and I only deal with t because it was so strongly pressed. Having received these assets, which were sufficient to pay the respondent Murray, the executor of Samuel McMillan was entitled and bound to discharge the legacy, and it is immaterial that Samuel McMillan's own estate, and what he got from Edward McMillan, became mingled, and that payment was in fact made from the combined assets.

Two other principal matters were argued, as well as some smaller questions relating to individual assets.

Those two were, first, the effect o a release under seal of her $5,000 legacy given by the respondent Murray, and, second, her right to appropriate the residue of an account opened in the Standard Bank by Samuel McMillan in his lifetime in his own name and that of the respondent Murray.

The appellant contends that the passing of accounts of both estates by the Surrogate Court of the County of Ontario, and the orders made thereon, are not binding on her, because it is not conclusively demonstrated by the respondents that notice of the appointments under which they proceeded was served upon her. It is, however, unnecessary to decide that point, because the course taken at the trial and before this Court involved the consideration of every possible item as to which any objection could exist.

It appears that, after Edward McMillan's death, Samuel McMillan decided to sell the farm in which he had been interested as part owner—an interest increased by the share therein of Edward McMillan which came to him under his brother's will. He agreed to sell it, and it was necessary to get a release of the legacies which under Edward McMillan's will were a possible charge upon the real estate. He asked the respondent Murray, and she consented, to release her legacy so that the sale could go through. The release is absolute in terms, but the facts in evidence shew that no payment had been made. I think the respondent Murray is entitled to shew the true state of affairs, and to claim her legacy notwithstanding the wide terms of the document she signed. No one now setting it up had at its date any vested interest in Samuel McMillan's estate. He himself was a party

ONT.
S. C.
SPROULE
v.
MURRAY.
Hodgins, J.A.

to its procurement for a limited purpose; and, unless those now claiming the right to take advantage of it were themselves misled or had changed their position, they are in no sense entitled to claim an estoppel against her: *Carpenter* v. *Buller*, (1841), 8 M. & W. 209, 213.

A further contention is made that payments actually made to the respondent Murray were so made in payment or part payment of the legacy in question, or that it should be held that what was given or transferred to her by Samuel McMillan should be so dealt with, and that it should be determined that the legacy has been at all events partly satisfied.

This is largely based upon the purchase by Samuel McMillan of a house in Beaverton in the name of the respondent Murray and the payment of $1,800 therefor.

So far as it is a matter of evidence, there is nothing to support the argument that this was or was intended to be a payment instead of a gift.

The relations between the niece and her old uncles had been very close since her infancy, and the only ones who testify make it clear that Samuel McMillan intended to make the purchase for her, and to live with her and under her care in the house he purchased, until he died. I do not think that it would be competent for the Surrogate Court to entertain the question as to the ownership of the house when taking the accounts of the estate, or whether it was obtained by undue influence, nor can we do so in appeal; but there is no objection, I think, to either Court determining whether the conveyance of the property should be treated as a payment and so a discharge to the executor as to the legacy *pro tanto*. Proof that it was so intended is a burden that lies on those asserting that fact, and here there is none. If it were necessary to corroborate the statement of the respondent Murray as to the gift, under the statute, I think the clear evidence of Roach, the solicitor acting then for the vendor, and the circumstances of the parties previous to and at the time, establish in material particulars what the respondent Murray deposes to.

The joint account presents more difficulty. At the trial the evidence given by the respondent Murray was as follows:—

"Q. Your uncle Samuel opened a joint account in the Standard Bank? A. Yes, on the 25th of March, 1915.

"Q. Did you know anything about that before? A. Yes, I did.

"Q. Tell us what took place? A. He come home and told me about it; he said, 'There is money in the bank so you can pay up everything after I am gone'—funeral expenses—and then he says, 'You will have money to keep you until such time as the estate is settled; that may be a year or two.'

"Q. What was in the account, do you remember? A. There was eighteen hundred and something.

"Q. That is what was put in when the account was opened? A. Yes.

"Q. And money was drawn out of that from time to time? A. Yes.

"Q. Was there a bank-book? A. Yes.

"Q. Who had the bank-book? A. I had it.

"Q. Did you draw cheques on the account? A. Yes, I went and got the money as it was needed. We boarded a man from the plant, and his wife and child, for six months, and got nothing for it——

"Q. Never mind that. The account was disappearing? A. Yes.

"Mr. Ferguson: Then the joint account was used for the running expenses of the house? A. Yes.

"Q. And the balance in the account at his death you took? A. Yes.

"His Lordship: How much was it?

"Mr. Ferguson: $1,072.90, my Lord."

Of her examination for discovery, the following questions and answers were put in:—

"83. Q. What became of the $2,000 that was paid later on? A. After payment of the balance of the house he put that in the joint account in the bank.

"84. Q. With you? A. With he and I.

"85. Q. That was the beginning of the joint account? A. Yes.

"86. Q. In March before he died? A. Yes.

"87. Q. And that was the beginning of the first joint account? A. Yes."

"96. Q. Sam McMillan was illiterate, unable to read or write? A. He could read print, but not writing.

"97. Q. You had power of attorney from him to transact his banking business? A. Yes, in 1904.

ONT.
S. C.
SPROULE
v.
MURRAY.
Hodgins, J.A.

"98. Q. He could not do banking business himself? A. He got very feeble and did not want to be bothered with it.

"99. Q. And the reason why this joint account was taken out was so that you could go ahead and transact the business? A. He told me and it was always a rule that he wanted to pay for everything right away, and after he made that he came home and said that I could always go ahead and do the same and that there was money left in the bank for me to do that and there is money in the bank for you to live on.

"100. Q. You weren't there when he took out the joint account? A. No, I was not.

"101. Q. But you signed the slip eventually? A. Yes.

"102. Q. How long after making the joint account? A. I do not remember."

"168. Q. Now in the disbursements in connection with the Sam McMillan estate there is an item of $85 paid to Dr. McDermott: what do you know about that? A. I paid that.

"169. Q. Where did you get the money from? Out of the joint account? A. Yes. There was a custom in that house to pay everything in spot cash, and he gave me those instructions when he passed away that he left this money in the bank for me and to pay everything.

"170. Q. Did you pay it in one cheque? A. On the 23rd October.

"171. Q. And how about Dr. Smith's account of $29.55? A. I paid that.

"172. Q. The undertaker's of $143.75, how was that paid? A. Joint account, just the same.

"173. Q. Then the Frank Lapp of $9, that was paid out of the joint account? A. Yes."

The respondent Madill, on his examination for discovery, refers to the joint account thus:—

"349. Q. Did he have any money in the bank himself when he died? A. No.

"350. Q. Neither joint account or otherwise? A. There was a joint account.

"351. Q. In whose name? A. Sam McMillan and Margaret Murray.

"352. Q. Is that accounted for in the estate in any way? A. No.

ONT.

S. C.

SPROULE v. MURRAY.

Hodgins J.A.

"353. Q. Why? A. Because it was for the survivor.

"354. Q. Wouldn't that be an asset of the Sam McMillan estate? A. No, it was transferred to the Margaret Murray estate. The bank transferred it. We did it for Miss Murray."

The money was Samuel McMillan's and the joint account evidently his own idea. Previously to the opening of the joint account, the respondent Murray had a power of attorney and used to draw on her uncle's account in the bank as occasion required. There was, no doubt, some reason in his mind for making the change. The direction given by him is stated differently in the extracts I have quoted. But substantially the expressed wish and the power given to her were that she should pay the running household and ordinary outgoings, his funeral expenses, and use it for her support after his death, while it lasted. The bank-book is produced and discloses nothing as to the depositors or the terms on which the money was left with the bank, except that the regulations printed in the book are so drawn as to deal with a single depositor. Although the banker, the respondent Madill, was called, no inquiry was made as to the terms of deposit.

I think the fair conclusion from what appears is that Samuel McMillan intended to have the money devoted to his own support and that of his establishment, including the respondent Murray, during his life—and that when he died, and then only, the money was to become the respondent's. I cannot find that the respondent Murray was to become jointly interested in the money in such a way as to give her the absolute right to dispose of it, irrespective of the instructions or directions given by Samuel McMillan. The absence of this element seems to me to involve the retention by him of the real ownership of the money while he lived. It was to be his, but she was free to spend it for certain purposes, which extended even after his death. She was to pay his funeral expenses, and then to have it for her support.

This absence of joint ownership, as I see it, distinguishes this case from *Weese* v. *Weese* (1916), 37 O.L.R. 649. The circumstances indicating the difference between joint interest and "a mere arrangement for convenience," leaving the ownership in the depositor whose money it was, may be seen in *Marshal* v. *Crutwell*, (1875), L.R. 20 Eq. 328, and in *Everly* v. *Dunkley*, (1912), 8 D.L.R. 839, 27 O.L.R. 414.

ONT.

S. C.

SPROULE v. MURRAY.

Hodgins, J.A.

In *Hill* v. *Hill* (1904), 8 O.L.R. 710, there was a deposit receipt shewing that the money was to be payable to father and son "or the survivor," but the understanding between the parties was that the money should remain subject to the father's control and disposition and that whatever should be left at his death should then belong to the son. The money was held to belong to the father's estate, and the circumstances were regarded as pointing to an ineffectual attempt to make a testamentary gift.

I cannot distinguish this from the present case. It is clear from the evidence of the respondent Murray that "it was always a rule that he wanted to pay for everything right away, and after he made that he . . . said I could always go ahead and do the same and that there was money left in the bank for me to do that." It may reasonably be assumed that, had the respondent Murray neglected to pay the household and other expenses promptly, her uncle would have at once asserted his right and ownership.

Mr. Justice Maclennan, in *Daly* v. *Brown* (1907), 39 Can. S.C.R. 122, at pp. 148, 149, makes some remarks which are rather in point here:—

"In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole, by authorising his daughter also to draw. He could still draw the whole whenever he pleased, up to the day of his death, and, if he did, it would all be his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all, and a payment to her would have discharged the bank; but the money would still have been the father's money in her hands. She would have been accountable to him for it all."

In *Schwent* v. *Roetter* (1910), 21 O.L.R. 112, Mr. Justice Riddell reviews the English and Canadian cases and points to exclusive control for the life of the deceased as making a distinction to be borne in mind in considering the decisions.

A Divisional Court, in which the trial Judge here presided, *Southby* v. *Southby* (1917), 38 D.L.R. 700, 40 O.L.R. 429, decided the case against the survivor wholly upon the ground that, notwithstanding the terms of the direction to the bank, the deposit was simply a mode of conveniently managing the husband's affairs.

See also *Smith* v. *Gosnell* (1918), 43 O.L.R. 123

In the case in hand, but for the evidence of the respondent Madill, there is no corroboration of the statements of Miss Murray, if these are to be taken as establishing a joint tenancy in the deposit. That this is necessary is stated in *Schwent* v *Roetter* (*ante*). Madill, however, only corroborates the fact that there was a joint account and that, in his view, it was to be for the survivor. But he does not say why he so thought or so treated the account, nor what kind of a joint account it was. His evidence is not sufficient to corroborate the exact terms which Miss Murray deposes to and on which the case must necessarily be decided. In my view, the residue of the account belonged to Samuel McMillan's estate.

Dealing now with the smaller items: The first is $30, based on a cheque payable to the Edward McMillan estate and endorsed and cashed by the respondent Murray. She deposes that she paid the proceeds over to Samuel McMillan, but it is objected that her statement needs corroboration, and *Thompson* v. *Coulter*, 34 Can. S.C.R. 261, is relied on. But this is an accounting by an executrix and in a matter arising after Edward McMillan's death, so that the statute does not apply. If the respondent Murray's statement is believed, and no one denies it, then she, as executrix of Edward McMillan, is discharged of liability for this item, and no question as to it can arise, because it was Samuel's property under Edward McMillan's will, and the executrix, having proved a proper disposition of it under that will, cannot be asked to account for it again as part of Samuel's estate: *McClenaghan* v. *Perkins* (1902), 5 O.L.R. 129.

(2) One half of the balance on the sale of the farm assets is claimed as belonging to Edward McMillan. If this item is open to the appellant, it seems to be satisfactorily disposed of. Samuel McMillan, the residuary legatee of Edward, his brother, conducted the sale and paid the whole proceeds into his own account. The respondent Murray never got them or any part of them. I do not regard the entries in the auctioneer's book as sufficient proof, unless amplified by some evidence verifying and explaining them, to charge any one with responsibility for more than is sworn to be the real amount in which Edward's estate and Samuel McMillan were interested. The notes were all accounted for as they were paid except the McLennan note, the proceeds of which came in after

ONT.

S. C.

SPROULE v. MURRAY.

Hodgins, J.A.

the accounts were passed, and one half of which was paid to the appellant. There is nothing to support the suggestion that more was received than has been accounted for. Samuel McMillan was capable of dealing with his own interests at the sale, and what he got in cash during his life and the notes found after his death in the bank are the limit of accountability on the evidence given at the trial.

(3) Two items of bank interest, $22.10. Mr. Roach, solicitor for the respondents, says that these two items are included in the balance of $299.99, which was turned over from the Edward McMillan estate to the Samuel McMillan estate, and are accounted for in that estate. There is nothing to cast any doubt on this statement, and it must be accepted.

(4) Commission has been allowed by the Surrogate Court Judge at $420, and of this $220 is objected to. In my judgment, this is not a matter that can be gone into here. The parties, if notified of the passing of the accounts, should have appealed against the allowance, and, if not notified, should have, when they learned the amount, applied to that Court for leave to reopen the matter or to appeal. The allowance for care, pains, and trouble is a personal one given by statute to the trustee or executor and is no part of his account as such. It is only when an executor is asked to account in the Supreme Court that the question of notice of the passing of the accounts in the Surrogate Court becomes important (Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 71*).

*71.—(1) Where an executor . . . has filed in the proper Surrogate Court an account of his dealings with the estate, and the Judge has approved thereof, in whole or in part, if he is subsequently required to pass his accounts in the Supreme Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under any such person.

* * *

(3) The Judge, on passing the accounts of an executor . . . shall have jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof, in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to an appeal under section 34.

(4) The persons interested in the taking of such accounts or the making of such inquiries shall, if resident within Ontario, be entitled to not less than seven days' notice thereof, and, if resident out of Ontario, shall be entitled to such notice as the Judge shall direct.

. . .

or when the Surrogate Court is dealing with the compensation or on appeal therefrom. It cannot be that, if the Surrogate Court Judge has allowed compensation, an action for an account can be brought in the Supreme Court to review that decision. And, if such an action would not lie upon that one cause of action, then it is not competent to attack the amount even when an action for a general accounting might be brought. I therefore decline to go into the matter, but I am glad to think that, with the detailed knowledge which I have acquired in dealing w th this appeal, no great injustice has been done n the amount allowed, even though the chief assets consisted of mortgages which were assigned to the beneficiaries. But, whether that is so or not, and it is not the test to be applied in this case, I do not think the amount can be questioned save by way of appeal as provided by virtue of the combined effect of the Trustee Act, R.S.O. 1914, ch. 121, sec. 67, sub-sec. 3, and the Surrogate Courts Act, R.S O. 1914, ch. 62, sec. 34.*

(5) $67 in Samuel McMillan's bank-account which the respondent Murray, in her examination for discovery, says has not been accounted for. The evidence does not disclose whether this is really included in the accounts, but the Registrar of this Court may, on settling the judgment, inquire into it and direct payment if the appellant is really entitled to a share of it.

(6) Interest on the amounts withheld until shortly before the trial. These are $100 (interest on Ritchie mortgage), $52.50 (McLennan note), and perhaps some other small items. The Registrar may allow interest on them from the date of the writ.

(7) Succession duties to the amount of $328.61 were paid. The debt of $5,000 was not deducted, and so the amount paid the Government was too large. The executor is trying to get something back and if he does will account for it. He is willing to

*Section 67, sub-sec. 3, of the Trustee Act is as follows:—

(3) The Judge of a Surrogate Court, in passing the accounts of a trustee under a will . . . may from time to time allow to him a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate.

Section 34 of the Surrogate Courts Act is in part as follows:—

34.—(1) Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court.

(5) An appeal shall also lie from any order, decision or determination of the Judge of a Surrogate Court, on the taking of accounts . . .

ONT.

S. C.

SPROULE v. MURRAY.

Hodgins, J.A.

apportion this between the beneficiaries, and the Registrar may deal with this as well.

(8) Costs. Counsel for the appellant argues that the action was necessary and that she should get her costs. It must be admitted that the estates of the two brothers were mixed together, and Mr. Madill, executor of each, says that the accounts were not properly kept, but that no one was the loser, as the estates were properly administered. It is unfortunate that Mr. Stewart, the former solicitor of the appellant, died some time ago It appeared from Mr. Roach's letter of the 13th June, 1916, that Mr. Stewart had personally gone over the affairs of both estates and was completely satisfied. Things dragged on however. Mr. Donelly went overseas, and it was not until about a week before the trial that a final offer was made to pay the appellant's share of the McLennan note, $52.50; one half of the Ritchie interest, $50; one half of the deposit paid on the Beaverton house purchase, $25; to apportion the succession duties between the beneficiaries; to pay the share of the appellant of the bank interest and the costs of the action on the County Court scale. This was refused, and the trial proceeded. I think up to that time the action was not an unreasonable proceeding in the interest of all parties; but, after that offer, the appellant should, I think, be confined to what may result from the determination of her legal rights.

I have, as already stated, not considered the question whether the appellant is or is not bound by the accounts passed by the Surrogate Court. It is contended that she had no notice of them; but, owing to the course the case has taken, it makes little matter, for everything objected to has been gone into and is dealt with herein, and no case has been made out for a general retaking of the accounts. But there is no evidence before this Court that the appellant was not notified. The onus was upon her, in view of the orders of the Surrogate Court Judge, having regard to the provisions of the Surrogate Courts Act, sec. 71. It is not to be assumed, without clear evidence, that the Surrogate Court Judge disregarded the provisions of sub-sec. 4 of sec. 71.

The proper result of what has been said is that the judgment at the trial should be varied, and a judgment directed to be entered referring to the Registrar of this Court the items specially mentioned as proper to be dealt with by him, and directing pay-

ONT.

S. C.

SPROULE
v.
MURRAY.

Hodgins, J.A.

ment of them, as well as of the other sums, if any, referred to in the letter of Mr. Roach dated the 21st November, 1918, and one half of the amount properly payable to the appellant as her share of the moneys in the joint account at the time of the death of Samuel McMillan, less payments properly made thereout, which amount can be ascertained by the Registrar, with interest on them from the date of the writ.

As to costs: the action was not an unreasonable one, but, in view of the small success it achieved, and the failure of the appellant upon her main contentions both in the action and on appeal, I think that, instead of our endeavouring to apportion the costs, each party may well bear his or her own costs both of the action and appeal. *Judgment below varied.*

IWANCHUK v. IWANCHUK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Simmons, JJ. October 3, 1919.

ALTA.

S. C.

EVIDENCE (§ II E—191)—TRANSFER OF LAND—FATHER AND SON—FATHER UNABLE TO SPEAK ENGLISH—FIDUCIARY RELATION OF SON—ACTION TO SET ASIDE TRANSFER—BURDEN OF PROOF.

Where a father can neither read nor write English and the son acts as interpreter in giving instructions to a solicitor for preparing a transfer, without pecuniary consideration, from the father to the son, the only means the father had of knowing what he is signing being to depend on the honesty and good faith of the son, the son occupies a fiduciary position of a very high character, and in an action brought by the father to set aside the transfer the burden of proof rests on the son to prove that the father knew quite well the nature and effect of the instrument he was signing.

Statement.

APPEAL by plaintiff from the trial judgment in an action to set aside a transfer of land. New trial ordered.

Frank Ford, K.C., and *J. A. McCaffry*, for appellant; *J. C. Macdonald*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiff and defendant are father and son respectively. At the time of the trial in February last the defendant was 33 years of age. In 1903 he was therefore about seventeen. In that year the father agreed to purchase a quarter section of land from the Canadian Pacific Railway Co. under an instalment plan. In 1906 before he had obtained title or paid up in full he executed a transfer of an undivided one-half interest in this land to the defendant. In 1912 the son filed a caveat against the land to protect his interest. In 1914 the plaintiff obtained his

ALTA.

S. C.

IWANCHUK v. IWANCHUK.

Stuart, J.

title and a certificate was issued to him subject to the defendant's caveat. In February, 1918, the defendant registered his transfer of 1906 and obtained a certificate of title for an undivided one-half interest. In May, 1918, the plaintiff filed a caveat against this interest claiming that the transfer of 1906 had been secured by fraud and in July, 1918, the plaintiff brought the present action whereby he seeks to set aside that transfer.

The defendant in addition to defending brought a counterclaim for partition and for an accounting as to the profits of the land.

The trial Judge dismissed the plaintiff's action with costs and also the defendant's claim for an accounting but granted the prayer of the counterclaim for a partition.

From this judgment, the plaintiff appeals, and there is no cross-appeal.

After hearing the evidence adduced on behalf of the plaintiff which consisted, in addition to the formal evidence of the registrar, of the testimony of the plaintiff, his wife and his two younger sons and then the examination and a portion of the cross-examination of the defendant, the trial Judge intervened with questions as to the best way to make a partition of the quarter section and then the following conversation occurred:—

The Court (addressing defendant's counsel): Do you propose to call any more evidence?

Mr. Macdonald: I have the brother Stephen here.

The Court: I do not want to hear it.

Mr. Macdonald: The only other evidence is the mother-in-law and the only other independent witness I want is Short.

The Court: There is no object in having any more lying, there has been enough and the trouble is I cannot tell who is doing it. Do you wish to recall any rebuttal Mr. McCaffry?

Mr. McCaffry: Only in regard to the counterclaim.

The Court: The only part of the counterclaim I am considering is the division, the partition which results necessarily from the dismissal of the action. Here I am with the story of the plaintiff on the one hand, the other witnesses do not strengthen his case, the boy Nikoli rather strengthens the case of the defendant; Peter's evidence and his manner of giving it convince me that he had altogether too much feeling in the matter and his evidence is largely what he has been told.

Mr. McCaffry: There was one witness I thought would have impressed your Lordship, the one your Lordship examined. That boy told his story—

The Court: I know, but his story is in favour of the defendant. I do not lay much attention to the fights and the troubles between the father and the defendant, that may or may not be true, it does not affect this case, but as to

the land his evidence was as to a dickering to obtain the other half of that quarter, to get it all, it was not as to the dispute that there was an interest in half of it. I will dismiss the action. The burden is upon the plaintiff and he has not satisfied it and in this case that burden is added to considerably by this claim being one to upset the title to land. I will dismiss the action.

He then after some more discussion intimated that the defendant should have his costs of the action, and that there would be a judgment for partition giving the parties time to agree upon the exact method and a formal judgment was ultimately entered.

From this extract it is quite apparent that the trial Judge rested his decision upon the principle of the burden of proof. As he said, he did not know whom to believe and he therefore decided that the plaintiff must fail in his action because he considered that the burden of proof rested upon him. It appeared also to him that the defendant was entitled to a partition merely if he asked for it while as to the right to an account the defendant upon the same principle of burden of proof would also fail.

There are, however, some admitted facts which have in my opinion a peculiar bearing upon the question of burden of proof. The plaintiff could not speak English in 1906 and even at the trial his evidence and that of his wife had to be taken through an interpreter. In 1906 he could neither read nor write English or indeed any language. He was able to write his own name but that is all. He and the defendant went together to the office of Short, and it was there that the transfer in question was drawn. The defendant was the transferee. The transfer was expressed to be for the consideration of "one dollar and other valuable consideration" and it was as an admitted fact a voluntary transfer without pecuniary consideration passing at the time. The only means which the plaintiff had of communicating with the solicitor was through the mouth of his son, the defendant and the grantee, as interpreter. The only means the plaintiff had of knowing what he was signing was to depend upon, and to trust to, the honesty and good faith of his son. The solicitor spoke only English, and the document was in English. The son knew this and knew that his father was entirely dependent upon him for information as to what was going on, what was being said and what was being done. There would appear to me to be no doubt that the son then occupied a fiduciary position of a very high character, and it was to him that the voluntary transfer was made.

ALTA.

S. C.

IWANCHUK v. IWANCHUK.

Stuart, J.

I think that there is no doubt that in such circumstances the burden of proof rested upon the son and not upon the father. It was upon him to prove that his father knew quite well the nature and effect of the instrument he was signing. Inasmuch as the trial Judge undoubtedly rested his judgment upon the other view, viz.: that the burden of proof rested upon the father I think with much respect that the appeal ought to be allowed.

There is another circumstance which strengthens this view. It appears from an examination of the transfer that it was registered without the production of the father's certificate of title. This seems to have been quite unauthorized. It could not be done except by order of a Judge which was not given. Any argument as to presumptions and burden of proof which might be rested upon the possession of a certificate of title by the son would therefore seem to be possibly open to very grave objection.

The appeal should be allowed with costs, the judgment below set aside and an order made for a new trial. The costs of the first trial should abide the result of the second one.

Appeal allowed, new trial ordered.

ONT.

S. C.

HAWLEY v. HAND.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford and Middleton, JJ. March 19, 1919.

COSTS (I—9)—LIABILITY OF EXECUTOR—DISCRETION OF COURT—REVIEW.

Where an action is defended by an executor and judgment rendered against him, the Court has the discretion, where there is an insufficiency of assets in the estate, to award the costs against the executor personally, to be paid out of his own estate; such discretion is not subject to review.

Statement.

APPEAL by defendant from a judgment of Falconbridge, C.J.K.B. (1918) 15 O.W.N. 170, in an action brought by Frederick M. Hawley against Havelock E. Hand, to recover damages for false representations alleged to have been made by the defendant whereby the plaintiff was induced to purchase certain shares of the stock of a company and for delivery up or indemnity in respect of a promissory note made by the plaintiff. After the trial, the defendant died, whereupon, upon the application of Jessica H. Hand, executrix of the will of the defendant, an order was made to continue the action against her, as such executrix, defendant by order to proceed.

The judgment appealed from is as follows:—

The defendant departed this life after the trial, and, by order to proceed, the action was continued against his executrix.

The plaintiff has proved his case. Exhibit 2, in the defendant's handwriting, is a most damning document, and the attempted explanation of it is not satisfactory.

The representations were in fact untrue, and, if not false to the knowledge of the defendant, were made recklessly with the purpose of inducing the plaintiff to purchase the stock, and they did induce him to purchase the same.

There will be judgment against the executrix as such for $4,050 and costs and an order for the delivery up of the note in the pleadings mentioned or indemnity from liability thereon.

The operative paragraphs of the judgment as settled were as follows:—

2. This Court doth order and adjudge that the plaintiff do recover against the defendant Jessica H. Hand, as executrix of the said Havelock E. Hand, deceased, the sum of $4,050 and his costs of this action forthwith after taxation thereof, such moneys and costs to be levied out of the property of the said Havelock E. Hand come to the hands of the defendant Jessica H. Hand to be administered if she has so much in her hands to be administered, and if she has not so much thereof in her hands to be administered, then the said costs are to be levied out of the property, goods, chattels, lands and tenements of the said defendant Jessica H. Hand.

3. And this Court doth further order and adjudge that the defendant Jessica H. Hand do forthwith deliver to the plaintiff or to whom he may appoint the promissory note in the pleadings mentioned, or in the alternative do give to the plaintiff a good and sufficient indemnity against all liability upon the said note, such indemnity to be settled by the Master in Ordinary in case the parties differ about the same.

Jessica H. Hand appealed from the judgment of FALCONBRIDGE, C.J.K.B., in so far as it required her to pay personally the plaintiff's costs of the action.

J. M. Ferguson, for the appellant.

R. S. Robertson, for the plaintiff, the respondent.

At the conclusion of the argument, the judgment of the Court was delivered by

MEREDITH, C.J.C.P.:—The proper form of judgment against an executor has always been that the plaintiff recover debt and costs

ONT.

S. C.

HAWLEY v. HAND.

Meredith, C.J.C.P.

out of the assets of the testator if the defendant have so much, but, if not, the costs out of the defendant's own property: executors and administrators have no advantage over other litigants as to costs: they were always liable to pay them *de bonis propriis* if there were no assets.

In this case the executrix voluntarily assumed the defence of this action, taking out herself the order continuing it against her: no doubt, in the expectation or hope that the judgment to be pronounced in it would be in her favour: but it was not.

There is, therefore, no good reason in law, or as a matter of discretion, why she should not pay the costs out of the estate or personally according to the rule which I have stated.

It is of course enough to dispose of this appeal to consider that there was power so to impose costs as I have mentioned: because we cannot review the discretion exercised in awarding them, no leave to appeal having been obtained: Judicature Act, sec. 24.

The appeal must be dismissed.

Appeal dismissed with costs.

CAN.

S. C.

THE GREAT WEST SADDLERY Co. v. THE KING.

THE JOHN DEERE PLOW Co. v. THE KING.

THE A. MACDONALD Co. v. HARMER.

Supreme Court of Canada, Sir Louis Davis, C.J. and Idington, Anglin, Brodeur and Mignault, JJ. May 6, 1919.

CONSTITUTIONAL LAW (§ II A—194)—STATUTE—COMPANIES ACT 6, GEO. V. (1915, SASK.)—REGULATION—DOMINION COMPANIES—PROVINCIAL LICENSE.

The provisions of ss. 23 and 25 of the Companies Act (1915, 6 Geo. V., Sask.) requiring all companies to register and take out an annual license before carrying on business in the Province, are *intra vires* the Legislature, and are applicable to companies incorporated by the Dominion Parliament to do business throughout Canada.

[*John Deere Plow Co.* v. *Wharton* (1914), 18 D.L.R. 353, [1915] A.C. 330, distinguished; *Harmer* v. *Macdonald* (1917), 33 D.L.R. 363, 10 S.L.R. 231, affirmed.]

Statement.

APPEAL from a decision of the Supreme Court of Saskatchewan, 33 D.L.R. 363, 10 S.L.R. 231, affirming the judgment at the trial in favour of the plaintiff. The effect of this judgment was to affirm the convictions against the appellant companies in the other two cases.

The Great West Saddlery Co. and the John Deere Plow Co. were convicted by a police magistrate of Regina of

violating the provisions of ss. 23, 24 and 25 of the Companies Act of Saskatchewan and on a case stated to the Supreme Court the convictions were affirmed. In the *Harmer* case (1917), 33 D.L.R. 363, an action was brought to restrain the company from carrying on business without being registered or licensed under these provisions.

Ss. 23, 24 and 25 of the Act read as follows:—

23. Any company, whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object and carrying on business in Saskatchewan, shall be registered under this Act.

(2) Any unregistered company carrying on business, and any company, firm, broker or other person carrying on business as a representative, or on behalf of such unregistered company, shall be liable on summary conviction, to a penalty not exceeding $50 for every day on which such business is carried on in contravention of this section, and proof of compliance with the provisions of this section shall be at all times upon the accused.

(3) The taking of orders by travellers for goods, wares or merchandise to be subsequently imported into Saskatchewan to fill such orders, or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in Saskatchewan, shall not be deemed to be carrying on business within the meaning of this Act.

24. Any company may become registered in Saskatchewan for any lawful purpose on compliance with the provisions of this Act and on payment to the Registrar of the fees prescribed in the regulations:

Provided that the registrar may in the case of all companies (other than those incorporated by or under the authority of an Act of the Parliament of Canada) or proposed companies refer the application to the Lieutenant-Governor in Council who may refuse registration at his discretion, and in the case of refusal such company, or proposed company shall not be registered.

25. Every company may, upon complying with the provisions of this Act and the regulations, receive a license from the registrar to carry on its business and exercise its powers in Saskatchewan.

(2) Such license shall expire on the thirty-first day of December in the year for which it is issued, but shall be renewable annually upon payment of the prescribed fees.

(3) A company receiving a license from the registrar may, subject to the provisions of its charter, Act, or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act.

(4) There shall be paid to His Majesty, for the public use of Saskatchewan, for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor in Council.

(5) Every company which carries on business in Saskatchewan without a license, and every president, vice-president, director and secretary or secretary-treasurer of such company, shall be respectively guilty of an offence and liable on summary conviction to a penalty not exceeding $25 for every day the default continues.

The decision of the Supreme Court of Saskatchewan as to

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

whether or not these provisions were *intra vires* was asked by the stated case and appeal and given in favour of their validity.

Wegenast, for the appellant.

Chrysler, K.C., for the respondent, the Government of Saskatchewan.

Lionel Davis, for the respondent, Harmer.

C. C. Robinson, for the Dominion of Canada.

Nesbitt, K.C., and *Barton*, for the Ontario Government.

Davies, C.J.

DAVIES, C.J.:—These three actions which were brought to test the constitutional validity of certain sections of the Companies Act of Saskatchewan, 6 Geo. V., 1915 (Sask.), c. 14, requiring all companies, provincial and foreign, to register in the Province and to take out an annual license and pay an annual fee before carrying on business therein and providing that every company carrying on business in Saskatchewan without such license should be guilty of an offence and be liable on summary conviction to a penalty not exceeding $50 for every day the default continued, came before us in one consolidated appeal and were argued together.

The trial Judge in the Court of first instance upheld the validity of the impeached sections, and the Court of Appeal in that Province, consisting of five Judges, unanimously confirmed the judgment of the trial Judge.

The sections in question, the validity of which is impeached, were enacted by the legislature of that Province after the decision of the Judicial Committee in the case of *John Deere Plow Co.* v. *Wharton* (1914), 18 D.L.R. 353, [1915] A.C. 330, and were, no doubt, enacted in an honest attempt to comply with the principles which in that case it was declared should control provincial legislation with respect to companies chartered by the Dominion of Canada. The objectionable features of the previously existing legislation of the Saskatchewan Legislature, somewhat similar to those sections of the B.C. Legislature which in the *Wharton* case, *supra*, had been held *ultra vires*, were eliminated and the present provisions introduced in lieu of them.

Whether the legislature has been successful or not in avoiding the constitutional perils of enactments which may be said to some extent to control and regulate the business activities in the Province of Dominion companies is the question now before us.

It depends altogether upon the construction given to the reasons for judgment of the Judicial Committee in the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330, before referred to. I have read and re-read this judgment several times and studied it most carefully. As a result, I cannot conclude that the legislature in this instance has exceeded its powers in enacting legislation requiring all companies, local and foreign, including Dominion, to register and pay an annual fee. Nor do I think the section imposing a penalty upon a Dominion company for every day it carries on business in the Province without having paid the annual fee is *ultra vires* or other than a reasonable sanction to the requirement of the payment of the annual tax or fee imposed.

I reach this conclusion not without grave doubt whether the section requiring the company to take out a license to carry on business in a Province is not objectionable and *ultra vires*. In the result, however, I have concluded that the Saskatchewan Companies Act as amended and now before us, while in form to some extent objectionable as seeming to require a provincial license to enable a Dominion company to carry on its business in the Province may nevertheless be so construed as to be held to be merely a taxing Act, levying an annual tax or fee, alike on local companies as on extra-provincial companies, including Dominion ones. Its form may be, and I think is, objectionable and unfortunate, but its essence and substance merely require the payment of an annual fee or tax with a provision that the company shall not carry on its business in the Province until the annual fee is paid subject to a penalty for every day it so transgresses.

The requirement of payment of such a tax is not objectionable and is expressly referred to in the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330, by the Judicial Committee as permissible legislation by the Province while the penalty for non-payment of the fee may be looked upon as a non-objectionable sanction for the recovery of the tax.

I do not think the requirement of a license to enable the company to carry on its business is *intra vires*, but I would in this case treat it as negligible and inapplicable to Dominion companies, and if the tax was paid more in the nature of a receipt for its payment than as a license to carry on business, I do not

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

Davies, C.J.

think the company, after payment of the tax, would be liable to the penalty prescribed if it declined to accept the license and continued to carry on its business. The legislature has no power to require the acceptance of a license from it to enable a Dominion company to carry on its business in the Province. It might require registration, it might impose an annual tax, it might possibly enact the penalty clause as a sanction for the recovery of the tax, but it could not compel the company to accept a license from it to enable it to carry on its business. The company derived its power to do that throughout the Dominion from the Dominion who gave it its charter and while the legislature could not prohibit or control the exercise of these powers it nevertheless could, in my judgment, exact the payment of an annual tax from the Dominion company in common with other foreign companies and local companies, which itself created and chartered and could probably enforce the payment of such tax by the imposition of a penalty. I reach this latter conclusion, as I have said, with difficulty and doubt. It is to be regretted that the legislation should take the form it did, but looking at its essence and construing it as I do, I will not hold it to be *ultra vires*.

Of course, the legislation requiring a license and prescribing a penalty or penalties for not taking one out before carrying on business may take an objectionable form. In the case before us, I think on my construction of the statute, it, while objectionable in form, is not so in essence. The license required, the fee payable and the penalty prescribed apply equally to local and foreign companies, which include Dominion, and it cannot be successfully argued that the fees are excessive or that they are other than such fees as may reasonably be imposed as direct taxation for the purpose of revenue within the Province. *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.

Nor can it be said that such fees and the penalties imposed on the company for carrying on its business without their payment are really calculated to affect the status or powers of a Dominion company. The penalties prescribed are only a means of recovering the annual fees. Once those fees are paid these penalties could not be exacted.

I may add that I have not reached my conclusion as to the license without doubt and hesitation in view of the reasons for the

decision in the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330, and as these appeals avowedly seek to obtain a judicial construction of the judgment of the Privy Council in that case it would have been better from every standpoint, in my opinion, if they had been taken direct to the fountain head which could best explain the exact meaning and effect of the principles it laid down, and so avoid the delays and costs of totally unnecessary appeals to this Court.

I would, in view of the reasons given above, dismiss these appeals with costs.

IDINGTON, J.:—These appeals were by consent re-argued together, and they ought to be decided upon the same single neat point of law whether or not a local legislature can tax an incorporated business company deriving its incorporation from the Dominion Parliament.

All the other issues attempted in argument to be dragged into the case seem entirely irrelevant. If the tax is paid the other issues become of no consequence for the purposes of the disposition of the litigation respectively involved in each case.

The issuing of any more interrogatories on merely abstract points of law by the Dominion Government to this Court for purposes of information or of testing the limits of the powers of local legislatures in regard to some supposed assertion or possible assertion of power, seems for the present to have reached the bounds of its toleration, yet that does not seem to have exhausted the resources of ingenuity on the part of others for we are invited to answer in some of these cases questions needless to answer if the power of taxation in question exists.

The Legislature of Saskatchewan, having due and proper regard to the fate which rightly befell some extremely unjustifiable British Columbia legislation in the case of *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, decided to conform, so far as it could, to the decision in that case; repealed its old statutes bearing upon the like questions (of which some are not involved herein) and enacted a new Companies Act wherein it incorporated a provision for registration and licensing of all corporate business companies and subjected all, whether of local organization under the Act, or of Dominion or of foreign origin, to an initiative and annual license fee of the same graduated

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

Idington, J.

scale fixing the amount to be paid in proportion to capital. It clearly did this by way of taxation which the appellants seek to escape.

I know of no reason why they should not be subjected thereto or why the place of origin should be a ground for freeing them from the common burden all should bear in support of the government of the Province—where they choose to carry on business—and seek the protection it gives.

Nor do I see any imperative reason for confining the exercise of the taxing power to some statute earmarked as a taxing Act.

The questions of choice of subjects for taxation and equality of burden to be borne thereby, and best modes of enforcing payment thereof, have never yet been scientifically settled in a way satisfactory to those who have paid the greatest attention to such questions.

What we have primarily to deal with is the single issue of whether the annual tax for the non-payment of which one of these companies has been penalized, falls within what is referred to in the B.N.A. Act as "direct taxation."

It seems to fall well within the decisions in the cases of *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, and the *Brewers & Maltsters Association* v. *Attorney-General of Ontario*, [1897] A.C. 231, as being direct taxation.

Indeed no question was raised in argument founded upon any doubt as to this tax being direct taxation.

In the graduated scale as a basis for its application I cannot distinguish it from the former and in the licensing fee as a mode of its imposition it seems to fall within the latter case.

I cannot, where the power seems so clear, entertain, as a valid argument, in answer to the judgment in the two first named cases enforcing the penalties, the objection that there are provisions in the Act claimed to be *ultra vires*.

These collateral contentions seem wholly irrelevant to the single issue before us, so far at least as concern the respective judgments for penalties.

Their introduction seems but an attempt to becloud the real issue which is a very narrow one.

As to the *Harmer* case (1917), 33 D.L.R. 363, though not differentiated in the argument from the other two, it occurred to

re that possibly the introduction of some of these alleged objections was not so far fetched.

In that we have to consider the basis upon which a shareholder is proceeding against his company for relief.

I am, however, of the opinion that there is quite enough in the plaintiff shareholder's complaint, when confined to the question of improperly incurring penalties by refusing to pay the tax and all implied therein, to maintain the action and the resultant judgment, without considering the other excuses for not doing so or contentions set up by either party.

It seems to me the same observations are applicable to the appeal in the Manitoba case.

I observe, however, that there is a slight difference between the language used in the final clause of the case stated in the *Harmer* case, *supra*, and that used in the final clause of the case submitted to the Manitoba Courts. I shall revert to this in closing what I have to say.

I agree entirely with the reasons assigned by the late Chief Justice of Manitoba, and substantially with all advanced by Cameron, J., in support of the judgment of the Court of Appeal from Manitoba in the *Davidson* case (1917), 35 D.L.R. 526.

In deference to the argument presented herein, I desire to point out that, in my opinion, a corporation, by whomsoever or whatsoever power created, has no greater right in any Province than a private individual enjoying full rights of citizenship and not personally disqualified in any way, going there to do business, and in many respects has less, unless expressly given same by virtue of some legislative authority endowed with power to do so as, for example, in the cases of banks or railway companies.

If created by the Dominion authority its capacity must fall within what an exercise of the so-called residuary powers of the Dominion may create, unless in the cases specifically provided for either expressly or impliedly in the enumerated powers of the B.N.A. Act conferred on the Dominion.

The Great West Saddlery Co. in question in no way falls within any of the latter. There is, therefore, no reason for relying upon any such implication as may arise in favour of the corporation created to execute the purposes of any of the said enumerated powers.

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

Idington, J.

It was suggested in argument that the judgment of the Judicial Committee of the Privy Council in the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330, had said the Dominion Companies Act rested upon item No. 2 of the said enumerated powers. I do not so read it. And after the numerous futile attempts theretofore made, before said Court, to make that item relative to "Trade and Commerce" subservient to the enlargement of the powers of the Dominion in relation to conferring extraordinary powers upon ordinary trading companies, I submit respectfully, that any such expression, if to be read as suggested, must be treated as *obiter dicta*.

It was in no way necessary for the decision of the single neat point decided in the *Wharton* case, *supra*.

Moreover, we have, since that case, the expression of opinion by it in the insurance case, *Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta*, 26 D.L.R. 288, [1916] 1 A.C. 588, at p. 596, which seems to deny the power to rest any license thereon to carry on any "particular trade."

The pith of the said expression of opinion is contained in the following extract, 26 D.L.R., at p. 291:—

> There was a good deal in the Ontario Liquor License Act, and the powers of regulation which it entrusted to local authorities in the Province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen* (1882), 7 App. Cas. 829. But in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91. Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Provinces.

This express declaration of the Court above relevant to the non-existence of the power claimed for the Dominion so far as rested upon the enumerated item of "Trade and Commerce" seems to be conclusive against the contention of appellant, for it is only by virtue of something alleged to rest upon said item the mysterious right is asserted.

If the Dominion cannot assert the power claimed for it by way of an express license, much less can it do so by mere incorporation giving specified rights to certain parties to trade in a corporate capacity.

The legal entity must submit to the same laws properly enacted by and within the powers of a provincial legislature as the private individual.

The power to impose a tax and enforce its collection by means of prohibition to trade until it has been paid and its payment evidenced by a license has been asserted and upheld especially in relation to the manufacture and sale of liquor in so very many ways that one is surprised to hear the argument now put forward that the doing so is to be treated as an improper assertion of power and a denial of anything more than it means.

Though the testing of the power has been more in evidence before the Courts in relation to the liquor traffic than any other, the successful assertion of the power has been asserted in manifold ways by provincial legislation ever since Confederation.

Much of that has been asserted through the powers given the municipalities, which again rests upon item No. 9 of s. 92 of the B.N.A. Act, as to the licensing power as a means of raising revenue.

The taxation of transient traders by municipalities—a very old form of tax—and sometimes of the travelling circus, would be an illusory thing if the collection was not enforced by prohibition of carrying on the business of him so liable.

I only present these casual illustrations as a test of the possible need of the power to prohibit the carrying on of business until the tax may have been paid, in order to render it effective, of which no reasonable person, speaking of its possible exercise in relation to such cases, would be likely to deny. A judicial creation of a mere theoretical power to tax without any potentiality of its enforcement is apparently the high aim of the appellants.

But so long as the decision in *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, and all involved therein stands as good law, the power of the provincial legislatures over contracts will remain what it was always intended to be.

There would not seem to be in principle any difference in the

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

Idington, J.

quality of the power invoked whether exercised in relation to such transients or others presenting greater promise of permanency.

Yet the transient trader or the circus man might easily become incorporated and often is in fact. Are we to say incorporation by virtue of the Dominion legislation inherently carries with it a greater sanctity than any other?

We do know from the record herein that the John Deere Plow Co., Ltd., one of the appellants herein, became so incorporated on the application of four gentlemen of Moline, in the State of Illinois, one of the United States of America, and a dealer in Winnipeg.

Why should such a legal entity be entitled to claim, merely because so created by virtue of Dominion legislation, professing only so to create, and not pretending thereby to confer greater rights to trade anywhere in Canada, than any mere private individual citizen of Canada possesses, that it has such superior rights?

The questions submitted are not necessary for the determination of the single issue which the pleading presents in either the *Harmer* case (1917), 33 D.L.R. 363, from Saskatchewan, or the *Davidson* case (1917), 35 D.L.R. 526, from Manitoba.

Each plaintiff is entitled to succeed by reason of the company attacked defying the law of the Province in question and thereby becoming liable to penalties and possibly more serious consequences.

I am strongly impressed with a suspicion begotten of circumstances coming under my observation in these proceedings and the needless frame of the questions submitted that these actions are collusive and used as a means of interrogating this Court in a way it should not submit to at the mere whim of any private individuals desiring to know how far their companies can go.

Long ago, in the Province of Ontario, provision was made by legislation for the settlement of contentions between that Province and the Dominion, or it and other Provinces. And likewise provision was made for the Court having jurisdiction at the suit of either the Att'y-Gen'l for Canada or the Att'y-Gen'l for Ontario to entertain an action for a declaration as to the validity of any statute or any provision therein, and the Constitutional Questions Act of Ontario had existed from an earlier period.

The existence of such legislation, as well as similar legislation by the Dominion, seems to indicate, to put it mildly, a doubt as to the propriety of private individuals attempting what is attempted by some part of what is before us herein.

I think the appeal should be dismissed with costs to each of the respondents in the case wherein he is concerned.

ANGLIN, J.:—The impeached provisions of the Companies Act of Saskatchewan (R.S.S. 1915, c. 14) are, in my opinion, clearly distinguishable from those of the British Columbia statute held to be *ultra vires* in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330. The important differences are so fully and so satisfactorily pointed out and discussed in the judgments of Elwood and Newlands, JJ., in the Saskatchewan Courts, and in the opinions prepared by Brodeur and Mignault, JJ., which I have had the advantage of perusing, that I cannot do better than adopt the reasons given by them for concurring in the dismissal of these appeals.

BRODEUR, J.:—The three appellant companies are incorporated under the authority of the Companies Act of Canada (R.S.C. 1906, c. 79) and are empowered to carry on their business throughout the Dominion of Canada.

By the provisions of ss. 23 and 25 of the Saskatchewan Company Act, 6 Geo. V., 1915 (Sask.), c. 14, any company carrying on business in the Province must register and take out a license. As the appellant companies have not registered and have not taken out the prescribed license, they have been prosecuted. They claim that those provisions of the provincial statute are *ultra vires* and they rely on the decision of the Privy Council in the case of *John Deere Plow Co.* v. *Wharton*, *supra*, to sustain their contention.

The *John Deere Plow* case had reference to the operation of the Companies Act of B.C. which empowered the provincial authorities to refuse to a federal company the right to carry on business on the ground that there was another company of the same name upon the local register. The evidence shewed that the John Deere Plow Company had applied for a license and its application had been rejected. Such a legislation and action affected the status of the company itself, though it had been incorporated by the Dominion authorities, and the Privy Council

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

Brodeur, J.

decided, [1915] A.C. 330, that the legislation was *ultra vires* of a provincial legislature, as far as the federal companies were concerned.

When the *John Deere Plow* decision was rendered, the Saskatchewan legislation contained provisions similar to those of British Columbia, and the Saskatchewan Legislature, at its next session, repealed the objectionable provisions and the companies legislation is now contained in c. 14 of the statutes of 1915. The provisions as to registration and licensing, which were applicable formerly to foreign and Dominion companies, are now of general application to all companies, whether they are incorporated by the Province itself or by the Dominion or other provincial authorities or foreign states.

The statute simply provides that all companies, whether local or not, would be equally taxed by means of license, and the statute also provided that they should all be registered.

The failure of those companies to take a license or to register renders them liable to a penalty.

There is nothing in the statute which prevents them from carrying out their corporate powers to make contracts and to sue under those contracts, but they are simply required to observe the general registration provisions and take a license for purposes of taxation.

The object of the registration provision is to keep the public informed as to the status of those companies. They are bound to hand over to the registrar a return shewing the amount of the share capital, the quantity subscribed and paid up, the names of the directors and some other useful information which the public may need to do business with those companies (s. 34). It is of the utmost importance for a person who contracts with a corporation to know the legal status of the latter and to see whether the contract contemplated is within the powers granted to the company by its Act of incorporation or its letters patent.

The fees which the company have to pay for their registration look to me as being very reasonable and could hardly cover the expenses which the establishment of the registrar's office would entail.

The unauthorised and fictitious companies will then be prevented from deceiving the public, since any one may obtain

from the registrar the information as to any *bonâ fide* company and may ascertain the powers and standing of such company in the same manner as if the company had obtained its charter under provincial authority.

Perhaps that knowledge could be procured in applying to the Dominion authorities; but who is going to inform the person desirous of procuring that information that the company is a federal one? It might be a foreign or provincial company. Besides, the distances in our country are so great that each Province should have in its capital the necessary data as to the existence, the status and the capacity of any company.

That provision concerning registration is a law of general application enacted under the powers conferred by s. 92, and there is nothing in it which may deprive a federal company of its status and powers.

The obligation for a federal company to take out a license from and pay a tax to the provincial authorities is also a law of general application; it and the companies incorporated locally have to pay for it just as well as the companies incorporated outside the Province.

In the case of *Bank of Toronto* v. *Lambe* (1897), 12 App. Cas. 575, that question has been decided. It was there held that though the banks are incorporated by the Dominion Parliament, they may be bound to contribute to the public objects of the Provinces where they carry on business.

That same principle was affirmed by the Privy Council in the *Brewers & Maltsters'* case, [1897] A.C. 231, where the Ontario Liquor License Act, which provided that no person should sell any liquors for consumption in the Province without having first obtained a license was held to be valid.

The judgment of the inferior Courts in the present cases, which decided that ss. 23 and 25 of the Saskatchewan Companies Act were valid and *intra vires*, are well founded.

The appeal should be dismissed.

MIGNAULT, J.:—These three appeals were argued together and the question is as to the validity of ss. 23 and 25 of the Companies Act, 1915 (Sask.), c. 14. [Mignault, J.

That Act was passed after the decision of the Privy Council in the case of *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353,

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. THE KING.

Mignault, J.

[1915] A.C. 330, and the intention was, no doubt, to conform to the rules therein stated. Whether the legislature has done so is the question which has now to be decided.

In my opinion in the case of the *Great West Saddlery Co., Ltd.* v. *Davidson*, p. 404, *post*, I have stated the test, derived from the decision of the Privy Council in the *John Deere Plow Co.* case, *supra*, according to which the validity of such legislation must be determined. This test is whether a Dominion company is compelled to obtain a license and to be registered in a province as a condition of exercising its powers.

The material sections of the Saskatchewan statute, which essentially differs from the Manitoba Companies Act referred to in the other case, are ss. 23, 24, 25, 26, 27, 28 and 30, which are in the following terms:—

23. Any company, whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object and carrying on business in Saskatchewan, shall be registered under this Act.

(2) Any unregistered company carrying on business, and any company, firm, broker or other person carrying on business as a representative, or on behalf of such unregistered company, shall be liable on summary conviction, to a penalty not exceeding $50 for every day on which such business is carried on in contravention of this section, and proof of compliance with the provisions of this section shall be at all times upon the accused.

(3) The taking of orders by travellers for goods, wares or merchandise to be subsequently imported into Saskatchewan to fill such orders, or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in Saskatchewan, shall not be deemed to be carrying on business within the meaning of this Act.

24. Any company may become registered in Saskatchewan for any lawful purpose on compliance with the provisions of this Act and on payment to the registrar of the fees prescribed in the regulations;

Provided that the registrar may in the case of all companies (other than those incorporated by or under the authority of an Act of the Parliament of Canada) or proposed companies refer the application to the Lieutenant-Governor in Council who may refuse registration at his discretion, and in the case of refusal such company, or proposed company shall not be registered.

25. Every company may, upon complying with the provisions of this Act and the regulations, receive a license from the registrar to carry on its business and exercise its powers in Saskatchewan.

(2) Such license shall expire on the thirty-first day of December in the year for which it is issued, but shall be renewable annually upon payment of the prescribed fees.

(3) A company receiving a license from the registrar may, subject to the provisions of its charter, Act, or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act.

(4) There shall be paid to His Majesty, for the public use of Saskatchewan, for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor in Council.

(5) Every company which carries on business in Saskatchewan without a license, and every president, vice-president, director and secretary or secretary-treasurer of such company, shall be respectively guilty of an offence and liable on summary conviction to a penalty not exceeding $25 for every day the default continues.

26. Every incorporated company shall, before registration, file with the registrar a certified copy of its charter and by-laws, and a statutory declaration of the president, vice-president, secretary, or manager, that it is still in existence, and legally authorised to transact business under its charter.

27. The Lieutenant-Governor in Council may prescribe and from time to time alter, such regulations as he may deem expedient for the registration of all companies and may fix the fees and other payments to be made in connection with the administration of this Act, and such regulations shall have the same force and effect as if incorporated in and forming part of this Act.

(2) All regulations in connection with this Act shall be published in the *Saskatchewan Gazette*.

28. Every company not exclusively engaged in the business of banking, insurance, express, railways, telephones, telegraph, trust, loan, land, building, contracting, agencies, farming, ranching, employment, recreation, and such other business as may from time to time be determined by the Lieutenant-Governor in Council, shall, not later than the first day of January in every year, pay an annual fee prescribed by the regulations of the Lieutenant-Governor in Council.

30. Should the registrar not receive any fee prescribed by the regulations made by the Lieutenant-Governor in Council under this Act by the date such fee is due he shall send to the company in default a registered letter notifying it of its liability and at the expiration of a period of one month, should such fee remain unpaid, he shall, without further notice, cause the name of the company to be struck off the register and publish the fact in the *Saskatchewan Gazette*.

Provided that the liability of every director or officer or member of the company shall continue and may be enforced as if the name of the company had not been struck off the register.

It is to be noted that these sections apply to all companies, whether incorporated under the Saskatchewan statute or otherwise, and that the registrar does not appear to have the right to refuse registration to companies incorporated under the authority of an Act of the Parliament of Canada. There are no provisions, such as ss. 118 and 122 of the Manitoba Companies Act, prohibiting a Dominion company from carrying on business in the Province until it has obtained a license, and denying it access to the Courts to enforce contracts made by it while unlicensed.

The real point, to my mind, is not whether the appellant companies were required to register and to obtain a license but whether they were compelled to obtain registration and a license as a

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. DAVIDSON.

Mignault, J.

condition of exercising their powers in the Province of Saskatchewan.

They were, no doubt, required to register and to secure a license, and in default of registration they were subject to a penalty not exceeding $50 for every day on which they carried on business in contravention to s. 23, and in the case of their failure to take a license they were, under s. 25, subject to a penalty for carrying on business in Saskatchewan without a license not exceeding $25 for every day the default continued.

The form of expression in s. 25 is not exactly the same as in s. 23, but the effect of both sections is that if these companies carry on business in Saskatchewan without having registered or without having obtained a license, they incur a separate penalty for each day they so carry on business.

Do these provisions amount to compelling these companies to register and obtain a license as a condition of exercising their powers in Saskatchewan? As I have said, there is nothing here, as in the Manitoba Act, prohibiting an unlicensed Dominion company from carrying on business or depriving it of the power to sue on contracts made by it in pursuance of its business. But inasmuch as carrying on business without registration and without a license is made an offence punishable by a fine, it is argued that this business is thereby made illegal so that no right to sue on a contract made under these circumstances would exist by law.

It is to be noted that in the *John Deere Plow Co.* case, 18 D.L.R. 353, [1915] A.C. 330, the B.C. Companies Act under consideration contained a similar provision (s. 167) to ss. 23 and 25 of the Saskatchewan statute, and the Judicial Committee, at p. 357 (18 D.L.R.), after mentioning, among other provisions of the B.C. statute, s. 167, said:—

> What their Lordships have to decide is whether it was competent to the Province to legislate so as to interfere with the carrying on of the business in the Province of a Dominion company under the circumstances stated.

And after discussing ss. 91 and 92 of the B.N.A. Act they add, at p. 361:

> It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the Province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.

Their Lordships did not attempt to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by provincial legislation, although they stated that a Dominion company could not refuse to obey the status of a Province as to mortmain, or escape the payment of taxes, although these may assume the forms of requiring, as a method of raising a revenue, a license to trade which affects a Dominion company in common with other companies. Somewhat tentatively they added that it might have been competent to the legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated in the Province to register for certain limited purposes, such as the furnishing of information.

The Saskatchewan statute applies to all companies whether incorporated in the Province or otherwise. The registration required by s. 23 does not *per se*, as I read the statute, furnish any information, but it is enacted by s. 34 that, not later than March 1, in each year after its registration, the company shall furnish certain particulars to the registrar. It is obvious, however, that the statute was drafted with the purpose of bringing it well within the rules laid down in the *John Deere Plow Co.* case, 18 D.L.R. 353, [1915] A.C. 330.

I now come back to the question which I stated above, whether ss. 23 and 25 compel the appellant companies to register and obtain a license as a condition of exercising their powers. My difficulty to answer this question in the affirmative is that, under the holding in the *John Deere Plow* case, *supra*, the Province can for the purpose of raising a revenue, require a license to trade which affects a Dominion company in common with other companies. If so it can impose a penalty for failure to take out the license (B.N.A. Act, s. 92, sub-s. 15). Can this penalty be imposed for each day during which the company carries on business without taking out a license? Inasmuch as the Province can, for revenue purposes, require the taking out of a license to trade, as decided in the *John Deere Plow* case, *supra*, it follows that it can impose a penalty for trading without such license, and therefore for each day during which the unlicensed company carries on trade. This does not give to ss. 23 and 25 of the Saskatchewan statute the effect of compelling the appellant companies to register and to obtain a

CAN.
S. C.
THE GREAT WEST SADDLERY CO. v. THE KING.
Mignault, J.

license as a condition of exercising their powers. These companies, with all other companies, are compelled to take out a license to trade and to pay therefor the fees prescribed by the Lieutenant-Governor in Council, and their liability to pay the penalty is not due to the fact that they are exercising their powers under their charters but that they are carrying on business without taking out a license to trade.

The appellants complain that the basis of the registration fee is the nominal or authorized capital of the company without regard to the amount paid thereon or the amount employed in the Province. This may be objectionable, but I cannot see how it can affect the question of jurisdiction.

I would, therefore, think that ss. 23 and 25 of the Saskatchewan Companies Act are not *ultra vires*, and that the appeals of the appellant companies should be dismissed with costs.

Appeal dismissed with costs.

CAN.
S. C.

THE GREAT WEST SADDLERY Co. v. DAVIDSON.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 6, 1919.

CONSTITUTIONAL LAW (§ II A—194)—DOMINION COMPANIES—MANITOBA COMPANIES ACT (R.S.M. 1913, c. 35)—LICENSE TO DO BUSINESS IN PROVINCE.

A Province has power under s. 92 of the British North America Act to compel, under penalty, extra provincial corporations, including Dominion companies, to take out a license as a condition of doing business in the Province. Part IV. of the Manitoba Companies Act, R.S.M. 1913, c. 35, is *intra vires* the Legislature.

[*John Deere Plow Co.* v. *Wharton* (1914), 18 D.L.R. 353; [1915] A.C. 330, distinguished; see also *Mickelson* v. *Mickelson* (1916), 28 D.L.R. 307; *The Companies Case*, 26 D.L.R. 293, [1916] 1 A.C. 598; *The Insurance Case*, 26 D.L.R. 288, [1916] 1 A.C. 588; *Bonanza Creek Case*, 26 D.L.R. 273, [1916] 1 A.C. 566, and annotations in 18 D.L.R. 364, and 26 D.L.R. 295.]

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba (1917), 35 D.L.R. 526, affirming the judgment at the trial in favor of the plaintiff.

This appeal raises the same question as that in the case immediately preceding.

The material provisions of the Manitoba Companies Act, the validity of which is in question, are the following:—

106. In this part, except where the context requires otherwise, the expression "corporation" means a company, institution or corporation

created otherwise than by or under the authority of an Act of the Legislature of Manitoba.

108. Corporations of the classes mentioned in this section are required to take out a license under this part, viz.:

Class V—Corporations (other than those mentioned in section 107) created by or under the authority of an Act of the Parliament of Canada, and authorized to carry on business in Manitoba;

Class VI—Corporations not coming within any of the foregoing classes.

118. No corporation coming within Class V or VI shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such corporation, carry on any of its business in Manitoba unless and until such corporation has received such license and unless such license is in force; provided that taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative and no office or place of business in Manitoba, shall not be deemed a carrying on of business within the meaning of this part; provided also that the onus of proving that a corporation has no resident agent or representative and no office or place of business in Manitoba shall, in any prosecution for an offence against this section, rest upon the accused.

122. If any corporation coming within Class V or VI shall, contrary to the provisions of s. 118, carry on in Manitoba any part of its business, such corporation shall incur a penalty of fifty dollars for every day upon which it so carries on business, and so long as it remains unlicensed under this part it shall not be capable of maintaining any action, suit or other proceeding in any Court in Manitoba in respect of any contract made in whole or in part within Manitoba in the course of or in connection with business carried on contrary to the provisions of said s. 118; provided, however, that upon the granting or restoration of the license, or the removal of any suspension thereof, such action, suit or other proceeding may be maintained as if such license had been granted or restored, or such suspension had been removed, before the institution thereof.

123. If any company, firm, broker, agent or other person shall, contrary to the provisions of s. 118, as the representative or agent of or acting in any other capacity for a corporation, carry on any of its business in Manitoba, such company, firm, broker, agent or other person shall incur a penalty of twenty dollars for every day upon which it, he or they so carry on such business.

119. No company, corporation or other institution not incorporated under the provisions of the statutes of this Province, shall be capable of acquiring, holding, mortgaging, alienating or otherwise disposing of or lending money on the security of any real estate within this Province, unless under license issued under any statute of this Province in that behalf. (See amendment 6 Geo. V., 1916, c. 20, ss. 4, 5.)

(2) The foregoing provisions of this s. 119 shall apply whether the said company, corporation or institution directly acquires, holds, mort-

CAN.

S. C.

THE GREATWEST SADDLERY CO. v. DAVIDSON.

gages, alienates, or otherwise disposes of, or lends money on the security of any real estate within the Province, or through any agent, personal or otherwise.

112. A corporation receiving a license under this part may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other creating instrument acquire, hold, mortgage, alienate and otherwise dispose of real estate in Manitoba and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under Part I of this Act, with power to carry on the business and exercise the powers embraced in the license . . . . . .

113. The powers of any corporation, licensed under the provisions of this part, with respect to acquiring and holding real estate, shall be limited in its license to such annual or actual value as may be deemed proper.

126. For a license to a corporation coming within Class V or VI, such corporation shall pay to His Majesty for the public uses of Manitoba such fees as may be fixed by the Lieutenant-Governor in Council, and no license shall be issued until the fee therefor is paid; provided that, with respect to a corporation carrying on outside of Manitoba an established business, when applying for a license under this part, the Lieutenant-Governor in Council may reduce the fee payable for such license to such sum as he may think just, having regard to the nature and importance of the business proposed to be carried on in Manitoba and the amount of capital proposed to be used therein. A corporation seeking a reduction under this section shall give to the Provincial Secretary such statements and information respecting its business and financial position as he may call for, and shall verify the same in such manner as he may require.

(2) There shall be paid to His Majesty for the public uses of Manitoba, upon transmitting to the Provincial Secretary the statement required by s. 120, the fee of five dollars if the capital stock of the corporation does not exceed the sum of one hundred thousand dollars, and a fee of ten dollars if the capital stock of the corporation exceeds the said sum of one hundred thousand dollars, and until such fee has been paid such statement shall be deemed not to have been made and transmitted as required by said section.

109. A corporation coming within Class V shall, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on its business and exercise its powers in Manitoba.

110. A corporation coming within Class VI may, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein.

121. If a corporation receiving a license under this part makes default in observing or complying with the limitations and conditions of such

license, or the provisions of the next preceding section, or the regulations respecting the appointment and continuance of a representative in Manitoba, the Lieutenant-Governor in Council may suspend or revoke such license in whole or in part, and may remove such suspension or cancel such revocation and restore such license. Notice of such suspension, revocation, removal or restoration shall be given by the Provincial Secretary in *The Manitoba Gazette*.

The trial Court and Court of Appeal held these provisions *intra vires*.

Wenegast, for appellant; *Lionel Davies*, for respondent; *Chrysler*, K.C., for the Saskatchewan Government; *C. C. Robinson*, for the Dominion of Canada; *Nesbitt*, K.C., and *Barton*, for the Province of Ontario.

DAVIES, C.J. (dissenting):—This is an appeal from the judgment of the Court of Appeal for Manitoba which, on an equal division of opinion amongst the Judges of that Court, upheld the judgment of the trial Judge affirming the constitutionality of those provisions of the Manitoba Companies Act which were in question in that case.

Davies, C.J.

The case was one in effect asking the Court to construe and apply to the sections in question of that Act the principles laid down by the Judicial Committee in the case of *John Deere Plow Co.* v. *Wharton* (1914), 18 D.L.R. 353, [1915] A. C. 330; which should govern and control provincial legislation with regard to Dominion companies.

Amongst those principles it was stated, at p. 360 (18 D.L.R.) by their Lordships of the Judicial Committee, that the "Province cannot legislate so as to deprive a Dominion company of its status and powers." Their Lordships went on, however, to state that this does not mean that the companies could exercise those powers in contravention of the laws of the Province generally, but simply that the status and powers of the Dominion company as such cannot be destroyed by provincial legislation, and they held that it followed from those premises that the provisions of the Act of British Columbia there in question, compelling the Dominion company to obtain a provincial license or to be registered in the Province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. DAVIDSON.

Davies, C.J.

Applying these principles and this conclusion of their Lordships to the case of the sections of the Manitoba statute now before us, I cannot reach any other conclusion than that these sections are *ultra vires*.

I have, in my reasons for judgment in the case before us on the Saskatchewan Companies Act, 6 Geo. V., 1915, c. 14, argued at the same time as this appeal was, stated shortly why I reached the conclusions that the sections there in question were not *ultra vires* of the Legislature excepting one section requiring the company carrying on business within the Province to take out a license from the Province to enable it to do so, and I there suggested that that one section might and should be construed as applicable only to foreign companies other than Dominion ones. In the case now before us, however, the legislation of Manitoba is entirely different from that of the Province of Saskatchewan, which latter legislation had been revised after the decision of the Judicial Committee in the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330, with the evident intention of complying with the principles laid down in that case.

It seems to be clear from the decision of the Judicial Committee in the *Wharton* case, *supra*, that while to some extent a Provincial Legislature may regulate and tax the activities within the Province of a Dominion company, it cannot for any purpose prohibit or restrict its entry into the Province or its carrying on business there.

The primary question then with respect to this Manitoba legislation is whether the provisions of Part IV. of its Companies Act, purporting to confer upon such companies when a provincial license has been obtained, and while it is in force, power to carry on business in Manitoba, exercise their powers, enforce their legal rights in the Courts on contracts or otherwise and hold land necessary for their business and *until the license has been granted* or *after it has ceased to be in force to prohibit them from doing any and all of these things*, are *ultra vires* of the Provincial Legislature.

In my opinion, such legislation, if upheld, would directly deprive the company of its status and powers conferred upon it by its Dominion charter and is clearly contrary to the principles

laid down by the Judicial Committee in the *Wharton* case, *supra*, as those which should control and prohibit provincial legislation with regard to Dominion companies.

The provisions of Part IV. of the Companies Act of Manitoba are, it is true, not identical with those of the British Columbia Act condemned by the *Wharton* decision, but with the exception of s. 18 of the Act of B.C. empowering the registrar to refuse a license under certain circumstances to a Dominion company, they are substantially the same.

I agree with the contention of Mr. Robinson, counsel for the Dominion Government, that the decision in the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330, did not rest upon s. 18 or upon the fact that under it the registrar had refused a license to the appellant. The Lord Chancellor, in the report of that case, 18 D.L.R. at p. 357, states the question for determination by their Lordships to be whether legislation prohibiting unlicensed companies from suing in the Province and penalizing the carrying on of their business there and prohibiting the licensing of a company with the same name as one already in the Province was valid legislation. At p. 361 he answers his questions as follows:—

> It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the Province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.

The passage in the judgment at p. 362 (D.L.R.), where their Lordships indicate what legislation would have been competent to the Province, shews clearly that the whole of the legislation there in question and not merely s. 18 of the B.C. statute was decided to be beyond the provincial powers.

For these reasons and for those stated by Perdue, J., in the Court of Appeal, with which I fully agree, I am of opinion that this appeal should be allowed with costs and the questions with respect to the validity of the sections of the Manitoba Act answered as indicated by Perdue, J.

IDINGTON, J., dismissed the appeal for the reasons given in *The Great West Saddlery Co.* v. *The King*, page 391 *ante*. Idington, J.

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. DAVIDSON.

Anglin, J.

ANGLIN, J.:—Not, I confess, without some hesitation I have reached the conclusion that this appeal should be dismissed. A vital difference, in my opinion, between the Manitoba Act now under consideration and the British Columbia statute dealt with in *John Deere Plow Co.* v. *Wharton* (1914), 18 D.L.R. 353, [1915] A.C. 330, lies in the absence from the former of any provision similar to s. 18 of the B. C. Act (s. 6, c. 3, stats. of 1912), which enabled the registrar to refuse a license to any Dominion company whose name resembled that of an existing company, society, or firm carrying on business, or calculated to deceive, or otherwise, in his opinion, objectionable. The refusal to grant a license under this provision was the ground of complaint in the *Wharton* case, *supra*. The Manitoba Act, on the other hand, by s. 109, expressly provides that the right of a Dominion company—which, in this respect, differs from any other extra provincial company (s. 110)—shall be absolute.

I cannot but think that the condemnation in the *Wharton* case, *supra*, of several sections of the B.C. Act prohibiting an unlicensed Dominion company from carrying on business, denying to it the aid of the Provincial Courts, etc., depended largely, if not entirely, on the fact that the obtaining of a license by such a company was not made an absolute right under the statute but rested in the discretion of the registrar. These sections were not condemned by the Judicial Committee without qualification, but only "in their present form," 18 D.L.R. 363. It was the discretion which s. 18 purported to vest in the registrar that, if valid, would amount to an interference "with the carrying on of the business in the Province of a Dominion company," 18 D.L.R. at p. 357, that would enable that provincial official to deprive a Dominion company of its status and powers. Short of such interference or deprivation, the right of the Province to subject Dominion companies, in common with others, to taxation and to registration for purposes pertaining to the administration of justice or to civil rights in the Province, such as the holding of property and the making of contracts, is fully recognized by their Lordships (pp. 361 and 362) and the exercise of such control may take the form of requiring the Dominion company, like others, to take a license to trade from the Pro-

vince. The power to exact compliance with legislation of that character implies the right to enforce it by appending appropriate sanctions. So long as the Dominion company, by paying the tax imposed or by making the entry required, has the absolute right to obtain the provincial license its status as a company is unimpaired and the exercise of its powers and functions is not unduly fettered.

Of course a Province may not, under the guise of taxation, or of the exercise of any of its powers under s. 92 of the British North America Act, in substance and reality require a Dominion company to re-incorporate or otherwise to acquire from it anything in the nature of status, capacity or powers. The "pith and substance" of the legislation must be taken into account. But I agree with the views expressed by Meredith, C.J.O., in *Currie* v. *Harris Lithographing Co.* (1917), 41 D.L.R. 227 at pp. 241-2; 41 O.L.R. 475, 490-1, as to what should be the attitude of the Court in approaching the consideration of this phase of the case. Dealing with them in the spirit indicated by the Chief Justice I incline to accept the view of Cameron, J., that the concluding words of s. 111 of the Manitoba statute, "such limitations and conditions as may be specified in the license," which would otherwise be a source of embarrassment, should be held to relate only to the other "foreign" companies falling under s. 110, which contains corresponding terms, and not to Dominion companies excluded from the application of s. 110 and specially provided for by s. 109, which entitles them to be licensed without qualifications.

Approaching the Manitoba statute with a view of upholding it, if by fair consideration of them the impeached provisions can be brought within the provincial legislative powers—I think they may be regarded as an exercise of the powers of direct taxation and in regard to the administration of justice and the control of civil rights conferred on the Provincial Legislatures by s. 92 of the B.N.A. Act and as not involving such an interference with status, capacity or powers of Dominion companies as would bring them within the condemnation of the Judicial Committee in the *Wharton* case, 18 D.L.R. 353; [1915] A.C. 330.

BRODEUR, J.:—The appellant company is incorporated under

Brodeur, J.

CAN.
S. C.
THE GREAT WEST SADDLERY CO. v. DAVIDSON.
Brodeur, J.

the authority of the Companies Act of Canada (R.S.C. c. 79) and is empowered to carry on its business throughout the Dominion of Canada and with its head office in Winnipeg, in the Province of Manitoba.

By the provisions of the Companies Act of Manitoba (R.S.M. c. 35, ss. 106 to 130) which deal with extra provincial corporations, a license has to be applied for by all those corporations to the provincial authorities; the license will have to be obtained before these corporations can carry on business in the Province and they will not be authorized to acquire and hold real estate in the Province, except to the amount and the value mentioned in the license.

The appellant company not having applied for such a license, the respondent, Davidson, one of its shareholders, has instituted an action to force the company to take such a license and the Att'y-Gen'l of Manitoba has intervened in support of that action and to maintain the validity of those provisions which were attacked by the appellant company. It is claimed by the latter that the decision of the Privy Council in the case of *John Deere Plow Co.* v. *Wharton, supra,* sustains their contention.

The *John Deere Plow Co.* case, 18 D.L.R. 353; [1915] A.C. 330, has reference to the construction of the Companies Act of B. C. which empowered the provincial authorities to refuse to a federal company the right to carry on business on the ground that there was another company of the same name upon the local register. The evidence shewed that the John Deere Plow Co. had applied for a license and that its application had been refused.

Such a legislation and action affected the status of the company itself though it had been incorporated by the Dominion authorities; and the Privy Council decided, 18 D.L.R. 353; [1915] A.C. 330, that the legislation was *ultra vires* of a Provincial Legislature.

There is between the B.C. legislation and the Manitoba legislation a vast difference. While the B.C. legislation gave the provincial authorities the power to refuse the license (s. 18 B.C. statutes) the Manitoba statute declared on the contrary (ss. 108-109), the corporations created under the authority of the Parlia-

ment of Canada and authorized by their Act of incorporation to carry on business in Manitoba are entitled to receive a license to carry on their business.

What is the nature of that license?

It is a method of taxation by which to secure a revenue for the purposes of the Province. All the companies, whether incorporated by the local Legislature, or by the Dominion Legislature, by any foreign state or any other provincial authority, are bound to pay the same license in proportion to their capital.

The object of this legislation is also to keep the public informed as to the status of those companies. They have to file a certified copy of their charter; they are authorized to transact business under their charter; they must have in the Province an agent to accept service of process in all suits, except in the case when the head office of the company is in the Province, and to publish at their expense in the *Official Gazette* and in a newspaper the fact that they are duly authorized to carry on business in the Province.

It is of the utmost importance for a person who contracts with a corporation to know the legal status of the latter and to see whether the contract contemplated is within the powers granted to the company by its Act of incorporation or its letters patent.

The unauthorized and fictitious companies will then be prevented from deceiving the public since any one may obtain from the Provincial Secretary information as to any *bonâ fide* company and may ascertain the powers and standing of such company in the same manner as if the company had been incorporated by the provincial authority. Perhaps that knowledge could be procured in applying to the Dominion authorities, but who is going to inform the person desirous of procuring that information that the company is a federal company? It might be a foreign or provincial company. Besides, the distances in our country are so great that each Province should have in its capital the necessary data as to the existence, the status and the capacity of any company.

The obligation for a federal company to take out a license under the Manitoba statute is a law of general application. The

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. DAVIDSON.

Brodeur, J.

companies incorporated locally have to pay just as well as the companies incorporated outside of the Province.

In the case of *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, that question has been decided. It was there held that though the banks are incorporated by the Dominion Parliament, they may be bound to contribute to the public objects of the Provinces where they carry on business.

It is contended by the appellant that its status as a federal company is affected because the law provides that before carrying on business it is bound to take a license.

There is a distinction to be made when it is said that a company will not trade in a district and that a company, if it does so, must have a license.

That question came up in the case before the Privy Council in 1897, of the *Brewers & Maltsters* v. *Attorney-General*, [1897] A. C. 231. It was the case of a Dominion company incorporated by a Dominion charter and authorized by a Dominion license to manufacture liquor in all the Provinces of the Dominion. The Ontario Legislature passed an Act declaring that before a person could sell liquor in Ontario he would have to take a license from the provincial authorities. That legislation was held valid.

I am unable to distinguish this case from that decided by the Privy Council.

It is contended also that the legislation is *ultra vires*, because there is a restriction as to the powers of this federal company to hold real estate in the Province.

That contention is disposed of by the judgment of the Privy Council in the case of *Colonial Building Assoc.* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157 at p. 164.

In the *John Deere Plow Co.* case, 18 D.L.R. 353; [1915] A.C. 330, so much relied upon by the appellant, Haldane, L.C., who delivered the judgment said on that point, at p. 362:—

> Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to mortmain (*Colonial Building & Investment Association* v. *Attorney-General of Quebec*) (1883), 9 App. Cas. 157, at p. 164, or escape the payment of taxes even though they may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*) (1887), 12 App. Cas. 575.

That expression of views disposes, in my opinion, of the con-

tentions of the appellant company. Its appeal fails and it should be dismissed with costs.

MIGNAULT, J. (dissenting) :—I so fully agree with the reasons for judgment of Perdue, J., of the Court of Appeal of Manitoba, that it does not seem necessary to state at any length why I am in favor of allowing this appeal.

In expressing my opinion I shall strictly confine myself to the concrete case which is before this Court and avoid stating general rules governing, in matters of company legislation, the jurisdiction of the Dominion Parliament or of the Provincial Legislatures, the more so as the Judicial Committee of the Privy Council has formulated, in the case of the *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353; [1915] A.C. 330, a plain rule whereby the present controversy can be decided.

The test of the validity of the Manitoba statute can therefore be stated, in the language of their Lordships in the *John Deere Plow Co.* case, at pp. 360 and 361, as follows:—

> It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation . . .
>
> It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the Province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the Province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the Province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

Applying this test to the legislation in question which was adopted before the *John Deere Plow Co.* case, *supra*, was decided, there can be no doubt that it cannot be sustained. I am here satisfied to adopt the statement of the purport and effect of this legislation made by Perdue, J.:—

CAN.

S. C.

THE GREAT WEST SADDLERY CO. v. DAVIDSON.

Mignault, J.

In the Manitoba Companies Act, Part IV., the expression "corporation" means a company, institution or corporation created otherwise than by or under an Act of the Legislature of Manitoba (s. 106). Corporations created by or under the authority of an Act of the Parliament of Canada and authorized to carry on business in Manitoba, referred to as Class V., are required to take out a license (s. 108). To this there are certain exceptions, but these do not include the defendant. Class VI. includes corporations not coming within the preceding five classes. A corporation coming within the class to which the defendant belongs shall, upon complying with the provisions of Part IV. and the regulations made thereunder and paying the fee required, receive a license to carry on its business and exercise its powers in Manitoba (s. 109). A corporation coming within the class to which the defendant belongs or within Class VI. "may upon complying with the provisions of this part (Part IV.) and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein." See s. 110. A corporation receiving a license may, subject to the limitations and conditions of the license and of its own charter, acquire, hold and dispose of real estate in Manitoba (s. 112); but it shall not be capable of acquiring or disposing of real estate unless it has been licensed (s. 119). No corporation coming within the class which includes defendant shall carry on any of its business in Manitoba unless a license has been granted to it and is in force, and no agent of the corporation may carry on its business in Manitoba until a license has been obtained; exception is made in regard to buying or selling by travellers or correspondence where the corporation has no resident agent or place of business in Manitoba (s. 118). If such a corporation carries on business in Manitoba without a license it shall incur a penalty of $50 a day and, so long as it remains unlicensed, it shall not be capable of maintaining any action, suit or proceeding in any Court in Manitoba in respect of any contract made in whole or in part in Manitoba (s. 122). If its agent carries on any of the business of such

a corporation in Manitoba while it is unlicensed he shall be liable to a penalty (s. 123).

This legislation, no doubt, differs in degree from the B.C. statute, the validity of which was questioned in the *John Deere Plow Co.* case, 18 D.L.R. 353; [1915] A.C. 330, but it clearly fails when the jurisdiction of the Manitoba Legislature is measured by the test laid down in that case. This statute compels the appellant company to obtain a license and to be registered *as a condition of exercising its powers and of suing in the Courts.* This the Legislature could not do.

It has been contended that this is a taxation measure and as such was one which it was competent for the Legislature to enact. It is further urged that the Province has exclusive mortmain jurisdiction and that, therefore, it is for it alone to determine the conditions under which a Dominion corporation can acquire and hold property.

I think the answer is obvious. Granting the jurisdiction of the Province in these matters, the Province cannot, in my opinion, so exercise this jurisdiction as to deprive a Dominion company of its status or powers. In other words, it cannot, in imposing taxation, prevent the company from exercising its powers until it has paid the taxes imposed. Nor can it, as was done by this statute, deprive the company of its power and capacity to acquire, hold and dispose of real estate in Manitoba, or to carry on its business, unless and until a provincial license is obtained.

To decide otherwise and to sustain the validity of such a statute would in effect restrict the power of the Dominion Parliament to the creation of the company and the enumeration of its powers, but the company would find itself paralyzed and its powers would be inoperative so long as it had not complied with the requirements exacted by the Province. I cannot think that the Judicial Committee ever contemplated, in the *John Deere Plow Co* case, *supra,* that this could be done.

I would allow the appeal and answer the first four questions in the negative and the fifth question in the same manner as Perdue, J. The respondent's action and the interventions of the Att'ys-Gen'l of Ontario and Manitoba should be dismissed.

Appeal dismissed with costs.

ONT.

S. C.

HOLLAND v. TOWN OF WALKERVILLE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. May 8, 1919.

MUNICIPAL CORPORATIONS (§ II G—235)—HIGHWAYS—SURFACE WATER—DAMAGE TO BUILDING—EXCAVATION—LICENSE—LIABILITY.

The Ontario Municipal Act (R.S.O. 1914, c. 192, ss. 406a, 483) confers no power upon a municipal corporation to give a license to make excavations on a highway in the course of building operations by an abutting owner; and where the latter, on the assumption that the license gave him the right, did make such excavations, in consequence whereof a wall of the building fell in from the accumulation of water on the highway, the injury will be deemed occasioned by his own unlawful act and he has no recourse against the corporation.

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages for injury to the plaintiff's building, in the town of Walkerville, by water, caused, as the plaintiff alleged, by the negligence of the defendant town corporation.

The judgment appealed from is as follows:—Holland owned land at the corner of Assomption street and Lincoln road in Walkerville. On this he erected a large building with stores below and flats above, extending east along the south side of Assomption street from Lincoln road to an alley in the rear. Early in the construction, the rear wall along the alley fell in, and had to be rebuilt, and then fell in a second time, and was again rebuilt. It is said that this was caused by rain and surface water which were caused to flow into the alley by reason of the pavement constructed by the municipality upon Assomption street and by water cast upon the alley from adjoining buildings across the alley—that the "corporation was negligent in permitting the buildings to be constructed so as to cast waters upon the alley in considerable volume."

When the claim was first put forward, it was alleged that the wall had been carried away three times, and not twice, and traces of this dishonesty persist in the evidence put forward at the trial.

I have come to the conclusion that the view I expressed at the trial should prevail, and that the falling of the wall is not to be attributed to anything for which the municipality is responsible.

When Holland started to build, he intended the brick foundation wall to go to the boundary of his property; and, to enable this to be erected, he, without any colour of right, excavated the soil of the street and the alley some distance beyond his property line. On the alley side some soil fell in and had to be removed; and, when the wall was built, he filled in earth in this excavation. This

earth, lacking cohesion when wet, exerted very substantial pressure inward upon the wall, which was not fully hardened and which lacked weight and support, and so it fell. The cause was satisfacto ily given by the defendant corporation's witnesses.

Assomption street is graded downward from the lane from the point where the alley enters it, and the alley now paved was then unpaved and sloped to the street from a point about 50 feet from the street-line. The kerb having been cut away to afford an entrance to the alley from Assomption street pavement, there seems to be a hollow in the pavement which catches the rain as it falls, and which is imperfectly drained, but this was not the cause of the so-called "rush of water." In the heavy rain there was water in the lane upon the surface from the natural drainage and from the roof of the shed and barns. This, no doubt, settled into the soft earth of the excavation unlawfully made by Holland in the lane, and was ample to accomplish the result. There was no great flood —just an ordinary heavy thunder-shower.

The action fails and must be dismissed.

J. H. Rodd, for the appellant.

John Sale, for the defendant corporation, respondent, was not called upon.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—Mr. Rodd has presented his case very fully and fairly, but we think the points taken in the course of the argument are fatal to him. Meredith, C.J.O.

First, we think that there was no authority in the corporation to give a license to the appellant to interfere with the highway. The sections of the Municipal Act that have been referred to—secs. 406*a*., sub-sec. 3(*a*), and 483*—shew that the power of the

*Section 406*a*. was added to the Municipal Act, R.S.O. 1914, ch. 192, by the Municipal Amendment Act, 1914, 4 Geo. V. ch. 33, sec. 13. It provides that "by-laws may be passed by the councils of cities" (see a further amendment by the Municipal Amendment Act, 1917, 7 Geo. V. ch. 42, sec. 16) for certain purposes, among which is:—

"3. (*a*) For permitting the use of a portion of any highway or boulevard by the owner or occupant of land adjoining such highway or boulevard during building operations upon such land for the storage of materials for such building or for the erection of hoardings."

Section 483 of R.S.O. 1914, ch. 192, enacts that by-laws may be passed by the council of every municipality for certain purposes, among others:—

"1. For setting apart portions of the highways . . . for the purpose of boulevards . . .

"3. For permitting the owners of lands to make, maintain and use areas under and openings to them in the highways and sidewalks . . . .

(This is amended by the Municipal Amendment Act, 1917, 7 Geo. V. ch. 42, sec. 22, giving authority to permit the construction of a bridge across a highway.)

ONT.
S. C.
HOLLAND v. TOWN OF WALKERVILLE
Meredith, C.J.O.

corporation is limited to giving a right to put up what is known as a hoarding for the storage of materials. It is a limited right, and confers power to do no more than that.

Then I think, even if there had been power, still the difficulty in the way of the appellant is that no proper authority was given to him to do what he did. It is said that it was given by the inspector or some official of the corporation, but there is the significant fact that a permit was obtained from that officer, and it contains no such authority—it is simply an ordinary building permit, and gives only the right to occupy with a hoarding a portion of the street for the purpose of building operations.

There is no ground upon which it could be held that this corporation had—if it had the power to do so—sanctioned what was done by the appellant. It was by reason of the unlawful act of the appellant himself that what happened became injurious to him.

Appeal dismissed with costs.

CAN.
S. C.

MITCHELL v. THE MORTGAGE COMPANY OF CANADA.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1919.

LANDLORD AND TENANT (§ I—3)—LEASE—REQUISITES—DEFINITE COMMENCEMENT OF TERM—STATUTE OF FRAUDS.

In order to satisfy the Statute of Frauds, and create a valid lease there must appear either in express terms or by reasonable inference from the language used, on what day the term is to commence and when it is to end. A memorandum which has inserted alternative time for the commencement of the term does not satisfy these conditions and is insufficient.

[*Mitchell* v. *Mortgage Co. of Canada* (1918), 43 D.L.R. 337. Affirmed.]

Statement.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, 43 D.L.R. 337, 11 Sask. L.R. 447, reversing the judgment of the trial Judge, and dismissing the plaintiff's action with costs. Affirmed.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

Eug. Lafleur, K.C., for appellant; *F. H. Chrysler*, K.C., for respondent.

Idington, J.

IDINGTON, J. (dissenting):—The authority given by the respondent in its telegram of Dec. 21, 1916, confirmed by its letter of Dec. 22, 1916, would seem to confer ample authority on

the alleged agents to make an agreement for a lease for five years subject to submission to the respondent of the tenders for repairs and improvements.

Pursuant thereto the agents on Jan. 27, 1917, and Jan. 30, 1917, reported all that seemed required as condition precedent and named appellant as proposed tenant.

To this respondent answered by a telegram on Feb. 5, 1917, as follows:

290 Garry Street.

Romeril, Fowlie & Co.,
Prince Albert, Sask.

What rental is Mr. Anderson prepared to pay for ground floor? Not given in your letter.

MORTGAGE COMPANY OF CANADA.

To this wherein the name of the proposed tenant was accidentally confused with that o fthe man tendering for the work to be done, the following reply was sent by the agents:—

Prince Albert, Sask.

Mortgage Company of Canada,
290 Garry Street,
Winnipeg, Man.

Ground floor one hundred month not including heat. Tenant John Mitchell, rush lease Avenue.

(Sgd.) ROMERIL, FOWLIE & CO.

On February 8, 1917, the appellant and the said agents of respondent agreed as evidenced by the following receipt:—

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars, being deposit on rental of St. Regis ground floor, building taken at $100.00 per mo., for a term of five years to start from completion of repairs or when handed over to Mitchell.

$50.00. ROMERIL, FOWLIE & CO.
A. ROMERIL.

The date is not given but that is supplied by the cheque of the appellant shewn to have been given at same time.

This documentary evidence read in light of the surrounding facts and circumstances leaves no doubt in my mind of a concluded contract sufficient to meet the requirements of the Statute of Frauds.

The date of the beginning of the term was made certain within the recognized maxim: *id certum est quod certum reddi potest.*

ONT.

S. C.

MITCHELL v. THE MORTGAGE COMPANY OF CANADA.

Idington, J.

Cases of this nature requiring certainty of the term of a lease are curiously enough those which the learned author of Brooms Legal Maxims puts in the foreground of his commentary on this maxim and cites in 7th ed., p. 465, as illustrative of the meaning of the maxim.

The only question raised by the Court of Appeal seems to have been the effect to be given the concluding words of the receipt "or when handed over to Mitchell" which that Court seems to have read as casting a doubt upon the certainty of meaning in the receipt.

I feel no difficulty in regard thereto for obviously there is nothing more implied than if there had been added to the preceding language a stipulation that in the event of the parties agreeing on another date that might by consent be substituted for the operative words already used, which in themselves were binding.

These words on which stress is laid are clearly, as Counsel for appellant suggests, mere surplusage.

The bargain thus closed could not be affected by the later correspondence between respondent and its agents, which tried to introduce a term, previously unthought, of giving the right to the respondent to terminate by a three months' notice the five years' lease it was bound to give.

Nor could the doubt suggested later of the repairs and improvements contemplated throughout by the earlier correspondence being likely to exceed the estimate, affect the contract.

Any possible difficulty on that score was, as matter of fair dealing, removed by the offer of appellant to bear the extra expense.

The contract if need be might be read as one to spend at least the sum named in such repairs, alterations, or improvements and thus remove any difficulty of non-compliance with the Statute of Frauds which might in law attach to the verbal offer of the appellant to bear such extra expense.

The question of the agents signing their own name instead of the respondent's was not very seriously pressed in argument, but is amply answered by the authorities cited in Leake on Contracts, 4th ed., 189; and in Fry on Specific Performance, 4th

ed., 236: and see also the case of *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, and the case of *Fred Drughorn Limited* v. *Rederi Aktiebolaget Transatlantic*, 120 L.T. 70.

I do not think we are bound to exercise our mental ingenuity to find excuses for anyone pursuing the course respondent saw fit to pursue.

The appellant if confined to a claim for specific performance might be sufficiently met by some of these subterfuges but I submit it had broken a pretty plain obvious agreement and should pay the damages thereby suffered.

The appeal should be allowed and the judgment of the trial Judge restored with costs here and below.

DUFF, J.:—The contract, if there was one, between the appellant and the respondent was that a certain building, of which the respondent was the proprietor, should be altered in certain respects; and that on the date of the completion of the alterations the appellant should receive and accept a lease of part of it for five years, subject to determination on three months' notice. This contract as a whole would be a contract within the fourth section of the Statute of Frauds, the agreement to make the changes being in part consideration for the undertaking by the appellant to accept the lease.

I am inclined to think that the provision as to determination upon notice is not sufficiently evidenced in writing, but assuming it to be so, it is quite evident that it is at least doubtful whether the respondent's agents had authority to undertake to effect alterations at a cost greater than $800, and there is no doubt that when it was discovered that the cost of the projected alterations would exceed this figure both the appellant and the company's agents proceeded to negotiate afresh, treating the whole matter as at large. An understanding between them was reached, but the conclusion I have arrived at, after carefully reading the statement of February 15, and the letters of the 20th and 24th of the same month, is that there is too much indefiniteness in the expressions used in relation to the subject of alterations to enable one to say that the beginning of the contemplated term is ascertained by reference to the date of the

CAN.
S. C.
MITCHELL
v.
THE MORTGAGE COMPANY OF CANADA.
Brodeur, J.

"completion of repairs" within the meaning of the memorandum of February 20.

The appeal should be dismissed with costs.

ANGLIN, J.:—I concur with Duff, J.

BRODEUR, J. (dissenting):—This is an action for specific performance of an agreement for a lease or for damages. The property in question is on the ground floor of a property known as the St. Regis Hotel in the Town of Prince Albert, Saskatchewan. It had been for a few years without any tenant and was probably in a very dilapidated condition. The respondent was the owner of it and as its office is in Winnipeg it had instructed the firm of Romeril, Fowlie & Co., of Prince Albert, to rent the ground floor of the building, the company undertaking to make some repairs not to exceed $1,000, and they wrote them on Dec. 22, 1916, that they would "rent the ground floor at $100 per month, we to do the repairing to the plumbing and heating, and any other repairs that are absolutely necessary."

On February 8, those agents agreed with the appellant to rent that property and gave him the following receipt:

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars being deposit on rental of St. Regis ground floor, building taken at $100 per mo., for a term of five years to start *from completion of repairs or when handed over to Mitchell.*

$50.00. ROMERIL, FOWLIE & Co.,
A. ROMERIL.

It appears that the appellant intended to carry on on those premises a restaurant and that a man named Maclean, who was keeping a restaurant in the vicinity, did not like the idea of having a competitor in his neighborhood and tried to obtain the lease for himself, offering to pay part of the repairs and also to give a larger rent.

Those new offers evidently tempted the respondent; and, disregarding the most elementary principles of honesty, it accepted the proposition to lease the property to Maclean.

Being sued by Mitchell for specific performance or for damages, it was condemned by the trial Judge to pay a sum of $550 in damages.

The Court of Appeal, 43 D.L.R. 337, 11 Sask. L.R. 447, reversed that judgment on the ground that the agreement was

not a concluded agreement which would satisfy the Statute of Frauds and that the receipt given by the real estate agents did not specify the date at which the lease would start.

The respondent pleaded also that the agents had no authority to give the receipt which they had given to the appellant; but the two Courts below decided against it in that respect and that point was not very strongly pressed at the argument. There is no doubt that Romeril, Fowlie & Co. were the agents of the respondent, that they had been instructed to lease the property in question for a sum of $100 per month and that they had agreed to do some repairs and alterations in order to render the property habitable; and there is nothing in the receipt which would induce one to question the authority of the agents. It must be stated to credit of the agents that they had been urging upon the respondents to carry on their agreement with Mitchell; but evidently the temptation of having a larger sum of money was too strong for the honesty of the company.

There is no doubt that it is essential to the validity of a lease that it shall appear on what day the term is to commence. There must be a certain beginning: otherwise it would not be a perfect lease, and in a contract for lease, in order to satisfy the Statute of Frauds, the term of commencement must be shewn. *Marshall* v. *Berridge* (1881), 18 Ch. D. 233.

But the commencement of the term may be collected from the memorandum or by reference to some of their writings. Then the question comes up whether we can collect from the language of the agreement at what date the lease was to commence.

In the case of *Oxford* v. *Provand* (1868), L.R. 2 P.C. 135, it was decided that where a certain amount of rental has to be paid from the date at which a building should be completed that those terms expressed with sufficient clearness the intention of the parties to bind themselves from the time it was made to do the several acts stipulated. Lamont, J., in the Court of Appeal admitted that, if the agreement provided simply that the term should commence when the repairs should be completed, the case of *Oxford* v. *Provand*, *supra*, would apply; but that by

CAN.
S. C.
MITCHELL
v.
THE MORTGAGE COMPANY OF CANADA.
Brodeur, J.

inserting in the receipt given by Romeril, Fowlie & Co. an alternative time for the beginning of the term it was impossible to hold that the commencement is fixed or can with reasonable certainty be concluded from the document.

The lease stated that the term was to start from the completion of the repairs or when the building was handed over to Mitchell. I would construe this language as meaning that the lease shall commence at the termination of the repairs; but if by a new agreement between the parties the property was handed over before or after the repairs were complete, in such a case the lease would start from the latter date. But I maintain that the primary agreement of the parties was that the rent should start from the date at which the repairs would be complete and that there is no reason then to distinguish the present case from the case of *Oxford* v. *Provand, supra.*

In those circumstances, I have come to the conclusion that the judgment of the trial Judge should be restored and the appeal allowed with costs of this Court and of the Court below.

Mignault, J.

MIGNAULT, J.:—The appellant sues for specific performance, or, in the alternative, for damages on a contract of lease which he alleges he made with the respondent of certain premises in the City of Prince Albert, Saskatchewan. The agents of the respondent for renting these premises were Romeril, Fowlie & Co., and assuming that the latter did rent the premises to the appellant, there is a question whether the agents did not exceed their authority by not stipulating the right of cancellation on giving three months' notice. I think however that for the decision of this case it will suffice to determine whether or not the writing on which the appellant relies satisfies the requirements of the Statute of Frauds. This writing is in the following terms:

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars, being deposit on rental of St. Regis ground floor, building taken at $100.00 per mo., for a term of five years to start from completion of repairs or when handed over to Mitchell.

$50.00.

ROMERIL, FOWLIE & Co.,
A. ROMERIL.

The rule to be applied has been authoritatively stated as follows:

It is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements. *Marshall* v. *Berridge* (1881), 19 Ch. D. 233, at p. 244.

Measured by this rule, the receipt relied on by the appellant evidently fails to satisfy the requirements of the Statute of Frauds. I doubt whether the parties ever intended it to be a memorandum witnessing a contract, or anything more than a receipt for the money paid by the appellant. Even if it can be looked on as a memorandum it is impossible to determine from it the time of beginning of the lease. The term of five years is stated "to start from completion of repairs or when handed over to Mitchell." These repairs are not described, nor is it said who is to make them. It is true that the respondent, in correspondence with the agents, expressed its willingness to spend on repairs the sum of $800, and that the agents, but only after the date of the receipt, sent it an estimate specifying certain repairs and improvements amounting to $1,122. When the respondent demurred at paying more than $800, the appellant says that he agreed to pay the excess in cost, over and above the $800, which would shew that the matter had not been finally closed by the receipt which imposed on him no such obligation.

But looking at this receipt, the time of commencement of the lease is not stated nor can it be inferred from its language. Could Mitchell be forced to take possession and pay rental before the repairs were completed? Or when these repairs, and they had not then been specified, were made, and a delay ensued before the premises were handed over to Mitchell, from which of the two events, the completion of the repairs or the handing over of the premises, would the five year lease begin? The receipt is too vague to permit any answer being given to these questions, and consequently it cannot be taken as complying with the Statute of Frauds.

The appellant relies on the decision of the Privy Council in *Oxford* v. *Provand* (1868), L.R. 2 P.C. 135, but I think that this decision is clearly distinguishable from the present case. In

CAN.

S. C.

MITCHELL v. THE MORTGAGE COMPANY OF CANADA.

Mignault, J.

Oxford v. *Provand*, *supra*, the Privy Council as a court of equity considered the surrounding circumstances and the conduct of the parties in dealing with the property comprised in an agreement vague in its language, in the interval between the making of the agreement and the commencement of a suit for its enforcement. The tenant, who attacked the memorandum, had before the suit taken possession and had sub-rented a part of the buildings referred to in the agreement as having to be constructed, or the building of which had then to be completed. I would have had no hesitation in the present case had the appellant been put in possession of the premises referred to in the receipt. But such was not the case and the receipt stands alone and without the aid of any surrounding circumstances or of any conduct of the parties in dealing with the property that can shew a certain time at which the term of the lease would begin.

Although I cannot think that the respondent acted in the matter as the rules of fair dealing required, still there is no escape from the conclusion that in law the appellant cannot succeed in this appeal, which must in my opinion be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

RE GIBSON and CITY OF HAMILTON.

Ontario Supreme Court, Appellate Division, Mulock, C.J., Ex., Clute, Riddell, and Sutherland, JJ. May 12, 1919.

TAXES (§ VI—220)—INCOME TAX—FUNDS IN HANDS OF TRUSTEES—RESIDENCE.

Income in the hands of a group of trustees not collectively residing within Ontario, for a beneficiary to be determined in the future, the testator himself never having lived in the Province, cannot be regarded as income "derived" by a person resident in Ontario, or income "received" by an agent, trustee, etc., for a non-resident, and is not liable to taxation under the Ontario Assessment Act (R.S.O. 1914, c. 195, ss. 5, 10-13).

Statement.

APPEAL by the trustees of the estate of the Honourable William Gibson, deceased, from an order of the Senior Judge of the County Court of the County of Wentworth dismissing an appeal by the trustees from the decision of the Court of Revision for the City of Hamilton whereby an assessment of the estate of the deceased, by the Corporation of the City of Hamilton, in the year 1918, for taxable income, $9,200, was affirmed.

ONT.

S. C.

RE GIBSON AND CITY OF HAMILTON.

The appeal was upon a case stated by the County Court Judge.

Two of the trustees and one of the beneficiaries resided in the city of Hamilton; the deceased himself did not in his lifetime reside in Hamilton.

The questions stated for the opinion of the Court were:—

(1) Is that portion of the revenue of the estate of the Honourable William Gibson received by the trustees in Hamilton assessable anywhere, under the provisions of the Assessment Act as to taxation of income?

(2) If so, is it assessable in Hamilton?

John Jennings and *George C. Thomson*, for the appellants.

F. R. Waddell, K.C., for the respondents.

MULOCK, C.J. Ex.:—This is an appeal from the judgment of His Honour the Judge of the County Court of the County of Wentworth, dismissing an appeal by the trustees of the estate from the decision of the Court of Revision of the City of Hamilton, affirming an assessment of the estate of the deceased in respect of the sum of $9,200 as taxable income in the year 1918. Mulock, C.J. Ex.

The will of the testator contains the following clauses:—

"7. . . . And I direct that all the income from time to time not required for the purposes of maintenance of my said children shall be added to and form part of my estate herein called the 'general trust estate.'

"8. I hereby declare and direct that my trustees shall hold the said general trust estate and all other trust premises (if any) . . . and after having carried out the terms of any declaration or declarations of trust which I may have made upon trust on my youngest living child attaining twenty-five years to divide my general trust estate as it may then exist in equal shares or portions among my children then living and the children then living of any deceased child of mine such grandchildren taking (equally as between them) if more than one the share their parent would have taken if then living and the share of any such grandchild under twenty-one years of age shall be paid to his or her guardian duly appointed or be received and held by the Mercantile Trust Company of Canada Limited as such guardian or as trustee."

It is admitted that no portion of the $9,200 in question is required for the maintenance and education of any child of the testator.

ONT.

S. C.

RE GIBSON AND CITY OF HAMILTON.

Mulock, C.J. Ex.

The provisions of the Assessment Act, R.S.O. 1914, ch. 195, applicable to the question before us, are as follows:—

Section 5: "All . . . income derived either within or out of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions."

(Then follows a list of exemptions, none of which apply to the income in question.)

Section 11: "Subject to the exemptions provided for in sections 5 and 10:—

"(*a*) Every person not liable to business assessment under section 10 shall be assessed in respect of income;

"(*b*) Every person although liable to business assessment under section 10 shall also be assessed in respect of any income not derived from the business in respect of which he is assessable under that section."

Section 12. "Subject to sub-section 6 of section 40 every person assessable in respect of income under section 11 shall be so assessed in the municipality in which he resides either at his place of residence or at his office or place of business."

Section 13. "Every agent, trustee or person who collects or receives, or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario, shall be assessed in respect of such income."

According to sec. 5, "income," to be liable to taxation, must be income "derived" by a person resident in Ontario or "received in Ontario by or on behalf of a person resident out of Ontario." That is, the income in respect of which any one is liable to taxation must be either (a) income derived by such person being resident in Ontario, or (b) income received by an agent, trustee, etc., for a non-resident.

In the former case the person assessable is the beneficiary: in the latter, it is his representative. The beneficiary "derives" the income, but the representative merely receives it.

Income to be assessable must, I think, fall within one or other of these two classes.

By the terms of the testator's will, no one at present is entitled beneficially to the income in question, nor until a future period can it be determined who shall be entitled to take beneficially.

There can be no taxation of income without previous assessment of some person in respect of such income. A person liable to assessment becomes personally liable to pay the tax. At the present time no one is liable to assessment in respect of the income in question or entitled to it beneficially.

Counsel for the respondents argued that under sec. 13 the trustees were assessable. To bring the case within that section, it must appear that the trustees are collecting or receiving the income for or on behalf of a person, and also that such person is resident out of Ontario. It may be that the person who ultimately becomes entitled to the income in question is yet unborn. Such a person does not come within the class of persons mentioned in sec. 13, namely, persons resident out of Ontario. This implies a person living at the present time and residing out of the Province.

Further, the section renders the trustees assessable only when the *cestui que trust* resides out of the Province. Such is not the present case. I am, therefore, of the opinion that, in view of the facts of this case, the trustees are not assessable in respect of the income in question. Thus, there is no one at the present time who is assessable in respect of the income in question, and the inference is hat under such circumstances the Legislature did not intend that the fund should be liable to taxation.

I therefore, with respect, think the appeal should be allowed, with costs, if asked.

RIDDELL, J., agreed with MULOCK, C.J. Ex. Riddell, J

CLUTE, J.:—The following case is stated for the opinion of a Divisional Court, by way of appeal by the trustees of the estate of the late William Gibson from the judgment of His Honour Judge Snider, Judge of the County Court of the County of Wentworth, dated the 12th November, 1918, whereby an appeal by the said trustees from the decision of the Court of Revision for the Municipality of the City of Hamilton, dated the 16th October, 1918, was dismissed. Clute, J

This appeal is made pursuant to sec. 81 of the Assessment Act, as enacted by the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, sec. 6.

The said estate was assessed in 1918 by the Municipality of the City of Hamilton for income on a sum of $9,200. The said trustees dispute the right of the said municipality so to assess the said estate, on the following grounds:—

ONT.
S. C.
RE GIBSON AND CITY OF HAMILTON.
F Clute, J.

"(1) The general principle of the Assessment Act, R.S.O. 1914, ch. 195, as respects the taxation of income, is, that revenue in the hands of agents or trustees (except agents or trustees for non-residents of this Province) is not assessable in the hands of such trustees nor until it reaches the hands of the persons (being residents of this Province) who are entitled to use the same for their own purposes.

"(2) That under the Assessment Act now in force, R.S.O. 1914, ch. 195, there is no authority for the assessment of income of this estate in the hands of the trustees, as by the terms of the will the same shall be added to and form part of the testator's 'general trust estate,' which is not divisible until 1920.

"(3) That the revenue or income of the estate is not assessable by the Municipality of the City of Hamilton."

The following are admissions of fact:—

"(a) That the testator did not reside in Hamilton.

"(b) That two of the trustees reside in Toronto, one in Winnipeg, and two in Hamilton.

"(c) That only one beneficiary resides in Hamilton.

"(d) That none of the income in question is required for the maintenance and education of any child of the testator.

"(e) That the said general trust estate is not divisible until 1920.

"(f) That there is sufficient income of the estate received by the trustees in Hamilton to justify the assessment if assessable in Hamilton."

The questions for the opinion of the Court are: (1) Is that portion of the revenue of the estate of the Honourable William Gibson received by the trustees in Hamilton assessable anywhere, under the provisions of the Assessment Act as to taxation of income? (2) If so, is it assessable in Hamilton?

Clause 7 of the will directs that "all the income from time to time not required for the purposes of maintenance of my said children shall be added to and form part of my estate herein called the 'general trust estate.'

"8. I hereby declare and direct that my trustees shall hold the said general trust estate and all other trust premises (if any) . . . and after having carried out the terms of any declaration or declarations of trust which I may have made upon trust on my

youngest living child attaining twenty-five years to divide my general trust estate as it may then exist in equal shares or portions among my children then living and the children then living of any deceased child of mine such grandchildren taking (equally as between them) if more than one the share their parent would have taken if then living and the share of any such grandchild under twenty-one years of age shall be paid to his or her guardian duly appointed or be received and held by the Mercantile Trust Company of Canada Limited as such guard an or as trustee."

Section 2(*e*) of the Assessment Act defines "income," and adds: "and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source."

Section 5 provides that " . . . all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person out of same, shall be liable to taxation," subject to certain exemptions which do not affect this case.

By the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*x*), "person" shall include any body corporate or politic, and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

Section 5 of the Assessment Act makes all income derived within Ontario by any person or resident therein liable to taxation.

The first question is: Do the trustees of this estate fall within the definition of "person," within the meaning of sec. 5?

It does not appear from the case stated who the trustees are, or whether they are also the executors of the will.

In my opinion, the definition of "person" in the Interpretation Act, above referred to, is broad enough to include the trustees in this case: they fall within the definition of the term "person" in the Interpretation Act.

I think it plain that the intention of the Act is that all income—unless excepted—is liable to taxation. The Act should "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . according to the true intent, meaning and spirit thereof:" Interpretation Act, sec. 10.

ONT.

S. C.

RE GIBSON AND CITY OF HAMILTON.

Clute, J.

If the construction contended for by the trustees is the true one, the true intent and meaning of the Act might be avoided and its application precluded in every case of this kind.

The answer to the first question should be "Yes."

Under the heading "Taxation on Income directly," secs. 11, 12, and 13 contain certain provisions. Section 11 (1) (*a*) provides that "every person not liable to business assessment under section 10 shall be assessed in respect of income."

Section 10 refers to business assessment.

Section 12 (1) provides that, subject to sub-sec. 6 of sec. 40 (which refers to mines and does not affect this case), every person assessable in respect of income under sec. 11 shall be so assessed in the municipality in which he resides at his place of residence or at his office or place of business.

I think the trustees in this case are included in the above definition of "person," and that the portion of the revenue of the estate received by the said trustees is assessable in their hands as income.

The statute does not expressly declare in what municipality such income shall be assessed; but, inasmuch as, under secs. 11 and 12, every person in respect of income shall be assessed in the municipality in which he resides, either at his place of residence or at his office or place of business, and as the trustees represent the estate of the deceased person, by analogy and implication from the wording of the statute the said income should be assessed by the municipality where the testator resided and carried on his business at the time of his death, and is not assessable in Hamilton.

I think the appeal should be allowed with costs, if asked.

Sutherland, J.

SUTHERLAND, J., agreed in the result. *Appeal allowed.*

MAN.

K. B.

Re SMITH ESTATE.

Manitoba King's Bench, Mathers, C.J.K.B. October 6, 1919.

DESCENT AND DISTRIBUTION (§ I A—4)—DEVOLUTION OF ESTATES ACT, R.S.M. 1913, c. 54—INTESTACY—ONLY NEPHEWS AND NIECES SURVIVING—NO PROVISION IN ACT—DISTRIBUTION.

The Devolution of Estates Act, R.S.M. 1913, c. 54, makes no provision for the case of an intestate who dies leaving neither widow nor parents, nor lineal descendents, nor brothers nor sisters surviving, but only children of deceased brothers or sisters. The Act did not intend to change the law as it previously stood and the position of the estate as to which there is an intestacy should be distributed amongst the nephews and nieces of the intestate *per capita* and not *per stirpes*.

Adamson and *Lindsay*, for Western Trust Co.; *E. D. Honeyman*, for next of kin.

MATHERS, C.J.K.B.:—This is an application for advice by the executors of the last will of the deceased William Smith. As to part of the estate there is an intestacy, and it is as to the distribution of this portion that the executors are in doubt. The intestate had been married, but his wife predeceased him, leaving no children. His father and mother were also dead. He had six brothers and sisters, all of whom died before he did. Two died childless, but four left living children at the time of the intestate's death.

The question arises as to how the portion of the estate as to which there is an intestacy should be distributed amongst the children of the deceased brothers and sisters, whether *per capita* or *per stirpes*.

Section 12 of "the Devolution of Estates Act," R.S.M. 1913, c. 54, makes no express provision for the case of an intestate who died leaving no child or other lineal descendants, or wife or husband, father or mother, or brother or sister, but who left nephews and nieces, the children of deceased brothers and sisters. It does provide that if the intestate have no father or mother, his estate shall go to his brothers and sisters in equal shares, and if "any" of his brothers and sisters be dead, their children shall take the parents' share. The statute also provides for the case where there are neither brothers or sisters, or children of brothers or sisters, but it is silent as to the case where *all* the brothers and sisters are dead, leaving children. It was urged that "any" should be construed to mean "any or all," but I cannot so construe it without attributing to the Legislature an intention to make a very important change in the law respecting the distribution of the property of intestates.

The section in question was first enacted as s. 8 of "An Act to Regulate Administration of Intestates' Estates," 34-38 Vict. Man. stats., passed at the first session of the first Legislature of Manitoba in 1871, and has remained in force without change. At that time the law undoubtedly was that if an intestate left neither widow nor parents nor lineal descendants, but did leave one or more brothers or sisters, and the children of one or more deceased brothers or sisters, the estate went to the brothers and sisters equally, the children of deceased brothers or sisters taking

MAN.

K. B.

RE SMITH ESTATE.

Mathers, C.J.K.B.

the parents' share. In other words, the distribution in that case was *per stirpes*. But if in the case stated there were no brothers and sisters surviving, but only children of deceased brothers or sisters, the whole estate was distributed amongst such children *per capita*; *Lloyd* v. *Tench* (1751), 2 Ves. Sr. 213, 28 E.R. 138; *Buissieres* v. *Albert* (1754), 2 Lee 51, 161 E.R. 260, 11 Hals. 22; Williams on Executors 1254; Walker & Elwood on Descent 352; Williams Personal Property 525; Armour on Devolution of Estates 278, 279.

The law was founded on "An Act for the better Settling of Intestate Estates," 22 & 23 Chas. II., c. 10, which provided for equality amongst kindred of equal degree. Brothers and sisters are of the second degree, whereas their children are of the third degree. If there were any kindred of the second degree and the representatives of others of the same degree the estate was distributed into as many parts as there were kindred or representatives of kindred of that degree, that is to say if an intestate had had five brothers or sisters, but two of them had predeceased him, one leaving five and the other three children, the estate would be divided into five equal parts of which one would go to each of the three brothers or sisters still living, one part to the five children of the one deceased brother or sister and one part to the three children of the other deceased brother or sister. But if all the brothers and sisters had been dead, the estate would have been distributed amongst their children equally. When there were no kindred of the first or second degree, but there were nephews and nieces, children of deceased brothers and sisters, these being all of the third degree shared the estate equally.

If the Legislature meant by using the words "if any of his brothers be dead" to provide also for the case where they were "all" dead, it will be seen at once that a very important change was effected in the law of distribution of the property of an intestate. The word "any" may, as sometimes used, be sufficiently comprehensive to include "all," but I do not think it should be so construed here. Had the Legislature intended to effect such a radical change in the law it would no doubt have expressed such intention in clear language. It could have easily put the matter beyond doubt by inserting the words "or all" after the word "any."

I think the proper conclusion is that the Legislature did not

intend to change the law but that it has altogether omitted to provide for the case where all the brothers and sisters are dead, leaving children, and that in such a case the law of distribution as it prevailed before the statute is still in force.

In my opinion the portion of the estate as to which there is an intestacy should be distributed amongst the nephews and nieces of the intestate *per capita* and not *per stirpes*.

Costs to all parties out of the estate. *Judgment accordingly.*

ROBSON v. WILSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford, and Middleton, JJ. March 21, 1919.

EASEMENTS (§ IIA—5)—WAY—EXPRESS GRANT—LOST GRANT—LIMITATIONS ACT, R.S.O. 1914, C. 75.

An easement to use an existing and well-marked lane or roadway over another's land, the only means of access to a farm and constantly used as such for a half a century, is acquired by express grant under a conveyance of the farm together with "all ways, easements and appurtenances, belonging or appertaining, or used, occupied and enjoyed;" and title thereto would also be presumed from the doctrine of lost grant, or would arise under the Limitations Act, where there was no actual unity of possession of the dominant and servient tenements during the period of 20 years preceding the commencement of the action.

Statement

AN appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiffs, in an action in the County Court of the County of York, in which the plaintiffs claimed an injunction restraining the defendants from trespassing upon the plaintiffs' land and cutting and destroying trees, damages, an account, and a declaration of the plaintiffs' rights. The defendants asserted a right of way over the plaintiffs' land—the right to the use of a lane.

The judgment appealed from is as follows:—

It is conceded by all parties that, while the owners of the west half of the lot have a right of way over the lane in question by express grant, there is no such grant in favour of the south-east quarter, owned by the defendants. A short abstract of the title is necessary to a proper understanding of the case:—

Henry Peterman acquired the south-east quarter in 1872 and the north-east quarter in 1875. Some time between 1875 and 1879 (it could not have been earlier than 1875), Henry Peterman, owning the 100 acres, established the lane along the southerly part of the north-east quarter, and put up the fences. The

ONT.
S. C.
ROBSON
v.
WILSON.

southerly fence of the lane is the boundary-line between the north-east and south-east quarters. Some years before, there was a travelled way or trail leading from the west half of the lot to the 7th concession, but this was an irregular and circuitous way, passing first through the south-east quarter, and then running north-easterly through the north-east quarter to the 7th concession. We are not concerned with it in this action. In 1879, Henry Peterman, who then owned the 100 acres, conveyed the south-east quarter to his son George, who, soon after, erected a house and barn thereon. The barn is close to the lane; the house is a little farther away. A gate was put in the lane-fence, and ever since that time access to and egress from the house to the 7th concession has been over this lane and through this gate.

It is contended by the defendants, first of all, that from the grant by Henry Peterman to his son George in 1879 of the south-east quarter, a grant must be implied of the right to use this lane.

There can be no doubt, I think, that, as a matter of law, if at the date of the conveyance from Henry Peterman to his son George the right of way in question was an apparent and continuous easement, which was necessary to the reasonable enjoyment of the south-east quarter, and which had been and was at the time of the grant used by the owner of the 100 acres for the benefit of the south-east quarter, then a grant of such easement will be implied: *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31; *McClellan* v. *Powassan Lumber Co.* (1907), 15 O.L.R. 67, (1908), 17 O.L.R. 32, and (1909), 42 Can. S.C.R. 249.

If the house and barn had been built before this grant, and the lane had been used before this as a means of access to the house and barn, I should have thought that the right of way was an apparent and continuous easement, and would pass. But in 1879 the condition was this. There was a straight lane running back from the 7th concession; the south boundary of the lane is the boundary between the north-east quarter and the south-east quarter; the lane itself being entirely upon the north-east quarter. It was made in the first instance for the benefit of the owner of the west half. To make a right of way an apparent and continuous easement, it is necessary to shew that it is more than a mere convenience. I think it must be shewn that, while there is no absolute necessity, there is some necessary dependence upon

it, and I do not think this has been shewn in this case. Why should we infer or imply from the conveyance in 1879 that the grantor intended to give a right of way over the lane in question? The south-east quarter fronts upon the 7th concession; may we not with equal right assume that the grantor thought that, if buildings were erected, access to them would be obtained over another way from the 7th concession?

Finding, then, as I do, that the right of way over the lane in question was not an apparent and continuous easement enjoyed by the south-east quarter, the defendants' contention on this branch of the case fails.

Then it is contended, secondly, that the defendants have acquired a right of way by prescription. To obtain this they must shew that the right of way has been actually enjoyed by them or their predecessors in title, claiming a right of way, without interruption, for the full period of 20 years next before this action was brought. There is no doubt at all that during the last 20 years and longer the people who occupied the premises and lived in the house on the south-east quarter did use this lane as a means of getting to and from the house and in working the farm. But, unfortunately for the defendants, there has been unity of possession for most of that period. In 1890, George Peterman sold the south-east quarter to George Robson, and in 1898 Henry Peterman sold the north-east quarter to Samuel Robson. George Robson, up to the time of his death in 1896, worked the whole 100 acres, owning the south-east quarter, and renting the north-east quarter from Henry Peterman. The two places were worked together. In 1897, the south-east quarter was sold by the mortgagee to George H. Wilson, a brother of the widow of George Robson. George H. Wilson allowed his sister to work the place, she paying what she could and keeping up the interest. From 1898 to 1908, the widow of George worked the south-east quarter, and also paid $10 a year rent for the pasture in the rear of the north-east quarter and for the use of the lane. From 1908 to 1912, Edwin Robson, a son of George, rented the north-east quarter from his grandfather, Samuel Robson, and Edwin and his mother worked the 100 acres. In 1912, the widow and Edwin moved away, and the defendant Wilson took possession of the south-east quarter, and

ONT.
S. C.
ROBSON
v.
WILSON.

the plaintiff Robson the north-east quarter. So that, during at least 10 years of the time since George Robson acquired the south-east quarter in 1890, there was a unity of possession, though not of ownership. Whatever may be said as to the effect of unity of possession, as distinguished from unity of ownership, upon a claim by prescription at common law, as to which *vide* Gale on Easements, 9th ed., p. 182, it has been held with regard to a claim under the Prescription Act that mere unity of actual possession occurring at any time during the period is sufficient to prevent a claim from being established under the Act, even though the alleged dominant and servient tenements be held under different landlords: *Onley* v. *Gardiner* (1838), 4 M. & W. 496; *Battishill* v. *Reed* (1856), 18 C.B. 696; *Damper* v. *Bassett*, [1901] 2 Ch. 350.

Some doubt has been cast upon the first two of these decisions in *Ladyman* v. *Grave* (1871), L.R. 6 Ch. 763, at p. 768, and in *Ecclesiastical Commissioners for England* v. *Kino* (1880), 14 Ch. D. 213. But in *Damper* v. *Bassett*, which is later than any of them, Joyce, J., said (p. 354) that the decisions in question have not been overruled or expressly disapproved of, and should be followed. And the reason for this rule is not hard to find. During the unity of possession the servient owner can never complain of the use of the easement, in other words, cause an interruption in the user. In this case the owner or tenant of the south-east quarter had during the unity of possession the right to use the lane by virtue of being tenant of the north-east quarter, and during such period the owner of the north-east quarter could not complain or interrupt.

There will be judgment for the plaintiffs for a declaration and an injunction as prayed, and for $15 damages for the cutting of the trees, and for the costs of the action.

In parting with this case, I ought to add that, in view of the fact that this lane has been used as a means of access to the house and barn on the south-east quarter for so many years, and inasmuch as depriving the defendants of the use of it now will entail the making of another and separate entrance from the 7th concession, and in view of the fact that the plaintiffs are obliged to keep open the lane in question for the owners and occupants of the west half of the lot, it is to be hoped that the plaintiffs will

allow the lane to be used as heretofore upon the defendants paying a reasonable rental for its use.

The judgment for the $15 and injunction will be against the defendant Wilson alone.

J. Gilchrist, for the appellants.

A. J. Anderson, for the plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The judgment appealed against deprives the defendants not only of their only means of access from the front to the back of their farm, but also of their only means of access to their farm, upon which one of them resides, in any way; and does so notwithstanding the fact that such means of access have been in constant use by the defendants, and those through whom they acquired title to this land, for half a century, and have been the only means of such access ever since the land was occupied or used in any manner.

Such a user of a right of way necessarily carries with it very strong evidence of a legal right to it; and it must be an exceptional case in which it can lawfully be brought to an end, as that in question in this action is by the judgment appealed against. The lawyer, as well as the layman, is very properly opposed to a disturbance of such long-continued possession; the lawyers have gone so far as to write, and often enforce, the fiction of a lost grant, to prevent such a disturbance of such a possession. But there are exceptional cases; and we have now to consider whether this is a case in which the plaintiffs are entitled to the right which the judgment appealed against gives them notwithstanding such possession, in all the circumstances of the case.

The common defences to an action such as this are: that the defendant has been and is lawfully entitled to the right of way under: (1) an expressed grant; (2) an implied grant; (3) a lost grant; or (4) the Limitations Act: and all these defences are open to the defendants here, as they were in the County Court also.

But, before considering them, the material facts must be found, for really the case depends upon fact more than law: I mean that when the facts are found, and kept in mind, there should not be any great doubt or difficulty regarding the law which is applicable to them; and, although at the trial, and upon the argument of this appeal too, the whole story of all the lands involved, and all the devolutions of the titles to them, and many incidental

ONT.
S. C.
ROBSON
v.
WILSON.
Meredith, C.J.C.P.

circumstances, were fully discussed, the material facts are really few in number and little in controversy, or, at all events, easily found.

The owner of the west half of the whole lot has a right of way over the plaintiffs' land—which is the north-east quarter of the whole lot—to the concession-road in front of the lot, at its easterly limit. This right of way was made appurtenant to the west half of the lot by the will of Samuel Wallis, made in the year 1848.

Henry Peterman became the owner of the defendants' land, the south-east quarter of the whole lot, in the year 1873; and he became the owner of the plaintiffs' land, the north-east quarter of the whole lot, in the year 1875.

Henry Peterman's son George became the owner of the land which is now the defendants', the south-east quarter lot, under a deed from his father to him, dated the 17th November, 1879.

It is not necessary to refer to any of the deeds or other writings by which title has come down to the plaintiffs and defendants respectively, further than to say that in none of them, until recent years, is any right of way described or referred to except in the general words attributed to the conveyances by such enactments as Short Forms of Conveyances Acts.

The locality of the right of way created by the will of 1848 was not defined in the will: and, the front of the lot being swampy, Henry Peterman, after acquiring title to the two quarter lots, and intending to bring them into use and cultivation, naturally, and very reasonably, proceeded to lay out a way, and construct a road, for the three-fold purposes of affording a means of access to his two quarter-lot farms, and a way which would well meet the obligation imposed upon the north-east quarter-lot by the will of 1848; and that way he made, almost necessarily, along the southerly limit of that quarter-lot, extending from the highway in front of the whole lot back to the west half of the lot. He could not make one-half on the south-east quarter because that would not satisfy the obligation of the will, which created the right of way over the north-east quarter only; and to serve both quarter-lots best it had to be made just where it is.

The way in question has been called a lane, but it is fairly entitled to a more imposing name: instead of being 10 or 12 feet in width, it was at once made two rods wide; it was fenced on both

sides; a culvert was built in it; and, where necessary, it was in the first place made in the manner called "corduroy;" that is, it was constructed of timber logs laid crosswise as its foundation.

Much of the work done in making this permanent and efficient way was done by George Peterman, the son, working together with his father, to afford a good means of ingress and egress for the three-fold purposes I have mentioned.

Not only was there no other means of ingress and egress for the south-east quarter lot when George Peterman acquired title to it, but, as I have said, there never had been, and has never since been and is not now: and the same applies equally to the north-east quarter lot.

Under the Short Forms of Conveyances Act in force when the deed from father to son was made, the father granted: "all . . . ways . . . easements . . . and appurtenances whatsoever" to the south-east quarter-lot "belonging or in anywise appertaining, or with the same . . . used, occupied and enjoyed . . ." (R.S.O. 1877, ch. 102, sec. 4).

As the deed to the son was not made until 6 years after the father became owner of the south-east quarter-lot, and 4 years after he became owner of the other lot, and as there was no other way in or out of either, the way in question must have been pretty well constructed, and have been in use for several years, when the son became owner of the quarter-lot.

The facts of the case seem to me to bring the way in question well within the words of the grant which I have quoted; and therefore the first of these four defences is established.

As to the second of these—an implied grant—the defendants could gain nothing by it if they failed on that of the expressed grant: if the way does not come within the meaning of the words expressed, it cannot come within the meaning of any that should be implied.

But, if these two defences should fail, the third ought to succeed: the case is a strong one for applying the doctrine of a lost grant, without going nearly as far as the Courts of law in England have gone in applying it. The law upon the subject is discussed in the leading case, upon other points, of *Dalton* v. *Angus* (1881), 6 App. Cas. 740, where the rule is shewn to be—as it is generally understood to be—that where it is found that there has been what

ONT.
S. C.
ROBSON
v.
WILSON.
Meredith, C.J.C.P.

is equivalent to adverse possession for more than 20 years it ought to be presumed to have originated lawfully, that is, in most cases, in a grant: and that unity of possession, which would defeat a defence under the Statute of Limitations, might not defeat a claim under this defence: see *ib.* at p. 814, and *Aynsley* v. *Glover* (1875), L.R. 10 Ch. 283.

The suggestion that, the case being one between father and son, the use and benefit which the son had of the way should be attributed to a mere license by the father—a mere matter of courtesy or favour—has no weight in my mind: I am not inclined to think that a father would convey less than a stranger in such a matter—a father selling to his son the farm in question without any other means of access to it; and a way which the son probably did more than the father to make. And, if that were not so, the suggestion would not account for the use of the way after the north-east quarter passed into the hands of others.

But, should the defendants fail on all of the first three of these defences, they should, in my opinion, succeed on the fourth. They should, admittedly, except for what is called a unity of possession of the two quarter-lots for several years within, and also before, 20 years next before the commencement of this action. What is relied upon is some kind of a tenancy of the north-east quarter-lot which the owner of the other quarter-lot is said to have had. There was, at no time, any unity of ownership: if there had been, a very different question would have arisen; the parties would hardly be engaged in this litigation if such were the case.

Under the demise from year to year, or other right in respect of the north-east quarter-lot, whatever may have been its exact character or duration, before or during the last 20 years, there was no extinguishment in law, or in fact, of the right of way: there was not any kind of cessation in fact of its use: it would be puerile to urge that the owner of the south-west quarter-lot ceased to make use of the way as one appurtenant to the lot he owned, and the only means of access to it, and exercised only the rights of a tenant or less than a tenant of the other quarter-lot whenever he or she passed over it between his or her own home on his or her own lot and the highway to which the private way led: to urge that he or she abandoned in fact his or her greatly needed rights in connection with this way as owner to enjoy them as tenant, a tenant such as

he or she was: see *Hollins* v. *Verney* (1884), 13 Q.B.D. 304. Nor must it be forgotten that the owner of the north-east quarter-lot, even if he had also acquired ownership of the other quarter-lot, could not close the way, because of the right appurtenant to the west half of the lot. The learned County Court Judge seems to have thought that the cases of *Onley* v. *Gardiner*, (1838), 4 M. & W. 496, and *Battishill* v. *Reed*, 18 C.B. 696, required that he should consider that mere unity of possession during the 20 years immediately before action defeated a defence under the Statute of Limitations. In that I am quite unable to agree. Whether, during the tenancy or tenancies or the exercise of any other right, the owner of the south-west quarter-lot or his tenant was or was not actually enjoying the right of way in question, claiming right thereto as such owner, must be a question of fact, for there can be no reasonable contention that as a matter of law he or she could not do so; there should be no such contention in the face of the obvious fact that he or she was so actually enjoying it.

It is difficult to gather from the report of the case of *Onley* v. *Gardiner supra*, just what the facts were, but I should gather that there was no use of the way during the period of unity of possession. The statement of facts is that there was a use of the plaintiff's closes 40 years before action, but that user had long ceased: that down to about 15 years before action the three closes—plaintiff's and defendant's—had been occupied together: and that, from that period down to action brought, a way over the plaintiff's close from the defendant's close had been used for all purposes—the early use was for carrying hops and hop-poles only. It is difficult for me to see how a case decided upon such a state of facts can rule a case such as this, of such widely different facts, leading to widely different inferences and conclusions. In that case it seems that, upon its particular facts, no one could complain of any use which was made of any of the closes during the unity of possession. But how is it possible to assert that no action could have been brought by the owner of the south-west quarter as such owner for an unlawful use of the way as a way appurtenant to his own lot, and in that way only it was used; or indeed an action against him as tenant for being a party to such an encroachment upon and trespass to the demised land? And it may be added that, even in that case, leave was given to amend by pleading a right

ONT.

S. C.

ROBSON v. WILSON.

Meredith, C.J.C.P.

immemorially; or, as in these days, of a lost grant. And in the case of *Battishill* v. *Reed*, "there was an interval of ten years, when there was no user at all:" *per* Jervis, C.J., at p. 705.

But in truth there was no actual unity of possession at any time within 22 years next before the commencement of this action: all that is really asserted is that the widow Robson, who, some time after her husband's death, became tenant-at-will of her brother, one of the defendants, acquired from the owner of the north-easterly quarter-lot a right of pasturing in the "bush" on part of it, and some right in regard to the way in question: that right her son, who knows best, testified was a right of pasturing it as well as the bush, the two parts being open to one another so that one could not be pastured without the animals going upon the other; and this seems to me to be manifestly so, because there was no power to let more than that, because of the right of way appurtenant to the west half of the lot, not to mention that it was and always had been the only means of access to the two easterly quarter-lots: so that I must again say that it is puerile to contend that the owner of the freehold let this way to any tenant with the right among other things to plough it up and put in crops: to contend that the woman took anything but a right of pasturing in the "lane" and in the "bush" connected with it, a right which, in the climate of this Province, extends over a period of about 6 months only in each year: and, as to the 4 years when the quarter-lot was really let, it was let to Mrs. Robson's son, not to the owner of the other quarter or to his tenant: so that there was not in fact any unity of possession at any time within 22 years next before this action was brought.

Therefore, if the defendants should fail upon the other three defences, they should succeed upon the fourth: but they should succeed, in my opinion, upon the first, which excludes the second and fourth, and also the third.

I would allow the appeal and dismiss the action upon its main branch, involving the question of right of way: on the minor branch of it, trespass in cutting down and carrying away some trees, the plaintiffs have judgment for $10 damages, and that judgment is not appealed against, and therefore must stand: the defendants should have their costs of this appeal and the general

costs of the action, and no order should be made as to costs of the minor branch, if there be any separate costs applicable to it.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD and MIDDLETON, JJ., agreed in the result.

Appeal allowed.

O'BRIEN v. KNUDSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. September 15, 1919.

MORTGAGE (§ I E—20)—TRUSTEES—PERSONAL LIABILITY—MISTAKE IN DRAUGHTSMANSHIP—REFORMATION OF INSTRUMENT.

A covenant in a mortgage by trustees expressed to be made by them "as trustees but not otherwise" will in the absence of other controlling words be held to limit their liability to the payment of the money out of trust estate and will not render them personally liable. If, therefore, it appears from the evidence that the parties agreed that the mortgagors were to pay as trustees and not otherwise and failed through a mistake in draughtsmanship to express that intention in the instrument, it should be reformed so as to limit the liability as intended.

[*Watling* v. *Lewis*, [1911] 1 Ch. 414, distinguished; *Wilding* v. *Sanderson* [1897] 2 Ch. 534, applied; 45 D.L.R. 187, reversed.]

Statement.

APPEAL by defendants from the judgment of Black, J. (1918), 45 D.L.R. 187. Reversed.

F. T. Congdon, K.C., for appellants; *A. P. Luxton*, K.C., for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The Judge of the Yukon Court held, as I understand his reasons for judgment, that the principle of *Watling* v. *Lewis*, [1911] 1 Ch. 414, was applicable to the facts of this case. With respect, I do not think so. Assuming that case to have been well decided, it goes no further than this, that on the facts there the covenant for non-liability was inconsistent with and therefore repugnant to the antecedent obligation to pay. There is nothing anomalous in a mortgage in which the personal covenant of the mortgagor to repay the loan has been omitted or limited.

A covenant in a mortgage by trustees expressed to be made by them "as trustees but not otherwise" will, in the absence of other controlling words, be held to limit their liability to the repayment of the money out of trust estate and will not render them personally liable therefor. *Per* Lord Cairns in *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337; and Buckley, L.J., in *Re Robinson's Settlement*, [1912] 1 Ch. 717, at pp. 728 and 729.

If, therefore, it shall appear that the parties agreed that the

B. C.
C. A.
O'BRIEN v. KNUDSON.
Macdonald, C.J.A.

defendants were to pay as trustees and not otherwise and failed to express that intention in the instrument, it ought to be reformed. The uncontradicted evidence of several witnesses is to the effect that before the execution of the mortgage the defendants were assured in the most explicit terms by the plaintiff's solicitor and in her presence, that they were not to incur personal liability for the debt but were to obligate themselves merely as trustees. What then took place amounted to a distinct agreement between the parties to that effect. The plaintiff gave no evidence on her own behalf, though there appeared to be no impediment to her doing so either in Court or on commission. The evidence of Mr. Tabor, her solicitor, was not obtainable owing to his death before the trial of the action.

There is nothing in the circumstances of the case inconsistent with the evidence of the defendants that it was agreed that they should not be under personal liability. Their evidence, standing as it does uncontradicted, I am not embarrassed by any doubt as to whether or not that clear case has been made out, of mutual mistake, which must be made out in order to induce the Court to order reformation of a deed.

Now, while a person who signs an agreement is not to be excused from its performance because he misunderstood it, through no incapacity to read or understand its terms, yet, when he has been induced by the opposite party to sign on the footing that the instrument means what the parties have agreed it shall mean, and it has not that meaning, he may, I think, properly be granted reformation of the instrument when the circumstances do not call for rescission. The present is not a case for rescission either on the pleadings or on the facts. It appears to me to be a clear case of a mistake in draughtsmanship. Mr. Tabor, whose good faith was not questioned, may have thought that as the defendants were trustees in fact and were executing the mortgage as such, no liability would attach to them except to repay the loan out of trust funds available therefor. He failed to aptly express what the parties had agreed to. The mistake was not, in strictness, a mistake of law at all. It was a mistake on the part of the solicitor in not correctly expressing the agreement which had been come to. To say that Mr. Tabor merely expressed his opinion of the legal effect of the deed, or, to put it in another way, his inter-

pretation of the personal covenant, does not, in my opinion, meet the substance of the defendants' case. Suppose there had been an antecedent agreement in writing containing a stipulation that the mortgage should contain a covenant limited to an obligation on the part of the mortgagors to repay the loan out of trust funds and nevertheless the mortgage executed in pursuance of the agreement contained the covenant which this mortgage contains contrary to the intention of all parties, could the deed not be reformed? I think it cannot be doubted that it could. The case is not, in my opinion, distinguishable in principle from *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

The mortgage should therefore be reformed so as to limit defendants' liability as intimated above.

We are not, I think, concerned on these pleadings with the plaintiff's rights, if any, against the society of which the defendants are trustees. It may be that, as borrowers, the society is under obligation to pay their debt, but as to this I express no opinion.

GALLIHER, J.A.:—The covenant to pay contained in the mortgage is a personal covenant, but I think we must hold upon the evidence that there was, prior to signing the mortgage, an agreement concurred in by both parties, that the defendants were not to be made personally liable.

Galliher, J.A.

If that is so then the covenant does not express the true agreement between the parties and it is a proper case for rectification.

I have read the reasons for judgment of the Chief Justice and am in agreement with them.

MCPHILLIPS, J.A. (dissenting):—There is no question that the mortgage as executed imposes a personal liability upon the mortgagors for the payment personally of the money borrowed. The mortgage followed the passage of resolutions of Dawson Lodge No. 1393 Loyal Order of Moose. To support rectification upon the ground of mistake all that the Court below had before it was evidence of a general and somewhat ambiguous nature, that at the time of the execution of the mortgage, C. W. C. Tabor, K.C., of the Yukon Bar, now deceased, said that there would be no personal liability upon the mortgagors in executing the mortgage —that they (the mortgagors) were simply signing as trustees. It was also sworn to that Mrs. O'Brien, the mortgagee, was present when this statement was made, but no evidence establishing that

McPhillips, J.A.

B. C.

C. A.

O'BRIEN v. KNUDSON.

McPhillips, J.A.

Mrs. O'Brien heard the statement or knew its purport. Of course, what Mr. Tabor said or did in pursuance of his duty as her solicitor would be binding upon Mrs. O'Brien, but it is a very serious onus that rests upon the mortgagors to make a case for rectification against the plain legal effect of the document. The mortgage was placed in the hands of the mortgagors and was read or was capable of being read by the mortgagors before execution. Further it is to be remembered that fraud is not set up or that there was any misrepresentation. It comes to this, that a gentleman of high standing and experience in the profession of the law, in whom apparently all the parties had confidence, is said to have made a statement as to the effect of the mortgage which is in contradiction to its terms. Further, a mortgage without personal liability upon the mortgagors to repay the money advanced would be a most unusual transaction, and it is to be noted that the previous mortgage in its terms imposed personal liability. Such a contract needs most careful evidence for its establishment. The unfortunate situation is that Mr. Tabor is dead, and it is now sought to make out a case for rectification upon these sworn statements, no documentary evidence of any nature or kind lending any corroboration to the statements made, statements that in their nature reflect upon the legal ability and acumen of the late Mr. Tabor, and certainly all in the interest of those who make them, and it is to be observed that the exact words used by Mr. Tabor are not sworn to but their effect only. I attach little or no value to this evidence, and certainly do not value it to the degree of entitling it to bring about rectification. The trial Judge has given careful attention to the evidence which was advanced before him, he having the opportunity of seeing the witnesses and observing their demeanour, and although we have no observations from the trial Judge thereon, it may be fairly inferred that the evidence was not so cogent in its nature or so satisfactory as to warrant it being taken against the writing, the solemnly executed mortgage, taking into consideration all the attendant facts and circumstances. There is no corroboration of any nature or kind as against the deed and its plain legal effect. I fail, therefore, to see that it has been made out that the Judge has erred either in fact or law. The decision is one that could be reasonably come to, that the appellants have failed to discharge the onus that was upon them, and

failing in this, no rectification could be granted. I have no hesitation in arriving at the conclusion that the evidence falls far short of establishing a case for rectification and in this connection, upon the point that the mortgagee, Mrs. O'Brien, was present when the alleged statements were made, it is to be remembered that Mrs. O'Brien was not present at the trial, being out of the country at the time this was stated at this Bar by Counsel, and further the rectification claimed in the pleadings was set up in October, a time when the Yukon Territory is practically closed to the outside world. Of course, no doubt it was the mortgagee who brought the action to trial; had though Mrs. O'Brien been present in Court when the statements were made and not denied them, the case might have assumed another complexion (see *Forget* v. *Baxter* (1900), 69 L.J.P.C. 101, at p. 106, [1900] A.C. 467). Without rectification, of course it is common ground that there is liability upon the appellants upon the personal covenants contained in the mortgage. It is instructive upon the point of what evidence should be forthcoming to bring about rectification, to read what Chelmsford, L.C., said in *Fowler* v. *Fowler* (1859), 4 De G. & J. 250-276, at pp. 264, 265, 45 E.R. 97, at 103:—

But the appellant insists, in the next place, that it was the meaning of all the parties that the deed should be confined to Mrs. Fowler's property; that if it includes anything more it has arisen from mistake or accident; and he calls upon the Court to rectify the deed so as to make it correspond with this intention.

The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord Thurlow's language is very strong on this subject; he says, "the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence:" *Lady Shelburne* v. *Lord Inchiquin*, 1 Bro. C.C. 338, 28 E.R. 1166. And this expression of Lord Thurlow is mentioned by Lord Eldon in *The Marquis of Townshend* v. *Stangroom*, 6 Ves. 328, 31 E.R. 1076, without disapprobation. If, however, Lord Thurlow used the word "irrefragable," in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed

B. C.
C. A.
O'BRIEN v. KNUDSON.
McPhillips, J.A.

upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement.

Has the appellant, then, given such evidence as must be demanded of him to establish not only that there has been a miscarriage or mistake in framing the deed, but also as to the exact form to which it should be brought in order fully to meet the real and complete intention of the parties?

I am not of the opinion that this appeal requires further elaboration. I content myself by saying that it has not been established that the trial Judge was wrong in arriving at the conclusion which he did, *i.e.*, that no sufficient case was made out for rectification, a conclusion with which I entirely agree. I will merely refer to the following additional authorities in support of the judgment under appeal, relied upon by the Counsel for the respondent: *Howatson* v. *Webb*, [1907] 1 Ch. 537, affirmed by the Court of Appeal, [1908] 1 Ch. 1, and *Pears* v. *Stormont* (1911), 24 O.L.R. 508 (Boyd, C.) I would dismiss the appeal.

EBERTS, J.A., would allow the appeal. *Appeal allowed.*

ONT.
S. C.

McARTHUR v. NILES LIMITED.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford and Middleton, JJ. March 21, 1919.

CROPS—RIGHTS OF SEED-MERCHANTS AND LANDLORD—CONTRACT—PRIORITIES—SEIZURE—CONVERSION.

An agreement by seed-merchants with the tenant of a farm that the "crop growing, and in all its conditions, should be and remain at all times their property," does not create in their favour a right superior to that of the landlord, who was entitled to one-third of the crop under the terms of his lease priorly executed; and where such share of the crop had been set apart for the landlord and later seized by the seed-merchants, they will be liable to him in conversion.

Statement.

AN appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, for the recovery of $147 and costs, in an action in the County Court of the County of York, brought to recover damages for wrongful entry on the plaintiff's land and removal and conversion of 40 bushels of pease.

The judgment appealed from is as follows:—

The facts of this case, though not admitted, are practically undisputed.

The plaintiff obtained possession of the pease in question under an agreement with his tenant Stutt, under which the plaintiff took these pease and other produce in satisfaction of the tenant's obligations, and the tenant gave up possession on the 17th October, 1917.

At the time this arrangement was entered into, and the plaintiff took possession of the pease as his own, he, the plaintiff, had no notice or knowledge that the defendants claimed, or had any contract under which they might claim, these pease. It is true that the tenant did tell the plaintiff that the defendants were entitled to 24 bushels of pease which were to be delivered to them, but these 24 bushels were returned to the defendants, and are not now in question. The plaintiff took delivery and possession of the pease in dispute, and stored them away in a building, not on the premises on which the pease were grown, but on premises near-by. The plaintiff must be regarded in the light of an innocent purchaser for value.

The rights of the parties, it seems to me, depend entirely upon the construction placed upon the contract between the defendants and Stutt, and the legal consequences of such contract so construed. As I read the contract, it is in effect a sale, first of all, of the 24 bushels of seed pease. Stutt is to pay for the seed in any event at $2 a bushel. This seed is "supplied" by the defendants, and Stutt agrees to pay for the same, and there is no reservation of ownership in the seed as distinguished from the crop, for the sufficient reason that such a reservation is useless in the case of seed supplied to be at once sown. The remaining provisions of the contract relate to the crop to be afterwards grown or acquired from this seed. This is to be at all times the property of the defendants. As between the parties to the contract, this provision is, no doubt, valid. But I can see no reason for refusing to apply to this case the legal principle that a grant of future-acquired chattels confers only an equitable interest therein upon the grantee; and if, when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant and becomes the owner thereof both at law and in equity: *Joseph* v. *Lyons* (1884),

ONT.

S. C.

MCARTHUR v. NILES LIMITED.

15 Q.B.D. 280; *Hallas* v. *Robinson* (1885), 15 Q.B.D. 288; *Holroyd* v. *Marshall* (1862), 10 H.L. Cas. 191, 11 E.R. 999. And, apart from this principle of law, I do not think that the parties intended that the property in the pease in question should actually pass until the crop was grown and harvested and weighed, for there is a significant clause in the contract which leads to the opposite conclusion. Stutt agrees that he "shall not withhold any part thereof or transfer or sell any part thereof to any other party or parties whatsoever." If the parties intended that the property in the pease to be grown should pass upon the execution of the contract, such a provision against selling to any one else would not be necessary; for, if the property passed, Stutt could not, if he wished, make a valid sale to another. This clause is based upon the assumption that Stutt could or might confer upon a purchaser a title to the crop, and therefore provides that he shall not do so. In this view of the law and under this construction of the contract, the plaintiff is entitled to judgment.

I cannot help regarding what the defendants did as a high-handed and profitable proceeding for them. They had already more than recouped themselves when they got back the 24 bushels, and might have been satisfied with that, though, of course, they are entitled to demand what they conceive to be their full legal rights.

The plaintiff is entitled to the value of his 30½ bushels of pease, which I place at $4 a bushel, or $122. I also allow the plaintiff $25 for the trespass committed upon the premises, making a total of $147.

There will be judgment for this sum and the costs of the action.

McGregor Young, K.C., for the appellants.

J. J. Maclennan, for the plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This is one of those cases in which the question involved is more than half answered when it is quite understood.

The material facts are simple, and not disputed. The plaintiff owns the land upon which the crop of pease in question was grown; one Stutt acquired some interest in the land—either as "cropper" or tenant—and afterwards entered into the contract with the defendants under which they claimed and took possession of the pease.

ONT.

S. C.

MCARTHUR v. NILES LIMITED.

Meredith, C.J.C.P.

Under this agreement—quite a common one in these days—Stutt was to grow, upon the plaintiff's land, the pease in question, for the defendants, who were to supply the seed and might supervise the crop and enter on the land to bestow upon it, before or after harvest, any labour of their own to enhance its quality or purity or to avoid unreasonable delay in the delivery thereof; and whose property the crop growing "in all its conditions shall be and remain at all times."

It cannot reasonably be doubted that such an agreement is quite a valid one in law, whether the pease became or did not become at any time part of the land. The agreement is in writing, signed by both parties to it.

The only question there can be is, whether the plaintiff had a prior right to the pease in question under the transaction between Stutt and him.

That transaction is evidenced by a printed lease of a very formal character, which is signed by the parties to it, and purports, in proper technical language, to be a demise of the land for one year, the rent reserved being $1, payable on the day of the date of the lease, "and one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the said demised premises."

If the transaction were really a demise of the land, giving the tenant the exclusive right of possession of it for the year, with a right in the landlord only to distrain for rent at the end of the year, it ought to be obvious that he had no right which could prevent Stutt making the bargain which he did make with the defendants: and that no delivery of the pease by Stutt to the plaintiff could deprive them of their right to them.

On the other hand, if the form of the transaction be disregarded, and if it be considered one under which the plaintiff was at all times to have a one-third share of all the crops grown upon his land, it may well be that that earlier right should prevail over the later-acquired rights of the defendants, provided that, under the real agreement between this plaintiff and Stutt, Stutt had not power to make such an agreement as that which he actually made with the defendants to grow the seed pease for them.

So that it really all comes down to that simple question: did the plaintiff acquire a right to one-third of all crops grown by

ONT.
S. C.
McARTHUR v. NILES LIMITED.
Meredith, C.J.C.P.

Stutt on the plaintiff's land, without any right in Stutt to make for the plaintiff, as well as himself, the agreement he did make with the defendants—acquire it when the lease was made? If so, this appeal should be dismissed, otherwise it should be allowed and the action should be dismissed.

Under all the somewhat unusual circumstances of the case, I incline to the view that the plaintiff did acquire such a right without conferring on Stutt such a power, and so would dismiss the appeal. The plaintiff was to have one-third of the crop; and no time was fixed for payment of the rent if the one-third of the crop was merely rent reserved. All the circumstances point, perhaps, more to "working on shares" than to a real demise, though there is much to be said in favour of the view that the one-third of the crop which the landlord was to have is, as to the crop of pease in question, one-third of the gross income from the transaction with the defendants.

We all agree in this: that the appeal should be dismissed.

Britton, J. BRITTON, J., agreed with MEREDITH, C.J.C.P.

Latchford, J. LATCHFORD, J.:—As between the plaintiff and his tenant Stutt, the plaintiff was, by the terms of the lease, entitled to receive from Stutt one-third in kind of all the crops grown during 1917 on the demised lands. One of such crops was the crop of pease grown by Stutt from the seed supplied to him by the defendants under an agreement, made subsequent to the lease, which provided that the pease grown from such seed should "in all conditions"—that is, after as well as before severance—be and remain the property of the Niles company. The plaintiff was not a party to the agreement between Stutt and the defendants.

When Stutt thus agreed that the defendants should be entitled to all the crop of pease, he was subject to a covenant to deliver one-third of that very crop to the plaintiff.

I am firmly of the opinion that, when Stutt made the agreement with the defendants, he had not the power to transfer to them what he had previously transferred to the plaintiff. The case is one in which the maxim applies: *Nemo plus juris in alium transferre potest quam ipse habet.*

Stutt recognised the prior right of the plaintiff by delivering to him one-third in kind—and not more—of the pease grown on the leased lands. That third became the plaintiff's property;

ONT.

S. C.

McARTHUR v. NILES LIMITED.

Latchford, J.

it was removed off the lands leased to Stutt and passed into the plaintiff's possession as rent received by virtue of the demise. It was in his possession as absolute owner, when the defendants, without his knowledge, entered upon the premises where he had stored it and removed it to their own warehouse.

The learned trial Judge held that the defendants' entry was a trespass, and their removal of the pease a conversion; and that they are liable in damages for the trespass and for the value of the pease.

I agree in his conclusions. The case of *Burnett* v. *McBean*, (1858), 16 U.C.R. 466, cited in support of the appeal, is, I think, fatal to it. There the plaintiffs had agreed with one Dean that they would supply wood for burning bricks, which he was to make for them. The cost of the wood was to be deducted from the price to be paid for the bricks. The plaintiffs supplied the wood and Dean made and burned the bricks. Afterward Dean assumed to transfer the bricks to the defendant, who prevented the plaintiffs from taking possession of them. Draper, C.J., left the case to the jury with an instruction that if the bricks were to be manufactured for the plaintiffs, and were to be theirs as they were made without any delivery, then the plaintiffs should recover. The jury having found for the plaintiffs, the direction was held to be proper by a full Court—Robinson, C.J., and McLean and Burns, JJ.

This case seems to me to have decided nothing more than that the subsequent could not prevail against the prior agreement.

In *Bank of British North America* v. *McIntosh* (1897), 11 Man. L.R. 503, a strong Court, Taylor, C.J., Killam and Bain, JJ., held, on an appeal in an interpleader issue, that an agreement to create a merely equitable charge upon a crop prevailed as against an execution creditor.

I am of opinion that the appeal should be dismissed with costs.

Middleton, J.

MIDDLETON, J.—The plaintiff is the owner of a farm in the township of King. On the 1st March, 1917, he leased this farm to one Stutt for one year, the tenant paying $1 and statute labour taxes only, but also agreeing to allow to his landlord "one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the said demised premises."

ONT.

S. C.

McARTHUR v. NILES LIMITED.

Middleton, J.

On the 12th April, 1917, Stutt made an agreement with the defendants, who were seed-merchants, under which he received from them 24 bushels of pease, agreeing that "the crop growing, and in all its conditions, should be and remain at all times the property of the defendants," who were to be at liberty to supervise the same before or after harvest; and, upon harvesting, the entire crop was to be delivered to the defendants, who would pay him $2 per bushel for the produce, less $2 per bushel for the seed supplied.

The crop grown, though supervised by the defendants, was harvested by Stutt, and an adjustment took place between him and his landlord by which 40 bushels of pease, being the landlord's share of the pease produced, after deducting 24 bushels to be allowed for seed, were delivered to the landlord, and placed by him in a building on the land in question. On the 6th November, 1917, the defendants broke into the building and removed these pease, claiming them as theirs under the agreement with Stutt. The plaintiff then sued the defendants for the conversion of the pease in question.

The learned County Court Judge, in a considered judgment, has found in favour of the plaintiff, holding that, while the agreement between Stutt and the defendants was, no doubt, a valid agreement between them, he could "see no reason for refusing to apply to this case the legal principle that a grant of future-acquired chattels confers only an equitable interest therein upon the grantee; and if, when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant and becomes the owner thereof both at law and in equity."

I have arrived at the same conclusion as the learned Judge, but base my decision upon somewhat different reasoning; and I think it is a matter of importance, in a community in which there are so many agreements for the farming of land upon shares, that this principle should be clearly enunciated.

Although under the agreement with Stutt the property in the seed pease remained in the defendants, it was contemplated that the pease should be sown upon the plaintiff's farm. When these

pease were sown, or at any rate when grown, they became part of the land, upon the principle indicated by the maxim *Quicquid plantatur solo solo cedit*—a maxim which, as shewn by the authorities collected in Broom's Legal Maxims, 8th ed., p. 314, applies to the case of seed sown, not merely by civil law, but according to eminent writers upon English law. The effect of the affixing of chattel property to land is to vest the title in the owner of the land and to change the nature of the chattel, and to make it part of the realty. This is so even as against the true owner of the chattel, *â fortiori* where the affixing was contemplated by the agreement under which possession was parted with: *Hobson* v. *Gorringe*, [1897] 1 Ch. 182.

The crop during the whole time of its growth was not a chattel, but remained part of the real estate. The tenant, by virtue of his tenancy, had the right to cut and harvest the crop, and so convert it into a chattel, and upon its severance it ceased to be real, and became chattel, property, and the property then became vested, in accordance with the terms of his agreement with the landlord, which alone gave him the right to cut it, and an undivided third was the property of the landlord: *Mills* v. *Brooker* (1919), 35 Times L.R. 261.

The suggestion is made that, because the seed belonged to the defendants, the crop harvested must also belong to the defendants—that it was merely a growth of the seed. Whether this is true as a matter of biology or not, it is not the principle which has been recognised in any of the somewhat numerous cases dealing with the question. Although the crop in one sense is derived from the seed, the seed had to die—the vital germ developed into the plant by absorbing the elements found in the soil, the air, and the water, and the energy derived from the sun. The seed harvested was formed from the germ in the ovary of the flower, and from the pollen, whence borne no one can tell. There is no such identity between the seed sown and the seed harvested as to enable the property to be traced. The view entertained in the cases, as already stated, is that the growth is derived from the soil, and until the growth is completed, at any rate, it forms part of the soil. Any injury to it is an injury to the land, and the right to recover was, according to the old practice, by an action for trespass to the land. See *Crosby* v. *Wadsworth* (1805), 6 East 602, 102

ONT.

S. C.

MCARTHUR v. NILES LIMITED.

Middleton, J.

E.R. 1419; *Brereton* v. *Canadian Pacific R.W. Co.* (1898), 29 O.R. 57. In the case in East, the plaintiff had contracted with the owner of a close for the purchase of a growing crop of grass. It was held that he might maintain an action for trespass *qu. cl. fregit* against a person entering the close and taking grass, but he failed in his action because his contract was for the sale of an interest in or concerning land, and, therefore, not being in writing, was within the 4th section of the Statute of Frauds.

In *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357, 107 E.R. 766, an outgoing tenant, who had sown wheat, sold the wheat to the incoming tenant. The purchaser did not pay. The vendor sued for the price of goods bargained and sold, and for goods sold and delivered. It was held that this was a sale of an interest in land.

In *Poulter* v. *Killingbeck* (1799), 1 Bos. & P. 397, 126 E.R. 973, the owner of the land let it to another, on condition that he should have a moiety of the crops. While the crop was in the ground it was appraised: an action of *indebitatus assumpsit* was brought. It was argued that the plaintiff could not recover, on the ground that the contract was within the Statute of Frauds. The plaintiff was held entitled to recover upon the special agreement made at the time of the appraisement, the action not being on an agreement with regard to lands. Had it not been for the appraisal and new agreement, the action would have failed.

In *Evans* v. *Roberts* (1826), 5 B. & C. 829, 108 E.R. 309, an agreement was made for the sale of a then growing crop of potatoes. It was held that this was a sale of goods, wares, and merchandise, different opinions being expressed by the different Judges dealing with the case. Bayley, J. (p. 831), took the view that the contract was "for the sale and delivery of things which, at the time of the delivery, should be goods and chattels," and suggested that, when the potatoes were at maturity and ceased to grow, they might then be regarded as having become chattels. Littledale, J., on the other hand, is more radical. He holds (p. 839) that "a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not . . . . . within the 4th section of the Statute of Frauds.

In *Jones* v. *Flint* (1839), 10 Ad. & Ed. 753, 113 E.R. 285, the earlier cases are discussed. There was an oral agreement under which the defendant agreed to buy a crop of corn, some stubble, and some

potatoes growing upon the land. It was held that this was not within the 4th section, Denman, C.J., stating (p. 758): "If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And, although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from their original character, not to be on that account a contract for the sale of any interest in land."

In *Brantom* v. *Griffits* (1876), 1 C.P.D. 349, it was held that growing crops are not goods and chattels within the Bills of Sale Act, Brett, J., summarising the law thus (p. 353): "It seems to me that the result of the authorities is that, though for certain purposes and under certain conditions they are goods and chattels, they are not so for all purposes, and therefore we must inquire further."

The result of all these cases is, I think, to establish that crops growing on land are part of the land, but that it is open to the owner of the land, at any rate when the crops have reached maturity, to treat them as chattels. The significance of that is, that here the landlord never agreed to treat this crop as chattels except upon the terms that he should be entitled to an undivided one-third of the crop when converted into chattels. All this is quite in accord with the law relating to emblements and awaygoing crops, the tenant's right to emblements and awaygoing crops depending upon an agreement, express or implied.

It is also in accordance with the common law under which growing crops could not be the subject of larceny.

Appeal dismissed.

CANADIAN VICKERS COMPANY Ltd. v. THE "SUSQUEHANNA."

CAN.
Ex. C.

Exchequer Court of Canada, Audette, J. September 20, 1919.

SHIPPING (§ III—10)—QUANTUM MERUIT—OVERHEAD CHARGES—CONTRACTOR'S PROFITS—COST OF CONSTRUCTION—WITNESSES—CREDIBILITY.

The plaintiffs were owners of marine construction works and shipyards and had large capital invested and had large contracts on hand from the Government for the construction of drifters and trawlers for war purposes. The work in question was accepted by the plaintiff only after pressing and urgent request from the defendant, whatever the cost might be, as emergency work and to oblige him, in order that the ship might get out of the river before the close of navigation. Plaintiffs were obliged to take men off other work and went behind on Government contracts.

CAN.

EX. C.

CANADIAN VICKERS COMPANY LTD. v. THE "SUSQUEHANNA."

Held, that under all the circumstances of the case, and considering the abnormal state of business and the advanced prices prevailing during the war, 90% of the cost of labour, as an overhead charge, plus 10% on the total cost as contractor's profits, were fair and reasonable items to be added to the actual cost of labour and materials, in arriving at the valuation of the work done by plaintiff.

2. That "Cost of Construction" includes, besides actual cost of labour and materials, an allowance for overhead expenses, and a profit on the capital employed in producing an article or doing a piece of work.

3. That where the trial Judge did not hear or see the witnesses, an appellate Court is as competent to appreciate the facts and estimate the credibility of the evidence as the Court of first instance.

Statement.

APPEAL from the decision of Maclennan, L.J.A., at Montreal (1919), 44 D.L.R. 716. Varied.

The action *quantum meruit* was taken by plaintiffs to recover from defendant the sum of $52,983.34 for work done in repairing the S.S. "Susquehanna." The defendant admitted its liability but claimed that the amount asked was excessive and that too much was charged for overhead expenses and offered the sum of $35,000 in full settlement.

On December 4, 1917, the case was referred to the Deputy District Registrar, who heard the witnesses and their counsel and on Oct. 5, 1918, filed his report allowing plaintiffs' claim in full.

The case was then heard by Maclennan, L.J.A., at Montreal, on a motion of defendant to vary the report of the Deputy District Registrar, and on Nov. 23, 1918, the said Judge delivered judgment declaring the offer and tender of $35,000 sufficient and condemning the defendant to pay this amount.

Appeal was then taken from this judgment to this Court sitting in appeal and the appeal was heard at Montreal before Audette, J., on May 20, 1919.

F. H. Markey, K.C., for appellant; *A. R. Holden*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, pronounced on Nov. 23, 1918.

The facts concerning the case having already been set forth in the judgment below, it will be sufficient, for the understanding of the matter in controversy, to state briefly that the "Susquehanna," on account of her size, having been cut in two sections at Buffalo, N.Y., with the object of taking her down the St. Lawrence through the canal, the owners of the vessel approached the plaintiff company, at Montreal, to repair and join her together.

The plaintiff company was at that time overloaded with work at their shipyard, and the negotiation for the repairs, leading to the present suit, originated in the following manner, there being no contract for the same. These negotiations were carried on by Auditore on behalf of the vessel, and Miller on behalf of the company. The former was not heard as a witness, but Miller was, and I see no reason to question the reliability of his evidence, as was done below. Moreover, it must be said here that the trial Judge who pronounced below, was absolutely in no better position than I am to estimate the credibility of the evidence, because it was taken before the Registrar, and the Judge did not have the advantage of seeing the witnesses and in this way have an opportunity of determining the weight to be attached to the evidence by their demeanour while under his personal observation.

Now Miller says that, after the exchange of correspondence, Auditore, in July, 1917, came to his office and asked that the company should dock the two portions of his vessel, and he then quoted a price for joining the vessel together, but exclusive of all other work. He further stated that this could only be done provided the dock was not required for other important work, such as repairs to transports or repairs to ocean-going freighters, equivalent to freighters, practically ships over which the Government had control. Auditore understood this and brought his ship to Montreal, and when she arrived the dock was occupied by the S.S. "Singapore," a large ocean freighter. The consequence was he could not dock his vessel, and then Auditore said:—

> What can I do? Can you carry out the other work, such as engine room repairs, and deck repairs and miscellaneous work, such as he had a list prepared? We declined. We not only declined several times, but declined in writing. (p. 7). We declined and I said we could not undertake the work, owing to scarcity of men and so on. Auditore begged us to do something for him to get his ship out of *the river before the close of navigation*. I then called up Quebec—the dry-dock, and endeavoured to get them to undertake the work and finally they succeeded, and the ship was docked at Quebec to be joined together. Before she left our works for Quebec, and before we undertook any work on her at all Auditore met me at the Grand Trunk Station in Montreal and we met French, Chief Surveyor of Lloyds Register in New York, and Auditore explained to French we had refused to do any work on the ship on account of the scarcity of men, and French said :"Miller, look here, you have to do something to help him out. He has had one trouble after another with this ship. Here he is in Montreal with every likelihood of his ship being frozen up for the winter." I told French I would look into the matter and I told Auditore I

CAN.

Ex. C.

CANADIAN VICKERS COMPANY LTD. v. THE "SUSQUEHANNA."

Audette, J.

would let him know in a day or two what I could do, and the result of all these *pourparlers* was the letter, exhibit P. 1, which reads as follows:—

July 12, 1917.

Frank Auditore, Esq.,
Windsor Hotel,
Montreal, Que.

Dear Mr. Auditore:

Mr. Cameron has been thoroughly through the "Susquehanna" and finds it absolutely impossible, in the incomplete state in which the various items are, to figure a definite price. He estimates, and judging by the description, I think he is correct, that this work will cost in the vicinity of $35,000, apart from joining together.

We are prepared to quote you a firm price for joining together of $22,000, including dock dues, but not including any repairs to damage done in coming through the canal.

We would, however, much prefer that you take the ship to New York for completion, as I am fully confident that, notwithstanding the condition of the yards in New York, you are more likely to get a quicker job from your friend Mr. Todd than from us, as we cannot possibly afford to draw a large number of men off present work.

We will be glad to let you know as soon as we ascertain the extent of the damage to the "Singapore" when your ship can get on the dock.

I am sorry we cannot quote you a firm price, but you will understand the conditions.

Yours faithfully,
(Sgd.) B. L. MILLER.

Now this letter shews the works were accepted under pressure and to oblige the defendant, as the company could not possibly afford to draw a large number of men off present work, and lest too much importance is attached to these figures of $35,000, which were afterwards offered in settlement by the defendant, it is, in fairness, well to bear in mind that while that estimate is made with the qualification that "Cameron has been thoroughly through the 'Susquehanna' and finds it absolutely impossible, in the incomplete state in which the various items are, to figure a definite price," and with the further hereinafter mentioned statement about the number of items covered at the time.

Miller at p. 104 of his evidence adds "that Auditore, at that time, said: 'Miller, for goodness sake put your men on, and go on with the work. I don't care what it costs, but get my ship out of the river before the river freezes.'" The work was done and the ship taken down to Quebec to be put together.

Then at pp. 98 and 99, of the evidence, Miller says that when this estimate of $35,000 was made, as above mentioned, the list of the repairs only contained 65 items—plus about 7 or 8 more

on which work was not done—the actual numbers completed being 65 on the first list, to which in August were added 122 more items of repairs, making this figure of $35,000 obviously inadequate.

Captain Barlow in the course of the work also signed three emergency orders (pp. 220 and 221) for extras of the list on hand at the works.

The number of men employed on these repairs from July 9 to August 14, as shewn in exhibit R. 4, was 2 on the first day, increasing during the first week to 73, the second week to 200, the third week to the highest total of 271, and subsequently dropping to 82 on the last day.

A number of men were taken off from some other important works in the yard, the construction of which involved $1,000,000, and as a result the plaintiffs went behind on their contracts for drifters and trawlers, and Miller further contends that every repair in the yard was interfered with by yielding to the defendant and accepting his work under pressure.

The only question now to be determined, the defendants having accepted and taken over the works, is what is the fair and reasonable value, the market value, so to speak of the said works *under the circumstances*. The defendant having accepted and taken over the works, stands in the position of a person who employs another to do work for him without any agreement as to his compensation, and in such a case the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit—*quantum meruit*.

What can be done in the absence of actual evidence of the fair cost and value of each item of work mentioned in this famous statement of these 65 plus 122 items? Under such circumstances nothing else is left but to take the figures given—which have not been controverted by any evidence, with respect to labour and material—and consider whether the overhead and profit charges are right and fair. The defendants admit liability for the work done, and materials supplied, but contest the amount claimed.

The defendants have really thrown themselves at the mercy of the plaintiffs with the object of having their work done promptly to enable them to get out of the St. Lawrence before the freezing of the river, and carry on the profitable business of freighting during the war. And the plaintiffs would probably do that work

CAN.

EX. C.

CANADIAN VICKERS COMPANY LTD. v. THE "SUSQUEHANNA."

Audette, J.

in much less time than any other firm. No price being mentioned, the builder is entitled to the fair and reasonable value of his work, and the materials supplied. "Such reasonable price must include payment for skill, supervision and services of contractor himself." Hudson, 4th ed., 476.

The amount claimed by the plaintiffs is the sum of $53,190, and the account rendered, filed as exhibit P. 2, reads, as follows:—

Naval Construction Works, Maisonneuve,
Montreal, P.Q., Dec. 3, 1917.

Mr. Frank Auditore,
44 Sackett Street,
Brooklyn, N.Y.,
Bought of Canadian Vickers Ltd.

To joining together S.S. "Susquehanna" as per statement attached:

Material from stock	$5,517.57		
Material purchased	829.98		
		$6,347.55	
Handling charges 5%		317.88	
			$6,665.43
Labour		14,905.73	
Overhead factor 90% on labour		13,415.16	
			28,320.89
			$34,986.32
Profit, etc			16,554.89
			$51,541.21
Tug services as per copy invoices attached.			2,000.00
			$53,541.21

The items with respect to the material, handling charges and labour, while not admitted are not contested. The contestation centres on the two items of overhead factor at 90% on labour and the rate of profit.

The defendant, as we have seen, was very anxious to get the work done as expeditiously as possible, with the object of using his vessel, the freight rates being then very high on account of the war—and on the other hand, the cost of shipbuilding and repairs had again, on account of the war, increased to abnormal figures.

I think I may state that both parties will agree as to the principle that both overhead and profit charges are properly allowable in such a case as this; and that controversy arises only as to the respective rates of such charges. The percentage of

overhead made in this case refers to works of the yard outside of the floating dock, and the shell shop operations. It is the percentage that overhead bears to productive labour. Having said so much it becomes unnecessary to go into the question of "overhead" beyond saying that "overhead" is part of the actual costs (Evd., p. 233). "Overhead" takes care of the general expenses of the business, not coming under the head of material and labour, but such expenses as cannot be charged up to any one job, and have to be apportioned over the whole business of the firm. So that "overhead," if properly ascertained, is just as much actual costs as the other items.

Fawcett, in his "Manual of Political Economy" (8th ed., p. 351), lays down that:—

> The term "cost of production" includes not simply the cost of material and the wages of labour, but also the ordinary profit upon the capital employed in producing the particular commodity.

After taking into consideration all the circumstances of the case, the abnormal state of the business during the war followed by advanced prices, and moreover weighing the conflicting evidence upon the subject—inclusive of the view cited from the authorities—to the list of which I might add "Cost of Accounting," Nicholson & Rohrback—I have come to the conclusion not to interfere with the overhead charge. It is of common and general knowledge that during the war the Government of Canada entered into contracts allowing over 90% on overhead charges, but with only 10% profit.

Coming to the question of profit, I must say I am entirely at variance with any conception that could, under the present circumstances, justify a profit of 47 3-10% as charged. What reason is there to depart from the usual rate of profit under contractual works, I fail to see. Some evidence upon this question is furnished by witnesses who have no idea, as appears upon the face of their testimony, of our Canadian climatic conditions, if it has any bearing upon the question.

> Although the average profits realized in different trades may greatly and permanently differ, yet there is a certain rate of profit belonging to each trade. Such a rate indicates a point of equilibrium about which the average profits of the trade may be considered to oscillate. And the competition of capital is an agency which is ever at work to restore the average rate of profit to the position of equilibrium whenever disturbed from it. Fawcett, Manual of Political Economy, p. 349.

CAN.

Ex. C.

CANADIAN VICKERS COMPANY LTD. v. THE "SUSQUEHANNA."

Audette, J.

A good normal profit under the circumstances would be between 10% and 15%, but in view of the large overhead charges allowed, I have come to the conclusion that 10% will reasonably and justly compensate the plaintiff.

The item of $2,000 for towage is a disbursement made by the plaintiff at the request of the defendant, and should be allowed in full.

The plaintiff is therefore entitled to recover from the defendant the sum of $40,484.95, arrived at in the following manner:—

Material from stock	$ 5,517.57	
Material purchased	829.98	
		$ 6,347.55
Handling charges 5% (Dubitante, but de minimis)		317.88
Labour	$14,905.73	
Overhead factor 90% on labour	13,415.16	
		28,320.89
		$34,986.32
10% profit		3,498.63
		$38,484.95
Tug services		2,000.00
		$40,484.95

The appeal is allowed, with all costs.

Appeal allowed.

ONT.

S. C.

PERE MARQUETTE R. Co. v. MUELLER MFG. Co. Ltd.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Ferguson, JJ.A. March 28, 1919.

CARRIERS (§ IVA—515)—FREIGHT RATES—TARIFF—MISDESCRIPTION OF GOODS.

A common carrier cannot collect freight rates on "metal scrap" at a rate different from that established by the Railway Board tariff, simply because the shipper innocently misdescribed the goods in the bill of lading, what was in fact "metal scrap" being described as "copper ingots."

Statement.

APPEAL by defendants from the judgment of Meredith, C.J.C.P., in an action for a declaration as to the proper rate chargeable for the carriage of goods by the plaintiffs for the defendants, and for payment accordingly. Reversed.

The judgment appealed from is as follows:—

This case is by no means as complicated as the number of exhibits put in, and the amount of testimony taken, at the trial, might indicate. It is all in a very narrow compass.

The question raised is: what freight rate should be paid for the carriage of the brass or copper, and other metals combined, from San Francisco to Sarnia, which the defendants received from the plaintiffs, as carriers of them. The rate for carriage, in such cases, is not something which depends upon the parties to the contract alone; the laws of this country, and those of the United States of America, have something to say upon the subject. Those laws prevent discrimination and prohibit the companies from exacting anything except that which has been approved by the proper officer appointed by the Government. The authorised tariffs prevail, and they provide for the "classification" of goods.

Goods of one character are carried at a higher rate than those of another class. It depends perhaps mainly upon the quality—whether the goods are more or less valuable—but, however that may be, what is binding upon every one is the classification and the rates authorised.

The difficulty in this case is to decide what classification and consequent rate is applicable to the goods in question. The testimony upon this question is not sufficient to satisfy my mind. Therefore, the case must go to the proper officer to ascertain and state what the rate applicable is—unless the parties are able to come to an agreement as to it. There ought to be no occasion for a reference, the parties ought to be able to agree on that point. Once the character of these goods is ascertained, and the law applicable to them is determined, it ought to be easy to find out conclusively, from a proper railway officer or railway board, what the rate is, and then judgment could be entered accordingly.

If the rate should not be ascertained, by agreement between the parties as suggested during the argument, or from a proper officer—though I am quite sure it could and should be—then there must be a reference as I have mentioned; which means more litigation and more costs.

I must now clear the way for ascertaining what the rate is, and, for that purpose, I find: that the goods in question are not ingot copper or ingot brass, though, until broken, having only that appearance, nor are they what might properly be described as either scrap brass or scrap copper; though their value is pretty much that of the same weight of such scrap. But they are not scrap brass or scrap copper; nor could they be truly described as

ONT.
S. C.
PERE MARQUETTE R. CO. v. MUELLER MFG. CO. LTD.

such. In the way that the case presents itself to my mind, it is not material how the goods might best in a word or two be described, that which they are said to be is largely Japanese or Chinese money tokens in casings, having the appearance of ingots.

The defendants, for their own purpose, chose to describe the goods as copper ingots, and with that description and representation delivered them to the railway carriers, to be carried with that care which should be given to goods of that character. Having done that, I hold, the defendants are bound to pay the proper rate applicable to such goods—copper ingots. It cannot be under that description possible that they might ship the goods, either by mistake, or designedly so as to get the benefit of the care given to the carriage of such goods, and then turn around and say they are goods of much less value—"scrap"—and should be carried at the much lower rate. I cannot think that reasonable men would enter into a contract of that kind, and I am sure these railway companies would not. They generally take care of themselves very well and make no mistakes of that character; nor would Government officers, if they had the power, impose it upon them: it is too plainly unreasonable and unfair. I firmly decline to make any ruling that would have the effect of enabling any shipper, by his own fraud, or the fraud of any one else, or his own mistake, to obtain and enforce a "discrimination" in his own favour. No precedent can be found for it, and none shall be made by me.

But it is contended that the carriers themselves have expressly declared in their contract that, no matter what may be said or done, by the owner of the goods, the freight is to be paid only according to the classification of the goods as they, in character, actually are: that the true character of the goods is alone to determine the rate. That is Mr. Weir's contention, and he supports it by reading a clause of the bill of lading, which is in the e words:—

"The owner or consignee shall pay the freight and all other lawful charges accruing on said goods, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the goods shipped are not those described in the bill of lading, the freight charges must be paid upon the goods actually shipped, with any additional penalties lawfully payable thereon."

I am quite in accord with Mr. Brackin in his contention that that is a provision in favour of the carrier and not against him: that it could not have been intended to apply to a case of this kind. The full rate and the additional penalties are imposed on the shipper. It is aimed against him only. It cannot have been intended that a shipper might describe goods falsely, so that they might have special care and attention, which if truly described they would not get, and then, when the time comes to pay the freight bill, be allowed to pay upon the basis of the lower classification, and for carriage which might have been of an entirely different character if the goods had been truly described. It could hardly be contended that, if their goods were shipped and carried as gold ingots, the defendants need pay only the freight rate for scrap brass or copper. The principle is the same, when shipped as copper ingots: the difference is only in measure of the carriage cost.

I hold and find: that the freight charges should be paid according to the classification applicable to the character of goods as stated by the defendants in their telegram, and as delivered to and accepted by the railway company, and accordingly carried by them from San Francisco to Sarnia.

Nothing was said by Mr. Weir, in his argument, as to the payment which the defendants made. I do not see how anything could be said, of any consequence, in regard to it. The payment was made to the local agent of the plaintiffs, at Sarnia, and he endorsed a cheque which contained words indicating that the cheque effected a payment in full of the freight charges. It is always open to one who gives a receipt for a payment, to prove a mistake in it. In this case, even if the payment had been made to some one of higher authority than the local agent, I cannot understand why an error of any character could not be corrected. And the endorsement was not even a receipt. The payee may not actually accept its terms; in which case, the position of the parties seems to be this: the drawer of the cheque may sue to recover his money, and he who cashed it may counterclaim for the full amount of his demand.

My conclusion upon the whole case is this: that the defendants must pay freight at the proper rate applicable to the goods as

ONT.

S. C.

PERE MARQUETTE R. CO. v. MUELLER MFG. CO. LTD.

FERGUSON, J.A.

described by them—"copper ingots." If the parties cannot agree upon what that rate is, it must be referred to the proper local officer at Sarnia to ascertain it. The plaintiffs are entitled to their costs of this action upon the scale applicable to the case, and subject to set-off, if any, under the Rules.

A. Weir and *A. I. McKinley*, for the defendants.

R. L. Brackin, for the plaintiffs.

The judgment of the Court was delivered by

FERGUSON, J.A.:—An appeal by the defendants from the judgment of the Chief Justice of the Common Pleas, dated the 3rd December, 1918, declaring the plaintiffs entitled to be paid the tariff rate for the carriage of copper ingots, although the goods carried were not copper ingots, but were in fact scrap metal, and referring it to the Local Master at Sarnia to find the lawful tariff rate on copper ingots.

The plaintiffs cross-appeal, asking that the Court dispense with the reference and do now find the amount to which the plaintiffs are entitled, by reference to the printed tariff put in.

In their pleading the plaintiffs state their claim as follows:—

"1. The plaintiff is a common carrier operating a line of railway in the United States of America and in the Province of Ontario.

"2. During the months of January and March in the year 1917 the defendant received at Sarnia, Ontario, over the line of the railway of the plaintiff, several shipments of brass, upon which shipments the defendant was liable to pay the freight charges to the plaintiff.

"3. The proper freight tariff applicable to such shipments required the plaintiff to charge against and collect from the defendant the rate applicable upon brass, but the defendant refuses to pay freight except at the rate applicable upon scrap metal, the result being that, while the total freight upon such shipments charged at the proper tariff rate was $10,292.81, the defendant has paid to the plaintiff the sum of $3,600.79, the amount claimed by the defendant to be the proper freight charges, leaving a balance of freight charges in respect of the said shipments owing by the defendant to the plaintiff of $6,692.02."

The dispute between the parties is as to whether the rate of freight is to be fixed by the description in the bill or by the true

ONT.

S. C.

PERE MARQUETTE R. CO. v. MUELLER MFG. CO. LTD.

Ferguson, J.A.

description of the commodity carried. The goods were shipped and described in the bill as copper ingots, but were in truth scrap metal. The authorised tariff rate on copper ingots is admitted to be $2.20 per hundred, and on scrap metal 76.8 cents, making a difference on the shipments of $6,692.02.

In December, 1916, the defendants entered into contracts with Paul Wenger & Company, of New York, to purchase from them "Brass ingots, analysis not guaranteed, about same as sample; delivery ex-steamer, San Francisco, California; shipment from Japan by steamer during December, 1916, or January, 1917; terms, net cash against documents."

The defendants, on presentation of documents, paid the purchase-price, and instructed that the goods be shipped from San Francisco, California, to Sarnia, and, believing them to be ingots according to their contract of purchase, directed that the goods be classified and shipped as copper ingots. The defendants paid to the plaintiffs for carrying charges the tolls that would be payable on scrap metal.

The plaintiffs were not satisfied to accept this sum in full satisfaction, and in this action claim that, because the defendants classified the goods as copper ingots, they must pay on the basis of their own description and classification.

The parties agreed before us that the bill of lading and the printed tariff put in as evidence were the bill and tariff authorised, approved, and adopted by the Interstate Commerce Commission, U.S.A., and the Canadian Railway Board, and that the law of the United States governing tariffs and contracts of common carriers was the same as that of Canada, and that the provisions of the Canadian Railway Act were applicable to the contract between the parties.

As I see it, the point in this case is, can a common carrier collect freight charges on metal scrap at a rate different from the rate established by the Railway Board tariff, simply because the shipper at the time of the shipment innocently misrepresented what was in fact metal scrap to be copper ingots?

At the trial the case appears to have been dealt with on the meaning of the express provisions of the bill of lading and the conditions thereon endorsed.

I am of the opinion that sec. 314 of the Railway Act, R.S.C.

ONT.

S. C.

PERE MARQUETTE R. Co. v. MUELLER MFG. Co. LTD.

Ferguson, J.A.

1906, ch. 37 (as enacted by (1908) 7 & 8 Edw. VII. ch. 61, sec. 11), prevents a carrier collecting tolls other than those provided for in a tariff authorised and approved of by the Railway Board.

Counsel for the plaintiffs argued that their claim did not contravene that section, as they were claiming the authorised rate on copper ingots, and that the rate is governed by the description in the bill.

The defendants say that the description in the bill does not affect or govern the rate; that the rate must be fixed and determined by the proper description of the goods carried; that sec. 315 not only limits the carrier and the shipper, but limits the Railway Board's right to fixing tolls by reference to the goods carried, and not by reference to what they are represented or agreed to be.*

No Canadian case was cited to us—and I have not been able to find any—dealing directly with the point. In *Watson* v. *Canadian Pacific R. Co.* (1914), 20 D.L.R. 472, 32 O.L.R. 137, it seems to me to have been assumed that the only rate recoverable was that authorised on the goods when properly described; the question decided in that case was whether or not sec. 341 provided an exception to the general rule.

In *Urquhart* v. *Canadian Pacific R.W. Co.* (1909), 12 Can. Ry. Cas. 500, 2 Alta. L.R. 280, a claim by a shipper for damages

*Sections 314 (as enacted by sec. 11 of the Act of 1908) and 315 (as in the original Act) are as follows:—

314. The company, or the directors of the company, by by-law, or any officer of the company thereunto authorised by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged in respect of the railway owned or operated by the company, and may specify the persons to whom, the place where and the manner in which, such tolls shall be paid.

2. The tolls may be either for the whole or for any particular portion of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company or by any person in respect of a railway or any traffic thereon until a by-law authorising the preparation and issue of tariffs of such tolls has been approved by the Board, nor, unless otherwise authorised by this Act, until a tariff of such tolls has been filed with, and, where such approval is required under this Act, approved by, the Board; nor shall any tolls be charged under any tariff or portion thereof disallowed by the Board; nor shall the company charge, levy or collect any toll or money for any service as a common carrier except under the provisions of this Act.

6. The Board may, with respect to any tariff of tolls, other than the passenger and freight tariffs in this Act hereinafter mentioned, make regula-

suffered by reason of the railway company misquoting the rate, Stuart, J., delivering the judgment of the Alberta Court of Appeal (12 Can. Ry. Cas. at pp. 505-6), said:—

"It is conceded that in view of the provisions of the Railway Act no action would lie upon the contract of affreightment, and that it is impossible to consider what passed between Urquhart and the agent of the defendant company as a contract to carry the potatoes at 32½ cents per hundred pounds. Inasmuch as the true rate according to the authorised tariff then in force was 58 cents, and as the imposition of any different rate, either higher or lower, is forbidden by the Act, such a contract would clearly be illegal and void."

There are a number of cases in the United States, and they will be found collected in Lust & Merriam's Digest, pp. 564, 803 to 808, and in 10 Corpus Juris, pp. 509 to 514.

"Neither misquotation, contract, or decision of a Court on the reasonableness thereof can alter the legal rate:" *Blinn Lumber Co.* v. *Southern Pacific Co.* (1910), 18 Interstate Commerce Commission Reports 430, 433. (The quotation is from Lust & Merriam's Digest, p. 808.)

"No excuse, which operates as an evasion of the rate, has any standing as matter of law in defence of a proved violation of such rate. Mistake, inadvertence, honest agreement and good faith

tions fixing and determining the time when, the places where, and the manner in which, such tariffs shall be filed, published and kept open for public inspection.

315. All such tolls shall always, under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

2. No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.

3. The tolls for larger quantities, greater numbers, or longer distances may be proportionately less than the tolls for smaller quantities or numbers, or shorter distances, if such tolls are, under substantially similar circumstances, charged equally to all persons.

4. No toll shall be charged which unjustly discriminates between different localities.

5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line, is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that owing to competition, it is expedient to allow such toll.

6. The Board may declare that any places are competitive points within the meaning of this Act

ONT.

S. C.

PERE MARQUETTE R. CO. v. MUELLER MFG. CO. LTD.

Ferguson, J.A.

are alike unavailing:" *New York New Haven and Hartford R.R. Co.* v. *York and Whitney Co.* (1913), 215 Mass. 36, at p. 39.

"Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper:" *Kansas City Southern R. Co.* v. *Carl* (1913), 227 U.S. 639, 653.

The Canadian Railway Board held that it could not even consider a contract between the shipper and the carrier as a tariff condition in fixing rates. But the Supreme Court of Canada, in *Montreal Park and Island R.W. Co.* v. *City of Montreal* (1910), 43 Can. S.C.R. 256, and in *Canadian Pacific R.W. Co.* v. *Regina Board of Trade* (1911), 13 Can. Ry. Cas. 203, 45 Can. S.C.R. 321, indicated that they thought that the Board had jurisdiction to consider such contract as a tariff condition when they were fixing the rate, but that the rate could not be fixed by act or contract of the parties.

On reference to the report of *Canadian Pacific R.W. Co.* v. *Regina Board of Trade*, 13 Can. Ry. Cas. at p. 213, it will be seen that the Board said "that it was not the intention of Parliament in passing section 315 of the Railway Act to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract."

These two latter cases are not directly in point, but they seem to me to indicate the view of the Board and the Supreme Court of Canada in reference to the rights of the carrier and the shipper, and to bear out the view expressed in the American cases.

Endorsed on the bill is a condition reading in part as follows:—

"If upon inspection it is ascertained that the goods shipped are not those described in the bill of lading, the freight charges must be paid upon the goods actually shipped."

The defendants in this case claimed that that condition applied in their favour, but the learned trial Judge said:—

"I am quite in accord with Mr. Brackin in his contention that that is a provision in favour of the carrier and not against him: that it could not have been intended to apply to a case of this

kind. It cannot have been intended that a shipper might describe, goods falsely so that they might have especial care and attention . . . and then, when the time comes to pay . . . be allowed to pay upon the basis of the lower classification."

I think it is erroneous to apply to this bill of lading the same rules of construction as are applied to agreements made between individuals unrestricted in their right to contract. Section 340 of the Railway Act, R.S.C. 1906, ch. 37, gives the Board power to regulate and prescribe the terms and conditions under which any traffic may be carried by the company; and, it being admitted that this bill is on a form prescribed by a Board having the duty to guard and protect, not only the rights of the parties to the contract, but the rights and interests of the public, we should, I think, in interpreting it, look at it differently from a contract between parties enjoying perfect freedom of action, and should construe it so as to interpret it in accordance with the true intent and meaning of the Board that prescribed it, rather than in accordance with what should be presumed to be the intention of the contracting parties, who had no power to alter its terms.

Being of opinion that the true intent and purpose of the Railway Act and of the Board is to fix the rate by reference to the goods actually carried, rather than by reference to the description thereof in the bill of lading, and that the effect of the Act is to prevent the carrier collecting any rate other than that authorised in manner provided for in the Act, I think the contract should, if possible, be given a construction which will best give effect to the Act and the intent and purpose of the Board.

I do not consider it necessary to deal with the hypothetical case stated by the learned trial Judge, for this is not a case of intentional misdescription, where the defendant is seeking to set up and take the benefit of his own fraud, or a case calling upon us to consider whether or not a defendant can set up his own fraud as an answer to a claim. It may be that the plaintiffs have a cause of action against the defendants for deceit or negligence, but that claim is not before us in this action. The claim here is for the lawful tariff charges on the goods carried, as fixed by the contract of the parties, read in the light of the provisions of the Railway Act.

I would, for these reasons, conclude that, both by the statute

ONT.

S. C.

PERE MARQUETTE R. Co. v. MUELLER MFG. Co. LTD.

Ferguson, J.A.

and the contract of the parties, the rate on the goods carried must be fixed by their actual and proper description and classification, rather than by their description in the bill of lading. It being admitted that the goods actually carried would have been properly described and classified as "scrap metal," and that the description used in the bill of lading, "copper ingots," is a misdescription, it follows that the plaintiffs' claim for the lawful tariff rate must be limited to the lawful tariff rate on "scrap metal;" and, that rate having been paid before action brought, the plaintiffs' action fails.

I would allow the appeal with costs, and dismiss the cross-appeal and action with costs.

Appeal allowed; cross-appeal dismissed.

CAN.

Ex. C.

CLAYOQUOT SOUND CANNING Co. Ltd. v. S.S. "PRINCESS ADELAIDE."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, Loc. J., in Adm. August 21, 1919.

SALVAGE (§ I—4)—APPREHENDED RISK OF DANGER—NATURE OF SERVICES—COMPENSATION.

Where there is apprehension of risk, or danger, to a ship, though no immediate risk or danger, the services voluntarily rendered such ship are in the nature of salvage services and though danger to the salving vessel is an ingredient of such services, it is not always necessarily present, and is not essential, but the degree of danger to life and property of the salvors is an element to be considered in arriving at the measure of compensation.

[*The "Andrew Kelly" v. The "Commodore"* (1919), 48 D.L.R. 213, referred to.]

Statement.

THIS is an action for salvage services rendered by plaintiffs' schooner "Iskum" to the defendant. The case was tried before Martin, L.J.A. at Victoria, B.C., on June 25, 1919.

The facts of the case are stated in the reasons for judgment delivered by trial Judge.

H. Beckwith, K.C., for plaintiffs; *James E. McMullen*, K.C., for defendant.

Martin, L.J.A.

MARTIN, L.J.A.:—This is an action for alleged salvage services rendered by the plaintiffs' auxiliary gasoline schooner "Iskum" (registered tons 42.44; length 68 ft., 6 inches) to the defendant ship "Princess Adelaide" (registered tons 1,910; length 290 ft.) on Oct. 13, 1918, at the northern entrance to Active Pass, where the "Princess Adelaide" had run aground on a reef near the lighthouse at Georgina point in a dense fog. For the purpose of

this case the fair value of the "Iskum" may be taken to be $17,000 and her cargo of salmon cans $1,130; and of the "Princess Adelaide," $360,000. The services rendered consisting in transferring 310 passengers and their baggage and 61 bags of mail from the "Princess Adelaide," when aground, to the steamer, "Princess Alice" during the fog. The "Iskum," like the "Adelaide," on her way from Vancouver to Victoria, sighted the "Adelaide" about 3.20 p.m. slightly on her port bow in the fog and went on into the Pass to determine her position and then returned to her in about half an hour, at which time it was arranged between the masters of the two vessels that the "Iskum" was to transfer the passengers, baggage and mail to the "Princess Alice," which had been summoned by the following wireless from the "Adelaide's" master to her owners at Victoria:

Ashore at Georgina Point at top of high water, 12 feet of water on main reef amidships. Fuel oil tank leaking. Send boat for passengers.

and was expected to arrive in about a couple of hours, depending upon the fog, and she did arrive about five o'clock, and anchored out in the channel about three cables from the "Adelaide." In the interval the "Iskum" had come alongside the "Adelaide" and was taking the baggage on board when the "Alice" arrived, and in the course of four trips between the two vessels she transferred all the passengers, baggage and mail as aforesaid, to the "Alice," and left for Victoria at 7.30 p.m. The "Iskum's" master, S. B. Wells, says that during the operation of transferring the baggage, which came first, he could see two vessels, but when it came to the passengers the fog was so thick that he could only see the vessels occasionally and never clearly, and in this he is confirmed by his mate, Larsen, while the master of the "Adelaide," R. B. Hunter, says that he saw the "Alice" during the whole of that time. I have no reason to believe there is here any intentional misstatement, but I think the difference in view may be explained from the very much greater height of the bridge of the "Adelaide," from which objects might be more clearly seen than from the lower elevation of the "Iskum."

The position and condition of the "Adelaide," and state of weather and tide, as they appeared to her master on the day of the "Iskum's" services may best be gathered from the following wireless messages he sent that day to her owners:—

CAN.

Ex. C.

CLAYOQUOT SOUND CANNING CO. LTD. v. S.S. "PRINCESS ADELAIDE."

Martin, L.J.A.

1. 310 passengers. No small steamers. Will have to transfer with boats large amounts of baggage. When will Tees be up? Fuel all spoiled, only one tank, which won't last long. Weather calm, thick fog. When will "Alice" arrive? (The "Tees" was a special salving steamer.)

2. Schooner "Iskum" arrived alongside. Will take passengers and baggage to "Alice." Will have to make three trips. Will take too long to go to Mayne Island wharf. "Alice" will be here in about half an hour.

3. Star-side bow 30 feet sloping to 27 feet at gangway door. Still shoaling to 14 feet at after gangway doors. Forward end of dining-room 12 feet deepening to 15 feet under steam. Port side 30 feet at stem shoaling to 20 feet at forward gangway doors, gradually shoaling to 9 feet at after gangway carrying 12 feet right aft, ship's head S.S.W., lighthouse right abreast the stern.

4. No. 2 oil tank full of water. (Salt).
No. 3 " " (port) full of water.
No. 3 " " (starb.) leaking slightly, able to use oil.
No. 4 " " (port) full of water.
No. 4 " " (starb.) leaking slightly.
No. 5 " " full of water, bilges dry, also tunnel.

At the time of the arrival of the "Iskum" arrangements were in progress to transfer the passengers to the "Adelaide's" boats by means of a special gangway and thence to the island shore within a distance of 100 ft., but these were discontinued. It would also have been possible, if nothing intervened, caused by accident, weather, or atmosphere, to transfer by rowboats the passengers, baggage and mails to the "Alice," but it would have taken several hours (being at best a cumbrous process) not less than four, I am inclined to think, beginning at 5 p.m. and soon extending into darkness, whereas the "Iskum," which lay alongside from 3.30 to 5 p.m. when she made her first trip to the "Alice," had finished the transfer in time to leave for Victoria at 7.30 as aforesaid. I am clearly of the opinion that it would have been inexcusable in the circumstance if the master of the "Adelaide" had failed to avail himself of the first opportunity to transfer so large a number of passengers, because, as Dr. Lushington said in *The Thomas Fielden* (1862), 32 L.J. 61, the paramount consideration is risk to human life, thus expressing it, p. 62:—

> Is it possible to contend for a moment that the property was not in very great danger, and that, to a certain extent, at a certain period, there was risk to human life, and that to the extent of 19 men at least? The time is of no consequence. I have ever held the opinion that, when once I can come to the conviction that human life has been at stake, even for a short time, it is the duty of the Court amply to reward the persons concerned; and for obvious and plain reasons—first, because from the necessity of the case, a very great reward should be given wherever there has been a sacrifice of human life; and, secondly,

that human life is above all other considerations, and ought never to be exposed to unnecessary hazard and risk. These are the principles.

And the same Judge said in the same case, p. 62:

Now, of course, according to ordinary principles, all these matters are governed by general rules; and it is utterly impossible to go minutely into each individual case and each particular point; and it never is a satisfactory investigation, take what pains you will, for it always will be that which Lord Stowell used to call it, a *rusticum judicum*.

And so for these reasons I shall refrain from examining further in unnecessary detail all the facts which it is necessary to consider which make up what Dr. Lushington called in the *Charlotte* (1848), 3 Wm. Rob. 68: "The many and diverse ingredients of a salvage service," which will be found classified in Kennedy on Salvage, 2nd ed., p. 133, at the end of which classification that learned author says:—

Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given: where few of them are found, or they are present only in a low degree, the salvage remuneration awarded is comparatively small.

In the article on Salvage, 26 Hals. (1914), p. 557, written by Kennedy and others, it is said:—

Salvage service in the present sense is that service which saves or contributes to the ultimate safety of a vessel, her apparel, cargo, or wreck, or to the lives of persons belonging to a vessel when in danger at sea, or in tidal waters, or on the shore of the sea or tidal waters, provided that such service is rendered voluntarily and not in the performance of any legal or official duty or merely in the interests of self-preservation.

And in the said book of the same learned author, Kennedy on Salvage, p. 18, it is said:—

Two things at least are essential to the constitution of a salvage service. There must, in the first place, be danger to the subject of the service. In the second place, the undertaking of the service must be a voluntary act on the part of the salvor.

The principal facts in favour of a salvage award that stand out in the case at Bar are:—The stranding of the steamer; her appreciable list to starboard, and in such a position that the apprehension, as it then appeared, of her sliding off to her own peril and that help of the "Iskum" could, though slight, not be wholly ignored; the existence of a fog; the large number of passengers; and the uncertainty of an unfavourable wind springing up at any time at that season of the year. It is admitted that the "Iskum" stood alongside and placed herself at the disposal of the "Adelaide" for the purpose of transferring her passengers, baggage, and mails from 3.30 till 7.30 p.m., when that service

CAN.

Ex. C.

CLAYOQUOT SOUND CANNING CO. LTD. v. S. S. "PRINCESS ADELAIDE."

Martin, L.J.A.

was completed. Many cases were cited to me but none of them, as is to be expected in these varying occurrences of the sea, is what might be termed close to the one at Bar. On the general principle of salvage it was said in *The Phantom* (1866), 1 L.R.A. and E. 58, by Dr. Lushington, at p. 60:—

I am of opinion that it is not necessary there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty, and reasonable apprehension. There might be danger of further difficulty occurring, and I think it is proved in this case, from the facts to which I have adverted, that it was a matter of importance for the vessel to be moved—that she was, while she lay where she did, in reasonable apprehension of danger, and that reasonable apprehension was fulfilled by the accident that occurred.

And in *The Ella Constance* (1864), 33 L.J. 191, Dr. Lushington also said, at p. 193:—

It is a case in which there was no immediate risk, no immediate danger, but there was a possible contingency that serious consequences might have ensued.

The subject has lately been considered by Bucknill, J., in the *Suevic*, [1908] P. 154, wherein he says, at p. 157:—

Cases of life salvage alone are of rare occurrence in this Court, and therefore it is necessary carefully to consider the principles upon which a salvage award may be made in such a case as this. I apprehend that it will be accurate to say that the principle which lies at the bottom of life salvage is that there must, in the first instance, be actual danger to the persons whose lives have been salved, or the apprehension of danger, and that seems to me to cover the whole ground. If there is no danger, or anything like danger, there is nothing to be saved from.

And at p. 158:—

Now, the weather being, as I find it to have been, foggy or misty, so that the light could not be seen, but only the loom of it in the water, and the wind of force about six, as I find, with a ground swell, these people very properly, as the master of the "Suevic" thought, had to be landed with the greatest expedition.

If anything had happened and any life had been lost through these people not being sent ashore as quickly as possible, very severe and harsh things would have been spoken of the master and of the great company he serves, and one may be satisfied that the master duly appreciated the position.

And at p. 159:—

People are fond, sometimes, of using the word "danger" only, but there is a great difference between danger and risk of danger; and just as the principle of salvage here applies to people on this ship who were either in danger or risk of danger, so a tug which is being navigated even by the most skilful navigator would be, I find, either in danger or risk of danger in going to the neighborhood in which this ship was.

I find myself quite unable to say that there was not here that

apprehension or risk of danger which constitutes salvage. The subject has been considered by me many times in this Court and a case which bears some relation to this one is the *Grand Trunk Pacific Coast S.S. Co.* v. *The "B.B."* (1914), 17 D.L.R. 757, 15 Can. Ex. 389, Mayers Adm. Law (1916), p. 544, wherein I held there was "an element of appreciable risk;" and see also my recent decision in *The "Andrew Kelly"* v. *The "Commodore"* (1919), 48 D.L.R. 213, 19 Can. Ex. 70. Some stress was laid in argument upon the fact that the "Iskum" was not in danger, but while that is one of the "many and diverse ingredients" of salvage, yet it is not an essential thereof—of the *"Ellora"* (1862), Lush, 550; the *"Altair,"* [1897] P. 105; and the *"Toscana,"* [1905] P. 148.

Viewing then the service here as salvage, I have to award the same and after full consideration of the circumstances I am of the opinion that the sum of $1,000 is the proper award to make, and in so doing I bear in mind what was said by the Admiralty Court in the *London Merchant* (1837), 3 Hagg. 394, at 400:—

> A great steam navigation company is peculiarly bound to encourage salvage assistance; they owe it to the public; they are particularly engaged in carrying the passengers; they are large contractors for carrying the mail.

Here it must be remembered, not only the passengers but their baggage, and the mail were transferred expeditiously to a place of safety, the baggage being so much that the mate of the "Iskum" says it was stacked up forward so high that he could not see over the bow from the wheelhouse. The apportionment of this award will be on the principle cited in the case of the *"Andrew Kelly," supra,* and I shall give further directions in regard thereto when the Registrar is furnished with particulars of the complement of the "Iskum's" crew.

There will be judgment accordingly for the plaintiff for $1,000 and the costs follow the event.

Judgment accordingly.

MAN.

K. B.

STERLING ENGINE WORKS, Ltd. v. RED DEER LUMBER Co. Ltd.

Manitoba King's Bench, Galt, J. May 7, 1919.

CONTRACTS (§ II D—194)—TO REPAIR—NEW MATERIAL SUPPLIED BY REPAIRER—RE-DELIVERY TO OWNER—SALE OF MATERIAL—LIABILITY—DELAY—UNREASONABLENESS—DAMAGES.

Under a contract to repair, where new material is put into the article repaired by the repairer, the new material so supplied passes to the owners by way of sale with all the rights incident to a sale, on re-delivery of the article to the owners, and the repairer is bound to supply such material as is fit for the purpose for which it is required and is liable for latent defects in such material.

The owner of the article repaired is entitled to have the defects remedied by the repairer, or by some one else at the expense of the repairer, but unreasonableness and delay on his part will disentitle him to damages for expenses which would not have been incurred but for such delay and unreasonableness.

Statement.

ACTION to recover the balance of an account for repairs made to a locomotive and counterclaim for damages caused by defective materials which were used in making the repairs.

J. C. Collinson and *B. C. Parker*, for plaintiff; *A. C. Ferguson* and *H. E. Kennedy*, for defendant.

Galt, J.

GALT, J.:—This case raises a question for decision which does not appear to have arisen in any case hitherto reported. The question is, whether a party who has undertaken to repair a locomotive, or other machine, is, or is not, responsible for the consequences of latent defects in the material which he supplies for the repairs.

The defendants, a lumber company at Barrows in Manitoba, possessed a locomotive engine which they utilized for the purpose of drawing their lumber on a switch line of about five miles in length. The locomotive was built in about the year 1891, and was acquired by the defendants about 1903. The fire-box of the locomotive had been in use by the defendants from 1903 to 1917, and it required to be repaired. Several other repairs to the locomotive also were advisable, and the defendants took the locomotive to Winnipeg for the purpose of having it repaired. The plaintiffs conduct engine works at Winnipeg, and they undertook to repair the locomotive. Instructions were given partly by Heaphy, an officer of the defendant company, and partly by Andrew R. Cavanagh, the manager, to William John Leaney, the manager of the plaintiff company. Cavanagh says that he and Leaney had an interview.

We talked about the fire box, and I told him the C.N.R. could do it in 6 weeks. He said his company could do it in about 3 weeks. I agreed he

should do it for time and materials. He was to do a first-class job of the fire-box.

Leaney's evidence is as follows:—

Q. You first of all saw Heaphy in connection with this matter? A. Yes, he came to me.

Q. What did he say? A. He said there was a locomotive out at Red Deer which required considerable work upon it, and he thought a new fire-box; he asked me if we did that kind of work, and I told him we could. We talked the situation over in a casual way, and he said of course this locomotive had been in the city for repairs several times, and he did not think the repairs had been satisfactory. He didn't say distinctly that they had not been; and I told him then that we had a good boilermaker (and we have) as good a boilermaker as there is in Winnipeg; he is practically a foreman, and he is working all the time, and he is in direct contact with the work, and I said I was satisfied he would do him a good job.

It is true that Leaney during his examination stated that his instructions were

to put a new fire-box into the boiler on the understanding that it was on a time and material basis, and that he was to judge the plate, to buy the plate for them.

But this evidence was given just after a lengthy legal argument had been made in Court on a motion for non-suit, from which it appeared most important to consider whether the material supplied was the property of the plaintiffs or of the defendants. I think that when Leaney subsequently stated that he was to judge the plate and buy it for the defendants, his statement was coloured by the argument which had just been advanced by his Counsel.

Subject to these observations I think the allegations in paragraphs 2 and 3 of the statement of claim are substantially correct. They read as follows:—

2. During the month of June, 1917, the defendant employed the plaintiff to repair a locomotive engine belonging to the defendant, and agreed to pay the plaintiff for the work done and material supplied to make such repairs within 30 days after the completion thereof.

3. The said work included the repairing of the fire box of said locomotive for which the defendant was to pay for the work done and material supplied.

The repairs were completed early in the fall at a cost of $3,349.45, and the defendants paid the plaintiffs on account $2,500 in three payments, the last of which was made in December, 1917, leaving a balance of $849.45, for which the plaintiffs now sue.

The defendants discovered after a few months' user of the locomotive that the new fire-box was defective. Laminations or blisters began to develop upon the plates, thereby weakening

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Galt, J.

their powers of resistance to the pressure of steam in the boiler. It was calculated to stand a pressure of 150 pounds to the square inch, and the government inspector, after examining the fire-box, prohibited the use of more than 125 pounds, and in April, 1918, cut this down to 100 pounds, thereby, according to the evidence of the defendants, rendering the locomotive useless.

On April 22, 1918, Fuller, the government inspector, reported to the defendants at Barrows: "The lanimations on side wall of fire-box are gradually getting worse. These plates will have to be replaced as soon as possible."

On April 23, the defendants telegraphed the plaintiffs as follows: "Inspector Fuller here to-day, condemned locomotive boiler insist on you coming up next train."

On May 1, the plaintiffs telegraphed to Cavanagh at Barrows:—

Without prejudice and carrying out our policy to endeavour to satisfy customers, will repair locomotive boiler at mill in accordance with Stewart's, chief boiler inspector, requisition which consists of cutting out and replacing laminated portions of plate, plates used to be supplied by your company, all necessary assistance to be given our employee, on condition that when work is satisfactory to Stewart balance of our account to be paid forthwith, advise if satisfactory.

On the same day, Stewart wired to Cavanagh:—

Repairs to boiler as outlined by Sterling Engine Works satisfactory to me. Cannot go out at present without great inconvenience. They will proceed with work so soon as plates satisfactory to you can be procured. Will advise their man what is required to be done.

On the same day (May 1) the defendants wired the plaintiffs as follows:—

Repairs on locomotive must consist of taking out the two laminated side sheets and replacing same with two new full length plates supplied by your company, and all expenses connected with the repairing to be borne by yourselves. Further you will furnish us at your expense, which includes railway transportation and incidentals of both locomotives to and from Barrows, with a locomotive suitable to carry on our operations while ours is being repaired. If this offer is not accepted within 24 hours, we will have railway company make repairs and all expenses and damages will be charged to your company.

Finally, on the same day, the defendants wired to Stewart:—

Thanks for your consideration but cannot accept Sterling Engine Works' offer. It has been proven that boiler plate is defective, and we must insist on their replacing same with two new sheets.

The plaintiffs did not agree to the defendants' demand so the defendants turned the locomotive over to the C.P.R. shops at Winnipeg to have the fire-box duly repaired. At the C.P.R.

shops portions of the plates on which the laminations had developed were cut out and new material was riveted in. The job was successfully carried out and the defendants have had to pay to the C.P.R. the sum of $2,297.39 for these repairs; and also sums of money for the hiring and use of another engine while the engine in question was out of commission, making a total of $3,789.50. A further claim for $1,000 for rent of another locomotive during the period of the original repairs was abandoned at the trial.

The defendants disclaim any liability to pay the balance claimed by the plaintiffs, and they counterclaim for the damages sustained by them in having the defective fire-box repaired and for moneys expended by them in hiring another engine, during the summer of 1918.

The Counsel who appeared for the parties shewed great diligence in collecting authorities bearing upon the points at issue, but they were unable to point to any case in England or the United States or Canada dealing directly with the question I have to decide, and I have been unable to find any such case. The principles applicable to the subject-matter, however, appear to be now fairly well settled, notwithstanding divergent views expressed in many of the cases.

First, treating the transaction as a sale of the new fire-box by the plaintiffs to the defendants: One of the earliest cases on the subject of latent defects is *Jones* v. *Bright* (1829), 5 Bing. 533, 3 M. & P. 155, 130 E.R. 1167. There the plaintiff purchased from the warehouse of the defendant, the manufacturer, copper for sheathing a ship. The defendant who knew the object for which the copper was wanted said: "I will supply you well." The copper in consequence of some intrinsic defect, the cause of which was not proved, having lasted only four months, instead of four years, the average duration of such an article, it was held by the Court (consisting of Best, C.J., Burrough, Park and Gaselee, JJ.) in an action on the case in the nature of deceit that the plaintiff was entitled to damages.

I make the following quotations from the judgments:

Best, C.J., says, 5 Bing., at p. 542, 130 E.R. 1171:—

It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Gait, J.

of the qualities of a commodity they purchase; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied. The Court must decide with a view to such rules, although, upon the present occasion, no fraud has been practised by the parties calling for a decision . . . In a contract of this kind, it is not necessary that the seller should say, "I warrant;" it is enough if he says that the article which he sells is fit for a particular purpose. Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, "Mr. Jones is in want of copper for sheathing a vessel;" and one of the defendants answered, "We will supply him well." As there was no subsequent communication, that constituted a contract, and amounted to a warranty.

Similarly in the present case the plaintiffs are bound by Leaney's agreement with Cavanagh that he would do a first-class job on the fire-box.

Then again Best, C.J., says at p. 546 (5 Bing.) 130 E.R. 1173:—

> The law, then, resolves itself into this; that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose. In the present case, the copper was sold for the purpose of sheathing a ship, and was not fit for that purpose: the verdict for the plaintiff, therefore, must stand.

Park, J., at p. 546 (5 Bing.) 130 E.R. 1173:—

> I entertain no opinion adverse to the character of the defendants, because the mischief may have happened by the oversight of those whom they employ; but on the case itself I have no doubt distinguishing, as I do, between the manufacturer of an article and the mere seller.

Burrough, J., at p. 548 (5 Bing.) 130 E.R. 1173:—

> The allegation in the declaration, that the copper was manufactured by the defendants, is sufficiently distinct; it is of the very essence of the case, and the plaintiff must have been nonsuited if he had failed to prove it.

In *Randall* v. *Newson*, (1877) 2 Q.B.D. 102, 46 L.J.Q.B. 259, the head-note shews that, on the sale of an article for a specific purpose, there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects. The plaintiffs ordered and bought of the defendant, a coach-builder, a pole for the plaintiff's carriage. The pole broke in use and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence.

The Court held, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole.

The distinction drawn by the Judges in *Jones* v. *Bright*, *supra*, between the manufacturer and mere seller of goods is no longer law, either in England or here.

In s. 16 of the Sale of Goods Act (R.S.M., 1913, c. 174), the seller of goods is made liable to the buyer under the circumstances I am dealing with whether the seller be a manufacturer or not. (See also the English Sale of Goods Act, s. 14.) On the other hand, where the subject-matter of a contract is only work and labour, the liability of the party who performs work and labour for another is much less onerous. It is treated in the text-books under the name of Bailments for Hire.

In Beven on Negligence, 3rd ed., p. 804, the various classes of bailments are dealt with. In a contract merely for labour or services, the bailee is presumed to possess the ordinary skill requisite to the due exercise of the art or trade, which he assumes. *Spondet peritiam artis*. Thus, where a tailor receives cloth to be made into a coat, or a jeweller a precious stone to polish or to cut, each of them is bound to do the work required from him in the course of his business in a workmanlike manner. He is required to bestow ordinary diligence, and that care and prudence which the average prudent man takes in his own concerns. For the contract is for mutual benefit; therefore the bailee is not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force, or from the inherent defect of the thing itself, unless he took the risk on himself; he is only answerable for ordinary neglect.

But when a bailment involves the supply of materials by the bailee in addition to his work or services on the article, the legal rights of the parties become more complicated.

Our law in regard to bailments appears to have been largely based upon the Roman and foreign law; the subject has been dealt with by Pothier in his Contrat de Louage, and by other authors, whose works are carefully considered by Story in his valuable work on Bailments.

Story says in the 9th edition of his work, s. 423:—

> Where the workman is not only to do the work but is also to furnish the materials, it is deemed in the Roman and foreign law rather a case of sale than a case of *locatio operis*. In the common law it is treated as a case of bailment only when the stock or materials belong to the employer. Where the principal materials belong to the employer, the case is still treated as a mere bailment,

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Galt, J.

although the workman may furnish some accessorial materials or ornaments. Thus, if A. sends cloth to a tailor to be made into a garment, and the tailor furnishes buttons and twist to complete it, it is a mere case of *locatio operis faciendi*.—S. 426: If while the work is doing on a thing belonging to the employer, or after it is finished, but before it is delivered to the employer, the thing perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman, the question arises who should bear the loss?

Bell in his Commentaries has deduced the following as the true rules on the subject:—

(1) If the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him; (2) If he is employed in working up the materials, or adding his labour to the property of the employer, the risk is with the owner of the thing with which the labour is incorporated; (3) If the work has been performed in such a way as to afford a defence to the employer against a demand for the price, if the accident had not happened (as if it was defectively or improperly done) the same defence will be equally available to him after the loss.

Story further says:—

These principles seem also well founded in the common law, and will probably receive the like adjudication in each of these cases, whenever it shall arise directly in judgment. (S. 426a.)

Leven at p. 807 quotes the above citation from Story and apparently accepts the conclusion arrived at.

Finally Story says in s. 478:—

And here it may not be unimportant again to take notice of the distinction, already alluded to, between cases where the workman is to make a thing out of materials owned by his employer, and cases where he is to make a thing out of his own materials. In the former cases, if the thing perishes without his default, before it is completed or delivered to his employer, he is, or may be, entitled (as we have seen) to a compensation to the extent of his work actually done. But in the latter cases the whole loss is his own, if the thing perishes before a delivery of it to his employer, and he is entitled to no recompense. In each case, however, the same rule of law applies: *Res perit domino*. The only difference is, that in the one case the employer is the owner; and in the other, the workman. In the first case, it is mere bailment; *in the last it is the sale of a thing in futuro*.

While, as I have said, there appears to be no case precisely applicable to the point stated at the commencement of my judgment, the above authorities and many cases throw light upon it, and indicate the principles applicable to it.

One of the leading cases is *Clay* v. *Yates* (1856), 1 H. & N. 73, 25 L.J. Ex. 237. There the plaintiff, a printer, verbally agreed to print for the defendant 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, and after the proof

sheet of the dedication was revised by the defendant and returned to the plaintiff, he, for the first time, discovered that it contained libellous matter, and refused to complete the printing of it. The Court of Exchequer (Pollock, C.B., Alderson, Martin and Bramwell, BB.) held:—

First, that this was not a contract for the sale of goods within s. 17 of the Statute of Frauds as extended by 9 Geo. IV., c. 14, s. 7. Secondly, that as the dedication was libellous the plaintiff was justified in refusing to complete the printing of it, and was entitled to recover for printing the treatise.

Pollock, C.B., at p. 77 (1 H. & N.) says:—

It appears from Chitty on Pleading, . . . that a count for work, labour and materials may be resorted to by farriers, medical men and surveyors, and that such is the form in which they are in the habit of suing. Against the opinion of Bayley, J., in *Atkinson* v. *Bell* (1828), 8 B. & C. 277, 108 E.R. 1046, we may set-off the opinions of Maule, J., and Earle, J., in the case of *Grafton* v. *Armitage* (1845), 2 C.B. 336, 135 E.R. 975, and then we have to decide the point as if it were quite new and without authority. It may happen that part of the materials is found by the person for whom the work is done, and part by the person who does the work, for instance, the paper for printing may be found by the one party, while the ink is found by the printer. In such cases it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. My impression is, that in the case of a work of art, whether in gold, silver, marble or plaister, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour and materials. *No doubt it is a chattel that was bargained for, and, if delivered, might be recovered as goods sold and delivered, still it may also be recovered as work, labour and materials.*

Martin, B., says at p. 79 (1 H. & N.):—

I am of the same opinion. There are three matters of charge well known to the law, viz., for labour simply, for labour and materials, and for goods sold and delivered. Now every case must be judged of by itself, and what is the present case? The defendant having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type, shall set it up in a frame and impress it on paper, that the paper shall be submitted to the author, that the author having corrected it, shall send it back to the printer, who shall again exercise labour and make it into a complete thing in the shape of a book. That being so, I think the plaintiff was employed to do work and labour, and supply materials, and for that he is entitled to be paid. It seems to me that the true criterion is this—suppose there was no contract as to payment, and the printer brought an action to recover what he was by law entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labour and materials supplied; therefore, this is in strictness, work, labour, and materials done and provided by the plaintiff for the defendant.

The next decision to which I would refer is *Lee* v. *Griffin*

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Galt, J.

(1861), 1 B. & S. 272, 30 L.J.Q.B. 252, 121 E.R. 716. There A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died. The Court of Queen's Bench (consisting of Crompton, J., Hill, J., and Blackburn, J.), held that B. could not sue A.'s executor in an action for work and labour done, and materials provided for his testatrix. It was further held by the Court that a contract to make a set of artificial teeth is a contract for the sale of goods, wares or merchandise within s. 17 of the Statute of Frauds, and as there was no sufficient memorandum of the contract within the statute, judgment was given for the defendant.

Crompton, J., says at p. 275 (1 B. & S.) 121 E.R. at 717:—

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labour, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labour done, and materials provided, as it could hardly be said that the subject-matter of the contract was for the sale of a chattel; perhaps it is more in the nature of a contract merely to exercise skill and labour. *Clay* v. *Yates*, *supra*, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labour, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labour or for the sale of a chattel. Here, however, the subject matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analagous to the measurement and fitting of the garment.

Hill, J., says at p. 276 (1 B. & S.) 121 E.R. 717:—

I am of the same opinion. I think that the decision in *Clay* v. *Yates*, *supra*, is perfectly right.

Blackburn, J., says at p. 278 (1 B. & S.) 121 E.R. 718:—

I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Perhaps the latest authoritative decision on the subject of latent defects is *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284. 56 L.J.Q.B. 563. There, cloth merchants ordered of cloth manufacturers worsted coatings which were to be, in quality and weight,

equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers or tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent and was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of cloths of that class. The House of Lords held, affirming the decision of the Court of Appeal, that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used.

Lord Macnaghten says at p. 299 (12 App. Cas.):—

But the governing principle in all the cases is the same. And, indeed, so far as I can see, there is no substantial distinction between the facts in the present case and the facts in *Jones* v. *Bright, supra*. There the defendants were manufacturers of copper. The plaintiff wanted copper to sheath a vessel. The defendants knew for what purpose he wanted it. The plaintiff's shipwright went to the defendant's warehouse and selected what he thought would suit, and he sheathed the vessel with the copper he selected himself. The sheathing was found to be decayed at the end of four or five months while it ought to have lasted four or five years. The plaintiff sued for damages. The jury found that the decay of the sheathing was occasioned by some intrinsic defect in the copper, but they could not tell what the cause of that defect was. There was no trace of fraud there. The defect was unknown and unsuspected. The Chief Justice stated that the conduct of the defendants was "most upright." But still he held them liable, and though some members of the Court took a narrower ground he based his judgment on the broad principle that manufacturers were bound to supply an article fit for the purpose for which they knew it was required. I can see no distinction between a sale by sample where the sample gives incomplete and consequently misleading information, and a case where the purchaser selects the goods in bulk, and those goods have an intrinsic defect not discoverable on inspection.

Your Lordships were warned that if the appeal should be dismissed the effect would be to hamper trade, and to cast on manufacturers a burden which has not been cast on them hitherto. That is the stock argument in all these cases. It was urged and rejected in *Mody* v. *Gregson*, L.R. 4 Ex. 49, 38 L.J. Ex. 12. It met the same fate in *Jones* v. *Bright, supra*. It has never yet availed to relieve manufacturers from the liability which they assume, by inviting customers to rely on their skill, or to excuse persons from fulfilling their contracts according to the real intention and true meaning of the bargain.

I find it difficult to appreciate the doctrine recognized in some of the cases, that when a bailee supplies merely accessorial materials

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Galt, J.

to the article he is repairing, no sale of such materials by the bailee to the bailor can be legally imputed.

In an illustration given by Story (s. 423), a man sent cloth to a tailor to be made into a garment, and the tailor furnished buttons and twist to complete. It is said that this was a mere case of *locatio operis faciendi*. The instance is perhaps an extreme one, but where the repairs to an engine required the bailee to supply valuable steel plate, capable of withstanding a severe tensile strain, and a heavy pressure of steam to the square inch (as was the case in this instance), the question deserves careful consideration. I think that the same principles must apply to the one case as to the other. In the one case the buttons and the twist were the property of the tailor, but when they were worked into the suit of clothes, they became the property of the customer. How was their ownership altered? The tailor did not intend to give them away. He charged for them.

The point came up squarely for decision in *Heath* v. *Freeland* (1836), 1 M. & W. 543, 2 Gale 140, 5 L.J. Ex. 253. There the plaintiff sued merely for work and labour and the jury found that he had performed work to the value of £4 and had furnished material to the value of £8. Upon a motion for non-suit in respect of the £8 for materials, Counsel for the plaintiff argued:—

But this was a common carpenter's job; no entire contract was proved, and it is unreasonable to divide work and labour from the materials. The former may draw the latter after it, as a necessary part of the same employment. Lord Abinger, C.B.: I fear you will not persuade the Court of that.

A non-suit was accordingly entered.

Under the former system of pleading, when a claim was made for work, services and materials, a difficulty occurred in separating the work and services from the materials, and in ascertaining the values of each. The aggregate sued for was like a chemical compound in which the individual ingredients are difficult to separate. But under our present system, which requires facts to be stated and particulars given, the aggregate sued for is more like a mechanical mixture from which it is easy to separate the ingredients. After separating the items for labour and services the only ingredient left is goods sold and delivered.

If, by any accident, the fire-box had been destroyed while still in the hands of the plaintiffs the loss must have fallen upon them, in accordance with Bell's Rule No. 1. But as the defects

were not discovered until after the locomotive was re-delivered, the defendants' rights are equally protected under Bell's Rule No. 3.

When the repairs were completed the plaintiffs rendered a lengthy bill (ex. 2) to the defendants shewing their charges for all articles supplied, as well as the hours of labour.

The materials in the fire-box are charged for at $461.64, of which $55.80 is the price of the two steel plates.

I am unable to distinguish the fire-box in this case from the artificial teeth in *Lee* v. *Griffin*, *supra*. Suppose that the lady who ordered the new set of teeth had, on the same morning, ordered from a piano factory a new set of notes for the keyboard of her piano. The work, services and materials in both cases alike required a skilful artizan, careful measurement, good material and a final fitting. The lady and the piano both needed repair in an important particular. If the legal result for the artificial teeth was a sale, I think the same result must follow for the piano; and, if so, I can see no distinction for the fire-box.

Finally, our Sale of Goods Act contains the following provision:—

> 3. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

Under the authorities above set forth, I am of opinion that when the locomotive was re-delivered by the plaintiffs, all the new material in it passed by sale to the defendants, with all the rights incident to a sale.

The liability imposed by our law upon a seller of goods required for a particular purpose, even in respect of latent defects, is not so harsh as might at first appear. The object of the rule is doubtless to require manufacturers to use their utmost skill and efforts to guard against these latent defects. The man who purchases from a manufacturer possesses this protection. If he, the purchaser, resells the article, he in turn becomes liable (as in the present case) to his sub-purchaser. But he has a remedy over against the manufacturer from whom he bought, provided that, when buying the goods he made known to the manufacturer, as he might and should have done, the purpose or purposes for which the goods were required.

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Galt, J.

In so far as the action is concerned, I am of the opinion that the plaintiffs, by furnishing a defective fire-box, for which they charged in all $2,094.32, have disentitled themselves from recovering the alleged balance of account amounting to $849.45.

With regard to the defendants' counterclaim, the rule of law is thus expressed in Chitty on Contracts, 16th ed., p. 879:—

> Where a party who is legally bound to perform a contract, does not, in fact, perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expenses incurred in so doing.

The defendants upon discovering the defects in the fire-box became entitled to have the defects remedied by the plaintiffs, or by someone else at the expense of the plaintiffs. I find therefore that the defendants are entitled to relief under their counterclaim.

What then should be the measure of damages? They claim not only the sum of $2,297.39, being the amount paid by them to the C.P.R. for repairing the fire-box, but also large sums of money paid out by them commencing June 20, 1918, for the hire of engines from the C.P.R. to serve their purposes while their own locomotive was out of commission. The total counterclaim is for $3,789.50.

The subject of the measure of damages was considered by the Privy Council in two cases recently. In *Erie County Natural Gas & Fuel Co.* v. *Carroll*, [1911] A.C. 105, 80 L.J.P.C. 59, the plaintiffs had obtained judgment for $54,031 damages by reason of the defendant company cutting off the supply of gas which the defendants had been supplying. The plaintiffs thereupon procured the gas required for their plant by acquisition from independent sources, and as a result the plaintiff suffered no substantial loss. The Privy Council held that the plaintiffs were only entitled to nominal damages.

In delivering judgment, Lord Atkinson, at p. 117 ([1911] A.C.) quotes with approval the judgment of Lord Esher in *Le Blanche* v. *L. & N. W. Ry.* (1876), 1 C.P.D. 286, at p. 302, 45 L.J.C.P. 521:—

> We think it may properly be said that, if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing.

Lord Atkinson goes on to say:—

> But whether the thing done was a reasonable thing to do must be determined having regard to all the circumstances.

The other case is *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, 80 L.J.P.C. 91. The action was brought for damages for certain pulpwood agreed to be delivered by the defendants to the plaintiff. In this case also Lord Atkinson delivered the judgment of the Privy Council, and I quote from his judgment at p. 307 ([1911] A.C.) the following statements of the law:—

And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as can be done by money, be placed in the same position as he would have been in if the contract had been performed. *Irvine* v. *Midland Ry Co.* (Ireland) 1880, 6 L.R. Ir. at p. 63. approved of by Palles, C.B., in *Hamilton* v. *Magill*, (1883) 12 L.R. Ir. at p. 202. That is a ruling principle. It is a just principle.

When the defendants discovered in December, 1917, that their fire-box was defective, the first obligation which devolved upon them was to act reasonably. The government inspector examined the fire-box and instructed that pressure of steam be reduced. The defects were apparent, and they could not be cured by the defendants themselves. The evidence shews that the locomotive was not used to any great extent, if at all, during the winter months. Manifestly, the defendants' duty, as well as their right was to explain the situation to the plaintiffs and get them to remedy the defects. If they had done this with reasonable promptitude, no necessity would have arisen for the defendants to hire other locomotives while their own was being repaired. Instead of doing this they allowed the matter to drift along until April, 1918. This delay was, in my opinion, unreasonable and the plaintiffs ought not to suffer for it. Then followed the correspondence between the parties on April 23 and May 1, 1918. I think it is fair to both parties to treat this correspondence as having taken place in December, 1917. The position of the parties at that time was that the plaintiffs had supplied a defective fire-box and were liable to remedy the defects at their own expense, and to pay all damages which reasonably resulted to the defendants. The plaintiffs then made an offer to the defendants (ex. 8) as set forth above.

In deciding whether or not this was a reasonable offer, which should have been accepted by the defendants, the following considerations must be borne in mind:—

(a) The legal obligation of the plaintiffs as above noted; (b) The defects complained of were latent defects, not imputable to any negligence of the plaintiffs; (c) The work performed by the plaintiffs on the fire-box and other

MAN.

K. B.

STERLING ENGINE WORKS LTD. v. RED DEER LUMBER CO. LTD.

Galt, J.

portions of the engine was entirely satisfactory; (d) The locomotive was not used to any great extent if at all by the defendants during the winter months; (e) The evidence indicates that the repairs could have been effectually performed at Barrows by skilled labour and a repairing outfit from Winnipeg; (f) The cost of the fire-box as shown by ex. 2 consisted of:—

(1) Boilermaker's time	$1,127.18
(2) Boilermaker's helpers' time	505.50
(3) Material	461.64
	$2,094.32

The cost of the two plates included in the third item was $55.80.

Now let us see what the plaintiffs' offer was.

(1) They offered to repair the locomotive at the mill in accordance with the inspector's requisition. On the basis of the former repairs, this would entail an expenditure of over $1,500 by the plaintiffs; and if they failed they would have to adopt other means of repairing it, or pay any expenses the defendants might reasonably incur;

(2) (And this seems to have been the stumbling block to the defendants) "Plates used to be supplied by your company, all necessary assistance to be given our employee."

The defendants chose to read this stipulation as an obligation upon them to pay for the new pieces of plate and for all necessary assistance. The offer does not expressly say so, although it certainly may be so read.

The total cost of the two plates originally was $55.80, and only a portion of them required to be replaced. The plaintiffs might well have supposed that the defendants would prefer to select for themselves some pieces of new plate on which they could safely rely. At all events, the cost was trifling, and if the plaintiffs, after completing the repairs, made any demur about paying the cost of the plate, the defendants had about $850 in their pockets, due to the plaintiffs, from which they might deduct such costs. The same observation applies to any small expense the defendants might be put to for "necessary assistance" if the circumstances justified it.

The defendants did not accept this offer, but made a counter-offer as follows:—

(1) Repairs of locomotive must consist of taking out of the two laminated side sheets and replacing same with two new full length plates, supplied by your company.

(2) All expenses connected with the repairing to be borne by yourselves.

(3) Further, you will furnish us at your expense, which includes railway transportation and incidentals of both locomotives to and from Barrows with a locomotive suitable to carry on our operations while ours is being repaired

(4) If this offer is not accepted within 24 hours, we will have railway company make repairs and all expenses and damages will be charged to your company.

In my opinion the plaintiffs' offer was a reasonable one, which the defendants ought to have accepted, and they should not have haggled over the trifling cost of the pieces of plate. If the defendants did not wish to choose the plate, they could have instructed the plaintiffs to select as good material as they could for the purpose.

On the other hand, the defendants' counter-offer was unreasonable in the following respects:—

(1) It was 4 months late; (2) There was no necessity for two new full-length plates; (3) Owing to the defendants' own delay, they were not entitled to have the services of the locomotives mentioned in clause 3 of their offer; (4) The demand for acceptance within 24 hours was, under the circumstances, peremptory and unreasonable.

When the locomotive was sent to the C.P.R. for repairs, it was only found necessary to remove two-thirds of the two plates. The various items charged for by the defendants in their counterclaim for the renting of engines and supplies during the summer of 1918 would never have been incurred but for the unreasonable conduct of the defendants. The same may be said of the claim for $2,297.39 incurred by the defendants to the C.P.R. by sending their locomotive to Winnipeg during the summer of 1918.

Taking all the above circumstances into account, and bearing in mind that the defendants' claim in respect of the latent defects is a claim *strictissimi juris*, I find that the only damages to which the defendants are entitled on their counterclaim consist of two-thirds of the price of the two steel plates, namely, the sum of $37.20.

Such a result, considering the amount of the counterclaim and the labours of both Counsel and the Court, reminds one, irresistibly, of the Roman poet's reflection: *Parturiunt montes, nascetur ridiculus mus.* But the legal rights dealt with are of importance. The action will be dismissed with costs.

The counterclaim will be allowed at the sum of $37.20, but with costs on the King's Bench scale.

Action dismissed.

B. C.

C. A.

ROYAL BANK v. McLEOD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. September 15, 1919.

MORTGAGE (§ VI J—140)—OF AGREEMENT—MORTGAGEE SUBSEQUENTLY BECOMING OWNER OF FEE—ACTION FOR BALANCE OF DEBT—RIGHTS OF PARTIES.

The defendant mortgaged to the Quebec Bank his interest in an agreement of purchase of land. Instalments remaining to be paid were paid out of advances made by the bank, whose business and assets the plaintiffs subsequently acquired. Before such acquisition the mortgage had been followed by a conveyance of the fee direct to the bank from defendant's vendor. The defendant, subsequently, in consideration of an extension of time for payment of his indebtedness to the bank, released by quit claim deed to the bank his equity of redemption. The bank thereupon became absolute owner of the land.

Held, *per* Macdonald, C.J.A., and Eberts, J., that the absolute character of the title acquired by the mortgagee did not prevent the re-opening of the foreclosure in case the mortgagee afterwards sued for any part of the debt, but in this case the foreclosure could not be re-opened by reason of the mortgaged property having passed into the hands of a *bonâ fide* purchaser for value and the right to sue for the balance of the debt was extinguished.

Held, *per* McPhillips and Martin, JJ.A., that the conveyance to the Quebec Bank was an absolute conveyance, and brought to an end the relationship of mortgagor and mortgagee. There had been a *pro tanto* reduction in the debt and the bank was entitled to sue for the balance of the indebtedness.

Statement. APPEAL from the judgment of Clement, J. Affirmed by an equally divided Court.

Sir Charles H. Tupper, K.C., for appellant; *J. A. MacInnes*, for respondent.

Macdonald, C.J.A. MACDONALD, C. J. A.:—At the hearing of this appeal counsel for the appellants moved to amend their notice to include a new ground of appeal which would enable them to contend that a portion of the indebtedness sued on was not covered by the mortgage and hence the inability of the plaintiffs to restore the security would be no obstacle to judgment in their favour in respect of that part of the indebtedness. They submit that, as the mortgage was given for a then present advance of some $21,000, and was to cover future advances as well as a past indebtedness which existed at the time of the execution of the mortgage, they were entitled to have applied to this alleged state of facts the law as expounded in *National Bank of Australasia* v. *Cherry* (1870), L. R. 3 P. C. 299. I would dismiss the motion. The point sought to be raised was not pleaded, nor was it raised in the Court below. The security was by both parties to the litigation treated throughout as a security for the whole indebtedness sued on. The defendant makes no complaint in respect of the

validity of the mortgage as one covering the whole indebtedness, and the plaintiffs in answer to interrogatories say that the security was taken for the whole indebtedness.

It is conceivable that had this issue been raised at the trial, evidence could have been led to shew that it was agreed between the parties, at a time when the advances referred to had become past due, that the security should cover them as well as the other indebtedness. It may be that the evidence before us relating to the subsequent transactions between the parties, viz., the conveyance of the land, the extension of time, and the quit claim deed, amount to such proof though I am not called upon to express an opinion either one way or the other. It is enough to say that had the issue been raised at the proper time facts might have been proved analogous to those in the above mentioned case where the original illegality had been cured.

As regards the appeal the facts are not in dispute. The defendant mortgaged to the Quebec Bank his interest in an agreement of purchase of land. Instalments amounting to $18,000 remained to be paid and these appear to have been paid out of advances made by the Quebec Bank, whose business and assets the plaintiffs have since acquired. Before such acquisition the mortgage had been followed by a conveyance of the fee direct to the bank from defendant's vendor. Subsequently the defendant in consideration of an extension of time for payment of his indebtedness to the bank, released, by quit claim deed to the bank, his equity of redemption. The bank thereupon became the absolute owners of the land, which, up to this time, admittedly had been held by the bank as a security for defendant's indebtedness.

Two questions suggest themselves to my mind for consideration. If the release of the equity of redemption was in law tantamount to foreclosure, as the trial Judge appears to have thought, then unless this is to be regarded as a mortgage out of the ordinary, the mortgagee is not entitled to recover upon the indebtedness when admittedly the security cannot be restored to the defendant, but appellants' counsel contended that this was not the ordinary mortgage nor the ordinary foreclosure. They say that the mortgage was a *collateral* security, and they suggest that this is a distinction of importance. I must confess that I do not see the force of this argument. To call the mortgage a collateral security

B. C.

C. A.

ROYAL BANK v. MCLEOD.

Macdonald, C.J.A.

does not, in my opinion, distinguish it from any other mortgage. If the creditor held other securities this mortgage was an additional one, and in the absence of a special agreement, the creditor might enforce, in accordance with the terms thereof, at its own option, any one or more of its securities. I take it that if a creditor having security for a debt demands an additional security in the form of a mortgage upon real estate, and the debtor accedes to the request and executes a mortgage, it matters not to the remedy whether it be called collateral or whether it be the only security which the creditor holds, and in the absence of a special agreement giving the creditor remedies other than those given by the law, the creditor's remedy is foreclosure and foreclosure alone. In my opinion there is no implied power to sell a security merely because it is, in common parlance, called collateral security. Now there was in fact a power of sale contained in what I shall call the original mortgage, that is to say, the mortgage of defendant's interest under the agreement of purchase. Putting aside questions which have been raised by respondent's counsel as to whether the power of sale could have been exercised by any one other than Robitaille, who at the time was manager of the Quebec Bank, and to whom it was given, and as to whether assuming that it could be assigned it had in law been assigned and become vested in the plaintiffs, it appears to me that this power of sale ceased to exist when the defendant parted with his equity of redemption. It would be anomalous to say that when a mortgagee had obtained absolute title, either by foreclosure or by release of the defendant of the equity of redemption, he could still exercise the power of sale contained in the mortgage. The reason for such power would have ceased to exist. It is suggested, however, by counsel for the appellant, that the release of the equity of redemption was given for the purpose of conferring a more absolute or untrammelled power of sale upon the mortgagee. The consequences of so holding would be that the release of the equity of redemption would not destroy the right to redeem and that the property, notwithstanding the release, was still held in mortgage. Seeing that difficulty, counsel for the appellants was obliged to contend that there was some sort of agreement between the parties, that after the said release, the land should be sold and the proceeds applied upon the indebtedness. No doubt the appellant might

have by agreement retained the right to enforce payment of the indebtedness, or such portion thereof as might not have been satisfied out of the proceeds of a sale of the property, but there is to be found in the evidence not a suggestion of such an agreement. The sale was made without the knowledge or consent of the respondent and no agreement, either written or verbal, has been proven substantiating appellants' submission. I think, therefore, that the trial Judge came to the right conclusion.

But there is a second point from which this case may be viewed. If the quit claim deed releasing the equity of redemption was not intended merely to obviate the necessity of obtaining foreclosure, then it must be taken to have been a settlement of the indebtedness. It was in effect a sale of the equity of redemption, and if so, this would extinguish the debt. This I think would follow from the principles laid down in *Vernon* v. *Bethell* (1762), 2 Eden 110, 28 E.R. 838; *Ensworth* v. *Griffiths* (1706), 5 Bro. P.C. 184, 2 E.R. 615; *Beatty* v. *Fitzsimmons et al.* (1893), 23 O.R. 245. This case is the converse of the second English case just cited. There, after the release of the equities of redemption, the question was as to the right of the mortgagor to redeem. I think the rule to be extracted from these cases is, that where the right to redeem has been lost by reason of the release, the land takes the place of the debt. In the Ontario case it is laid down that the purchaser of an equity of redemption is bound to pay off the encumbrances. Therefore, if the effect of the release in the case at Bar was to vest absolutely in the bank the land free from any right of redemption, and the parties entered into no agreement in respect of the consequences of such release as bearing upon the indebtedness, the indebtedness is extinguished. In my opinion, the appeal should be dismissed.

MARTIN, J. A., would allow the appeal.

Martin, J.

McPHILLIPS, J. A.:—The respondent in this appeal would appear to have been indebted to the appellants in a sum of about $95,000, and was sued for the sum of $85,214.73, after crediting $9,000, moneys realized from the sale of a parcel of land held by way of security by the Quebec Bank. The assets both real and personal of the Quebec Bank were sold to and acquired by the appellant under the provisions of the Bank Act. The indebtedness arose by reason of advances made upon promissory notes by the

McPhillips, J.A.

B. C.
C. A.
ROYAL BANK
v.
MCLEOD.
McPhillips, J.A.

Quebec Bank to the respondent and these promissory notes are now the property of the appellant. The advances were made throughout the years 1912 to 1918. In 1912 the respondent, then being indebted to the Quebec Bank, assigned, as a security in respect of the indebtedness, all his right, title and interest in the previously referred to parcel of land agreed to be sold to him by one Fulton, the Quebec Bank making a further advance of $21,657.18. It may be said in passing that the security could not of course under the Bank Act be effective save as to any past due indebtedness. The assignment of the agreement of sale held by the respondent was made to Robitaille, the manager of the Quebec Bank. On June 25, 1914, the indebtedness of the respondent to the Quebec Bank was it would appear $74,557.77 and demand was made for payment. This resulted in an agreement of that date between the respondent and the Quebec Bank whereby 3 months' further time was granted for payment, the respondent to execute a quit claim deed and release of his equity of redemption in the land to the Quebec Bank to be held in escrow. Default in payment took place and the quit claim deed was delivered up to the Quebec Bank. The quit claim deed had a special provision therein reading as follows:—

> And This Indenture Further Witnesseth that the Party of the First Part Doth Hereby release, acquit and forever discharge the Party of the Second Part from all claims, demands, suits, actions, contracts and accounts in respect of the said hereinbefore described lands and premises and of the rents and profits thereof and of all moneys realized by the sale of the said property or otherwise in connection therewith, the Party of the First Part hereby confirming all proceedings taken by the Party of the Second Part in connection therewith so far as they might affect the Party of the First Part.
>
> And the Party of the First Part covenants with the Party of the Second Part that he is the sole party beneficially interested in the said lands and premises and he will indemnify and save harmless the said Party of the Second Part from all further demands, costs, or charges in connection therewith.

It is apparent from the reading of this special provision that it was notice to the world, *i.e.*, to all purchasers of the land, that the respondent had conveyed and parted with all his interest in the land to the Quebec Bank.

It will be observed that in the special provision above quoted it was contemplated by the respondent that the land should be sold and there is no possible doubt that the respondent was a consenting party to the Quebec Bank selling the land as it might see fit and that power of sale enured to and was capable of legal

exercise by the appellant, the Quebec Bank's rights, title and interest in the land having passed to the appellant and the appellant did sell the land. There is no question raised that the sale was not for a fair price but the unconscionable contention upon the part of the respondent is that in selling the land the appellant has by operation of law and the application of legal and equitable principles released the respondent from all his indebtedness to the Quebec Bank, an indebtedness which as we have seen passed to the appellant payable by the respondent to the appellant. In effect the whole indebtedness of $85,214.73 was released by the course adopted in selling the land described in one security, a partial security only. It is submitted by the respondent, and it was agreed with by the trial Judge, that the effect of what was done was to bring into operation the same result as if a decree of foreclosure had been obtained in respect of a single security for the whole debt and the land sold, thereby placing it out of the power of the appellant to revest the title to the land in the respondent if payment of the total indebtedness were made by the respondent. The reasons for judgment (the judgment under appeal) of the trial Judge are set forth in the following terms:—

> It seems to me settled law that a person, who was once a mortgagee, but, who, by foreclosure decree or otherwise, has become the absolute owner of the mortgaged property, cannot sue for the debt or any part of the debt secured by the mortgage without re-opening the foreclosure; and if, by a sale of the mortgaged property to a third party, he has put it out of his power to reconvey that property to the mortgagor upon redemption, "He should," in the language of Idington, J., in *Mutual Life Assce. Co.* v. *Douglas* (1918), 44 D.L.R. 115 at 122, 57 Can. S.C.R. 243 at 253, "be restrained from proceeding to enforce that common law right whether by suing upon the covenant"—or other promise to pay—"or in way of asserting a proprietory right over any property he had held by way of collateral security to his mortgage."
>
> The general release clause in the instrument of transfer of the equity of redemption (ex. 6, June 25, 1914), has, in my opinion, no relation to the circumstances here. It was simply intended to make the bank's title to the mortgaged property more absolute, if that were possible. But the absolute character of the title acquired by a (former) mortgagee does not affect or prevent the re-opening of the foreclosure in case the (former) mortgagee afterwards sues for any part of the debt. And, as I have already intimated, where the foreclosure cannot be re-opened by reason of the mortgaged property having passed into the hands of the *bonâ fide* purchaser for value the right to sue is forever gone.
>
> The action must be dismissed with costs and the defendant is entitled to the declaration and injunction asked for in his counterclaim, with costs.

With great respect to the trial Judge, I am not of the opinion

B. C.

C. A.

ROYAL BANK v. MCLEOD.

McPhillips, J.A.

that what took place can be said to be at all analogous to that determined in the *Mutual Life Assce. Co. of Canada* v. *Douglas*, 44 D.L.R. 115. The present case is not one of foreclosure and it is not a case for the application of the principles that govern where foreclosure has been had and the mortgagee has later conveyed away the land. Here we have an express agreement and authorisation of sale of the land. The security was only one of a number of securities held by the appellant and there is no evidence whatever of any intention on the part of the Quebec Bank or the appellant to accept the quit claim deed in satisfaction of the whole debt. On the contrary there is every evidence so far as the documentary evidence goes that the respondent transferred all his title in the land and released the Quebec Bank from all requirement to account for any moneys realized by the sale of the land. To give effect to the contention of the respondent and to affirm the judgment of the trial Judge would appear to me to be in frustration of the plain intention of the parties as evidenced by the documents. It is apparent that the course sought by the respondent to evade liability for this large debt is an afterthought and a most unconscionable afterthought. It is sought to now invoke equitable principles to effectuate the release of a large indebtedness owing to the realization upon one minor security and the realization of about one-tenth of the total indebtedness is to be held to discharge the other nine-tenths. Can this be said to further the ends of justice? No doubt if the position could be said to be that stated by Davies J. (now Chief Justice of Canada) in *Mutual Life Assce. Co. of Canada* v. *Douglas*, *supra* at p. 118 (D.L.R.):—

> He could not have both land and the money secured upon it. If he chose to foreclose and then sell the land or part of it, he would be taken to have elected to take the land for his debt,

it would be idle to contend to the contrary. This language succinctly indicates that which is the law of England. It arises by operation of law where a particular course is adopted *i.e.*, foreclosure proceedings adverse to the mortgagor and where no agreement has been come to between the mortgagor and the mortgagee but the law of England places no ban upon the parties, it is not a case of election where the mortgagee proceeds in plain compliance with authorisation given by the mortgagor, plain

B. C.

C. A.

ROYAL BANK v. MCLEOD.

McPhillips, J.A.

consent to a sale being held. There was a power of sale and that power of sale was exercised and in all such cases after crediting the moneys realized the mortgagee may hold the mortgagor for the deficiency and that is the present case.

The present case is not one of suing for the mortgage debt. The land as we have seen was one only of several securities held by the Quebec Bank and at most could only be security for the debt past due when the security was taken *i.e.*, when the assignment of the agreement for sale to the respondent from Fulton was taken. Then, as I view it upon the facts of the present case the respondent assented to a sale being held of the land and at most all that can be claimed by the respondent is a reduction of the debt *pro tanto*. Upon this view of the matter, the language of Romilly, M. R., in *Palmer* v. *Hendrie* (1859), 27 Beav. 349 at p. 351 (54 E. R. 136) is instructive:—

> They (the mortgagees) are bound on payment to restore the property to the mortgagor and if it appear, from the state of the transaction, that, by the act of the mortgagee, *unauthorized by the mortgagor*, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law.

In the present case sale was authorised and contemplated by the mortgagor and in terms assented to by the documents executed and quoted from above. Then upon the special facts of the present case it may well be said in my opinion that the respondent, by his conveyance of the equity of redemption and express authorisation of a sale, has precluded himself from calling for a conveyance of the land (see Romilly, M. R., in *Palmer* v. *Hendrie*, *supra*, at p. 352). Here there is no attempt to hold the respondent for the whole debt. The purchase money of the land sold has been credited to the respondent and in this connection the language of Griffith, C. J., in *Fink* v. *Robertson* (1907), 4 C. L. R. 864 at p. 872 is much in point:—

> There is no reported case shewing the conditions on which the Court would have allowed the mortgagee to enforce his judgment under the circumstances (the C.J. had just previously referred to *Palmer* v. *Hendrie*, *supra*) whether they would have allowed the mortgagor at his option to treat the foreclosure as a satisfaction of the debt *pro tanto* at the date of the decree, or whether they would have regarded the liability for interest as continuing after the decree, and treated the mortgagee as a mortgagee in possession and liable to account on that basis.
>
> But it is inconceivable that, if the mortgagor was unable to redeem, the Court would have allowed the mortgagee to issue execution for the whole amount of the debt and also to retain the land. It follows from what has been

B. C.

C. A.

ROYAL BANK v. MCLEOD.

McPhillips, J.A.

said that it is inaccurate to say that a mortgagee *by suing upon the covenant in the mortgage* opened the foreclosure. His title to the land was, and remained absolute but the court of equity *would not allow him to recover the whole amount of the debt without reconveying the land.*

It is to be noted that in the *Mutual Life Assce. Co. of Canada* v. *Douglas, supra*, the Chief Justice, Idington and Anglin, JJ., expressed approval of the dissenting judgment of Higgins, J., in *Fink* v. *Robertson, supra*, and bearing this in mind it is important to note what Higgins, J., said at p. 894 in *Fink* v. *Robertson*:—

> One curious result of holding that the foreclosure of a mortgage involves the release of the debt is that a mortgagee who has foreclosed one mortgage must discharge, unconditionally, all the securities for the *same debt*. For instance, if he have a mortgage over Blackacre for £1,000, and if he take an additional security over Whiteacre, worth £200, for the *same debt;* then, if he foreclose the mortgage over Whiteacre, he can be forced to discharge the mortgage over Blackacre, without any further payment.

I am not unmindful that in the present case there is the difficulty of the land being conveyed away, but can it be reasonably said that because the land covered by one security for the portion of the debt then past due has been conveyed away the resultant effect is that all other securities and the *whole debt* stand discharged? This really affronts one, in fact it is a startling effect if that be the law; and particularly startling is it where we have in the present case the documentary assent to a sale being held. Here it is not the same debt and later I will point out that even should I be wrong in all my reasoning so far there remains a debt of no inconsiderable amount that the respondent must, in my opinion, be liable for, notwithstanding all that has taken place. In *Kinnaird* v. *Trollope* (1888), 57 L. J. Ch. 905, Stirling, J., said at p. 908:—

> On this part of the case *Palmer* v. *Hendrie, supra*, again throws some light. It was there held that the mortgagor, on paying off the mortgage debt, was entitled to have the property restored to him unaffected by any acts of the mortgagee *unauthorized by the mortgagor*. The necessary authority might be derived as in the case of *Rudge* v. *Richens* (1873), 42 L.J.C.P. 127, from the powers conferred by the mortgage deed, or from the direct concurrence of the mortgagor, or possibly otherwise; . . .

Now I consider the present case comes within the ratio of *Rudge* v. *Richens*. There was the power of sale, the clear and expressed contemplation that there would be a sale and that there should be no liability to account and a release to the Quebec Bank "of and from all liability in respect of said lands and premises." *Rudge* v. *Richens* was an action brought on the mortgagor's

covenant to pay the debt. The action being brought to recover the balance due to the mortgagee after giving credit for the money realized on the sale of the mortgaged property, the defendant pleaded by way of equitable defence a plea which shewed that the plaintiff had taken possession of the mortgaged property and sold the same under the power of sale contained in the mortgage, had thereby, as the plea alleged, deprived the defendant of his right to have such property reconveyed to him upon payment of the money and interest due on the mortgage and it was held that the plea was clearly bad, since it did not shew that sufficient had been realised by the sale to satisfy the debt.

In the present case of course it is not contended that sufficient was realised to satisfy the debt. It would be idle contention if advanced as what was realized fell short some $85,000 and more of satisfying the debt, yet it is now confidently submitted that what was done had the effect nevertheless of satisfying the whole debt. With great respect to all contrary opinion I cannot agree that that is the law. That the sale to the Quebec Bank by the respondent was *absolute* there can be no question and what is there in the law to prevent full effect being given to all its terms? In *Cossip* v. *Wright* (1863), 32 L. J. Ch. 648, Kindersley, V.-C., at p. 655, said:—

> . . . upon whatever grounds the party who made the conveyance may afterwards challenge the thing, this Court will look with the utmost nicety and care and suspicion, even a jealousy, into every one of those grounds brought forward by the party who complains of the transaction, to see whether upon any of those grounds there was anything on which the Court should say that the transaction ought not to prevail. But, if, after looking into all those grounds, the Court finds there is nothing of the kind, it will uphold the transaction, and therefore I see no more reason for setting aside this transaction and treating it as a mere mortgage than setting aside any other *bonâ fide* purchase.

I see no reason in the present case to in any way view the conveyance to the Quebec Bank as other than an *absolute conveyance* and the bringing to an end of the relationship of mortgagor and mortgagee. The bank has credited the purchase price of the land to the respondent and there has been a *pro tanto* reduction made in respect of the debt, only to be met with the unconscionable contention that although the bank treated the transaction as *bonâ fide*, which it undoubtedly was, and gave credit for the moneys realized in the way of the reduction of the debt of the respondent,

B. C.

C. A.

ROYAL BANK v. MCLEOD.

McPhillips, J.A.

that the resultant effect as contended for is that the whole debt is satisfied. I can only say that I fail to so read the law. To so expound the law calls for the citation of controlling authorities that I fail to find and I find myself unable not with any regret let it be said to give effect to a contention so subversive of natural justice and the ends of justice. Certainly any such holding must be founded upon intractable law, and to find that such is the law would go far to prove that our fond conception that we live in a free country is idle thought and a snare and delusion to the unwary. I would refer to *Lisle* v. *Reeve* (1902) 71 L. J. Ch. 42; Cozens-Hardy, L. J., adopted the language of Kindersley, V.-C., in *Gossip* v. *Wright*, *supra*, and of the language quoted by Cozens-Hardy, L. J., as used by Kindersley, V.-C., we have this stated at p. 52:—

> That the Court will allow the parties by a subsequent arrangement to enter into a transaction by which the mortgagor sells or releases, or conveys or gives up (call it what you will) his equity of redemption, and makes the estate out and out the estate of the mortgagee, is clear.

Cozens-Hardy, L. J., went on to say:—

> Now applying that principle and in the absence of a particle of either allegation or evidence to shew that the two deeds of June and July, 1898, were part of the same transaction, it seems to me to come simply to an arrangement made after a mortgage security between a mortgagor and mortgagees. And, so far as I know, there is no authority for saying that there is any disability in having a contract for an option made between mortgagor and mortgagee, not as part of the mortgage transaction, but at a subsequent period,

and the decision in *Lisle* v. *Reeve*, *supra*, was affirmed by the House of Lords—see (1902), 71 L. J. Ch. 768. That there was an existent power of sale capable of exercise by the appellant there can be no question and the exercise of it need not be expressed in the instrument—see *Kelly* v. *Imperial Loan, etc., Co.* (1885) 11 Can. S. C. R. 516 at p. 524; also see *Stevens* v. *Theatres, Ltd.* (1903), 72 L. J. Ch. 764.

Finally should I be in error in all that I have said and the resultant effect is as contended for by the respondent that the sale of the land by the appellant operated to release the debt, the debt released could at most be the debt existing at the time of the execution of the quit claim deed viz: June 25, 1914, and after that date further advances were made of about $5,500 and certainly as to these further advances the bank would be entitled to judgment.

Upon the whole case I am satisfied that the judgment of the trial Judge was wrong and judgment should be entered for the appellant as claimed for the $85,214.73 with subsequent interest, that is, the appeal should be allowed and the judgment of the Court below as entered set aside.

EBERTS, J. A., concurred with the Chief Justice.

Appeal dismissed, the Court being equally divided.

Re CLEGHORN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee and Hodgins, JJ.A. May 19, 1919.

WILLS (§ III A—75)—CONSTRUCTION—CONDITIONS—SUBSTANTIVE GIFT—TRUST OR CHARGE.

No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. A provision in a will expressed in the form of a condition may operate as a substantive gift by creating a trust or charge.

[Review of authorities.]

Statement.

APPEAL by Clara C. Cleghorn, the widow, from the judgment of Rose, J., in a motion by the executors of the will of T. H. Cleghorn, deceased, for an order declaring the true construction of the will.

The judgment appealed from is as follows:—By his will, made on the 14th June, 1913, the testator left all his property to his executors in trust, and directed them to carry on his business, if they could do so profitably, or, if they could not profitably carry it on, to sell it and any interests which he might have in leasehold properties, and he directed them to apply the profits of the business, if carried on, or the proceeds of the business and of the leaseholds, if sold, by first paying off any mortgage registered against his dwelling-house and then dividing the surplus in equal shares amongst his wife and his three daughters. He expressed a wish that his three daughters, if unmarried or widows, should make their home with the widow in the said house, and he said:—

"My said executors shall hold the said property upon trust and maintain the same and pay all rates, taxes, assessments, insurance premiums, and repairs upon the said house property, and permit my said wife and daughters to occupy the same so long as they shall all desire to do so."

At the time when the will was made, one of the three daughters

ONT.
S. C.
RE CLEGHORN.

was married; another married afterwards in the lifetime of the testator; the third is still unmarried.

The will goes on to say:—

"My said wife shall have the right to use, occupy, and enjoy the said house property with my unmarried or widowed daughters in any event for the period of two years after my death. If at the expiry of two years my said wife and daughters do not desire to live together in the said house, then upon payment to my said wife by my said daughters of the sum of two thousand five hundred dollars in cash, the said house property shall be held by my trustees for my said daughters free from any right of dower upon the part of my widow.

"Upon and in the event of the payment of the said sum to my widow in satisfaction of her right of dower in said house property, my said executors are to hold the said property and to permit my daughters Edna H. Cleghorn and Anna H. Cleghorn" (i.e., the two who were unmarried at the date of the will) "to occupy the said premises . . . as long as she or they remain unmarried with the said right of occupancy to such of my said daughters as shall last remain unmarried. In the event of my said son-in-law predeceasing my said" married "daughter . . . she shall have the same right of occupancy as is hereby given to my said" unmarried "daughters. Upon the termination of the last right of occupancy to convey the said property to my three daughters . . . as tenants in common. Taxes, rates, insurance premiums, and repairs upon the said property to be paid out of my general estate by my trustees so long as they retain the said property under the provisions hereinbefore mentioned."

Then there are certain specific bequests and a residuary clause as follows:—

"To divide all the rest, residue, and remainder of my estate among my said daughters, share and share alike."

The testator died on the 1st March, 1917. Since his death the widow has occupied the house alone, the unmarried daughter not desiring to live there. The daughters are said to desire the sale of the house, and they are unwilling to pay to the widow the sum of $2,500 mentioned in the will. The house is said to be the only present asset of the estate, except something less than $200 standing in the bank. The widow elected to take, in lieu of dower,

the benefits conferred upon her by the will; but, upon the argument, counsel for the daughters said that if the daughters are entitled to have the house sold, and if the widow's only interest is her dower, the daughters do not desire to hold her to her election.

The questions are: is the widow entitled to live in the house unless and until the daughters pay her $2,500; or is there a devise of the house to the daughters charged with the payment of the $2,500; or does the house pass under the residuary devise, and is the widow's only interest her dower interest?

I think the true reading of the will is as follows:—

The house is to be held by the executors and maintained by them, at the cost of the general estate, as a residence for the widow and the unmarried or widowed daughters, for two years "in any event," and for so long thereafter as the widow and the daughters, i.e., the unmarried or widowed daughters, *all* desire to live in it together. If, at the end of the two years, the widow and the unmarried or widowed daughters do not desire to live in it together, the trust to maintain it at the expense of the general estate, as a residence for the widow and daughters, comes to an end, and the widow is entitled to have her dower realised out of it, unless the daughters pay her $2,500 in satisfaction of her right of dower; but, if the daughters pay the $2,500, the executors are to hold the house and maintain it, at the expense of the general estate, as a residence for such of the daughters as are unmarried or widows, until the last right of occupancy by a daughter terminates, and, upon the termination of such last right of occupancy, are to convey it to the three daughters, as tenants in common. At the end of the two years, if the widow and the unmarried or widowed daughters do not desire to live in the house together, so that the trust to hold and maintain it as a residence for the widow and daughters comes to an end, and if the daughters do not pay the $2,500, so that the duty of the executors to maintain it as a residence for the daughters does not arise, the house, or, rather, the proceeds after payment of the dower, goes to the daughters, share and share alike, under the residuary clause.

If this is the correct reading of the will, there is no room for the suggestion that the house is devised to the daughters subject to a charge of $2,500 in favour of the widow: there is no direction to the daughters to pay anything; they are merely given the

ONT.
S. C.
RE CLEGHORN.

privilege of paying and so preventing the sale of the house and ensuring the maintenance of it, at the expense of the general estate, as a residence for such of them as are unmarried or widows.

The questions will be answered in accordance with the foregoing; and, if the parties think it desirable, there may be a declaration that, if the $2,500 is not paid, the widow will be entitled to dower notwithstanding the execution and registration of the deed of election.

The costs of all parties will be paid out of the estate.

Clara G. Cleghorn, the widow, appealed from the judgment of ROSE, J.

H. J. Scott, K.C., and *E. F. Coatsworth*, for the appellant.

J. J. Maclennan, for the respondents.

John Jennings, for the executors.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A. (after quoting a portion of the judgment of ROSE, J.):—Three daughters are living, one was married at the time the will was made, one has since married, and one is still unmarried. The property in question is No. 106 St. Vincent street, in Toronto.

The clause of the will upon which the appeal turns is in effect as follows:—

(c) "It is my sincere and earnest desire that my three daughters if unmarried or widowed shall make their home with my dear wife at 106 St. Vincent street and that they shall occupy and enjoy the same together and my said executors shall hold the said property upon trust and maintain the same and pay all rates, taxes, assessments, insurance premiums, and repairs upon the said house property and permit my said wife and daughters to occupy the same so long as they shall all desire to do so.

(d) "My said wife shall have the right to use, occupy, and enjoy the said house property with my unmarried or widowed daughters in any event for the period of two years after my death. If at the expiry of two years my said wife and daughters do not desire to live together in the said house, then upon payment to my said wife by my said daughters of the sum of two thousand five hundred dollars in cash, the said house property shall be held by my trustees for my said daughters free from any right of dower on the part of my widow.

(e) "Upon and in event of the payment of the said sum to my

ONT.
S. C.
RE CLEGHORN.
Hodgins, J.A.

widow in satisfaction of her right of dower in said house property, my said executors are to hold the said property and to permit my daughters Edna S. Cleghorn and Anna H. Cleghorn to occupy the said premises 106 St. Vincent street, Toronto, as long as she or they remain unmarried with the right of occupancy to such of my said daughters as shall last remain unmarried. In the event of my said son-in-law predeceasing my said daughter Ella L. Choquette she shall have the same right of occupancy so long as she does not re-marry as is hereby given to my daughters Edna S. Cleghorn and Anna H. Cleghorn, Upon the termination of the last right of occupancy to convey the said property to my three daughters Ella L. Choquette wife of the said Robert Choquette hereinbefore mentioned, Edna S. Cleghorn and Anna H. Cleghorn as tenants in common. Taxes, rates, insurance premiums, and repairs upon the said property to be paid out of my general estate by my trustees so long as they retain the said property under the provisions hereinbefore mentioned."

From a survey of the whole will it is evident that the desire of the testator was to preserve the house as a residence for his wife and unmarried daughters, including his married daughter if widowed.

To this end he directed the winding-up of his business and the payment of the mortgage upon the house. The amount realised from his business, however, proved insufficient to discharge the incumbrance, which was for $1,700. If the $2,500 is a charge upon the property, the equity is worth, it is said, about $2,200.

The question turns upon the meaning of the phrase "upon payment," which, if a condition, imposes a charge upon the property or upon the right of occupancy thereof given by the will.

The right to occupy for two years is given to the wife and the two daughters then unmarried as well as to the third if widowed. The expression "wife and daughters" must therefore include, as a matter of construction, the married daughter, because the testator evidently intended to give her a right which, though inchoate, might become actual within the two years.

And so the words "my said daughters," which occur twice in clause (d), refer to all these previously mentioned.

Jarman on Wills, 6th ed., pp. 1461, 1462, says:—

ONT.
S. C.
RE CLEGHORN.
Hodgins, J.A

"No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. Thus a devise to A., 'he paying' or 'he to pay £500 within one month after my decease,' without more, would at common law create a condition, for breach of which the heir might enter. . . . But the intention must be definitely expressed. . . . A provision in a will, expressed in the form of a condition, may operate as a substantive gift, by creating a trust or charge."

For this is cited, *inter alia*, Co. Litt. 236.b.: "so if lands be devised to one *ad solvendum* £20 to I. S. or paying £20 to I. N. this amounts to a condition." Then the following case is added:—

"And *Crickmer's* case was this: A man seised of certaine lands holden in socage had issue two daughters A. and B. and devised all his lands to A. and her heires, to pay unto B. a certaine summe of money at a certaine day and place; the money was not paid, and it was adjudged, That these words, 'to pay,' etc. did amount in a will to a condition; and the reason was, for that the land was devised to A. for that purpose, otherwise B. to whom the money was appointed to be paid, should be remediless, *et interest reipublicæ suprema hominum testamenta rata haberi*: and the lessee of B. upon an actuall ejectment recovered the moitie of the land against A."

Coming from that general statement to what is in issue here, Sir George Jessel, M.R., advances the matter by indicating the way in which a condition may operate so as to give a charge or create a trust and thus prevent a forfeiture.

He says in *In re Kirk*, (1882) 21 Ch. D. 431, at p. 437:—

"My view of those authorities is this, that though the words 'on condition' may be used by a testator, he does not mean to leave it to the choice of the devisee to say whether or not the person who is to take the benefit which is the subject of the condition, is to have it or not. The form looks like it, but the substance is not so. The substance is that he intends the legatee or devisee to perform the condition, and the person who takes the benefit of it is to have it in any event. In other words, it is that he does not intend the devisee, by refusing to perform the condition, to disappoint the person whom I will call the legatee, nor does he intend the death of the devisee to disappoint the legatee."

ONT.
S. C.
RE CLEGHORN.
Hodgins, J.A.

In that case the condition required the devisee to give up all claim to a sum of £3,400 due to him by the testator and in the will erroneously said to be charged by way of equitable mortgage on the property devised. The result of the decision was that, although the devisee had died in the lifetime of the testator, the condition had bound the land and the debt of £3,400 must be discharged out of it.

In addition to the cases cited on the argument the following seem to be in point:—

In *Barnardiston* v. *Fane* (1699), 2 Vern. 366, 23 E.R. 830, Edward Rothwell devised his real estate to his kinsman Sir Richard Rothwell, "paying £1,000 apiece" to his two daughters. The money not being paid, the daughters brought ejectment and succeeded. Sir Richard Rothwell's heirs afterwards brought their bill to be relieved, and obtained a decree for that purpose, paying what remained unpaid of the £2,000 with interest and costs.

In *Hodge* v. *Churchward* (1847), 16 Sim. 71, 60 E.R. 799, the will contained a devise of certain tenements to the son Matthew for life and after his decease to the first, second, third and fourth sons, and so on, lawfully begotten, paying to the wife £16 a year and to the daughter £10 a year. Vice-Chancellor Shadwell said: "The word 'paying' creates, not a trust, but a charge or condition."

In *In re Welstead* (1858), 25 Beav. 612, 53 E.R. 770, the words "in consideration of" were held to import a condition.

The case of *Hodge* v. *Churchward* was followed in *Cunningham* v. *Foot* (1878), 3 App. Cas. 974. Lord Cairns, L.C., says of it and in reference to the will in question in the case he was deciding (pp. 989, 990):—

"It was decided, and the decision has always been followed and never quarrelled with since, in the case of *Hodge* v. *Churchward*, that a devise of land to pay a sum of money to A.B. was a charge, and was not a trust for A.B. And, my Lords, the word 'pay' surely cannot mean more than the words 'well and truly pay,' and the words, 'well and truly pay' must mean simply on condition of well and truly paying; and, therefore, it being established law that a devise to A. 'paying' a sum of money to B. is not a trust, but is a charge, it must also be the law that a devise to A. 'to well and truly pay' to B. is not a trust, but is a charge; and a devise to A., 'on the condition of well and truly paying,'

ONT.
S. C.
RE CLEGHORN.
Hodgins, J.A.

must be a charge and not a trust. Therefore, taking the word 'legacies' to include the annuity, there is here a devise of the remainder of *Seskin Ryan* to the son, at the utmost charged with the condition of paying the annuity, that is to say, the arrears of the annuity, to the widow."

Lord Selborne, who took part in the judgment, also alluded to *Hodge* v. *Churchward* in this way (p. 1002):—

"I cannot distinguish the present case from *Hodge* v. *Churchward*, because (though the word 'condition' was not in that will) it was used in the judgment of *Sir Launcelot Shadwell* in a manner which proves that he would not have considered its addition to make any difference. The gift there was of lands to a tenant for life and remainderman 'paying to' the testator's wife and daughter certain annuities. The Vice-Chancellor said: 'The word "paying" creates, not a trust but a charge or condition; and therefore the plaintiff's claim is barred by the statute.'"

In *Re Oliver* (1890), 62 L.T.R. 533, Chitty, J., determined that the words "he paying thereout the following legacies" imported either a charge or a trust, and decided that, in the particular will then before him, a charge was created.

I think these cases indicate the principle upon which this will must be construed. The provision is that "upon payment" of the sum of $2,500 to the widow the trustees are to hold the house property for the three daughters.

The words appear to import a charge for that amount upon what is to be obtained when payment is made, and not a mere option, allowing the daughters, by refusing to exercise it, to obtain the property subject merely to the widow's dower.

Now upon what is the charge created? Is it upon the right of occupancy only or upon the property itself?

By clause (d), upon payment being made, the trustees are to hold the property free from the widow's dower "for my said daughters."

The terms of the holding are then defined. They are to permit two daughters while unmarried or the married one if widowed to occupy the premises. Upon the last right to occupy ceasing then the property is to be conveyed to the three daughters as tenants in common. I think it may reasonably be said that the holding of the property and the payment of the taxes, insurance,

ONT.
S. C.
RE CLEGHORN
Hodgins, J.A.

and repairs upon it for the period of occupancy is not for the benefit only of those entitled to occupy, but for all three whose ultimate advantage could only be secured if the outgoings were met so as to preserve it for them. That fits in with the earlier disposition, "to hold it for my said daughters," and that expression should control the after-provision as to occupancy, and relegate that right to a mere temporary use imposed for the better enjoyment of the property in specie by some one or more of the beneficiaries while unmarried. If a life-estate had been given to one daughter only, it would not have been possible, as it seems to me, to hold that the payment of the $2,500 was to be charged upon the life-estate, in face of the earlier direction to hold the "said house property for my said daughters," which came into effect immediately upon the payment being made.

The result is that the judgment in appeal should be reversed and the questions answered in accordance with this opinion.

As this judgment construes a will which is not clear, and whose phraseology gives rise to the ambiguity, the costs of all parties of the application and appeal should be borne one half by the appellant and one half by the daughters, those of the executors as between solicitor and client.

Appeal allowed.

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S. C.

STRAUS LAND CORPORATION Ltd. v. INTERNATIONAL HOTEL WINDSOR, Ltd.

Ontario Supreme Court, Appellate Division, Riddell and Latchford, JJ., Ferguson, J.A., and Rose, J. February 7, 1919.

1. LANDLORD AND TENANT (§ II D—33)—ACTION FOR RENT—FORFEITURE ALSO CLAIMED—WAIVER OF FORFEITURE—ABANDONMENT OF ACTION—EFFECT.

If in an action for rent forfeiture is also claimed for acts done prior to the date on which the rent claimed became due, the action operates as a waiver of the forfeiture. The abandonment of the claim for rent at the trial cannot reinstate the forfeiture.

[*Bevan* v. *Barnett* (1897), 13 T.L.R. 310, applied].

2. LANDLORD AND TENANT (§ III B—81)—ALTERATION OF BUILDING—LANDLORD'S CONSENT—ALTERATIONS NOT AUTHORISED—DAMAGES.

The consent of a landlord to the tenant changing the external front of a building by making a one-store entrance with one door, does not authorize the tenant to make a two-store entrance with two doors—and although the value of the building may be increased, the landlord is entitled to damages for the unauthorised change.

Statement.

APPEAL by plaintiffs from the judgment of Falconbridge, C.J.K.B., in an action by landlords against tenants for a declara-

ONT.

S. C.

STRAUB LAND CORPORATION LTD. v. INTERNATIONAL HOTEL WINDSOR, LTD.

tion of forfeiture of a lease of an hotel and premises, for possession, arrears of rent, damages, and other relief. Reversed in part.

The judgment appealed from is as follows:—In their statement of claim the plaintiffs ask for forfeiture of the lease and possession of the hotel property: (1) for non-payment of rent; (2) for breach of covenant to repair; (3) for breach of covenant not to assign or sublet without leave; (4) for damages.

At the trial claim No. 1 was abandoned.

(2) As to breach of covenant to repair. Plans and specifications had been agreed upon for certain repairs to the front of the building. The defendants undertook to make an immaterial variation in the design, altering the front so as to make two entrances and breaking up the interior into two shops. I find, upon the evidence, that the value of the property as a revenue-producer was increased, instead of being decreased, by the alteration. It may be that, under the covenant, the plaintiffs have the right to have the building restored at the end of the term to the same style and condition in which it was at the time of the demise or to the design contemplated in the plans and specifications agreed upon: *Sullivan* v. *Doré* (1913), 13 D.L.R. 910, at p. 912, 5 O.W.N. 70, at p. 72. Repairs of some kind were necessary, as shewn by the evidence of the sanitary inspector.

No complaint or objection was offered by the plaintiffs while the work was in progress, and no claim for forfeiture made until the work was completed. The real trouble was, that difficulty had arisen between G. H. Wilkinson (president and principal shareholder of the defendant company) and the plaintiffs about another matter, and that the plaintiffs were determined to get him and the defendants out of possession upon any pretext whatever.

(3) As to the breach of covenant not to assign or sublet without leave. Most of the repaired portion of the building is occupied by the defendant company. The plaintiffs contend that the hotel company have not the power to carry on business as dealers in rubber goods. That claim is answered by the decision of the Privy Council in *Bonanza Creek Gold Mining Co. Limited* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, followed in our Courts in *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105. There must be a valid assignment to work a forfeiture: *Cornish* v. *Boles* (1914), 19 D.L.R. 447 at p. 457, 31 O.L.R. 505, at p. 519.

The mere letting into possession is not a breach of covenant not to assign or sublet: *McCallum Hill & Co.* v. *Imperial Bank of Canada* (1914), 22 D.L.R. 203, 30 W.L.R. 343.

The plaintiffs had given their consent to a subletting, although they contend not to this one (see letter of the 12th January, 1918—exhibit 15).

The Court always leans against forfeiture: *McLaren* v. *Kerr* (1876), 39 U.C.R. 507; *Hyman* v. *Rose*, [1912] A.C. 623.

I find nothing in the authorities cited by the plaintiffs to affect the view which I am taking of the case. They are: *Curry* v. *Pennock* (1913), 10 D.L.R. 166 and 548, 4 O.W.N. 712 and 1065; *Fitzgerald* v. *Barbour* (1908), 17 O.L.R. 254, affirmed, *sub nom. Loveless* v. *Fitzgerald* (1909), 42 Can. S.C.R. 254; *Holman* v. *Knox* (1912), 3 D.L.R. 207, 25 O.L.R. 588. Some of the views expressed by the Court in this latter case must be modified by the judgment in *Hyman* v. *Rose* (*ubi supra*).

The action must be dismissed with costs.

D. L. McCarthy, K.C., for the appellants.

E. S. Wigle, K.C., for the defendants, respondents.

RIDDELL, J.:—The plaintiffs, the owners of the International Hotel, Windsor, bring this action (11th March, 1918) against their tenants. Riddell, J.

They allege that in the months of January and February, 1918, the defendants altered the building in breach of covenant; and that, on the 27th February, 1918, they (the plaintiffs) served a notice in writing specifying the breach, etc., and requiring remedy of breach and compensation, that the defendants did not remedy or compensate; further, the defendants, in January and February, 1918, sublet without leave part of the premises in breach of their covenant. Then they say that on the 1st February, 1918, a month's rent became due, and on the 1st March, 1918, another month's rent, "and the same are now in arrear and remain due and unpaid."

"The plaintiffs therefore claim:—

"1. Declaration of forfeiture of said lease for reasons alleged and for possession of the said building and premises.

"2. All arrears of rent.

"3. $500 damages for the said breaches of covenant to repair.

"4. $500 for mesne profits.

ONT.

S. C.

STRAUS LAND CORPORATION LTD. v. INTERNATIONAL HOTEL WINDSOR, LTD.

Riddell, J.

"5. Such further and other relief as to the Court may seem proper."

The defendants say that they offered a cheque for rent due on the 1st February, 1918, which was refused; they say they are and always have been willing to pay the rent; and they bring into Court $1,095 for the rent for February, March, and April, and ask relief from forfeiture, if any there be. They alleged consent to the changes and the subletting, and ask relief from the forfeiture, if any. The plaintiffs reply with the general issue.

At the trial the learned Chief Justice of the King's Bench dismissed the action with costs. The plaintiffs now appeal.

The claim for forfeiture can be shortly disposed of by the consideration that in this action a claim is made for rent due on the 1st March, 1918, after all the acts upon which forfeiture is hypothecated had been committed.

There has never been any doubt that a forfeiture does not act *ipso facto*, but can be waived, and that an unequivocal act which shews a claim by the landlord of the existence of a tenancy, after the act complained of, operates as such a waiver—at least if such act be done before an unequivocal claim of forfeiture. It is needless to cite authority for this elementary proposition: *McMullen* v. *Vannatto* (1894), 24 O.R. 625, is a case in our own Courts. Action brought for rent accruing due after the noxious acts is such an unequivocal act, operating as a waiver. This is equally elementary; *Dendy* v. *Nicholl* (1858), 4 C.B. (N.S.) 376, has never been questioned, but has been consistently followed: *Penton* v. *Barnett*, [1898] 1 Q.B. 276.

Whether, when in the same action for rent forfeiture is also claimed, the action will operate as a waiver, has been doubted. But *Bevan* v. *Barnett* (1897), 13 Times L.R. 310, decides in the affirmative. This case has been distinguished (e.g., in *Penton* v. *Barnett*, *ut supra*), but not questioned, much less overruled; it recommends itself on principle and should be followed. At the least such a proceeding is evidence of a waiver, and we should in the present case hold it a waiver. The annotations in 10 D.L.R. at p. 603, appended to the report of a British Columbia case, *Balagno* v. *Leroy* (1913), 10 D.L.R. 601, contain an interesting and valuable discussion with cases cited.

The acts alleged as justifying forfeiture are not continuing

acts so as to let in the exception, and I am of opinion that this action itself is a waiver and bars forfeiture.

If it should be contended—as it was not—that the landlords had determined to void the lease before the rent sued for accrued due, the answer is, that there was no act done unequivocally shewing that the landlords insisted upon the forfeiture until the issue of the writ; everything was still *in gremio*.

Then it was said that the claim for rent was abandoned at the trial; but, even if that were so, the forfeiture had already been waived and could not be reinstated: *Bevan* v. *Barnett*, *ut supra*. Except before us, however, there was no abandonment of the claim for rent; what was abandoned at the trial (if anything) was any claim for forfeiture on the ground of non-payment of rent. This is what took place:—

"Mr. Fleming (counsel for the plaintiffs): The claims for forfeiture, my Lord, are based upon the subletting without our permission and also the alteration of the premises without our consent; those are the two claims.

"His Lordship: You are not claiming by reason of non-payment of rent?

"Mr. Fleming: No, we are not making that"

"His Lordship: They are relying on the other two grounds."

And on the plaintiffs' agent being cross-examined:—

"Q. Wilkinson has paid you right along—a pretty respectable sort of citizen as far as you know? A. Mr. Wilkinson may have intended to pay his rent right along, he has not paid it as yet.

"Q. He paid you February and March into Court? A. We are finding no fault with that end of it."

Mr. McCarthy, before us, did in substance abandon the claim for rent; that was of no avail, and, for reasons to be set out later, the plaintiffs should not be held to this position.

The plaintiffs, in respect of the claim for forfeiture for subletting, might be in difficulty by reason of the provisions of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 22; but it is unnecessary to pursue this, in view of the decision that the forfeiture was waived by this action.

The claim for damages, however, seems to me to be well-founded. The changes made, it is admitted, could not lawfully have been made without the consent of the plaintiffs. The

ONT.

S. C.

STRAUS LAND CORPORATION LTD. v. INTERNATIONAL HOTEL WINDSOR, LTD.

Riddell, J.

plaintiffs did consent to a certain defined change, but not to the change actually made. Where a consent is given to act A, and act B is done instead, there is no consent to act B unless the differences between acts A and B are so trifling that the maxim *de minimis non curat lex* applies.

In the present instance, consent was made to change the external front of the building by making a one-store entrance with one door—what was in fact done was to make a two-store entrance with two doors. This cannot be considered such a difference that the eye of the law cannot see it or the mind reasonably contemplate it. The defendants then are wrongdoers, and it does not help them if the fact is that the building is better thus than it would have been had they acted upon the consent. A landlord has the right to determine how his building is to look, and the tenant may not substitute his own taste and judgment for the owner's.

There are several courses open to us: we might direct the tenants to reinstate the building as it was before the change (not to the state contemplated by the consent given to change—that consent is nugatory), either at once or on the completion of the tenancy, giving security in the meantime for such reinstatement. Either course, in my view, is inadvisable. I cannot think that there would be any increase in the value of the building at all corresponding to the expense, and consequently the defendants would be penalised without corresponding advantage to the plaintiffs. The third course is to treat this as a simple common law action and give the plaintiffs damages for the wrongs complained of. This, in my view, is the best course to pursue.

I do not think that, on the evidence before us, we can make a satisfactory estimate of what these damages are. I would, however, fix them at $200, and allow either party to take a reference at their own risk as to costs.

As to the subletting without leave, the damages would, in any event, be purely nominal, and I do not propose on a purely academic question to discuss the rather technical and intricate law governing such cases.

The only other question is as to the rent sued for.

We have seen that the claim for the recovery of the rent was not abandoned at the trial, but only the right, if any, to forfeiture

ONT.

S. C.

STRAUS LAND CORPORATION LTD. v. INTERNATIONAL HOTEL WINDSOR, LTD.

Riddell, J.

based upon the non-payment of the rent. The judgment, if allowed to stand, would bar the plaintiffs from recovering the rent due on the 1st February and 1st March, 1918. The notice of appeal does not set this up as a ground of appeal, and counsel before us abandoned the claim for rent. In strictness, therefore, the plaintiffs are barred of any right to this rent. It would, however, be unjust to hold the plaintiffs strictly to their position; we should now allow an appeal on this point *nunc pro tunc*, and give the plaintiffs judgment for the two instalments of rent due before the issue of the writ, namely, $730; this indulgence should not, however, entitle them to costs, rather the reverse.

As to costs: it is abundantly manifest that the real subject of the action is the forfeiture claimed; all else is subsidiary or incidental. There never was any dispute as to the rent or any refusal or disclination to pay it; and, had the action been for the rent alone, the plaintiffs could have no costs, but should pay the costs at least subsequent to the payment into Court; the previous costs, separate from the rest of the action, are negligible.

In respect of the damages for breach of covenant etc., the plaintiffs are entitled to something, but they have failed in their main contention; and, were that the only claim, they should not, I think, either pay or receive costs.

I think, on the whole, there should be no costs down to and inclusive of the judgment at the trial.

The costs of the appeal the plaintiffs should have, if they are willing to accept the judgment barring them of the right to rent due before the action; if, however, they desire to claim this, as is most probable, they should, as a term, pay the costs of the appeal.

Assuming then acceptance of the rent, the money paid into Court will be paid out to them, less the defendants' costs of the appeal, to be taxed, which will be paid to the defendants. If neither party desires a reference, the plaintiffs will have judgment also for $200 in full of all damages for breach of covenant sued upon, without costs; if a reference be had, the costs will be in the discretion of the Master, and judgment entered accordingly.

LATCHFORD, J., and FERGUSON, J.A., agreed with RIDDELL, J.

Latchford, J.

ROSE, J.:—The change made in the building seems to me to have been of some importance and to have been unauthorised; and I am unable to find that any resultant right of forfeiture has

Rose, J.

ONT.

S. C.

STRAUS LAND CORPORATION LTD. v. INTERNATIONAL HOTEL WINDSOR, LTD.

Rose, J.

been waived. As has been pointed out in other cases, the report of the decision in *Bevan* v. *Barnett*, 13 Times L.R. 310, is not entirely satisfactory, and it does not appear to me that, upon the authority of that case alone, it ought to be held that, if a lessor sues for a declaration of forfeiture of the term, he necessarily waives the forfeiture by coupling with his claim for that relief a claim for rent which accrued due after the forfeiture; and, if it is not, as a matter of law, necessary to hold that the inclusion of the claim for rent amounts to a waiver, it does not seem to me that in this case it ought to be found as a fact that there was a waiver: the true inference seems to me to be rather that the claims, which were made at the same time and were clearly inconsistent, were intended to be alternative—that the plaintiffs meant to say, "We ask to be put again in possession of our property, but, if we cannot have that relief, we ask for the rent."

The majority of the Court, however, think that the plaintiffs cannot have the relief for which the action was brought, and I agree that they should have the relief suggested in the opinion read by Mr. Justice Riddell.

Appeal allowed in part.

ONT.

S. C.

FOLLICK v. WABASH R.R. Co.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 19, 1919.

PLEADING (§ II J—238)—NEGLIGENCE—ACTION FOR DAMAGES—FINDING OF JURY—EXCESSIVE SPEED—DEFINITION.

In an action for damages for injuries sustained by being run down by defendants' engine, the Court on appeal held that the finding of the jury, that the company was guilty of negligence in not "proceeding with sufficient caution when approaching wreckage zone," was covered by the allegation of "excessive speed" in plaintiff's pleading, and excessive speed would be such speed as would be excessive under all the circumstances of the case, and that the jury had the right to pass upon the question of excessive speed.

[*Minor* v. *G.T.R. Co.* (1917), 35 D.L.R. 106, 38 O.L.R. 646, distinguished; *Columbia Bitulithic* v. *B.C. Electric R. Co.* (1917), 37 D.L.R. 64, 55 Can. S.C.R. 1; *Orth* v. *Hamilton Grimsby and Beamsville Electric R. Co.* (1918), 43 D.L.R. 137, 43 O.L.R. 137, referred to.]

Statement.

APPEAL by plaintiff from the judgment of Britton, J., in an action for damages for injuries sustained by the plaintiff by reason of an engine of the defendants running him down. He alleged negligence on the part of the defendants. Reversed.

The judgment appealed from is as follows:—The negligence complained of is driving the train at too great speed, and the train not

stopping before attempting to pass over a level crossing, where the interlocking system did not prevail.

The plaintiff was a married man, living at Bridgeburg, and was employed by the Michigan Central Railroad Company as section foreman.

On the 20th December, 1916, the plaintiff was sent with other men to clear away some wreckage caused by an accident at or near Niagara Junction. Early on the morning of the 21st December, he had finished his work and had crossed the track to put away his tools in a cabin. He had been working strenuously about 24 hours, and was doubtless going home for his breakfast and for a rest. Having put away his tools, he discovered that his lantern had been left behind, and he crossed the Wabash track to get it; and, having done what he wished with it, he desired to recross the track to go home. On coming out of the building, before recrossing the track, he looked eastward down the track to see if any train was coming in his direction. He would not say that he looked more than once, but he did look once carefully. He was an experienced railroad man, and knew the attendant dangers to the lives of men doing such work on or near the tracks. Having looked down the track and having seen nothing approaching where he was, he stepped forward and was struck by a heavy passenger train that rushed by him, causing the injuries of which the plaintiff complains. The engine-driver did not at the time know that an accident had occurred. The Wabash train going west had received notice that the track was clear, so there could have been no complaint that the engine-driver was wrongfully moving his train. This action is brought for the injuries to the plaintiff then received.

At the close of the trial of the plaintiff's case, the counsel for the defendants asked for a dismissal of the action, on the ground that, upon the whole evidence which had then been given, no actionable negligence had been shewn. I thought it better to reserve my opinion and to allow the jury to deal with it, subject to my decision.

I am of the opinion that the motion must prevail.

The jury found that there was negligence which caused the injuries to the plaintiff, and that such negligence was "in not stopping at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed," and that there was no contributory negligence by the plaintiff, and assessed the damages at $3,000.

ONT.

S. C.

FOLLICK v. WABASH R.R. Co.

I am of opinion that the accident to the plaintiff was a mere accident, for which the defendants were not responsible, and that there was no evidence that could be properly submitted to the jury to establish liability on the part of the defendants.

I think there was no evidence of such an excessive rate of speed at the time the accident occurred as occasioned injury to the plaintiff. The failure to stop, if it occurred, was at a place considerably east of the spot where the plaintiff was injured.

The negligence in not proceeding with sufficient care when approaching "the wreck zone" was not such negligence as was complained of by the plaintiff.

Just how the accident happened was best told by the plaintiff himself, who fortunately was not killed.

The plaintiff's evidence, taken from the reporter's notes, is in part as follows:—

"Q. That train was very close to you when you looked, wasn't it? A. Yes.

"Q. With a bright head-light shining? A. Yes.

"Q. And you didn't see it, you say? A. No.

"Q. You never saw it? A. I didn't see it.

"Q. There was nothing between you and that train? A. Not then.

"Q. And you want us to believe that you were wide awake, and in full possession of your faculties, you, an experienced railway man, stepped out with a train coming head-on towards you, and you didn't see it? A. I didn't see it.

"Q. Might as well not have had a head-light as far as you were concerned? A. It wouldn't have made much difference.

"Q. There it was, with a bright head-light coming right down on you, you were 7 or 8 feet away from this track; you looked up and didn't see the train? A. No, sir.

"Q. And you cannot explain it? A. No, I cannot.

"Q. You don't know why it was you didn't see it? A. Any more than those lights bothered me.

"Q. You were asked in your examination if you could explain it, and you said you could not? A. No, I can't explain it.

"Q. How do you account for the fact that you did not see the train? A. I cannot tell you that. I don't know why.

"Q. That is what you swore to before. You don't know why it was you didn't see that train? A. I don't know.

"Q. Then until you started to cross the track, of course there was absolutely nothing in the way of the Wabash train going right through? A. They had a clear road.

"Q. And nobody would know that you were going to cross until you actually started to cross? A. No.

"Q. So that the engineer of the Wabash train would have no opportunity of doing anything to stop his train after you started out? A. He should have been stopped.

"Q. That is not what you are asked, and perhaps the jury will decide the case—I say when you started out to cross the tracks, it was absolutely impossible for the Wabash engineer to do anything? A. Certainly.

"Q. In fact, he would be on the north side of his train? A. Yes, sir.

"Q. And he would not even see you? It is a question whether he would or not? A. Yes, it is a question. I was on the north side when I was struck.

"Q. I know, but you just popped out there as the engine hit you? A. Yes.

"Q. So it would be absolutely impossible for him to do anything after you appeared from behind the car? A. Yes.

"Q. And you venture a suggestion that he should have stopped? A. Yes.

"Q. And you know, as a matter of fact, that that is not the stopping place for this train, is it? A. They all got to stop there.

"Q. They don't stop there. You say they have got to, but they don't, do they? A. No, I know they don't.

"Q. The stopping place that is used for trains crossing there is back at the distant semaphore, isn't it? A. I should think so.

"Q. You know it, don't you? A. Yes.

"Q. And you knew it at the time? A. Yes.

"Q. You knew that perfectly well then, just as you know it to-day? A. Yes.

"Q. You venture some legal opinion that they should have stopped somewhere else? A. No, I know nothing about the legal opinion at all.

"Q. That is where the trains had been always in the habit of stopping, and that is where you knew they did, and you didn't expect there would be any train stop at this crossing that night? . . . ."

ONT.

S. C.

FOLLICK v. WABASH R.R. Co.

This evidence seems to me to bring the case quite within the case of *Hanna* v. *Canadian Pacific R.W. Co.* (1908), 11 O.W.R. 1069; see the last paragraph but one on p. 1074. In this present case there was no evidence in support of the plaintiff's claim that could properly be submitted to the jury.

As above stated, I must give effect to the defendants' motion for a dismissal of the action.

R. S. Robertson, for the respondents, the defendants.

Maclaren, J.A.

MACLAREN, J.A.:—The plaintiff appeals from a judgment of Britton, J., of the 20th November, 1918, dismissing the plaintiff's action brought to recover damages for his having been struck and severely and permanently injured by the locomotive of a Wabash passenger train, running westward from Bridgeburg to St. Thomas on the Grand Trunk track.

At the close of the plaintiff's case a motion for a nonsuit was made. The trial Judge reserved his decision on this application, and the trial proceeded. The jury answered the questions submitted in favour of the plaintiff, and assessed the damages at $3,000. The Judge, however, subsequently held that the evidence did not disclose any actionable negligence on the part of the railway company, and granted the motion for the dismissal of the action.

The plaintiff was a section-foreman of the Michigan Central Railroad Company, and on the morning of the 20th December, 1916, was sent with four section-men to clear the track of a train which had been wrecked at a crossing of the Grand Trunk track two miles west of Bridgeburg, known as the Niagara Junction. About 5 o'clock the next morning the track had been cleared, and the men were preparing to leave. The plaintiff crossed the Grand Trunk track to get a lantern he had left in a small building called "H. office" on the plan, about 10 feet south of the track. As he was returning, he says, he looked carefully to see if any train was approaching, and, seeing none, he started to cross, and, when nearly across, just as he was stepping over the north rail, he was struck by the locomotive of the Wabash passenger train going west, and hurled some 10 or 12 feet in a north-westerly direction, receiving very serious injuries.

The negligence of the railway company found by the jury was "in not stopping at a reasonable distance east of the distant signal

ONT.

S. C.

FOLLICK v. WABASH R.R. Co.

Maclaren, J.A.

and proceeding with sufficient caution approaching wreck zone which was observed." They also found that the plaintiff could not, by the exercise of reasonable care, have avoided the accident.

The provisions of the Railway Act, R.S.C. 1906, ch. 37, relating to this crossing, are contained in secs. 277 and 278, the material parts of which read as follows:—

"277. No train or engine or electric car shall pass over any crossing where two lines of railway, or the main tracks of any branch lines, cross each other at rail level, whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine or from a competent person or watchman in charge of such crossing that the way is clear . . .

"278. Every engine, train or electric car shall, before it passes over any such crossing as in the last preceding section mentioned, be brought to a full stop" (with a proviso that when a crossing has an interlocking switch system, trains may be relieved by the Board from coming to a full stop, on receiving the proper signals).

There was no interlocking system at this crossing, so that the foregoing provision as to always coming to a full stop before crossing was applicable to it.

The distance semaphore (called in the evidence the "distant" semaphore or signal) at which a train approaching this crossing from the east should come to a full stop, according to the decision of the Supreme Court in *Wabash R.R. Co.* v. *McKay* (1908), 40 Can. S.C.R. 251, at p. 254, was 700 feet east of this crossing.

Thomas Hughes, a railwayman, an independent witness, who was on a platform near the top of the tower of the home semaphore or signal, 35 feet above the ground, saw the train in question coming when it whistled in the cut, 1,900 feet east of the diamond crossing, and watched it until it crossed the diamond, and he swears positively that it did not stop during that period.

Thomas Kennedy, a railway conductor, also an independent witness, was up in the tower of the home semaphore, and heard the whistle in the cut. He watched the train until it passed the diamond crossing, which it did, he says, at the rate of 18 or 20 miles an hour. He also swears that it did not come to a full stop between these two points.

ONT.

S. C.

FOLLICK v. WABASH R.R. CO.

Maclaren, J.A.

Albert Jones, a locomotive engineer, who saw the accident, says that the train crossed the diamond going at the rate of 20 or 25 miles an hour.

Knight, the engine-driver of the Wabash train, said that he had come to a full stop; but his evidence at the trial differed widely from his examination for discovery; and, besides, his statements at the trial were also very conflicting in themselves. He said in his examination for discovery (Q. 50) that he stopped "between 150 and 200 yards from the diamond." At the trial he said to the company's counsel that he stopped 500 feet east of the distance semaphore, which the plan shews to be 700 feet east of the diamond crossing, making the distance from the stop to the diamond crossing to be 1,200 feet, instead of the 150 or 200 yards he had previously sworn to in his examination for discovery. At the trial he finally said to the plaintiff's counsel that the stop was at 2,400 feet east of the diamond.

In my opinion, the jury were quite justified in preferring the testimony of the two independent witnesses, Hughes and Kennedy, who had been clearing the track for this train, and who were advised of its being on the way, and were watching it from the time it whistled nearly half a mile east of the crossing until after the accident, one from the platform or landing of the tower of the home semaphore, and the other from the inside of the tower, to the testimony of the engine-driver of the Wabash train, although the latter was corroborated by some of the train-hands as to the train having been stopped between the cut and the crossing.

The two former were interested in and were closely watching the coming of the Wabash train, as they had moved their wrecking train to let it pass, and were waiting to return to their work, and after the accident they helped to remove the injured man. Not one of the train-hands mentions any circumstance to distinguish this occasion from any other of the hundreds of times they may have gone over this crossing by this night train; and, so far as the evidence shews, they were not even aware of the accident having happened until days after, except the fireman, who heard of it when he reached St. Thomas. Nester, the conductor of the Wabash train, says in his evidence that he did not know of the accident "for a long while after." The others do not say when they first heard of it. In any event it was for the jury to decide upon the

conflicting evidence, and they found that the train did not stop "at a reasonable distance east of the distant signal," and the defence did not attempt to prove a stop anywhere else.

The defence asserted and attempted to prove that the train had come to a full stop between the distance semaphore and the railway cut. This the jury have negatived. The only other stop in the evidence was at Bridgeburg, two miles east of the crossing in question. It was not contended by them that this could avail them as a stop to satisfy the statute with reference to this crossing.

The above ground alone is quite sufficient, in my opinion, to justify and sustain the verdict of the jury, but the liability may be put in other ways. If the train had come to a full stop anywhere near the crossing, even for a single second, it could not have struck or injured the plaintiff, as it would have lost considerable time in getting up its speed, and in one second more the plaintiff would have been safely across the track. It is important to note that the Wabash train was in the very act prohibited by the statute at the moment it struck the plaintiff, as the tender would at that very instant be crossing the Michigan Central track; so that the unlawful act and the injury were practically simultaneous and intimately connected.

Counsel for the company did not specifically complain of the verdict of the jury absolving the plaintiff from contributory negligence. His not observing the light of the approaching engine is, I think, sufficiently accounted for by the fact that the locomotive was hidden from him by a car of the wrecked train when he came out of the little office with his lantern, and that he may have been dazzled by the glare of lights surrounding him—from the locomotive of the wrecking train, from the home semaphore, and from the glares and lights that were being used so profusely by the men removing the wreck, which were distinctly visible to the Wabash engine-driver at the cut, before he whistled. The plaintiff might easily have mistaken the Wabash engine-light for one of these. The Wabash train also made less noise than usual on account of the heavy fall of snow during the night, and on account of the exhaust having been cut off as it was passing the distance semaphore, as described by the witness Kennedy, and its gliding quietly down the grade to the crossing. If it had stopped at or near the distance semaphore, it would have had to

ONT.

S. C.

FOLLICK v. WABASH R.R. Co.

Maclaren, J.A.

turn on again the exhaust on starting, and the plaintiff would then have had the additional warning of the noise of the exhaust; and of this additional warning he was deprived by the train not having stopped.

The excessive rate of speed at which the jury have found the train was going at the time of the accident works in two ways. In the first place it goes to support the finding of the jury that the train did not stop where the defence contends that it did. If it had stopped there, then it could not, according to the defendants' witnesses, have attained the excessive speed testified to by the plaintiff's witnesses, and which the jury have found that it had, when it reached the crossing. In the second place, if it had been going at a moderate rate, the plaintiff would have been able to get safely across the track before the engine reached him.

I am of opinion that the trial Judge was in error in holding that the negligence in not proceeding with sufficient care when approaching the wreckage zone was not such negligence as was complained of by the plaintiff. In my opinion, it is fully covered by the fourth paragraph of the statement of claim, and "excessive speed" would be such speed as would be excessive under all the circumstances of the case, and that the unusual circumstances of the wreckage, the additional lights, etc., are all to be taken into account.

Counsel for the defence took the ground that the jury had no right to pass upon the question of excessive speed, and that the right of the company as to speed was unrestricted, and cited in support thereof the judgment of the Second Divisional Court in *Minor* v. *Grand Trunk R.W. Co.*, 35 D.L.R. 106, 38 O.L.R. 646, where sec. 275 of the Railway Act was considered. At p. 108 it is said by Riddell, J., that "a train cannot be said to be negligently or improperly run in respect of speed unless it is transgressing the statute." After quoting the section, the learned Judge goes on to say: "It plainly says to a railway company, 'The law does not prevent you running your trains at any other place at any speed you please, but in a thickly peopled portion of a city, town or village, if you wish to run at a greater speed than 10 miles an hour, you must fence your track, etc.'" And again at p. 109: "The place not being thickly peopled, the jury was not at liberty to find that the speed was excessive." Although the language on its face is general

ONT.

S. C.

FOLLICK v. WABASH R.R. Co.

Maclaren, J.A.

and unqualified, yet I am of opinion that it should be restricted to the particular facts and circumstances of that case. It cannot surely be pretended, for instance, that a high rate of speed would not be negligent where the state of the road-bed or some other known circumstance made such speed dangerous.

I am of opinion that the language of Mr. Justice Anglin in *Columbia Bitulithic Limited* v. *British Columbia Electric R. Co.* (1917), 37 D.L.R. 64, 55 Can. S.C.R. 1, regarding highway crossings of railways applies with equal force to railway crossings. At p. 85, he says:—

"Unless these requirements of the statute intended to lessen the danger inseparable from the running over unguarded highway level crossings at a high rate of speed are complied with, the statutory sanction, in my opinion, cannot be invoked, the common law standard of reasonableness applies, and running at a speed which, under all the circumstances, is unreasonable is unwarranted and amounts to negligence towards the public lawfully using such highways."

In my opinion, the appeal should be allowed and judgment entered for the plaintiff for $3,000, the damages assessed by the jury, with costs throughout.

Magee, J.A. Ferguson, J.A. Hodgins, J.A.

MAGEE and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

HODGINS, J.A.:—I prefer to rest the judgment in this case upon the finding of the jury that the accident happened because the servants of the respondents did not proceed "with sufficient caution approaching wreck zone which was observed." There was evidence to support this conclusion, and it proceeds upon the rule laid down in *Orth* v. *Hamilton Grimsby and Beamsville Electric R. Co.* (1918), 43 D.L.R. 544, 43 O.L.R. 137.

The case of *Minor* v. *Grand Trunk R. Co.* (1917), 35 D.L.R. 106, 38 O.L.R. 646, must be read as confined wholly to the question of speed, irrespective of the circumstances of the moment which must control it: otherwise its view of the rights of a railway company is too broadly stated.

I do not express any opinion as to the breach of the statutory duty to stop before reaching the crossing of two railways.

I think judgment should be entered for the appellant for $3,000, with costs of action and appeal.

Appeal allowed.

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Manitoba King's Bench, Curran, J. October 3, 1919.

ARBITRATION (§ III—16)—JURISDICTION TO SET ASIDE AWARD—VALIDITY—MISCONDUCT—JURISDICTION OF UMPIRE.

Upon a motion to set aside, vary or amend a report filed by an umpire acting in pursuance of a consent judgment regarding certain building lots.

Held, that the Court of King's Bench (Man.) had jurisdiction to deal with charges of misconduct against an appraiser and the umpire, and also to deal with objections based on excess of jurisdiction by the umpire in making allowance for items not covered by the judgment. The Court further held that over-zealousness in supporting the claim of one of the parties and assuming the role of advocate on the part of the appraiser in disputed matters which had to be determined by the umpire, did not amount to misconduct on the part of such appraiser. *Held*, also, that the umpire had not been guilty of misconduct in withholding certain evidence from the appraisers.

If an umpire has made no mistake as to the extent of the jurisdiction conferred upon him the Court cannot set aside the award unless it is shewn that there was misconduct or some other equitable ground for interference but if the umpire has exceeded his jurisdiction, all of which is apparent on the face of the award, the Court can and ought to interfere.

Statement.

MOTION to a Judge sitting in Chambers and also as a Judge sitting in Court on behalf of the defendants to set aside, vary or amend a report or award filed in the action, made by Robert MacDonald, the umpire named in the judgment upon certain grounds set out in the notice of motion, and upon other grounds allowed at the hearing of the motion to be added to those enumerated in the notice of motion as served. Motion dismissed.

J. B. Coyne, K.C., and *A. T. Hawley*, for plaintiff; *A. J. Andrews*, K.C., *F. M. Burbidge*, K.C., *W. A. T. Sweatman* and *A. K. Dysart*, for defendants.

Curran, J.

CURRAN, J.:—The report or award in question was made in pursuance of a consent judgment pronounced in this action by the trial Judge which for convenient reference I set out in full as follows:

> This action having come on for trial this 22nd day of March, 1917, in the presence of counsel for the defendants as well as for the plaintiff, and counsel for all parties consenting,
>
> It is ordered and adjudged:
>
> (1) That all the contracts referred to in the statement of claim herein be and the same are hereby set aside.
>
> (2) That the plaintiff do recover from the defendants,
>
> (a) The sum of $1,680,956.84, in which amount is included the sum of $500,000, the amount of a certain bond dated July 31, 1913.

(b) All loss to the plaintiff by reason of defective workmanship and materials including the reasonable costs of ascertaining and remedying such defects.

Provided that in ascertaining such amount the appraisers, or in case of disagreement, the umpire, shall be the judges as to whether or not the work was defective and to what extent, and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money, if any, paid for that purpose shall be charged to the defendants.

(3) The defendants shall be entitled to set-off against the amount provided for in paragraph 2 hereof,

(a) The fair value of the work done and materials provided by the defendants on the new Parliament Buildings in the City of Winnipeg so far as erected on May 19, 1915, on the basis of a fair contractors' price (including reasonable contractors' profit) for the work done and materials furnished, having due regard to the character of the same and the purposes for which same was intended; in regard to the value of the work and material, consideration shall be had of prevailing prices at Winnipeg at the time the work was done, and in estimating the wages for men employed, the fair wage schedule of the Government as it stood in July, 1913, shall be followed.

(b) The value of the plant and materials taken over by the Government as at the time they were placed on the ground.

(c) The fair value of any work which had been done which was afterwards torn down and replaced by the defendants by order of the Provincial architect on account of and made necessary by change or changes in plan.

(4) For the purposes of ascertaining the amount payable to the plaintiff under sub-para. B of paragraph 2 hereof, and the amount to be set off by the defendants under paragraph 3 hereof, there shall be a reference to two appraisers, being Stephen Clifford Oxton, of the City of Winnipeg, hereby appointed by the plaintiff, and Roy Lyon Worthington, of the City of Winnipeg, hereby appointed by the defendants.

(5) The report dated August 5, 1915, and appendices of John Woodman, of Winnipeg, architect, made to the Royal Commission appointed by the Lieut.-Governor in Council to investigate into certain matters relating to the new Parliament Buildings shall be taken as correct in so far as the quantities of such building materials on hand but not in the building on May 19, 1915, are concerned, but the defendants shall be permitted to prove to the umpire that the said report is incorrect in respect of the quantity of cut stone taken over by the plaintiff and shew the quantity actually taken out, and the report of the said John Woodman as to the line up to which the said Parliament Buildings were built by the defendants, and as to what part of the work had been done by the defendants as at May 19, 1915, shall be taken as correct, but the said appraisers shall not be bound by the said report in respect to the quantity of material incorporated in such buildings or work done thereon prior to said date or the value thereof.

(6) In the event of the appraisers not being able to agree on any of the matters herein referred to, or in the event of one of the appraisers being dissatisfied with the diligence of the other in proceeding with any matter hereunder, such matter or matters shall be referred by either appraiser to Robert

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

MacDonald, of the City of Montreal, architect and engineer, who is hereby by both parties agreed to as umpire, and whose decision thereon shall be final.

(7) The appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection or examination, or from such other source as they may deem proper, and for that purpose may cause any work to be uncovered or any investigations to be made which the appraisers agree upon or the umpire desires.

(8) Upon conclusion of the said appraisal the said appraisers, or in the event of any disagreement, the umpire, shall make a report (which report shall incorporate and adopt the findings of the appraisers on all matters on which they agree, and state only his final conclusion on all matters on which they disagree) debiting the defendants with the sum of $1,680,956.84, and any sum, if any, found due under sub-para. B in paragraph 2 hereof, and crediting the defendants with the amount found due under paragraph 3 hereof, and striking the balance in favour of the plaintiff or the defendants, as the case may be, and such report shall be final and conclusive between the parties and may be made a rule of Court, and this judgment shall be a final judgment for the amount shewn in said report except as hereinafter provided.

(9) The appraisers and umpire herein shall exercise all diligence to promptly report in writing their findings; and shall deliver to the parties hereto, or their solicitors, a copy in writing of their report as soon as the same shall have been completed and not later than 60 days from the date of this judgment; or within such further time as may be fixed by a Judge of the Court of King's Bench.

(10) If the appraiser appointed by either party dies or refuses or is unable to act from any cause whatsoever, another appraiser in his place shall be appointed by the party whose appraiser has died or refused or been unable to act; and in case such party neglects to so appoint after receiving 5 days' notice from the other party, the appointment in such case shall be made by a Judge of the Court of King's Bench. And if the umpire dies or refuses or is unable to act, another umpire who shall be an architect or engineer and a British subject resident within the Dominion of Canada but not within the Province of Manitoba, shall be appointed by a Judge of said Court.

(11) The appraisal hereunder, shall not be subject to the provisions of the Manitoba Arbitration Act R.S. Man. 1913, c. 9.

(12) If on striking the balance hereunder, it is found that the balance is in favour of the plaintiff, and upon the said report being filed in Court in this action, then the defendants shall pay to the plaintiff the balance so found with interest at the rate of 5% per annum from July 1, 1914, to date of payment.

(13) And it is ordered and adjudged that the costs of and incidental to this action, together with the costs of the appraisal, be reserved to the trial Judge upon further directions after the filing of the appraisers' report.

(14) And it is ordered and adjudged that further directions be reserved.

(15) And it is ordered and adjudged that nothing herein contained shall be a bar to the addition of any other persons, firms or corporations as party defendants in the prosecution of this action or bringing a new action against any other persons, firms or corporations in respect of any matters in question in this action as against them or any of them.

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

(16) And it is ordered and adjudged that the counterclaim of the defendants be dismissed without costs.

The report or award of the umpire moved against is as follows:

The Board of Appraisal appointed under Order of the Court of King's Bench and dated Thursday, March 22, 1917, and by Mathers, C.J.K.B.

Stephen C. Oxton, of the City of Winnipeg, for the Attorney-General for the Province of Manitoba, for and on behalf of His Majesty, the King, in the right of the Province of Manitoba, plaintiff.

Henry Jackson Burt, of the City of Chicago, Illinois, United States of America, structural engineer, for Thomas Kelly, Lawrence Kelly and Charles Kelly, defendants.

Robert Henry MacDonald, of the City of Montreal, Province of Quebec, architect, appointed as umpire.

The above-mentioned Order, in paragraph 8, p. 4, provides for the submission upon conclusion of the appraisal, and as umpire, acting under such provision by reason also of the references made to me in matters herein contained, I submit the following details and the conclusions arrived at with respect to the value of work performed, and the costs to be borne by Thomas Kelly *et al.*, the former contractors for the erection of the new Parliament Buildings.

Under paragraph 1, the appraisers have set aside all previous contracts between the parties interested.

Under paragraph 2, sub-s. (a), the amount therein mentioned, viz., $1,680,956.84, in which amount is included the sum of $500,000, the amount of a certain bond dated July 31, 1913, has been taken as a debit charge against the defendant.

Under paragraph 2, sub-s. (b), "All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects." The question was submitted to the umpire, and the following figures give the decision with respect to such loss:—

DEBITS.

One-half cost of Royal Commission appointed to investigate all matters in connection with the new Parliament Buildings, known as the "Mathers' Commission." Cost item $68,965.07	$34,484.03
One-half cost of physical investigation made on the new Parliament Buildings which investigation disclosed the fact that caisson foundations were defective. Cost item $10,675.03	5,337.51
Portion of cost in repairing caissons up to Feb. 28, 1917	160,306.63
Loss by reason of defective and improperly cut stonework	12,531.57
Loss by reason of sundry items of improper work	3,247.05
Estimate of expenditure necessary to complete the repair of caisson foundations	615,213.00
Under paragraph 2, sub-s. (b)	$831,119.78

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

CREDITS.

Under paragraph 3, "The defendants shall be entitled to set-off against the amount provided in paragraph 2":

Sub-s. (a): Value of work done and materials provided—		
Agreed upon by appraisers	$241,077.51	
Determined by the umpire	818,174.80	
		$1,059,252.31
Sub-s. (b): Value of plant and materials taken over by the Government—		
Agreed upon by appraisers	$148,730.86	
Determined by the umpire	92,281.72	
		241,012.58
Sub-s. (c): Value of work done and replaced by defendants on account of changes in plans—		
Agreed upon by appraisers	$ 700.00	
Determined by the umpire	3,760.08	
		4,460.08
Under paragraph 3, Total		$1,304,724.97

SUMMARY.

Debits—		
Paragraph 2, sub-s. (a)	$1,680,956.84	
Paragraph 3, sub-s. (b)	831,119.78	
Total debit		$2,512,076.62
Credits—		
Paragraph 3, sub-s. (a)	$1,059,252.31	
Paragraph 3, sub-s. (b)	241,012.58	
Paragraph 3, sub-s. (c)	4,460.08	
Total credit		1,304,724.97
Balance in favour of plaintiff		$1,207,351.65

The following are the grounds set out in the notices of motion:

1. That Stephen Clifford Oxton, the arbitrator and appraiser appointed by the plaintiff, misconducted himself throughout the said appraisement and arbitration, particulars of which misconduct appear more particularly in the affidavits filed in support of this motion and in the exhibits therein referred to and without limiting the generality of the foregoing, the said Oxton misconducted himself as follows:—

(a) That the said Oxton knowingly and in breach of his duty as appraiser and arbitrator and contrary to the intent of the said judgment that the decision of matters in dispute between the plaintiff and the defendants should be referred to an impartial umpire resident out of the Province of Manitoba, forwarded to the said umpire after the date of the said judgment and prior to

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

the umpire entering upon his duties, the evidence before the Public Accounts Committee, the Mathers' Commission, and the evidence taken in and the report made thereupon, all of which contained serious charges against the defendants and dealt with matters other than those referred to the arbitrators and appraisers by the said judgment.

(b) The said Oxton repeatedly during the meetings of the appraisers and arbitrators made charges against the defendants of fraud, collusion and dishonest dealing and that the said judgment presupposed collusion and fraud. Whereas the defendants consented to the said judgment upon the understanding, as the judgment itself indicates, that the only matters to be submitted to the appraisers and arbitrators were the value of the work done and materials furnished and of the loss to the plaintiff from defective workmanship and material.

(c) With the distinct purpose of prejudicially affecting the mind of the umpire against the defendants and in order to lead him by way of compromise to increase the debits charged against the defendants, the said Oxton brought in three claims of outrageously large amounts, although the same were clearly beyond the scope of the judgment and were disallowed by the umpire.

(d) That the conduct of the said Oxton as aforesaid was intended to have and did have the effect of prejudicially affecting the mind of the umpire against the defendants.

2. That the said Oxton did not consider the matters referred to the arbitrators and appraisers with a fair, open and disinterested mind, but on the contrary, the mind of the said Oxton was biased against the defendants and in favour of the plaintiff.

3. That in determining the credits to which the defendants were entitled the arbitrators proceeded on a wrong principle, particulars of which appear in the said evidence and exhibits and without limiting the generality of the foregoing, the arbitrators and appraisers erred in refusing to allow the defendants, in respect to the item of cut stone, the sum of about $12,000 paid by the plaintiff and charged to the defendants, the said sum of $12,000 representing moneys claimed by workmen under the Fair Wage clause in the defendant's contract with the plaintiff and paid to such workmen by the plaintiff in addition to the sums already paid by the defendants.

4. In charging the defendants with the following items, namely:—

(a) One-half the cost of the Royal Commission appointed to investigate all matters in connection with the new Parliament Buildings known as the "Mathers' Commission," Cost item $68,968.07	$ 34,484.03
(b) One-half the cost of physical investigation made on the new Parliament Buildings, which investigation disclosed the fact that caisson foundation was defective, Cost item, $10,675.03	5,337.51
(c) Portion of cost of repairing caissons up to Feb. 28, 1917	160,302.62
(d) Loss by reason of defective and improper stone work	12,531.57
(e) Estimate of expenditure necessary to complete repair of caisson foundation	615,213.00

although the said items were not covered by the judgment herein and particularly by paragraph 2, sub-s. (b) thereof.

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

5. The said item (a), $34,484.03, was not properly chargeable against the defendants as it is beyond the scope of the terms of the said judgment. The amount paid in connection with the said investigation was not a loss to the plaintiff by reason of defective workmanship and material within the meaning of paragraph 2, sub-s. (b) of the judgment.

6. The said item (b), $5,337.51, was not within the terms of the said judgment, but was an expenditure made by the plaintiff in aid of and for the purpose of facilitating the investigation in the next preceding paragraph referred to and was not a loss to the plaintiff as aforesaid.

7. Item (c), $160,302.62. should not have been charged against the defendants because:

(1) The evidence before the umpire shewed that the same was incurred for work which was clearly and wholly unnecessary.

(2) The evidence before the umpire disclosed the fact that the defendants had constructed the caissons on hardpan as directed and authorized by the plaintiff.

(3) The umpire having admitted that the defendants were not, but the plaintiff was, responsible for the bearing under the caissons in the north wing, erred in charging any portion of the said item against the defendants.

(4) That the methods pursued in carrying out said work were wasteful, extravagant and not serviceable for the purpose for which the same were made.

(5) That the performance of said work shewed that the foundations were sufficient and that therefore no charge should be made against the defendants.

(6) If the defendants were responsible for any part of the said item and if the umpire were justified in holding the defendants responsible for the repair of the foundations, the utmost that the defendants were chargeable with was the cost of an entirely new foundation under that part of the building where the repairs were carried on and the evidence before the umpire disclosed that at least twice as much work was done and material furnished as was necessary to provide an efficient and ample foundation for that purpose.

(7) That included in the said item is the sum of $7,521.61 allowed by the umpire for which no explanation was given and no justification can be urged.

8. That item (d), $12,531.57. should not have been charged against the defendants as it was not shewn that the same was expended for the purpose of making good a loss to the plaintiff as aforesaid.

9. That if the umpire was justified in charging the defendants with any part of the said item (d), he erred in including in the said item:—

(1) The sum of $3,500 or thereabouts, the cost of replacing stone at the north-east corner of the building, which stone had previously been accepted by the plaintiff.

(2) The sum of $1,500 or thereabouts, part of the sum of $3,300 allowed by the umpire for six capitals, as evidence before him shewed that the said sum of $3,300 was excessive.

10. The said item (e), $615,213. should not have been charged against the defendants because it is not a loss to the plaintiff by reason of defective workmanship and materials within the meaning of paragraph 2, sub-s. (b), of the said judgment.

11. That the said item (e) should not have been charged against the defendants because the evidence before the umpire disclosed the fact that the foundations were sufficient.

12. Even if the umpire were justified in holding that the foundations were insufficient, the amount allowed by him, namely, the sum of $615,213, was grossly excessive for the following amongst other reasons:—

(1) As the said sum of $615,213 was based upon calculations made by the umpire in arriving at the sum of $160,302.62 for the reasons given under paragraph 7 hereof.

(2) That from the evidence before the umpire it was apparent that the plaintiff had no intention of repairing the foundations and that consequently but a very small part of the said sum of $615,213 would ever be expended.

(3) That the umpire refused to submit the foundations to practical tests, which would demonstrate the sufficiency or insufficiency thereof.

(4) Because the umpire, although selected for his qualifications as an engineer, refused and neglected to make such tests as an engineer should have made for the purpose of ascertaining the sufficiency or insufficiency of the foundations.

(5) In arriving at the said sum of $615,213 the umpire allowed a bearing pressure of 200 pounds per square inch only, which is a gross underestimate of the bearing pressure of concrete, the customary practice being to allow 400 pounds per square inch, and, having made an allowance of 200 pounds per square inch only, he has charged the defendants with double the quantity of concrete and work required to put in a new foundation.

(6) The umpire in computing the said sum of $615,213 figured on a unit price of $27 per cubic yard for concrete plus an additional price of $6 per cubic yard for the difficulty of putting in the foundations under an existing building and the said prices on the evidence before the umpire were grossly excessive.

13. From the evidence before the umpire he could and should have made calculations which would have shewn that the 297 caissons for the replacement of which the said umpire charged the said sum of $615,213 could have been replaced by a sum not exceeding $222,750.

14. The umpire proceeded upon a wrong principle. In order to arrive at an accurate estimate of the cost of replacing the foundations, he should have developed a plan shewing in detail what really needed to have been done in each individual case and from such plan computed the actual quantities and material involved and other elements of cost entering into the making of such estimate.

And upon the further grounds appearing in the affidavits filed in support hereof and the exhibits therein referred to, etc. And in the amendment to these grounds allowed at the hearing as follows:—

1. The misconduct of the said umpire and the said Oxton. The said Oxton produced on the arbitration and appraisement, a report made by Scenn Bylander, an engineer employed by the plaintiffs to investigate and report upon the sufficiency of the caissons under the new Parliament Buildings. The whole of the said report was shewn to the umpire. A part only thereof was shewn and given to the said Burt and upon the said Burt pressing for the balance thereof the said Oxton and umpire both falsely stated to the said Burt that the part so omitted had no bearing upon the matters under consideration on the said arbitration and appraisement, whereas the said part so omitted was vitally important and material.

2. The misconduct of the said umpire in:—

(1) Concealing from the said Burt the fact that he had, prior to his

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

entering upon his duties as umpire, received from the said Oxton the books, evidence and reports above referred to.

2. The umpire's failure to take the opinion of the Court upon the interpretation to be given to the terms of the judgment herein, although requested to do so by the said Burt.

3. Failure of the umpire to make tests to ascertain whether the said caissons were sufficient or not.

4. The failure of the said umpire to decide upon the sufficiency of the caissons though appointed because of his professional qualities and with the intention that he should so exercise his judgment.

5. On other grounds, the particulars of which appear in the reports of the proceedings upon the said appraisal and arbitration.

The defendants charging that in view of the matters in the next preceding paragraph referred to that the matters complained of herein amount at least to legal misconduct on the part of the said umpire and shew that conduct which otherwise might be innocent was in fact not so.

Preliminary objections to the defendants' mode of procedure were taken at great length by counsel for the plaintiff. It was contended in effect that the defendants had no *locus standi* in this Court and that I had no jurisdiction to entertain the motion in either capacity, as a Judge in Chambers or as sitting in Court. Owing to the importance of the matter both from the standpoint of the public interest and the great amount of money involved I thought it better not to then attempt to decide the weighty question of jurisdiction, but to note the objections made and allow the motions to proceed to a finality when all the material relied on by either party would be before me and in event of appeal from my judgment would be before the Court above, so that nothing would have been omitted from the record that the litigants thought material for the Court to consider.

I admitted in addition to the usual affidavit evidence and in the face of strong opposition from the plaintiff's counsel, the oral testimony of certain parties who had made affidavits in support of the motions. I had a discretion in this matter and I felt that I ought to exercise it in favour of admitting evidence that might throw light on the dispute rather than against such admission, where in so doing I fully reserved to the litigant objecting to this course all objections made for my further consideration.

Before stating my findings I would like to call attention to the great amount of material put before me on these motions, embracing over 1,700 typewritten pages, to say nothing of a very voluminous body of case law. It has taken me nearly two weeks

to read over and partially digest this great mass of material. I know I have not done it as thoroughly and as comprehensively as I could wish, and as the importance of the case deserved, but I think I have done it with sufficient thoroughness to enable me to reach a proper conclusion.

I overrule the general objections to my jurisdiction and hold that I have jurisdiction to deal with:—

First, the charges of misconduct against Oxton and the umpire; second, the various objections based on excess of jurisdiction by the umpire in making the allowances against the defendants stated in clause 5 of the notice of motion, namely, that these items were not covered by the judgment, and particularly by paragraph 2, sub-s. (b), thereof.

As to the charges of misconduct, I find that no case for such a charge against either Oxton or the umpire has been made out. These charges are set out in the notice of motion in paragraph 1, sub-clauses (a), (b), (c), and (d), and paragraph 2, and as to the umpire in the amended grounds before referred to.

While I am fully in agreement with the contention of the defendants' counsel that it was the duty of the appraisers to act honestly, conscientiously and with fairness to both litigants in the discharge of those duties assigned to them by the judgment, I fail to see that there has been anything approaching misconduct, legal or moral, if there be any distinction between the two, in the methods of advocacy of the plaintiff's claims adopted by Oxton. In the discussions before the umpire he may have been over-zealous and perhaps indiscreet in some of the things he said, and did, for instance, in withholding from Mr. Burt the last page of the second Bylander report. But in my opinion nothing has been proved to impugn his good faith and honest belief in the rectitude of the course he took.

The true position of these two men, called appraisers in the judgment, is somewhat difficult to define. They were not arbitrators in the usual acceptance or understanding of that term. Their primary duty was to reach a mutual agreement upon as many of the matters in dispute as possible, and apparently they were fairly successful in so doing. No fault is found with Mr. Oxton's conduct in this respect; it is only in connection with those disputed matters which had to be determined by the umpire that the defendants complain of his conduct. It is not alleged that he made any misstatements of fact to the defendants' prejudice

MAN.
K. B.
ATT'Y-GEN'L FOR MANITOBA v. KELLY.
Curran, J.

that might have biased or misled the umpire or that he tried to pervert or misrepresent the evidence coming before the umpire. He assumed the role of an advocate using such arguments and making such comments on the defendants' conduct as seemed to him just and proper to support the claims against the defendants he was making on behalf of the plaintiff. He says himself that he was representing the people of Manitoba in what he believed to be a struggle to right a great wrong. Some allowance ought therefore to be made if he appeared at times to be introducing irrelevant matter, and besides, it must be borne in mind that the proceedings were being conducted by laymen and not lawyers, and that by the terms of the judgment great latitude was allowed the umpire and the appraisers as to the character of the evidence they might consider and act upon. It is further to be borne in mind that the umpire properly had access to all records, reports and proceedings already had before the Royal Commission, the Public Accounts Committee of the Legislature and in the criminal proceedings against Thomas Kelly and the ex-Ministers. From these he could have gathered all that was prejudicial to defendants which had been urged by Oxton and very much more also. Having discharged their duties as appraisers, so far as mutual agreement was possible, they both appear to have accepted the role of advocates before the umpire, although in fairness to Mr. Burt it must be said he claimed to have taken this position only because Mr. Oxton had first done so which in a measure forced him to follow suit. In my view there was nothing wrong or improper in this, and what was done by Oxton does not justify a charge of misconduct, certainly not such misconduct as would justify a Court in interfering with this award.

Next, as to the charges of misconduct against the umpire. I find that the defendants have failed to establish these also. The statement in the amendment to the notice of motion in clause 1 that Oxton and the umpire both falsely stated to the said Burt that the part so omitted had no bearing upon the matters under consideration on the arbitration and appraisement is hardly in accordance with the facts as disclosed in the transcript of the arbitration proceedings: see pp. 568 and 569. What Oxton said was: "I shewed it (the second Bylander report) to you, Mr. Umpire, but I didn't give Mr. Burt access to it because it concerned a

question of policy that I did not consider he would be interested in," to which Mr. Burt replied, "If it is a question of policy that affects this appraisal, I might be quite interested in it," to which the umpire replied, "It does not." There were two reports made by Bylander to the Government. The first of these and all of the second except the last page were furnished to Mr. Burt during the course of the appraisal proceedings and it is the withholding of this last page at that time from Mr. Burt and the foregoing reply of the umpire which form the gravamen of the charge of misconduct against him.

He is further charged with concealing from Mr. Burt the fact that he had received from Oxton the reports and evidence before referred to. The other charges against the umpire, namely, failure to take the opinion of the Court upon the interpretation of the judgment, failure to make tests of the caissons and failure to decide upon the sufficiency of the caissons, do not, in my opinion, constitute even legal misconduct. The umpire had by the terms of the judgment almost unlimited discretionary powers in passing upon the questions submitted to him. He was clothed with these powers by the express consent and agreement of both litigants. The judgment in my view has the force and effect of a contract between the parties to this action. If the umpire chose to decide without making tests of caissons to ascertain their bearing capacity that was his right according to the judgment. If he chose to interpret the judgment as not placing upon him responsibility as an engineer of saying in his report whether or not the caisson foundations put in by Kelly were sufficient for their designed purpose, I think he was within his rights in so doing.

As to the charge concerning the Bylander report, having seen and read the page withheld, I fail to see anything improper or untruthful in the answer given by the umpire to Mr. Burt. The following is the part of the report that Mr. Oxton withheld from Mr. Burt:—

> There would be no object in selecting some of the caissons for examination, for in doing so there is an equal chance that the most inferior might be left unexamined and the same uncertainty and risk would still remain. The cost of the work already done has been very great. Simon advised me that the Government was most reluctant to incur any expenditure that could possibly be obviated, and I find that at least $1,000,000 expenditure would still be

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

required to secure the foundations. In view of this, I therefore recommend that the Government should take some risk and leave the remainder of the caissons, though unsatisfactory, as they are at present. Further cracks in the wall and settlement may be anticipated, and will no doubt occur for some years to come. Such settlements, however, are not likely, in my opinion, to cause any serious menace to the safety of the building and the risk the Government will be required to take is not excessive, considering the cost entailed in making the work good. While, therefore, I recommend that no further expenditure shall be incurred, it would appear that the Government is entitled to compensation for taking over the faulty work and the accompanying risk.

The umpire had this before him: Mr. Burt had not. I see in the missing parts nothing but advice to the Government which it might or might not see fit to follow. Some of these recommendations would seem to favour Kelly and others condemn his work. The umpire was entitled to give what weight he thought proper to Bylander's conclusions. It was not the right of the appraisers to be informed as to every bit of evidence the umpire had in his knowledge or possession. In an ordinary arbitration, recognizing the two appraisers as arbitrators, this would not be so; but these appraisers were not arbitrators in this sense. The appraisers having agreed upon certain valuations and disagreed upon others, the umpire then became the sole deciding factor as to those matters which were the subject of disagreement. The appraisers had no function under the judgment to take any part in such decisions beyond the privilege perhaps of urging upon the umpire their respective views and reasons for his adopting them. My views upon this matter meet the other objection that the umpire concealed from Burt the fact of receiving from Oxton the report of the Mathers' Commission and other documents. Concealment in the sense in which the word is here used implies a duty to disclose. There was no such duty resting upon the umpire; therefore there was no concealment in this sense. In any case the umpire did, after he reached Winnipeg, inform Mr. Burt of the receipt of these documents from Oxton. It is not clear just when this information was imparted, but I think that wholly immaterial. I accept the umpire's sworn statement that he did not read these documents prior to coming to Winnipeg. In my view of the matter it made little difference whether he read them before or after reaching Winnipeg and entering upon his duties. These documents were available to him here and at all times during the course of the proceedings if he chose to consult them. They constituted

evidence which it was quite within his province to consider. See clause 7 of the judgment:—

> The appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection or examination or from such other sources as they may deem proper.

If, as the defendants' counsel contends, the advance perusal of these documents would of necessity tend to bias the mind of the umpire, would not a later perusal have the same effect? That bias could only have been avoided by excluding these documents altogether from the umpire's knowledge; something that could not properly have been done.

I will now deal with the remaining grounds of objection to the award in their order as they appear in the notice of motion in Chambers: That the umpire proceeded upon a wrong principle in refusing to allow credit to defendants for an item of $12,000 for cut stone. I cannot discover that this was one of the items with respect to which the appraisers disagreed, and hence was a matter submitted to the umpire for decision. I do not know upon what principle or upon what evidence the umpire reached his decision and I do not think it much matters in view of the extraordinary powers conferred upon him by the judgment. In any event there is nothing on the face of the award to indicate whether or not the umpire dealt with this item: See list of credits allowed by him upon p. 4 of the original report of the umpire filed in Court. I therefore overrule this objection.

The next ground of objection:—

> The said item (a) $34,484.03, being one-half the total cost of the Royal Commission appointed to investigate all matters in connection with the new Parliament Buildings, known as the Mathers' Commission, cost item $68,968.07, was not properly chargeable against the defendants as it is beyond the scope of the terms of the judgment. The amount paid in connection with the said investigation was not a loss to the plaintiff by reason of defective workmanship and material within the meaning of paragraph 2, sub-s. (b), of the judgment.

The next ground of objection:—

> The said item (b), $5,337.51, being one-half the cost of physical investigation made on the new Parliament Buildings, which investigation disclosed the fact that caisson foundations were defective, cost item $10,675.03, was not within the terms of the said judgment, but was an expenditure made by the plaintiff in aid of and for the purpose of facilitating the investigation in the next preceding paragraph referred to and was not a loss to the plaintiff as aforesaid.

I will deal with these two items together. A reference to p. 664

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

of the arbitration proceedings discloses that on May 25, 1917, the date of the award, the umpire, in the presence of the two appraisers, announced his findings and offered the explanations and reasons therefor therein appearing. He had this to say as to the two foregoing debits:—

> The above were means by which discovery of defective work was accomplished. It is true that there were other results involving the representatives of the Government, but Kelly, as the contractor for the building, became responsible for his share of the cost as it is vital to discovery and ultimate repair.

In this view of the matter I would concur, if my concurrence was in order, which I do not think it is, because this was a matter wholly within the jurisdiction of the umpire to decide and his decision under such circumstances is not in my opinion subject to review by this Court except perhaps for fraud or misconduct. Clause 2 (b) of the judgment reads as follows:—

> All loss to the plaintiff by reason of defective workmanship and materials including the reasonable cost of ascertaining and remedying such defects, provided that in ascertaining such amount the appraisers, or in case of disagreement the umpire, shall be the judges as to whether or not the work was defective and to what extent and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary and what amount of money, if any, paid for that purpose shall be charged to the defendants.

Can anything be clearer than this language, and in view of it how can it be contended that these allowances by the umpire were not within the scope of the judgment or the power conferred upon him by that judgment? In his opinion it was not proper to charge the defendants with the whole of the amount so expended. He did not do so, but assessed only one-half of these costs against the defendants. For the reasons just given I therefore overrule both of these objections.

The next objection, No. 7, of the notice of motion, deals with item (c) of the appraisal, $160,302.62, allowed by the umpire as appears on the face of the award as "Portion of cost of repairing caissons up to February 28, 1917." The defendants urge seven grounds of objection to this item. I do not think any of them are tenable as the umpire's finding in respect to this item is in my opinion clearly within his jurisdiction and the scope of the judgment. To consider these objections on their merits would necessitate a review by this Court of a very complex and difficult situation involving an inquiry into the sufficiency of the caisson

foundation under the north wing of the building and the propriety of the expenditure by the Government for the purpose of repairing these foundations. I am clearly of the opinion that this Court has no jurisdiction to enter upon any such inquiry and I am equally clear that the umpire had. This is precisely one of the things that was delegated to him by the judgment and to no one else. It appears from the umpire's explanations upon p. 665 of the arbitration proceedings that the total amount expended by the Government upon the caisson foundations under this wing of the building was $237,099.54, of which he charged the defendants with the sum of $160,306.62, the item objected to. I think the umpire had jurisdiction to consider the question of this expenditure, its propriety or necessity and by whom the cost of it should be borne. It is clearly a matter falling within the provisions of clause 2 (b) of the judgment; if not, I cannot conceive of any matter that would. This Court cannot question the propriety of the amount charged by the umpire to the defendants for the valid reason that the parties themselves have selected their own forum to which to carry the disputed matters involved in this action and have by express agreement bound themselves to abide by the decision of that forum. The language of the judgment and the numerous authorities cited by the plaintiff's counsel I think leave no doubt upon this question. I therefore overrule this objection.

The next item, item (d), $12,531.57, for loss by reason of defective and improperly cut stonework. The defendants say this should not be charged against them as it is not shown that the same was expended for the purpose of making good a loss to the plaintiff. I have no recollection of any particular argument being directed to this item. The umpire stated (see p. 635 of the arbitration proceedings), that this amount was allowed by him "To cover loss by reason of defective and improperly cut stone work." I do not know what evidence he relied upon to support this finding but it is quite apparent that the allowance being one to remedy a defect in the work, falls within the scope of the authority given the umpire. He has seen fit to allow it and in my view that ends the matter. The objection therefore fails.

This brings me to a consideration of the last and largest item of the umpire's debit findings objected to, namely, item $315,213 allowed by the umpire as "Estimate of expenditure necessary to

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

complete repair of caisson foundation." The defendants object generally to the allowance of this item because "The evidence before the umpire disclosed the fact that the foundations were sufficient." They further object on six particular grounds set out in the notice of motion. I will deal with the general objection first.

I fail to see how I can give effect to it, because I do not know, and it nowhere appears in the material before me, what evidence the umpire had before him upon which he based his finding. The only record of what transpired before the umpire is contained in 675 pages of typewritten matter put before me on the argument as containing the arbitration proceedings. These consist almost wholly of discussions and arguments between the umpire and the two appraisers; very little evidence is there transcribed. It is manifest that there must have been a great deal of evidence of one kind and another considered by the umpire in connection with this whole matter that was not recorded and preserved and is not now available for review by this Court, even if such review was permissible, which I am of the opinion it is not. However, in giving reasons for his findings the umpire has thrown some light upon his allowance of this large item. At p. 667 the umpire says:—

> No. 9. Estimated expenditure to complete repair of foundation claimed by Government $1,000,000, charged $615,213. The decision has been made for the cost to repair and replace defective work *assumed to be in the same average condition as the caissons uncovered to date.* The cost is based on expenditure to date less per caisson for deeper foundations encountered in the north wing, and less reduction in excess material in new caissons finished at this date. The above conclusions have been based upon the decision that the work in the foundations is defective. The cracks in the walls are due to settlement, whether in the caissons themselves or in the foundation bed it is difficult to determine. If they were temperature cracks it is hard to explain why they are not more uniformly distributed over the building; the north wing has considerably more than any other portions of the building where the walls are not built as high, and any in the entrance steps are very few and of a very different kind. The contractor is not solely responsible for the foundations being off rock, but he is charged with the cost of giving proper bearing. . . . He is charged in the debits with a cost of good proper bearing. There are caissons down to boulder clay, but they do not get their full bearing there and it is very uncertain what the amount is.

And at the bottom of p. 672, in answer to a question by Mr. Burt, he says:

> *It (the charge) is not based on any knowledge that they (the caissons) are*

incapable, but based on the uncertainty respecting their condition and that what has been disclosed is sufficient reason for holding him responsible for the replacement.

The foregoing reasons or observations ought to be considered, I think, as either forming part of the award or as so connected with it, being in part the umpire's reasons for his findings, as to render them properly the subject of consideration along with the award itself. Without this explanation the umpire's finding, "Estimate of expenditure necessary to complete the repair of caisson foundations," might reasonably be held to be an estimated cost of repairs for known defects. Of course it was never pretended by anyone that all of the caissons had been explored. It was well understood that only some 75 of the total number of 369 had been uncovered and explored, and their actual condition disclosed. It is apparently from what was discovered by an examination of these 75 caissons that the umpire holds the defendants responsible for the replacement or repair of the remainder which were never explored at all. At least this is what I gather from his statements just quoted. The last part of the umpire's statement just quoted, namely, that the charge was not based on any knowledge that the caissons were not capable but based on the uncertainty respecting their condition, is in my opinion very significant as indicating—first, that he did not know the actual condition of these remaining caissons, and secondly, that he was therefore guessing as to their condition and as to what was necessary to be done to repair them and what the cost of such repair would be. Did the judgment give him power to speculate? This computation of $615,213 is an estimated amount not to remedy known defects but defective conditions assumed, not known, to exist and which may not actually exist at all in the remainder of the caissons. This assumption is based on knowledge of defective conditions in those caissons actually uncovered. Is that a sufficient reason or ground to justify the umpire in finding that all the caissons were bad and needed repair? Let me again refer to the judgment on this point: "All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable cost of ascertaining and remedying such defects." Admitting for the sake of argument that Mr. Oxton's contention is correct that all loss meant past, present and future loss, still

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

the defects occasioning such loss must be known and ascertained, not unknown, guessed at or speculated upon, or even assumed for reasons based on known facts as to some of the caissons unless it is certain that such known facts are properly applicable to the entire situation. Is that the case here? Future loss or damage is recoverable, but it must be predicated of known and actual conditions. A litigant claiming such damage must prove as a fact certain conditions from which such future loss may be estimated. Is the umpire here in any different position upon this question than a court of law would be? I do not think so. He may be freed from many of the restraints that affect a court of justice as to the nature and character of the evidence he can consider and found upon, but beyond that I do not think he should be permitted to go. It seems to me that here the umpire must be able to say the defects in these caissons are known to me from evidence that satisfies me such defects exist and not only that but I know the nature and quality of such defects. Surely such knowledge must be had before he could with any show of reason and justice proceed to apply a remedy. If not, would he not be in the position of a physician who assumes to prescribe a remedy for a disease he cannot diagnose? Bylander seems to have fully sensed this condition of affairs when he said in his second report to the Government:

> If it is desired to have an absolutely sure foundation there is no *via media* but only one procedure, namely, to examine every individual caisson and deal with it on its own merits. There would be no object in selecting some of the caissons for examination, for in doing so there would be an equal chance that the most inferior might be left unexamined and the same uncertainty and risk would still remain.

Bylander advised the Government, in view of the enormous expense that would be involved in securing the foundations, probably $1,000,000, to take some risk and leave the remainder of the caissons, though unsatisfactory, as they were. This advice appears to have been followed and the building completed on the foundations put down by Kelly. The number of caissons unexplored and not uncovered was, according to Mr. Oxton, 288, and it is in respect of these caissons that the $615,213 has been allowed by the umpire to repair defective work. How did he ascertain the necessary work to be done when he had never seen the caissons and not knowing their condition, how did he estimate

the cost of repairing them? Perhaps he was affected by the undoubtedly bad record of Kelly in connection with this work, and took it for granted that all of the unexplored caissons were bad or, at all events, as bad as those that had been uncovered, tested and repaired. He knew the cost of repairing the caissons under the north wing and used this to some extent as a basis for his charge. See his statement at the bottom of p. 670 of the arbitration proceedings:—

The chairman: Yes, that is right, 297 caissons to boulder clay, cost $688,912; on the same basis of cost as in the north wing with the excess material in there and a reduction was made then.

In my view of the clause of the judgment under which the umpire assumed to allow this item of $615,213 against the defendants two things must needs be established to the satisfaction of the umpire: First, that these unexplored caissons were defective; and secondly, in what respect before the cost of remedying such defects could be ascertained. Could this have been done satisfactorily without uncovering every one of these caissons? Bylander thinks not. The caissons were not uncovered and no tests of their bearing capacity were ever made by the umpire or anyone else. Mr. Burt strongly urged that it should be done as one way at no very great expense of settling the question definitely as to what super-imposed loads these caissons would bear. In view of what has been said, did the umpire exceed his jurisdiction in making this finding, and should the charge be allowed to stand?

As my jurisdiction has been challenged from the outset by the plaintiff, I must now consider that question more particularly.

In *Lemay* v. *McRae* (1889), 16 A.R. (Ont.) 348 at p. 353, Osler, J.A., said, referring to the decision of the arbitrator, who was acting under a voluntary reference or submission by agreement:—

He may have made other mistakes of law and fact as to matters within his authority; but if he has made no mistake as to the extent of the jurisdiction conferred upon him, the Court cannot set aside the award, unless it can be shewn that there was misconduct or some other equitable ground for interference is made out.

I should say that the converse of this is equally true, viz., that if the umpire has made a mistake as to the extent of the jurisdiction conferred upon him and has exceeded that jurisdiction all of which is apparent upon the face of the award, the Court can and ought to interfere. Upon this question of jurisdiction I would also refer to *Re an Arbitration between Hohenzollern*

MAN.

K. B.

ATT'Y-GEN'L FOR MANITOBA v. KELLY.

Curran, J.

Actien Gesellschaft and The City of London Contract Corporation (1886), 54 L.T.R. 596. Lord Esher, M.R., in the Court of Appeal, at p. 597, said:—

> The question is whether the arbitrator had jurisdiction to try the matters submitted to him. If he had jurisdiction to try these matters his decision cannot be disputed . . . The questions in this case are: first, what is the true construction of the submission to arbitration; and, secondly, what is the dispute between the parties?

In the same case Lopes, L.J., at p. 597, said:

> We have not to consider whether the arbitrator has decided rightly, but whether he has acted within his jurisdiction. However he may have decided, if his decision is *intra vires* we cannot interfere.

See also *Emmerson* v. *Stimpson* (1847), 9 L.T. 199, where it was decided that the Court had no more authority to review the arbitrator's decision upon a point of law referred to him than upon a point of fact, and that if the parties chose to refer a matter of law to an arbitrator his decision is final. In *Fuller* v. *Fenwick* (1846), 3 C.B. 705, it was held that the Court will not set aside or refer back an award for an objection in point of law not apparent on the face of it. In *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189, it was held that the decision of an arbitrator, whether a lawyer or a layman, is binding upon the parties both in matters of law and in matters of fact unless there has been fraud or corruption on his part or there has been some mistake of law apparent on the face of the award or *of some paper accompanying and forming part of the award*. See also *Leggo* v. *Young* (1855), 16 C.B. 626; also *Holgate* v. *Killick* (1861), 7 H. & N. 418, where Wilde, B., said:

> The principle to be collected from the later cases is plain, viz., that the Courts will not look at anything for the purpose of reviewing the decision of an arbitrator upon the matter referred to him, except what appears on the face of the award, or some paper so connected with the award as to form part of it.

From the foregoing cases it would appear that such mistake must appear on the face of the award or on some paper accompanying or forming part of the award or so connected with the award as to form part of it. Mistake as to jurisdiction is, I think, a mistake in a matter of law and if any such mistake has been made in this case and it is apparent on the face of the award or *upon the reasons for judgment accompanying the award*, it seems to me that the Court then has jurisdiction to review that question. I think the latter may well be considered as forming part of the

award and proper to be looked at, and to my mind, they seem to indicate an excess of jurisdiction.

However, I have grave doubts upon this question, so serious as to cause me to hesitate to decide that the umpire actually did exceed his jurisdiction in making this finding; more especially as I have no means of knowing what evidence the umpire had as to the nature and character of the work and material which had gone into these unexplored caissons; that it was possible for him to have interviewed workmen who had been employed in doing this work and who would have a knowledge of the various matters connected with the construction of these caissons, such as the material used, the depth to which they had been sunk and other kindred matters and so have ascertained enough from these and other sources to justify him in reaching the conclusion that he did.

In considering this question I do not think the material used in support of the motion should be considered. This was not the material which the umpire had before him. In view of the agreement of the parties to submit the matters in dispute to the decision of the umpire and their further agreement that his decision should be final and not subject to appeal, it seems to me it would be wholly improper for this Court to base any finding upon the material, which is largely new matter, produced by the defendants on the hearing of this motion. The parties never intended that this Court should review any matter decided by the umpire within the terms of the submission; he was to be the final judge, and, as I said before, while I have certain doubts as to whether or not he did confine himself in respect to this particular finding to the jurisdiction conferred by the judgment, I would not be justified because of my doubts upon this question in interfering with the umpire's finding. Before coming to any such far-reaching and disturbing conclusion, the Court should, I think, be satisfied beyond any doubt that there has been a clear excess of jurisdiction by the umpire apparent on the face of the award or some paper so connected with the award as to form part of it.

I think it is in the interests of justice and of all parties concerned that this litigation should be terminated by the means agreed upon by the parties themselves, and that therefore the umpire's findings should stand.

I must disallow the objections to this item also, and dismiss both motions with costs. *Motions dismissed.*

ONT.

S. C.

OSBORNE v. CLARK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Middleton, JJ. May 30, 1919.

HUSBAND AND WIFE (§ III A—143)—PARENTS INDUCING WIFE TO LEAVE HUSBAND—BEST INTEREST OF WIFE—LACK OF MALICE—HARBOURING—DAMAGES.

Parents who act without malice and believing it to be in the best interest of their daughter who is ill, take her with her consent from her husband to their own home, where she voluntarily remains, in order to be relieved from domestic worry, and as the best means of restoring her to mental and physical health, are guilty of no actionable wrong. The refusal of the parents to allow the husband to see his wife if honestly done in the best interests of the wife while she is ill does not constitute a harbouring for which the parents are liable.

[Discussion of the law and authorities upon alienation of affections, loss of *consortium*, the respective rights of husband and parents, enticing away and harbouring: *Winsmore* v. *Greenbank* (1745), Willes 577; *The Queen* v. *Jackson* (1891), 1 Q.B. 671; *Bannister* v. *Thompson* (1913), 15 D.L.R. 733, 29 O.L.R. 562, 20 D.L.R. 512, 32 O.L.R. 34; specially referred to.]

Statement.

AN appeal by the defendants from the judgment of CLUTE, J., at the trial, upon the findings of the jury, in favour of the plaintiff, in an action against his wife's father and mother to recover damages for alleged "misconduct and actions" of the defendants whereby his wife's affections had been alienated from him and he had suffered loss of *consortium*, and for that his wife had been "enticed away, received, and harboured by the defendants."

The jury found a verdict for the plaintiff and assessed his damages at $800, for which amount and the plaintiff's costs of the action the trial Judge directed judgment to be entered.

W. S. MacBrayne, for the appellants.

The plaintiff, respondent, was not represented.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This action is brought by the plaintiff against his wife's father and mother for damages for interference with his rights as husband of their daughter. At the trial the jury found a verdict in his favour and assessed his damage sat $800, and thereupon the trial Judge directed that judgment be entered in the action accordingly, with costs of the action; and the question involved in this appeal is whether the evidence adduced at the trial is sufficient to sustain that verdict and judgment.

The material facts upon which the case depends are few; and they are not at all in doubt.

Not long after the birth of the plaintiff's first child, his wife became ill, physically and mentally, and, in consequence of that

illness, it was deemed by all concerned advisable that she and her husband should leave their own house and live with the defendants for a while, as the wife was not in a fit state of health to be left alone, as she had to be, during her husband's work-hours, when living in their own home; and that arrangement was carried out; but, very soon afterwards, the disagreements out of which this action has arisen began. The mother-in-law objected to the plaintiff going into his wife's room when she, acting as she asserted on the advice of the physician attending the sick woman, considered it harmful. According to the plaintiff's evidence, on two different days he was thus prevented; and on the second occasion he left the house and did not come back again; his wife remained for about six months, and then, meeting her husband in the street, a reconciliation took place and they at once began to live together again.

I am unable to agree with the trial Judge in his ruling that a cause of action arose out of these circumstances, or out of any other circumstances proved at the trial.

The plaintiff and his wife were living with the defendants merely by leave of the defendants—a leave which might be revoked at any time. There was no contract between them giving the plaintiff a legal right of entry to the room in which his wife was, and from which he was once, according to the female defendant's testimony, twice, according to his, excluded. He can recover, if at all, only because of some infringement upon his marital rights.

In that respect the action is based upon the two common causes: abduction and harbouring of the wife.

Alienation of her affections was also to some extent relied upon at the trial; but there was no evidence of that: all that was done, whether wisely or unwisely, seems to have been done for the purpose of restoring the young wife to good health again.

Abduction, or enticing away, as it is now more commonly called, seems also to be out of the question: the wife went to live with the defendants not only with the husband's consent but with him: the common welfare of all concerned required that she should.

And the plaintiff quite failed to take the usual steps to give a right of action against a defendant for harbouring a plaintiff's wife. He made no assertion of his right to take her away; and made no request to the defendants to deliver her up to him.

ONT.

S. C.

OSBORNE v. CLARK.

Meredith, C.J.C.P.

The law applicable to abduction is thus comprehensively stated in a few words by Sir William Blackstone in his Commentaries on the Laws of England: the husband is "entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause."

As to harbouring, in the early case of *Winsmore* v. *Greenbank* (1745), Willes 577, the ruling was: that any person who receives a married woman into his house and suffers her to continue there, after he has received notice from her husband not to harbour her, is liable to an action, unless the husband has by his cruelty or misconduct forfeited his marital rights, or turned his wife out of doors, or by some insult or ill-treatment compelled her to leave him. And in the case of *Philp* v. *Squire* (1791), 1 Peake 114 (*82), Lord Kenyon is reported to have ruled: that, even though notice had been given in that case by the husband to the defendant, no action lay because the defendant seemed to have acted solely from principles of humanity.

Indeed the law seems never to have had any difficulty in finding a navigable channel between improper interference between husband and wife, by third persons, on the one side, and undue domineering, or petulant fault-finding of the husband, on the other: see *The Queen* v. *Jackson*, [1891] 1 Q.B. 671; and *Barnes* v. *Allen* (1864), 1 Abb. App. Dec. (N.Y.) 111.

I am in favour of allowing the appeal and dismissing the action.

Middleton, J.

MIDDLETON, J.:—The action is brought by a young machinist against his father-in-law and his mother-in-law to recover $10,000 damages for alleged "misconduct and actions" of the defendants by which his wife's affections have been alienated from him and he has suffered loss of *consortium*, and "for that his said wife has been enticed away, received, and harboured by the defendants."

The action was tried before Mr. Justice Clute and a jury on the 31st March, 1919, when a verdict for the plaintiff was found for $800, and judgment was entered for that amount and costs. From this judgment the defendants now appeal.

In the statement of claim, and in the evidence at the trial, there is much that is only relevant as going to shew malice on the part of the defendants, though malice is not expressly charged.

In this statement of claim it is alleged that the marriage with

ONT.
S. C.
OSBORNE v. CLARK.
Middleton, J.

the defendants' daughter took place on the 1st June, 1916, and that the plaintiff and his wife resided happily together until some time in August, 1917. It is then said that a few days after the marriage the plaintiff and his wife went to the defendants' house to obtain some property, when the mother-in-law detained the wife and assaulted the plaintiff. A police officer was then called in, and apparently the episode ended.

The plaintiff rented from the father-in-law a dwelling house, where he and his wife lived, but when he went to pay the rent he was "always treated with coldness and aversion."

In August, 1917, it is said, the father-in-law stayed at the plaintiff's residence for three days, and during that time had private conversations with the plaintiff's wife, after which she "seemed upset and disturbed in mind to such an extent that the plaintiff thought it wise to take her to her parents' residence, which he did, remaining there over night with her.

"It was then arranged between the plaintiff and the defendants that the plaintiff and his wife should take rooms with the defendants. The plaintiff returned to his house to make the necessary preparations, and on attending again at the defendants' house he was refused admission, ordered off the premises, and threatened with arrest by the defendant Rachel Clark.

"Since that time he has seen his wife on only one occasion, when he was walking past the residence of the defendants and saw his wife in the yard. He was talking to her over the fence when the defendant Rachel Clark came out of the house, and, seizing the plaintiff's wife, forcibly took her into the house, thus parting her from the plaintiff."

All this leads up to the claim for $10,000 for alienation and harbouring.

By the statement of defence, after denying all misconduct, the defendants said that the plaintiff, at the request of his wife, and on the advice of her physician, brought her and her child to their home, where she and her child had since been cared for. The child was born in August, 1917, and following the birth of the child the plaintiff neglected to provide suitable food, nursing, and medical attendance for his wife, and treated her with such cruelty that her health was impaired: that she had been suffering from nervous trouble since coming to live with the defendants,

ONT.
S. C.
OSBORNE v. CLARK.
Middleton, J.

and on the advice of her physician her husband had not been permitted to see her, as such interviews seriously retarded the improvement of her health. The defendants further said that they had done nothing whatever to influence their daughter in her relations with her husband, and all that they did was necessary for the recovery of her health, and what they did was done with the consent and approval of the plaintiff, and since his wife came to reside with them he had done nothing whatever towards the support of his wife and child.

The writ in this action was issued on the 25th September, 1917, the statement of claim filed on the 13th October following; and the defence was filed in due course on the 23rd October.

The action was tried on the 27th March, 1918, and the jury disagreed. The trial was then twice postponed, and finally took place on the 31st March, 1919, with the result above stated.

From the evidence given at the trial it appears that the plaintiff was not regarded by the defendants as a desirable suitor for their daughter. His attentions were discouraged. To use his own words, "They used me cool." The result was an elopement and marriage, the daughter at this time being only 18 years old. When, three days after the marriage, the young husband went to his father-in-law's house, as he says, "for her things," his mother-in-law met him, and his reception was not entirely pleasant, for "she hauled off and struck me in the face." He then secured the assistance of a policeman and went again: "She hauled off and hit me in the face and told me to get off the premises or she would have me arrested." Yet the "things" were given up to him. Almost immediately afterwards it is found that he is a tenant of a house owned by his father-in-law, paying a rental, the wife each month going to her father with the money.

Things went on in this way 8 or 9 months until a child was born on the 28th April, 1917. Then the parents first visited their daughter. The husband had to go to his work and apparently was not much in the house. His mother-in-law again "used me kind of cool." A woman was procured to assist at the birth and was two weeks with the wife. She was then left alone to care for herself and her child and the house, and this went on for a couple of months, it is said (I think, in truth, until August), when the father came down and stayed for two or three days. It is clear

that at that time the wife was in an exceedingly serious physical condition, and it was suggested—it is not clear by whom—that she should give up housekeeping and go to live with her parents. It was probably contemplated that the husband should also stay with them.

The husband's description of the wife's condition is that she was "acting strange." It is clear that she had broken down both physically and mentally.

If one departs from the story as told by the plaintiff and sees what the girl's mother has to say, the situation becomes very plain. The daughter did not know what she was doing or what she was saying: she did not know where she was. She was sitting in the house shivering and shaking. The plaintiff was naturally much alarmed. No doctor had been brought in, but one was sent for. He did not like to interfere, and thought the doctor who attended upon the birth should be called in. The mother-in-law said some arrangements would have to be made: the daughter could not stay where she was. She had been speaking of coming home, and the plaintiff said: "That is the best thing; just take her home." This was done, and another doctor was then called in, who advised that she must be kept absolutely quiet, and that her husband must not be allowed to see her, because his presence seemed to excite her. She was so weak when taken home that she had to be practically carried into the house. All this is not really disputed by the husband. He stayed with the defendants for three days, and was then told that he should go and make his home with his brother, who had a house, and that he would not be further admitted to their house. He went away, apparently acquiescing, and stayed with his brother, but the next day came back and was ordered off the premises. From this time on he never even called to make any inquiries as to his wife's condition. He says in the evidence that he walked past the house but did not see her.

The day after the husband was excluded, probably about the 1st September, the wife's father came to ask for her clothes and other property, but the plaintiff refused to give them up, and then apparently both the husband and the father went to an over-officious Police Magistrate to lay the situation before him. The result of the deliberation was that this Solon concluded that the

ONT.

S. C.

OSBORNE v. CLARK.

Middleton, J.

wife was probably insane, and communicated with the Asylum doctors and had them call at the defendants' residence to see whether this unfortunate young woman should be removed to the Asylum, this apparently being what her husband desired. On the 3rd September, the husband caused to be published in the newspapers an advertisement that he would no longer be responsible for his wife's debts, and this was followed by a counter-move on the part of the father-in-law, who had a summons issued under the Married Women's Property Act for the purpose of determining the ownership of certain chattels, including a piano, given by him to his daughter before marriage. Upon the hearing of this summons before the County Court Judge, the property was adjudged to be the wife's and directed to be given up.

In the course of time the wife improved to some extent, and then the episode occurred of which much is made, when the husband, seeing his wife in the garden, talked to her and sought to induce her to go away with him. He says that her mother then pulled her into the house.

The mother's version is that she did not interfere until she saw that her daughter was in a condition of collapse, then she assisted her into the house. This occurred in November.

In the following February, the plaintiff met his wife upon the street. She was then restored to health. He asked her to go home and she returned with him and has ever since lived with him. A second child was born in the following November.

In his evidence at the trial the plaintiff admits that there has been no alienation of his wife's affections.

The wife was called as a witness by her parents, but declined to give evidence, stating that she had nothing to do, and would have nothing to do, with this litigation. When the wife rejoined her husband, she took away all her property that had been in her father's house. As to the terms upon which the plaintiff and his wife were to occupy rooms at the defendants' house the evidence is exceedingly unsatisfactory. There is no statement sufficient to indicate any leasing. No mention is made of what was to be paid or the premises to be occupied; and, although in the charge to the jury reference is made to a supposed wrongful exclusion of the plaintiff from rooms that he had rented, that is not the cause of action which is set up in the statement of claim.

No medical evidence was given at the trial. One of the doctors was dead.

I have read the evidence more than once and with care, and am satisfied that, upon the indisputable facts, no cause of action has been shewn.

The right of a husband to the comfort and assistance of his wife, to all that is called for convenience her *consortium*, cannot be denied, and any outsider who interferes and deprives the husband of this, does so at his peril. When the wrongdoer is a man seeking the affection of the wife and enticing her from her rightful allegiance, the heinous nature of the wrong is obvious and needs no comment. When the persons accused are the parents of the wife, the situation is widely different. Though the relationship of parent and child still continues, it has become subordinate. Parents have still a right to guide, counsel and protect, but the husband is the true guardian of his wife, and under all normal circumstances the parents have no right to interfere between the husband and his wife; but, when what is done is done honestly and reasonably for the daughter's welfare, particularly where it is done with the husband's assent, no action will lie. I do not mean by this that the wife's parents may entice her away from her husband, even if they think that this is in the wife's interest. The duty which the wife owes to her husband is higher than a mere contractual obligation. One who induces another to break a contract is liable in damages, unless there is justification for his course. One who without justification induces the wife to violate her obligation towards her husband is, on the like ground, liable in damages.

In *Bannister* v. *Thompson* (1913), 15 D.L.R. 733, 29 O.L.R. 562, I had occasion to investigate with care the foundation of an action for damages for enticing a wife when there was no seduction. It was there found that the defendant had enticed the plaintiff's wife and procured her to absent herself unlawfully without the plaintiff's consent from his house, and secondly that the defendant had alienated from the plaintiff the affections of his wife and deprived him of her services and society. These two claims were presented as separate counts, and the jury assessed the damages upon them separately, and I awarded the total amount so found, doing so with some hesitation, feeling that it might well be that

ONT.

S. C.

OSBORNE v. CLARK.

Middleton, J.

these two counts were in reality an alternative description of the same wrong. Upon appeal, the Divisional Court (1914), 20 D.L.R. 512, 32 O.L.R. 34, took the view that these paragraphs covered essentially the same ground, and affirmed the judgment with a variation as to the amount to be recovered.

Winsmore v. *Greenbank*, Willes 577, is accepted as the foundation of the English law upon the subject, and undoubtedly conclusively establishes liability where the defendant "unlawfully and unjustly persuaded, procured, and enticed the wife" to leave her husband. That case is sometimes cited as though it were an authority which would support the proposition that a person who receives or harbours a wife, while she is living apart without her husband's consent, commits an actionable wrong. That proposition is in no way mooted in the case. Liability is said to be based upon an unlawful act on the part of the defendant. "If the fact that is laid by which he lost it" (i.e., his wife's *consortium*) "be a lawful act, no action can be maintained. By *injuria* is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie" (p. 581). "Had the words 'unlawfully and unjustly' been omitted" (i.e., from the declaration), "this question might have been material, because it is lawful in some instances for the wife to leave the husband" (p. 584).

The law applicable here is, as I have already said, in my view strictly analogous to the law as to procuring a breach of contract. I quote from Lord Macnaghten in *Quinn* v. *Leathem*, [1901]A.C. 495, 510, who says that the decision in *Lumley* v. *Gye* (1853), 2 E. & B. 216, 118 E.R. 749, "was right, not on the ground of malicious intention . . . but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference;" and from Lord Lindley, in the same case, p. 535: "The principle involved . . . cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

From what is said in this case, it is plain that malice, in the

ONT.
S. C.
OSBORNE v. CLARK.
Middleton, J.

sense of personal ill-will or evil motive, is not the foundation of the action, and in *Read* v. *Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 732, it is said by the Master of the Rolls that the converse of this is true, and no amount of good intention can justify the use of illegal means.

In *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K.B. 545, *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239, there is a discussion of the circumstances under which a third party is justified in going so far as to advise another to break a contract without incurring liability. That circumstances can amount to a justification is practically conceded, but no limitation of the right is laid down. What is said by Stirling, L.J., in the Court of Appeal, [1903] 2 K.B. at p. 577, is important: "That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not."

The relationship between parent and child constitutes a lawful justification and excuse for advice and counsel honestly given by a parent looking to the child's welfare, but in each case there must be the most careful scrutiny to see that this limit of lawfulness is not transcended, and greater care is necessary, where, as here, the parent has disapproved of the marriage, and is, rightly or wrongly, antagonistic to the spouse.

In this case there is absolutely no evidence by which any finding of malice on the part of the parents could be made. The course of action which, it may be said, they advised and counselled, was one which commended itself to the daughter and to the son-in-law. Manifestly the taking of the daughter to her old home and placing her under the care of her mother relieved her from a great deal of domestic anxiety and was the best thing to be done to restore her to mental and physical health. Up to this point there could have been no wrongdoing, and there is no suggestion that from this time on there was any enticement of the daughter to abandon her husband. The cause of action, if any, must be based upon the contention that the refusal to allow the

ONT.
S. C.
OSBORNE
v.
CLARK.
[Middleton, J.

husband to see his wife constituted a harbouring of the wife for which the defendants are liable.

In the old books of pleading, e.g., Bullen and Leake, 2nd ed. (1863), p. 295, two counts are given, the first, based upon *Winsmore* v. *Greenbank*, for wrongfully enticing and procuring the wife to depart and remain absent, the second for harbouring. This count does not purport to be based on any decided case, but reads that "G.B. was and is the wife of the plaintiff, and unlawfully and without the consent and against the will of the plaintiff departed from the house and society of the plaintiff; and the defendant, well knowing the premises, wrongfully and without the consent and against the will of the plaintiff received, harboured, and detained the said G., and refused to deliver her to the plaintiff, although requested by the plaintiff so to do; whereby," &c. Nothing that took place here could be so tortured as to be brought within this count.

But I am of opinion that under the law, as it now is, the suggested cause of action will not lie—at any rate unless it is shewn that the wife was detained against her own will.

In the case of *The Queen* v. *Jackson*, [1891] 1 Q.B. 671, it was determined that where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. It was there determined that the wife is her own mistress, and, notwithstanding marriage, can set up her will as to her own custody against her husband's will; that he is not entitled to assert his rights over her person without her consent, and, if she chooses to live apart from him, even without cause, he cannot forcibly take possession of her body. From this it follows that where the wife chooses to live apart from her husband he cannot maintain an action against the person with whom she lives for wrongfully detaining her from him.

Here the husband voluntarily surrendered his wife, she fully concurring, to her parents. He never requested her return; but, upon being refused access to the parents' house, left the wife, without further complaint, in their custody. This is in no sense a harbouring, even within the meaning of the old law. The word "harbouring" as used in the cases is used in the dyslogistic sense, as meaning "to conceal or . . . give secret or clandestine entertainment to noxious persons or offenders against the laws." See Murray's English Dict., vol. 5, p. 83, "Harbour."

ONT.

S. C.

OSBORNE v. CLARK.

Middleton, J.

When the law recognises that a wife who chooses to live apart from her husband may do so, she cannot be regarded as a noxious person or offender against the law whom it is unlawful to succour.

The whole question of the right of a parent to interfere has been the subject of more discussion in American than in English cases. See, for example, *Multer* v. *Knibbs* (1907), 193 Mass. 556, copiously annotated in 9 L.R.A. (N.S.) 322; *Tucker* v. *Tucker* (1896), 32 L.R.A. 623; *Beisel* v. *Gerlach* (1908), 18 L.R.A. (N.S.) 516.

For these reasons, it appears to me that this appeal must be allowed and the action dismissed with costs.

Britton, J.

BRITTON, J., agreed with MIDDLETON, J.

Riddell, J.

RIDDELL, J., agreed in the result.

Appeal allowed.

ONT.

S. C.

SCOTT v. TORONTO R. Co.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 19, 1919.

STREET RAILWAYS (§ III B—31)—UNUSUAL JOLTING OF CAR—DUTY OF SERVANTS IN CHARGE — NEGLIGENCE — INJURY — DAMAGES — EVIDENCE.

If there is unusual jolting or bumping of a street car it is the duty of the servants in charge of the car to ascertain why the bumping is going on. Failure to do this is negligence for which the company is liable in case of injury to a passenger, caused by the sudden stopping of the car, owing to the falling of a brake-shoe.

Where there is enough in the evidence to make it a fair question for the jury whether the injury was the cause of the disease or merely aggravated it, or whether the injury and the disease were in anyway connected, there is sufficient evidence on which they may properly find a verdict for the injured person.

Statement.

APPEAL by defendants from the judgment of Masten, J. Affirmed.

THE following statement of the facts is taken from the judgment of HODGINS, J.A.:—

Appeal by the defendants from the judgment at the trial before MASTEN, J., and a jury. The action was for damages for negligence causing injury to the plaintiff, a woman of 66 years of age, a finisher of dresses and blouses.

The questions and answers were as follows:—

"Q. 1a. Was the plaintiff injured as a result of the accident complained of? A. Yes.

"Q. 1b. Is the disease, i.e., arthritis, from which the plaintiff

ONT.

S. C.

SCOTT v. TORONTO R. CO.

is now suffering, attributable to the injuries sustained by reason of the accident? A. Yes.

"Q. 2. Were the defendants guilty of negligence which caused the injury complained of? A. Yes.

"Q. 3. If so, in what did such negligence consist? A. That of the car-crew in not ascertaining the cause of the jolting.

"Q. 4. Did anything happen before the accident which suggested that the street car was unfit to run? A. Yes, from the unusual jolting before the accident.

"Q. 5. If you answer 'Yes' to the last question, state what it was that so happened. A. Answered in the fourth question.

"Q. 6. If you find the defendants liable, what damages do you asses? A. We award the plaintiff $1,000."

The trial Judge directed judgment to be entered for the plaintiff for $1,000 and costs; the defendants appealed.

D. L. McCarthy, K.C., for the appellants.

J. B. Clarke, K.C., for the respondent.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A. (after setting out the facts as above):—Mr. McCarthy argued that the answers to questions 3, 4, and 5 do not indicate any actionable negligence; that the respondent called as her witness the appellants' master mechanic, who said that there was nothing to indicate to the appellants that the car was in any way defective and that no possible foresight could have avoided the accident. He also contended that the arthritis from which the respondent was suffering was not due to the injury, or that that point was left in doubt, and so the appellants could not be liable under that head of damage.

In order to appreciate the answers to questions 3, 4, and 5, it is necessary to know the cause of the sudden stoppage which caused the respondent's injury. She was sitting at the end of a seat where a small brass rod was placed a few inches above the seat-level, and against this she was thrown, the lowest part of her spine coming in contact with it. She was dazed by the blow, had to sit on the car-step after getting out, was helped to the next car, and finally got home She had to give up work after several days' trial.

That the stop was a sudden one is not denied, but it is said that no warning of it could be had by jarring, because it was

ONT.

S. C.

SCOTT v. TORONTO R. CO.

Hodgins, J.A.

found to be due to the fall of the brake-shoe, the coming down of which on the track in front of the wheel resulted in an immediate cessation of the car's motion, throwing every one about.

There is a brake-shoe on every wheel. Each pair is fastened to a brake-beam, which runs across between and in front o the whee's, about four inches above the pavement. McCrea, the master mechanic, thus explains the result of the fall of the brake-beam, from one end of which a plug, which held it up, had worked out:—

"Q. And the absence of that plug would allow the beam and shoe both to fall down? A. Yes, s r, at that end.

"Q. Now you say that plug was not there when it came in? What condition was the beam in? A. The beam was bent.

"Q. What was the beam made of? A. Steel.

"Q. A steel beam? A. Yes.

"Q. And you say it was bent? A. Yes, sir.

"Q. In what way? How was it bent? A. Well, it was sprung in itself; that is, it was twisted.

"Q. Sprung and twisted? A. Yes

"Q. And what condition was the shoe in? A. Well, the shoe was all right. The shoe and head were all right, but the beam had been twisted in its length. The beam goes across between the two wheels going down, and coming in contact with the ground had thrown it back and twisted it, and had bent the beam.

"Q. Had bent the beam? A. Yes.

"Q. What effect would that have upon the car? A. Coming in contact with the pavement would make the car—stop the car immediately. There would not be any bumps ahead of it at all, it would al happen at once; when the beam came down the car would stop. . . .

. . . . . .

"Mr. Clarke (for the plaint ff). The end of that beam would be out on the rail? A. It would fall inwards.

"Q. Yes, but it has only a very short distance to fall, hasn't it? A. About 4½ inches.

"Q. That wouldn't bring it in if it held the shoe directly in front of the wheel? A. It wouldn't ent rely.

"Q. No, it would strike the track. A. Mostly always the pavement is higher than the track, so it strikes the pavement before it strikes the rail.

ONT.

S. C.

SCOTT v. TORONTO R. Co.

Hodgins, J.A.

"Q. Well, with that end down, would you say that was so? A. Yes.

"Q. With the far end bound up, and that downwards, that it would strike the pavement first? A. Yes, sir.

"Q. You think it would? A. Yes, sir.

. . . . . .

"Q. If this beam fell down, as no doubt the evidence shews it did, at one end, would that be dangerous to drag the car along—for the motorman to continue to pull it along after it fell down? A. Well, I don't know if he could.

"Q. Yes, assuming that he could? A. Yes, assuming that he could, yes, it would be.

"Q. Assuming that the motive power would drag it along? A. I cannot assume that it would happen, under the circumstances.

"Q. Well, but answer this question. If the motive power was sufficient to drag the car along, with the one end of that beam down, would that be a dangerous thing to do? A. Yes, sir, if it were possible."

On examination he maintained that with the plug out the beam would fall and would stop the car instantly.

On re-examination he was asked about the steel band that went around the ends, which he said did not come in contact with the pavement, and then the questions and answers go on thus:—

"Q. No; but the brake-beams might, from what you say? A. The bottom of the brake-shoe might.

"Q. And they would be running on that class of street for a month. Well, suppose now that one of these bands that are around this had broken; what effect would that have? Wouldn't it let it down part way? A. No, the other would still have held it up.

"Q. Yes, but there was some latitude; might it not drag a little? A. Yes, might.

"Q. Might let it down an inch or two? A. Yes, if one of the hangers broke, the other would have to carry double weight, and double the work.

"Q. And that would allow it to hang down lower? A. Yes.

"Q. How much—three or four inches? A. No, it wouldn't

go down four inches, because then the shoe would be running on the pavement all the time; it would have to happen very sudden.

"Q. It would be rubbing on the rail all the time? A. Yes; in our case generally the pavement.

"Q. Well, they are supposed to be above the rail. A. Yes, but the rail is below.

"Q. It operates on the same part of the wheel as it runs on? A. Yes.

"Q. And, if one of those got out of position and let it down, the point of it might be catching in between the wheel and the rail? A. Yes, if the rail was above the pavement.

"Q. Now, if that bolt there got out in a mysterious way that no other bolt has got out, might it not have been some break that you do not suggest here, that you cannot tell, practically, how one of these pins that— A. Yes, the pin broke, and this hanger socket twisted enough to let that down below the truck-frame— it might come out.

"Q. And it might hold on for a considerable time before it came out all the way? A. It might take some time."

At the close of his examination, the learned trial Judge asked him these questions:—

"His Lordship: Would it be possible that this antecedent bumping that has been described by some of the witnesses would arise from some bending, or from partially breaking the pin, and the shoe getting down, not all the way down solid? A. It would be possible, yes.

"Q. That would be a theory? A. Yes, yes, sir, it is a sound theory too."

From this, the only evidence as to the cause of the violent stoppage of the car and the consequent jerk, it would appear that there was a possibility that if the brake-beam was let down at one end only, the other holding firm, there might and probably would be a period of time when there would be bumping or jarring, depending somewhat upon the character of the pavement, i.e., whether it was level or the blocks had heaved up. There was, therefore, some evidence upon which the jury might found their answer to Q. 4. If the possibility spoken of by Mr. McCrea existed, and he never puts it higher than that, the duty of the servants of the company was clear, i.e., to ascertain why the

ONT.
S. C.
SCOTT
v.
TORONTO
R. CO.
Hodgins, J.A.

bumping was going on: *St. Denis* v. *Eastern Ontario Live Stock and Poultry Association* (1916), 30 D.L.R. 647, 36 O.L.R. 640. There is, I admit, but slight evidence here to support the possibility, that given by the master mechanic, while his expert knowledge is not shewn to be possessed by either the motorman or conductor. But want of sufficient information in the subordinate officers is not a reason for absolving the company, who are, in law, charged with responsibility for conditions which may exist or happen. Assuming, as the jury have, that there was continuous bumping or jarring, inquiry should have been made at the time by those in charge, and I do not consider, as a sufficient excuse, the fact that bumping may be occasioned on the streets of Toronto by causes not in themselves involving danger. The absence of an inquiry at all by the motorman and conductor prevents the company from relying on their want of information. Both motorman and conductor say they did not notice anything unusual. It may be that the things mentioned by the master mechanic, viz., skidding, bad rail-joints, uneven scoria blocks, are so frequently the cause of bumping or jarring that their senses had been dulled to them, or they may have regarded them as matters of course. In either case they took it for granted that things were all right, and thus neglected the opportunity afforded them of ascertaining the cause and preventing the accident. I think the jury were entitled to come to this conclusion.

Arthritis as an element in the damages depends upon the evidence of two doctors, Richards and Starr, both eminent in their profession. The other physicians only throw side lights upon the case. If these two differed, there was evidence for the jury to weigh and decide upon.

Dr. Richards says that one blow such as the respondent got, might, if the whole of the spine was wrenched, produce the arthritis shewn on the skiagraphs, but cannot say positively that it was so caused. An injury at the point of the spine, in itself alone, he says, could scarcely be held responsible for the changes higher up in the spine (shewn on the plates), but he thinks it is possible to receive a very severe injury to the whole of the spine by sitting down and coming in contact with the brass rail, as the respondent said she did, without any wrenching of the spine. He also testifies that the development of arthritis is a very common occurrence in

consequence of receiving such an injury, in a person past middle life. The conditions evidenced by the plates, he considered, could be produced in nine months. He knew of one such case. Dr. Starr, *contra*, was of the opinion that, judging from what the plates disclosed and from his clinical examination, the arthritis was older than nine months, a matter of years, and was osteo-arthritis, a late stage of infectious arthritis. He also deposed that, in his opinion, one blow could not cause arthritis, but might aggravate it if the patient had it previously. On examination he rather hesitates to pledge himself to a positive opinion—thus:—

"Q. Do you tell the jury that it was more advanced than could take place in nine months; that her case was further advanced; and that the arthritis had arrived at a condition that could not have originated so recently as the date of the accident? A. Oh! no, I wouldn't like to say that.

"Q. No, I thought you could hardly say that.

"Q. So it might have arisen, from all you can say, it might have commenced, after the date of the accident? A. It might have, but not likely.

"Q. But not likely, you say? A. No.

"Q. And that is as far as you can say about the duration of this woman's case; therefore your evidence which you give to the jury is that the arthritis may or may not have arisen after this injury to her; that is a fair deduction from what you have said? A. No, it isn't a fair deduction.

"Q. Well, what is? A. You are asking a hypothetical question, if it is possible that the changes in the X-ray plate could have taken place within a series of months. I say in my experience it is not likely, but I would not like to say that it cannot happen, because I have seen things that look almost impossible happen, but it is not likely.

"Q. I did not ask you if it was not likely. I will put you back where you put yourself. You cannot say positively that it did not commence subsequent to the action? A. No, that is right."

The history of the case, as disclosed by the professional evidence, may be mentioned.

Dr. Coatsworth, sent by the appellants, examined the respondent on the 20th September, 1917, about a week after the accident. He found her complaining of tenderness at the lower end of the

ONT.

S. C.

SCOTT
v.
TORONTO
R. Co.

Hodgins, J.A.

spine, which he took to mean the coccyx. She said she suffered pain then; and, at a later visit on the 25th September, he understood it occurred when she walked. He says the blow did not hurt her "except in her mind." On the 25th February, 1918, Dr. A. J. Johnson, consulting physician of the appellants, examined the respondent. She then complained of a tender spot on the lower tubicle of the sacrum, just above the coccyx, but not in the coccyx. This resulted in pain in walking and sweeping. He did not examine the rest of the spine.

In June, 1918, Dr. Richards examined her and took X-ray photographs of the spine. He noticed tenderness at certain joints of the spine. Dr. Robertson, sent by the appellants, examined the respondent, but does not state when he did so. He says that an injury may be the primary cause of arthritis and that a bad wrench of the knees would produce osteo-arthritis in four or five months, but cannot say what the effect of the particular blow suffered by the respondent would be. He thinks the skiagraphs indicate a condition which would not be produced in the time which elapsed between the blow and the time he saw the X-ray plates, and that the arthritis preceded the injury. Dr. Starr examined the respondent in August, 1918, and found her suffering from an indefinite series of pains up and down the spine. The coccyx was not painful. All this testimony points to a progressive condition—the pain creeping upwards and persisting.

Dr. Richards admits that the respondent had osteo-arthritis. But he and Dr. Starr differ both as to the ability of one such blow to cause the condition described and also as to the length of time necessary to produce those conditions.

There is quite enough in the evidence I have quoted to make it a fair question for the jury whether the injury was the cause of the arthritis, or whether it merely aggravated the disease, and indeed whether the blow and the disease were in any way connected.

It was argued that there was no such connection, and that the medical evidence raised no doubt at all. I am unable to agree in this. The jury have found in favour of the respondent; and there was, in my opinion, evidence on which they could properly so find.

Upon the whole case I think the appeal fails and should be dismissed. *Appeal dismissed with costs.*

REX v. KNIGHT.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. October 18, 1919.

CRIMINAL LAW (§ II A—31)—PRELIMINARY INQUIRY—DEFECTIVE DEPOSITIONS—STENOGRAPHER'S OATH.

In cases to which s. 683 of the Criminal Code apply the fact that the evidence is taken in shorthand by a stenographer who is not a duly sworn Court stenographer and who did not before acting make oath that he would truly and faithfully report the evidence, is fatal to the conviction.

[*Dierks* v. *Altermatt* (1918), 39 D.L.R. 509; *Rex* v. *L'Hereux*, 14 C.C.C. 100; *Rex* v. *Johnson*, 19 C.C.C. 203; *Rex* v. *Limerick*, 27 C.C.C. 309, applied.]

In a summary trial under s. 774 of the Code for an indictable offence under s. 228, it is not necessary that the stenographer who takes the evidence in shorthand should be sworn before acting.

[*Rex* v. *Emery* (1917), 33 D.L.R. 556, applied.]

Statement

MOTION to quash two convictions of the defendant, one under the Liquor Act and the other under the Code.

J. K. Paul, for the motion; *James Short*, K.C., for Attorney-General.

Walsh, J.

WALSH, J.:—The evidence was taken in shorthand by one, who, it is said, was not a duly sworn official court stenographer, and who did not before acting take oath that he would truly and faithfully report the evidence. No answer has been made to the affidavit filed by the applicant in support of these allegations and it, when unanswered, is, I think, sufficient proof of their truth.

I agree with the opinion given effect to by Craig, J., of the Yukon Court, in *Rex* v. *L'Hereux*, 14 C.C.C. 100, and by Prendergast, J., of the Manitoba Court, in *Rex* v. *Johnson*, 19 C.C.C. 203, and by the Appeal Division of the Supreme Court of New Brunswick in *Rex* v. *Limerick*, 27 C.C.C. 309, that in a case to which s. 683 of the Code applies the fact that the evidence is taken in shorthand by a stenographer who is not a duly sworn court stenographer and who did not before acting make oath that he would truly and faithfully report the evidence is fatal to the conviction. As is said in those cases there is then no evidence which can be looked at to support the conviction which, therefore, cannot stand. I was not referred to nor have I been able to find any decision of our own Court on this point. The nearest approach to it that I have come across is in the judgment of the Appellate Division in *Dierks* v. *Altermatt* (1918), 39 D.L.R. 509.

The objection there was that the evidence which was in longhand was not taken down at the time but was prepared afterwards. Stuart, J., in delivering the judgment of the Court, says, at p. 515:

ALTA.
S. C.
REX
v.
KNIGHT.
Walsh, J.

"It is therefore apparent that the provisions of the Code applicable to the matter were not observed. This is enough to justify quashing the so-called order or decision." That statement should apply with equal force to such a departure from the provisions of the Code as is here complained of.

Though s. 683 appears in Part XIV. of the Code which deals with proceedings upon a preliminary enquiry it is by virtue of ss. 711 and 721 made applicable to a summary conviction. I think, therefore, that the conviction under the Liquor Act which is a summary conviction must be quashed.

The other conviction however is under s. 228 for keeping a common bawdy house which is an indictable offence. The trial of this charge was a summary one under s. 774 which is in Part XVI. of the Code. Under s. 798 neither the provisions of either Part XIV. or Part XV. shall apply to any of the proceedings under this part except as specially provided for in ss. 796 and 797 neither of which has anything to do with the question I am now considering. S. 683 is therefore expressly excluded from proceedings under Part XVI. and there is nothing in that part which corresponds in the slightest degree to it or which makes it necessary that a stenographer who takes in shorthand the evidence on a summary trial should be sworn before acting. I think for this reason that I cannot give effect to this objection on the motion to quash the conviction for keeping a common bawdy house. It is only because of the imperative requirement of that section, that in cases to which it applies the stenographer must be sworn before acting, that convictions based upon evidence taken in disregard of it have been quashed. In a case to which that section does not apply and for which no corresponding provision has been made I think the objection is not tenable. Stuart, J., in *Rex* v. *Emery* (1917), 33 D.L.R. at p. 568 after pointing out the fact to which I have just adverted that s. 683 is not incorporated in Part XVI. and that there is no specific direction in that part as to the taking of depositions says that he thinks the situation is the same in effect. I do not understand him by this to mean that the provisions of s. 683 must be applied to a summary trial of an indictable offence but simply as the context shews that in such a case there must be depositions just as there must be on a preliminary enquiry or on a summary conviction.

ALTA.

S. C.

REX v. KNIGHT.

Walsh, J.

I am unable, therefore, to give effect to this objection as against this conviction.

Failing this objection I am asked to quash this conviction because there is no evidence upon which the magistrate could properly convict this defendant of this offence. I have carefully read these depositions and I think that there is to be found in them sufficient to justify the magistrate in drawing the inference that the house kept by the defendant was a common bawdy house under the judgment of the Appellate Division in *Rex* v. *Davidson* (1917), 35 D.L.R. 82.

The motion to quash this conviction must, therefore, be dismissed. There will be no costs of either motion to either party.

Motion dismissed.

CANADA CYCLE & MOTOR Co. Ltd. v. MEHR.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell, Latchford and Middleton, JJ. May 30, 1919.

CONTRACTS (§ II D—175)—AGREEMENT "TO TAKE ACCUMULATIONS OF SCRAP"—IMPLIED AGREEMENT TO SELL—BREACH—DAMAGES.

A contract in writing whereby the defendants agree "to take the accumulations of scrap" from the plaintiffs for one year at certain specified prices, held to imply an agreement on the part of the plaintiffs to sell to the defendants the accumulations of scrap for a period of one year, and damages were recoverable for breach of this agreement.

[*Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173, followed; *The Queen* v. *Demers*, [1900] A.C. 103, distinguished.]

Statement.

APPEAL by the plaintiffs from the trial judgment. Affirmed.

On the 12th April, 1917, the defendants agreed "to take the accumulations of scrap" from the plaintiffs, for one year from that date, at certain stated prices.

The agreement was in a peculiar form. It was headed "Contract," and read, "J. Mehr & Son hereby agree to take," etc., but was signed by the plaintiffs. The defendants, regarding it as a proposal by the plaintiffs, wrote "Accepted" under it, and signed it "J. Mehr & Son."

Under this agreement, the plaintiffs delivered to the defendants 10 car-loads of scrap. The last delivery was on the 27th August, 1917. On the 25th September, 1917, the plaintiffs notified the defendants that no more accumulations of scrap would be supplied.

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEHR.

The plaintiffs brought this action for $1,870.51, the balance due on the scrap delivered. The defendants counterclaimed for damages for breach of the agreement.

On the 2nd October, 1918, judgment was entered for the plaintiffs for the amount of their claim, and execution thereon was stayed until after the trial of the counterclaim.

The counterclaim was tried by CLUTE, J., on the 27th February, 1919. It was then adjudged that the defendants were entitled to damages, and a reference was directed to ascertain the amount, further directions and costs being reserved.

The plaintiffs' appeal was from this judgment.

Shirley Denison, K.C., for the appellants.

G. S. Hodgson, for the defendants, respondents.

Latchford, J.

LATCHFORD, J.:—On the 12th April, 1917, the plaintiffs sent to the defendants the following document:—

"Contract. April 12th, 1917.

"Between Canada Cycle and Motor Co. Limited and J. Mehr & Son, Toronto, Ontario.

"J. Mehr & Son hereby agree to take the accumulations of scrap from the Canada Cycle and Motor Company Limited for a period of one year from this date, that is, until April 12th, 1918, the prices to be as follows:—

"No. 1 heavy meltings steel at $16 per g.t.

"Light steel at $7.50 per g.t.

"Bicycle turnings at $7.75 per g.t.

"F.O.B. Canada Cycle yards at Weston.

"Loading to be by J. Mehr & Son.

"Canada Cycle & Motor Co. Limited

"R. A. Bell, purchasing agent."

While in form—apart from the signature—a proposal by the defendants to the plaintiffs, this document is in fact a proposal by the plaintiffs to the defendants, and was so regarded by both the parties.

The defendants wrote "Accepted" under the proposal, and signed it "J. Mehr & Son."

Under the contract so formed, the plaintiffs delivered to the defendants 10 car-loads of scrap of the descriptions stated, the last delivery being on the 27th August.

On the 25th September, the plaintiffs notified the defendants that no more accumulations of scrap would be supplied.

In the meantime, two employees of the Russell Motor Company, the parent company of the plaintiffs, were convicted of having accepted bribes from the defendants. The two members of the defendants' firm were also prosecuted for having bribed the convicted employees, but were acquitted.

Mr. Denison did not, at the trial or upon this appeal, contend that the plaintiffs can base their refusal to make further delivery on whatever took place between the defendants and the employees of the Russell Motor Company. His contention was and is that the plaintiffs were not bound by the contract to do more than sell to the defendants, at the prices stated, such scrap as, during the period of one year from the 12th April, 1917, the plaintiffs chose to deliver to them.

When the plaintiffs brought this action for $1,870.51, the balance due on the scrap delivered prior to the 27th August, the defendants counterclaimed for damages for breach of the agreement. Judgment was entered in the plaintiffs' favour, on the 2nd October, 1918, for the amount of the claim, and execution stayed until the trial of the counterclaim.

The trial was had on the 27th February, 1919, when it was adjudged that the defendants were entitled to damages for breach of the contract, and a reference was directed to ascertain the amount, further directions and costs being reserved.

From this judgment the plaintiffs now appeal. They contend that they were not bound to deliver all or any of their accumulations of scrap to the defendants, but only such as they thought proper. "The defendants," they say, "were obliged to purchase all the scrap of the specified descriptions which were delivered to them, but we had not bound ourselves to deliver any scrap to them."

This contention failed before the learned trial Judge, and fails, in my opinion, on this appeal.

The agreement created by the defendants' acceptance of the plaintiffs' proposal is what the plaintiffs called it—a "contract." On the part of the defendants it was a contract to purchase from the plaintiffs the plaintiffs' accumulations of specified scrap produced in their works at Weston during a period of one year.

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEHR.

Latchford, J.

The case appears to me clearly to fall within the class referred to by Cockburn, C.J., in *Churchward* v. *The Queen*, (1865), L.R. 1 Q.B. 173, at p. 195: "Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. . . . If A covenants or engages by contract to buy an estate of B, at a given price, although that contract may be silent as to any obligation on the part of B to sell, yet as A cannot buy without B selling, the law will imply a corresponding obligation on the part of B to sell: *Pordage* v. *Cole* (1607), 1 Wm. Saund. 319 *i* (85 E.R. 449).

Care must of course be taken, as is pointed out in *Churchward* v. *The Queen*, *supra*, and *Hill* v. *Ingersoll and Port Burwell Gravel Road Co.* 1900, 32 O.R. 194, that a term be not implied which is contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. In the present contract, the intention that the plaintiffs shall sell is, to my mind, as clearly implied as the intention that the defendants shall buy is clearly expressed.

The case of *The Queen* v. *Demers*, [1900] A.C. 103, is relied on by the plaintiffs. In that case an order in council was passed on the 27th January, 1897, authorising the execution by the Secretary and Registrar of the Province of Quebec of a contract with Demers for the printing and binding during a period of 8 years from the 1st January, 1897, of certain official publications, at stipulated prices. On the 27th February, the Legislative Assembly was dissolved, and in the elections which took place on the 11th May the Government was defeated. In the meantime, on the 18th March, the contract was executed; but, in the confusion of the electoral campaign, an order in council, contemplated by the prior order as requisite to confirm the contract, was not passed before the Government resigned. The new Administration, which took office on the 28th May, passed an order in council cancelling

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEHR

Latchford, J.

the contract, after the 30th June—the close of the Province's fiscal year. Notice of cancellation was given to Demers. The work done by him up to the 30th June was paid for at the prices stated in the contract. Demers protested, insisting that the Government was bound to give him its printing and binding for the unexpired portion of the 8 years. The Government had more consideration for other journalists than for the editor of *L'Evenement*, and made a new agreement with Ernest Pacaud. Demers then instituted proceedings by petition of right claiming damages for breach of contract. He was successful to a varying but, to him, satisfactory extent in the Superior Court and in the Court of Queen's Bench. In both Courts constitutional questions of interest were raised. The validity of the contract was impugned on the ground that it had not been confirmed as contemplated by the order in council of the 27th January. In the Privy Council their Lordships did not deal with any such matters, but proceeded on the assumption that the contract was valid.

Lord Macnaghten, who delivered the jugdment of the Judicial Committee, lays down no principle of law applicable to the present or any other case, and he refers to no authority of general application. His observations apply only to the particular contract that was in question. All he finds in it is an undertaking on the part of Demers to do certain work at specified rates. For work so done the Government was bound to pay according to the agreed tariffs. But there was nothing in the contract binding the Government to give to Demers all or any of the printing work referred to in the contract, or preventing it from giving the whole or any part of the work they saw fit to other printers. Their Lordships therefore decided that Demers had not shewn any breach on the part of the Government, and allowed the appeal. It was manifestly considered that, like Churchward, Demers had founded his case upon the assumption of a covenant to be implied from the terms of the contract—a covenant which, according to sound and reasonable rules of construction, could not be implied.

One of such rules is that the considerations which determine the construction of an agreement with a great department of the public service, or of a formal contract containing stipulations on both sides in which each party proposes to state in plain language what obligations he means to undertake, differ materially from

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEHR.

Meredith, C.J.C.P.

those which are applicable to ordinary contracts for work or labour (Mellor, J., in the *Churchward* case, L.R. 1 Q.B. at p. 204, and Lush, J., at p. 211), or, it may be added, to informal agreements such as that made between the Mehrs and the plaintiffs.

I think the appeal should be dismissed—and with costs.

BRITTON, RIDDELL, and MIDDLETON, JJ., agreed with LATCHFORD, J.

MEREDITH, C.J.C.P.:—The only question involved in this appeal is, whether the judgment in the defendants' favour upon their counterclaim in the action ought to stand. That counterclaim is one for damages for breach of an alleged contract on the part of the plaintiffs to sell to the defendants all "the accumulations of scrap" from the plaintiffs' works for a period of one year at prices agreed upon.

Both claim and counterclaim were based upon a short and plain contract in writing in these words (setting out the contract as above).

No other agreement is alleged on either side, and there is no suggestion that this agreement should or could be reformed in any way; or that it does not set out accurately the whole transaction between the parties. The writing was drawn by the plaintiffs, and was submitted to, and in due course approved of, by the defendants, and thereupon made final and binding by the defendants' signature.

Obviously there is no contract in the writing such as the defendants allege; and, if the words which the parties used are given their plain meaning, the counterclaim should have been dismissed. All are agreed in that.

The single ground upon which the counterclaim is supported is: that, as the defendants were bound to buy, it must be assumed that the plaintiffs were equally bound to sell; and so the plaintiffs must be held liable upon the counterclaim upon that which is commonly called an implied contract. It is said that a buyer cannot buy unless a seller sells, which of course is true, necessarily so; but it is equally true, although of much less common occurrence, that a buyer may agree to buy without a seller being bound to sell, or a seller agree to sell without a buyer being bound to buy. We must not let our minds be carried away or prejudiced by want of experience in such things or by experience altogether of one character only.

It is, it need hardly be said, a strong assumption of power for any Court to add to or take from a contract deliberately entered into and put in writing in plain words by persons having infinitely better knowledge of the things dealt with in the contract and persons quite as capable as any of us of putting their agreement in plain words; it should be only necessity that justifies such a thing, though doubtless with many there is sometimes if not always an overpowering notion that they could and should make it a better contract or will or other writing, though entirely ignorant of, it may be, the causes of making it just as it is. It is far safer and far better to give effect to it as it is than in any manner to endeavour to give effect to it as it may seem to us it should be.

The case of Churchward—*Churchward* v. *The Queen*, L.R. 1 Q.B. 173—is the leading case, in modern times, upon the subject, and one in which the subject is very fully dealt with, and one which seems to be mainly relied upon in support of the counterclaim. I shall therefore be content to take the views expressed by the several Judges who considered that case, as laying down the principle applicable to this case. The Lord Chief Justice in that case expressed the principle in these words (p. 194):—

"But then, on the part of the suppliant, it is alleged that, although there may be no such covenant or undertaking expressed, it must necessarily be implied from the terms and tenor of the contract itself; and it appears to me that that is *the* question, and the *only* question, which we are called upon to determine."

And afterwards (p. 195) he remarked upon the great care that should be taken before making a contract speak where the parties had left it silent.

The rule as stated by Mellor, J. (p. 202), was, that "all that must necessarily be implied" from the scheme of the instrument and the expressions used in it might be taken into consideration in ascertaining the meaning and intention of the parties; and as to the case under consideration he put the test thus (p. 204):—

"Unless we can see our way to the conclusion that there must necessarily be implied . . . a contract that they will send these mails for a period of eleven years, the argument for the suppliant fails."

And Lush, J., dealt with the subject in these words (p. 211):—

"In dealing with formal contracts containing stipulations on

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEHR.

Meredith, C.J.C.P.

both sides, in which each party professes to express in plain language what obligations he means to undertake, I think the Court ought to be extremely cautious before they arrive at a conclusion that the parties intended more than they expressed. In order to raise what is called an '*implied*' covenant, I apprehend the intention must be manifest to the judicial mind, and there must be also some language, some words or other, capable of expressing that intention—not that any formal technical phraseology is required, but you must find words in the instrument capable of sustaining the meaning which you seek to imply from them."

That case therefore makes these things essential: "great care" or "extreme caution," "necessity," and "manifest intention;" and I cannot but think that no judgment in the defendants' favour can be given without disregard of all these. But for contrary opinions I should have been inclined to say that a judgment in the defendants' favour could have no firmer foundation than that of a "guess," and that if we really knew all that the parties to this action knew about each other and about the subject-matter of their contract we might deem it not a very good one.

In the first place, it is a mistake to treat the transaction in question as one of bargain and sale of an existing article and then to apply the law applicable to such a case: a very misleading mistake, perhaps easily fallen into. The contract was, as the parties plainly and accurately put it, "to take the accumulations of scrap" from the plaintiffs' premises; a thing that was necessary in order that they might carry on their business conveniently, whether the scrap was worthless or valuable; it is a common need in very many businesses, the most generally observed being perhaps the businesses of livery stable keepers. In some instances, and at some times, it may occasion outlay only, in others it may bring income; but one thing is always needed in making contracts for the removal of accumulations, and that is, that the contractor should be an honest man, and another that the owner of the property should have power to discharge him: having the right of entry upon the property and about the premises, great opportunity for dishonest gain is in the contractor's way; hence the need for control of the situation by the owner. It is easy to say, "But you can discharge a dishonest man, you are not bound to

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEEK.

Meredith, C.J.C.P.

keep him on;" that, however, has more of the judicial than the practical in it; you cannot always catch a dishonest man; and it is sometimes costly to charge one with theft, however guilty he may be, if his guilt cannot be proved in a court of law. The plaintiffs are a large manufacturing concern; shrewd and capable officers conduct their affairs; the defendants are buyers of "junk;" and events happening subsequent to the making of the contract prove that, if the plaintiffs made the contract which it is said the Court should by implication fasten upon them, those shrewd, capable men were inexcusably neglectful of their duties to their employers: what excuse could they give if really they made a contract, with those, now proved to be. dishonest men, which gives a right of entry upon the plaintiffs' property with the right to compel the plaintiffs to allow them to take away all the scrap from their works. My implication is, that these officers were right, and that if we impose upon the plaintiffs a contract binding for a year the wrong is done by us. There was no neglect, no madness, in the manner in which the contract was drawn; it was drawn as it is so that, without charge of dishonesty, without giving reason of any character for so doing, the dealings between the parties might be brought to an end by the plaintiffs at any time. And there was no reason why the defendants should not accept such a contract; they knew the character of the great concern they were dealing with; knew that as long as they fulfilled their part of the contract satisfactorily and honestly there was no danger of any discontinuance of the arrangement; they were mere traders in junk, not manufacturers, nor had they any interest in the scrap except the profit they might make on a resale of it; they went to no expense and lost no time in preparation for carrying out the contract; the discontinuance of the trading merely ended their profit or loss on the "scrap," and relieved them from the work of removing it; and it was worth a great deal to them to secure such a customer which with honest dealing on their part was almost sure to bring to them long-continued profitable business. On the other hand, it was but common prudence on the part of the plaintiffs to have some one bound to take away the accumulations; that it should not be open to the defendants to leave those obstructions upon the plaintiffs' property whenever it might suit their convenience to discontinue removing them.

ONT.

S. C.

CANADA CYCLE AND MOTOR CO. LTD. v. MEHR.

Meredith, C.J.C.P.

The fact that the writing has the word "Contract" at its head does not at all help the defendants; it is a contract, but a contract to which they want a further contract added by implication for their benefit.

Nor does the case of Dr. Pordage—*Pordage* v. *Cole*, 1 Wm Saund. 319 *i*—upon which the defendants rely, help them; it is, on the contrary, distinctly against them. The writing there in question sets out that Pordage and Cole had agreed that Cole should give the doctor $775 for all the doctor's lands and some goods, all particularly described in the writing, which purported to have been sealed by both of them. The Court held that each party had a mutual remedy against the other, for the word "agreed" was the word of each, but that it might be otherwise if it had been the word of the defendant only. In this case it is the word of the defendants only—"J. Mehr & Son hereby agree;" but really how could that case, on any ruling, govern one so different from it as this is?

Upon the parties' own-chosen words, upon the law, upon the cases, and upon that which seems to me to be the common sense of the matter, I am in favour of allowing the appeal and directing that the counterclaim be dismissed.

Appeal dismissed (MEREDITH, C.J.C.P., *dissenting*).

ONT.

S. C.

Re MONARCH BANK OF CANADA.

MURPHY'S CASE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell, Latchford and Middleton, JJ. April 30, 1919.

COMPANIES (§ V B—180)—BANKS — SHARES — SUBSCRIPTION — PROMISSORY NOTE—DEMAND FOR PAYMENT—NOTICE OF ALLOTMENT—AGENT SOLICITING—CONDITION SUBSEQUENT.

Assuming that allotment and notice of allotment are necessary to bind a bargain to take shares of stock in a bank, for which a promissory note payable on demand has been given, the allotment having been made, a written demand for payment of the note is sufficient notice.

If the agreement to take shares was made upon the condition that the subscriber should be appointed to some local office in management of the bank and that his account should be taken over by the bank, such undertaking being that of the person who solicited and made the agreement for the bank the condition was a condition subsequent and was no defence to a claim for payment for the shares.

Statement.

APPEAL by liquidator from an order of Ferguson, J.A., reversing an order of an official referee in a reference for the winding-up of the bank, that the name of the respondent should be placed on the list of contributories. Reversed.

The order appealed from is as follows:—The appellant signed an application for shares, agreeing to pay therefor in instalments,

ONT.

S. C.

RE MONARCH BANK OF CANADA.

in the manner and at the times set out in the written application. At the same time he and the agent of the bank who solicited his application entered into an oral agreement whereby the appellant gave the agent Barry a demand note for the total amount of his subscription, and Barry agreed to have the note accepted by the bank as payment for the shares, and to have the appellant appointed a director of the bank, and that the bank would take over his trading account and furnish him and his firm with large credits. The bank did not sue upon the note but upon the original subscription. In the books of the bank the shares were allotted on the terms of the original subscription. It is not asserted that the appellant was sent or received any notice of such allotment. It is, however, urged that, because he was notified by letter that his note was overdue, he had constructive notice of allotment under his signed application.

I cannot agree with this argument. It might be inferred from that letter that the bank had agreed to accept the subscription on the terms of the appellant's oral offer made to Barry, but the liquidator does not contend that this was done, and the books of the bank do not shew it to have been considered.

I am of the opinion that the liquidator has failed to shew an acceptance by the bank of the written subscription, by proving both allotment and notice of allotment pursuant to that subscription, and for that reason has failed to make out his claim, and that the appeal should be allowed with costs.

W. K. Fraser, for the appellant.

W. J. McWhinney, K.C. for Murphy, the respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.—The bank, following an ordinary method in like cases, sought purchasers, of its stock, through persons empowered by it to solicit purchasers; and one of such persons, having solicited the respondent, made the contract in question in this matter, for the bank, with him. In that transaction, the respondent, over his own signature, and asserting in the writing that it was over his own seal also, agreed with the bank to take the shares in question, and made, by way of his promissory note, payment for the shares in accordance with the agreement; and the agreement and note were then sent to the bank by the person who made the sale: the stock was allotted at once; and subsequently payment of the note was demanded, in writing, by the bank from the respondent.

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Meredith, C.J.C.P.

Under these circumstances, the Referee put the respondent's name upon the list of contributories, in respect of these shares, in the winding-up of the bank under the Winding-up Act; but, upon the respondent's appeal to a single Judge, the name of the respondent was removed from the list, on the ground that notice of allotment of the shares had never been given to him.

It is said that in England agreements to take shares in a company about to be or being formed, are usually made by way of an application for shares, an allotment of the shares, and notice of such allotment; but I am not sure that that method can be said to be the common one in this Province; if it could be, it would be needful to add that there are many exceptions.

Assuming, however, that allotment and notice were needed to bind the bargain, allotment was admittedly duly made, and there was, as I cannot but find, notice. The notice required can be only such as is needed to bring, or as brings, knowledge of the fact to the applicant: that is its purpose—the only reason for requiring it; and notice of that character was given to the respondent in the written demand which was made upon him in respect of the payment of his note; that is made very plain by him in his testimony in this matter; it is there admitted, more than once; that he knew that he had the stock; and he made no such pretence as is here made for him, that he was a mere unanswered applicant for it, without knowledge of its allotment.

The facts do not support the ruling appealed against: the ruling therefore falls.

But, in my opinion, upon another ground this appeal should be allowed.

Whether the method before mentioned be or be not the one usually followed in this Province, it was not followed in this instance. The substance of the transaction was an agreement to give and to take the shares in question; and it was so understood and acted upon by every one concerned in it. Acceptance of the price, or part of the price, should, alone, bind the seller. Mere applications for shares are not made by deed, or that which is intended for a deed, nor are first payments of the purchase-price so made. Applications may be so made and deposits may be made without bank or company being bound; but there should be something making that evident in a case of deed and payment.

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Meredith, C.J.C.P.

All that was done on each side shews that this transaction was not one of that character, nor at all thought to be by any one concerned in the making of it.

On this ground I am in favour of restoring the respondent's name to the list, if his third ground, yet to be dealt with, fails.

The third ground, upon which it is sought to support the ruling appealed against, is: that the agreement to take the shares was made upon the condition that the respondent should be appointed to some local office in management of the bank and that his account should be taken over by the bank: but, assuming such a condition to have been proved, and assuming that the undertaking, if any, was not, as in *Simon's Case**—as the writing taken by Simon proved it to be—that of the bank, but was that of the person who solicited and made, for the bank, the agreement, the condition was plainly, indeed necessarily, a condition subsequent, and so no defence to a claim for payment for the shares; and, if made the subject of a claim for damages, might fail because the failure of the respondent to make payment for his shares in part prevented a fulfilment of any such conditions. Purchasers did not pay for their shares, and the bank went to the wall.

The appellant might have been proceeded against on his note instead of upon the consideration for it, but in that case his position should have been worse rather than better. It is a creditor's right to proceed either way, or both.

We all agree that the appeal should be allowed and that the respondent's name should be restored to the list.

Riddell, J.

RIDDELL, J.:—This is an appeal from the order of Mr. Justice Ferguson of the 24th June, 1918, whereby the report of Mr. McAndrew, Official Referee, was reversed, by which report the Official Referee, on the 20th February, 1917, found the respondent, Murphy, liable in a winding-up proceeding for the sum of $3,750 and interest.

The facts of the case are not very complicated; those material are as follows:—

The Monarch Bank of Canada was incorporated by the Dominion Act (1905) 4 & 5 Edw. VII. ch. 125, assented to on the 20th July, 1905. After a number of meetings of what are

**Re Monarch Bank of Canada, Simon's Case* (1918-19), 14 O.W.N. 295, 16 O.W.N. 171.

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Riddell, J.

called the "incorporators" of the bank, the directors mentioned in the charter had meetings from time to time.

Apparently one J. F. Barry was appointed agent for the purpose of soliciting subscriptions, although there is nothing in the minutes of the provisional directors indicating his employment. However that may be, Barry, affecting to act as agent for the bank, called upon the respondent, Edward Joseph Murphy, a wholesale dry-goods merchant in Halifax, and solicited a subscription for stock. The respondent informs us that Barry's proposition was that if he, the respondent, would qualify as a director in Halifax, the bank would take over his account and give him an advance of $50,000 at a rate of interest one half per cent. lower than he was already getting at the Bank of Montreal, and that the Monarch Bank would give him other accommodation. Whether that was before or after his subscription for stock does not appear, but at all events he says that he did sign the subscription for stock, which was to be paid for by a demand note.

He signed a subscription for stock, of which the important parts are as follows:—

"I, the undersigned, hereby subscribe for 30 (thirty) shares of the capital stock of the Monarch Bank of Canada, at the price of $125 per share, and do covenant and agree to and with the incorporators of the said bank, with the bank itself, and with every other subscriber of the said bank, by virtue of this my subscription, to accept the shares now applied for, or any lesser number that may be allotted to me, and to pay for the same as follows: $10 on account of $25 premium on each share hereby subscribed for, upon the signing hereof, and to pay $5 on account of $25 premium on each share of stock upon allotment, and to pay a further $30 on account of each share of stock upon allotment, and to pay seven equal monthly payments of $10 each on stock per share on the first day of each and every month of the seven months immediately succeeding the date of such allotment, and to pay the balance of $10 premium on each share on the first day of the month next succeeding the date of the last monthly payment hereinbefore mentioned, and the above payments of $10 and $5 each on premium and the further payments mentioned to be made on stock shall be made to the Toronto General Trusts Corporation until the sum of $250,000 of capital stock is paid-up, together with the premium thereon, and

the payments so made to the said trusts corporation shall be at the disposal of the provisional directors of the said bank, or the majority of them, and after the said sum of $250,000 of capital stock is paid-up the balance of payments on stock and premium shall be payable to the Monarch Bank of Canada.

"I reserve for myself the right to pay these shares in full upon the allotment on the terms of the prospectus.

"The shares of stock so subscribed for shall not be assignable or transferable unless and until the same are paid up in full.

"The Toronto General Trusts Corporation shall place all such payments made to them to the credit and at the disposal of the provisional directors or the majority of them named by Act of incorporation of the said bank."

He gave his demand note, dated the 6th August, 1906, for $3,750, to the order of J. F. Barry, agent, with interest at 5½ per cent. per annum, and took from Barry a receipt in the following language:—

"Halifax, N.S.
"Aug. 6, 1906.

"Received from E. J. Murphy, Esq., his demand note dated Aug. 6, 1906, for $3,750 (thirty-seven hundred & fifty dollars) in payment of 30 (thirty) shares of Monarch Bank stock, Mr. Murphy to be a provincial director at Halifax, N.S.

"J. S. BARRY, agent,
"Monarch Bank of Canada."

The note was endorsed to the order of the Monarch Bank of Canada, without recourse, by Barry, and sent in by him, apparently on the 6th August, to the provisional directors; and on the 22nd August, at a meeting, 30 shares of the capital stock were allotted to Edward J. Murphy, the respondent herein.

The bank found difficulty in getting a sufficient amount of capital subscribed, and on the 18th September, 1906, Mr. Ostrom, the provisional managing director, wrote:—

"We are advised by Mr. Barry to inform you as nearly as possible just when our bank will be open for business, and I think to save you any unnecessary trouble it will be well to give it the time-limit. I am afraid we will hardly be able to open for another three months, as the directors desire to sell and distribute a large amount of stock so that we may start with a reserve, and I think

ONT.
S. C.
RE MONARCH BANK OF CANADA.
Riddell, J.

you will agree with me, as a business man, that it will be better to delay a little longer and not be handicapped when we do open.

"Trusting this will meet with your approval and thanking you in advance for your influence with prospective subscribers of the bank and hoping to make your acquaintance when I visit Halifax, I am," etc.

On the hearing, the respondent seems to have forgotten about that letter, as he says he did not hear from the bank after his subscription until the winding-up order was made.

On the 12th November, the managing director again wrote to the respondent as follows:—

"We beg to notify you that your note for $3,750 fell due to-day. We regret that you have not been notified of this before, but the Toronto General Trusts Corporation, in whose care your note is assured, said at the time we deposited it with them that they would notify at least one week before the note fell due. I was not aware until to-day that this had not been done. You understand when we depended on them we did not want to trouble you with two notifications.

"Trusting this will receive your prompt attention, and I am pleased to tell you that the bank is progressing. We are strongly advised to have one million subscribed before opening our doors for business, but this will be a matter for the directors to decide at a later date."

Whereupon Murphy answered on the 15th November:—

"I am in receipt of your favour of the 12th inst. and am very much surprised at its contents. The note signed by me was a demand note, and I cannot understand how it has become due on the 12th inst.

"The arrangement made with Mr. Barry was that this note was to be held by you and the interest paid out of the remuneration due me as local director. I have never received any stock certificate, and if this stock stands in my name it can be realised on to retire this note. In which case, all arrangements with Mr. Barry will be off, viz., that we transfer our account to your bank according to agreement made with him.

"Mr. Barry is out of town at present, but is expected back in a few days, when I will go into the matter with him.

"I have no intention of retiring this note at present, and if it has to be paid it will be done by realising on the stock."

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Riddell, J.

And the managing director replied, on the 21st November:—

"We have your favour of the 15th, and note what you say. We have sent Mr. Barry a copy of the same letter at Ottawa, and no doubt he will take it up with you."

An order was made for the winding-up of the bank, and, as has been said, the respondent has been held liable by the Referee, but relieved by my brother Ferguson.

The sole ground upon which my learned brother proceeds is that Murphy received no notice of the acceptance of his subscription.

The statement of law of Lord Cairns in *Pellatt's Case*, (1867), 2 Ch. App. 527, has always been accepted (p. 535): "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

As it seems to me, however, the present case does not fall within *Pellatt's Case*, and that for two reasons:—

In the first place, the subscriber reserves for himself the right to pay for these shares in full upon the allotment, on the terms of the prospectus. He swears that he gave this note in payment for 30 shares of the bank's stock, and the receipt which he took from Barry shews that this is in a sense correct, that he was paying for his 30 shares in full. Accordingly, as I think, there was an obligation on the part of the bank to let him have these shares, which he had paid for in a sense, that is, for which he had given his note.

But, assuming that in this case there was a necessity for a response by the company, it is well decided that that response need not be formal. As was said by Sir John Rolt, L.J., in *Gunn's Case* (1867), 3 Ch. App. 40, at p. 45, it is sufficient if there is "in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer." It seems to me to be abundantly clear that Murphy knew by the conduct of the bank that the bank had accepted his offer. In his evidence he says that he knew there was stock issued to him (see p. 5, at the beginning). That being so, there was something to inform him that there had been a response by the company to his offer.

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Riddell, J.

It seems to me, too, that the letter of the 12th November, 1906, is a sufficient notification to him, especially when taken in connection with the letter of the 15th November, 1906, in which he suggests that his note which had been given for the stock should be paid by realising on the stock. There is nothing like repudiation on his part.

I think he had sufficient notice, if notice were necessary, and I do not further consider the question as to whether notice was necessary.

It is perfectly plain, in my view, that the so-called conditions upon which the respondent subscribed for the stock, were not conditions precedent, but conditions subsequent, and that these cannot be set up, not having been taken advantage of to rescind or withdraw the subscription for stock before the winding-up, even if they might or could have been available then.

An argument which was apparently raised before the Referee was not addressed to us, namely, that in any case this note given by the respondent was in full payment for the stock, and therefore could not be considered as unpaid, and the stock must be taken to be fully paid-up stock. The argument is that the only thing the bank had was the promissory note.

It is true the respondent does say that the note was given in full payment of the stock, but the whole transaction shews that it was not intended that all the bank should have would be a promissory note, and that they must rely upon that note.

The respondent says in his evidence that he was giving a note which was to be held by the bank and the interest paid half, yearly; that the note was not to be paid except the interest on it (except at his convenience); that the note was to be carried along just as long as he wanted it. The whole nature of the transaction as well as his evidence, shews that he knew he was undertaking a liability, and that the note was not intended to destroy this liability. It is, of course, trite law that a note given for a liability does not extinguish the liability unless it is expressly so agreed, or the nature of the transaction shews that it must have been so agreed—the note simply suspends the remedy. This matter not having been argued before us, I do not further pursue it.

I am of opinion that the judgment of my brother Ferguson

should be reversed, and that of the Official Referee reinstated, with costs throughout.

BRITTON, LATCHFORD, and MIDDLETON, JJ., agreed that the appeal should be allowed.

Appeal allowed.

ONT.

S. C.

RE MONARCH BANK OF CANADA.

HOPKINSON v. WESTERMAN.

ONT.

S. C

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell, Latchford and Middleton, JJ. March 7, 1919.

FRAUDULENT CONVEYANCES (§ VIII—40)—ACTION FOR TORT—JUDGMENT NOT GIVEN—SETTING ASIDE CONVEYANCE—FRAUDULENT CONVEYANCES ACT (R.S.O. 1914, c. 105, s. 1)—CREDITOR.

Where the fraudulent purpose in making a conveyance of land is plainly to defeat the expected execution in a pending action for tort, the conveyance may be set aside although judgment in the action for tort has not been delivered. It is not necessary under the Fraudulent Conveyances Act (R.S.O. 1914, c. 105, s. 1) that the plaintiff shall be a creditor at the time of bringing an action to set aside a conveyance as fraudulent.

Statement.

APPEAL by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing an action brought to set aside a conveyance of land as being voluntary and fraudulent. Reversed.

J. P. MacGregor, for the appellant.

J. G. O'Donoghue, for the defendants, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is very plain that the deed of the land in question, impeached in this action, was made for the purpose of defeating the expected, and impending, execution in the then pending action for criminal conversation: the grantee, who was, and is, the wife of the grantor—who was the defendant in that action—knew that it was pending, knew all the facts upon which it depended, and knew that the wrong done was done so openly that a substantial verdict against her husband, in it, was certain; and, as she also knew, he had no other property out of which the amount of the judgment could be realised. And the effect of the deed was merely to transfer the ownership from husband to wife, the family having substantially the same benefit of it as if it had remained in the husband and he had not made himself insolvent. The case against the man was so plain that, soon after the deed was made, judgment was entered up against him in the action for criminal conversation, for $1,100, upon his consent.

The feeble efforts of the wife to shew that she had an interest in the land before the making of the deed, because she was saving

ONT.

S. C.

HOPKINSON v. WESTERMAN

Meredith, C.J.C.P.

in the money she received from her husband for housekeeping purposes, and because she sometimes went out working, really only makes plainer the purpose of defeating the claim in the criminal conversation action: in no case ever tried before me was there a less substantial claim of this character. In fact the case is one of the plainest of a fraudulent purpose.

But it is contended that this action must fail on the ground that the plaintiff was not a creditor of the fraudulent grantor when it was commenced, that he must bring a new action to enforce his rights: that any one who has a sufficient claim arising out of contract may bring such an action as this before he has recovered a judgment upon his claim; but that no one whose claims arise out of a wrong can bring such an action until he has recovered judgment upon his claim. That, however, is not and never was, in my opinion, the law: and there is no reason why it should be, no reason why claims *ex delicto* and claims *ex contractu* should not be upon precisely the same plane in this respect—though upon the question of fact, whether the intention was or was not to defeat, hinder, or delay the claimant, it may be a matter of consequence what the character of the claim was and what the prospects of success in it, as is exemplified in the mariner's case—*Ex p. Mercer*, (1886), 17 Q.B.D. 290.

In a somewhat ancient case—*Lewkner* v. *Freeman* (1699), 1 Eq. Cas. Abr. 149—it seems to have been said that debts founded *in maleficio* could, before judgment, be preferred to other debts. But the right to prefer was not so limited. The rule is, I think, rightly stated in the Cyclopædia of Law and Procedure ("Cyc."), vol. 20, p. 430, thus: "The well-nigh universal rule is that claims for damages arising from torts are within the protection of the statutes against fraudulent conveyances." It is difficult to see how it could be otherwise under the statute of Elizabeth, upon which this action is based, the words of that Act (13 Eliz. ch. 5, sec. 1*) being: "For the avoiding and abolishing of feigned, covinous and fraudulent . . . conveyances . . . devised and contrived . . . to delay, hinder

*Section 3 of the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, provides: "Every conveyence of real property or personal property and every bond, suit, judgment and execution at any time had or made or at any time hereafter to be had or made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures shall be null and void as against such persons and their assigns."

ONT.

S. C.

HOPKINSON v. WESTERMAN

Meredith, C.J.C.P.

or defraud creditors and others of their just and lawful actions . . ." What "others" can it be suggested can better come within the meaning of that word than such others as have actions pending in which they are sure to recover large damages? I know of none.

The case seems to me to be a plain one for directing that judgment be entered for the plaintiff in the usual form applicable to the case: see *Reese River Silver Mining Co.* v. *Atwell* (1869), L.R. 7 Eq. 347.

I would allow the appeal and direct that judgment be entered accordingly, with costs of the appeal and of the action.

The plaintiff sought also to support this action upon a claim for $20, arising out of a contract: but it is insupportable in that way; judgment for such an amount would not give any right to execution against lands, and so the deed could not stand in the plaintiff's way; and, if it did, the case would be an extraordianry one in which it could be held that such a conveyance as that in question was really made to defeat such a claim; few if any men are without personal property sufficient to satisfy such a small amount; beside which there are the judgment summons provisions of the Division Courts Act. But such an action could not be thrown out because the amount involved is beneath the dignity of the Court; the Court's dignity is best upheld when all rights properly presented are enforced. Substantial rights are preserved by the Rules respecting scales and set-offs of costs.

BRITTON, J., agreed with MEREDITH, C.J.C.P. Britton, J.

RIDDELL and LATCHFORD, JJ., agreed in the result. Riddell, J. Latchford, J.

MIDDLETON, J.:—Appeal by the plaintiff from the judgment of Clute, J., dated the 20th January, 1919, dismissing the action. Middleton, J.

The action is on behalf of creditors of the defendant Albert Edwin Westerman to set aside a conveyance of certain lands by Westerman to his wife, the defendant Jane Alice Westerman, dated the 12th January, 1917.

The plaintiff claims to be a creditor of Westerman for $20, being Westerman's share of the cost of a fence between the premises of the parties.

On the 18th December, 1916, the plaintiff sued Westerman for criminal conversation.

On the 13th March, 1917, the writ in this action was issued.

ONT.

S. C.

HOPKINSON v. WESTERMAN

Middleton, J.

On the 22nd May, 1917, the plaintiff recovered judgment in the action for criminal conversation, for $1,100.

The plaintiff based his case upon the existence of the debt of $20 at the time of the conveyance, and sought to use the pending action for damages as indicating a fraudulent intent. The learned trial Judge in dismissing the action said that, so far as it was based on the $20 claim, it was beneath the dignity of the Court, and that, so far as the claim was based on the pending action for criminal conversation, there was no debt and no fraud.

I find myself unable to agree either with the contention of the plaintiff or the view of the learned Judge.

First as to "the dignity of the Court." This most unfortunate expression had its origin in the Court of Chancery and was quite unknown in the Common Law Courts, where actions for the recovery of nominal damages for the vindication of rights were common. Under Lord Bacon's Ordinance of the 9th January, 1618, the Court of Chancery was forbidden to "take jurisdiction in suits under the value of £10;" and, as our Court of Chancery was by statute given the same powers as those possessed by the English Court in 1837, this limitation was introduced into the Province: *Gilbert* v. *Braithwait* (1871), 3 Ch. Cham. 413. Notwithstanding the provisions of the Judicature Act, this limitation still continues, for that Act did not confer new jurisdiction but gave to the Supreme Court the jurisdiction formerly possessed by either the Court of Chancery or the Common Law Courts: *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1885), 30 Ch. D. 387.

Thus this limitation of jurisdiction is based on an enactment of the Legislature, and not upon any idea of the Court as to its own dignity. A practice had grown up of refusing to entertain an appeal when less than $40 was involved: *Re McRae and Ontario and Quebec R.W. Co.* (1887), 12 P.R. 327, where it is referred to (p. 329) as a "salutary rule" which "should not be relaxed." This practice was put to an end by the decision in *Clarke* v. *Creighton* (1890), 14 P.R. 100, where Armour, C.J., says (p. 102): "We esteem it not beneath the dignity of this Court to determine all matters that come properly before us, be they never so small in amount, according to the best of our skill and knowledge, for our

ONT.
S. C.
HOPKINSON v. WESTERMAN
Middleton, J.

duty is 'to do equal law and execution of right to all the Queen's subjects, rich and poor, without having regard to any person'."

So far as the claim is based upon the $20 debt, there is another and far more serious objection indicated in *Zilliax* v. *Deans* (1891), 20 O.R. 539. A transfer of property can be regarded as fraudulent as against a creditor only where the property can be reached by that creditor. So a transfer of land cannot be attacked by a creditor whose claim is less than $40, for an execution against lands cannot be issued upon a judgment for less than this sum. For the same reason, the transfer of chattels exempt from seizure is not liable to attack: *Osler* v. *Muter* (1892), 19 A.R. (Ont.) 94.

But in order to make a transaction open to attack under 13 Eliz. ch. 5, it is not necessary that there should be an existing debt. The statute is for the protection of "creditors and others," and in this respect differs from our Ontario statute, which avoids preferential transactions at the instance of "creditors" only (Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5.)

Ever since *Longeway* v. *Mitchell* (1870), 17 Gr. 190, there has been no room for doubting that a class action will lie attacking a conveyance as fraudulent, either under the statute of Elizabeth or under the Provincial statute, without awaiting the recovery of judgment and issue of execution. When the attack is under the Provincial Act, the plaintiff must prove that he is a "creditor" within the meaning of that Act, and it is now clearly determined that one who has a claim for damages is not a creditor until his claim passes into a judgment: *Ashley* v. *Brown* (1890), 17 A.R. (Ont.) 500; *Gurofski* v. *Harris* (1896), 27 O.R. 201, 23 A.R. (Ont.) 717.

But, as already said, it is also established that one who has a claim for damages for tort, which has not passed into judgment, is within the statute of Elizabeth, but to succeed the plaintiff must establish more than a preference—he must shew a fraudulent intention: *Ashley* v. *Brown*, *supra*; *Gurofski* v. *Harris*, *supra*; *Mulcahy* v. *Archibald* (1898), 28 Can. S.C.R. 523. The existence of the debt due to the preferred creditor in such cases shews that there was not an intention to defraud, the mere intention to prefer not being made unlawful by that statute. See also *Carr* v. *Corfield* (1890), 20 O.R. 218. The fraudulent intention necessary to

ONT.

S. C.

HOPKINSON v. WESTERMAN

Middleton, J.

avoid the conveyance must be established by evidence in each case.

In *Ex p. Mercer*, 17 Q.B.D. 290, a defendant in an action for breach of promise made a settlement of an unexpected legacy received pending the action. He had other property, and said that at the time of this settlement he had not any thought of the pending action, and this statement was believed. In the result a large verdict was found against him. This is described (p. 300) as "a startling verdict," which he "should not have anticipated," and the mere fact that the assets remaining were not sufficient to satisfy it, it was held, did not compel the Court to find an intention to defraud when satisfied upon the evidence that no such intention in fact existed. This case is not authority for any wider proposition. But, when the defendant knows that he has no defence, and that the recovery of judgment is imminent, and the conveyance is of all his property, the situation is widely different. It is then very easy to establish the fraudulent nature of the transaction—indeed it may be the necessary inference from the bare facts. Here we do not need to go so far, as, on the evidence of the wife, the nature of the deed is disclosed:—

"I said to my husband, 'I think I have a right to go in for alienation of husband's affection as well as what he had done for his wife,' and of course I expect he thought he was doing what he should by letting me have the home." "Then of course he sued Mr. Westerman and I was vexed . . . and of course my husband had it made over to me then." "Q. You knew of course that Mr. Westerman did not have any other property in the world but this? A. Yes. He told me he would fix it up the best he could and he thought I should have it."

This and the admitted facts establish a clear case of an intention to defraud within the statute of Elizabeth.

Mr. MacGregor urged that the statutory presumption found in the Provincial Act, R.S.O. 1914, ch. 134, sec. 5 (4), where the transaction is attacked within 60 days, applied to this case. Manifestly it has no application where the transaction can only be reached under the earlier enactment. Fortunately for his client, the case is, in my view, established without resorting to this.

The appeal should be allowed and the conveyance set aside. Costs to be added to the debt. I would not make a personal order for costs against the wife. *Appeal allowed.*

THE KING v. RUSSELL.

MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B. October 1, 1919.

BAIL AND RECOGNIZANCE (§ I—40)—DISCRETION OF COURT—MISDEMEANOUR —FELONY—DOMINION STATS. 1869—SUBSEQUENT RE-ENACTMENT— LAW OF MANITOBA.

By Dominion statute 1869, 33 Vict. c. 30, s. 53, the question of granting or withholding bail was made discretionary in cases of misdemeanour as well as in cases of felony and although Manitoba had not then been taken into the Dominion the subsequent re-enactment of this section in the code made it also the law in Manitoba.

Statement.

APPLICATION to admit to bail certain persons committed to gaol to await trial on a charge of seditious conspiracy. Application granted.

E. J. McMurray, for applicants; *A. J. Andrews*, K.C., and *F. M. Burbidge*, K.C., for the Crown.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an application for an order to admit to bail R. B. Russell and seven others who have been committed to the common gaol at Winnipeg to await their trial upon the charge that they

during the years 1917, 1918 and 1919 did conspire and agree with one another and with other persons unknown to carry into execution a seditious intention, to wit., to bring into hatred and contempt and to excite disaffection against the Government and constitution of the Dominion of Canada and the Government of the Province of Manitoba and the administration of justice and also to raise discontent and disaffection amongst His Majesty's subjects and to promote feelings of ill-will and hostility between different classes of such subjects and were thereby guilty of a seditious conspiracy.

Subsequent to the commitment a similar application was made by the accused's counsel to Cameron, J., of the Court of Appeal, sitting as a Judge of this Court, and was by him refused. In the argument before Cameron, J., counsel for the accused contended that they were entitled to bail as of right, but submitted that if a Judge had a discretion to grant or refuse bail that discretion should under the circumstances be exercised in favour of the grant.

The contention that bail is a matter of right was based chiefly upon *Ex parte Fortier* (1902), 6 Can. Cr. Cas. 191, a decision of the Court of Appeal of Quebec. In that case the accused had been committed for trial upon two charges, viz., forging of an order on a post office savings bank and theft of a large sum of money. He subsequently applied to a Superior Court Judge for bail and was refused. Later he was brought before the Court of Appeal upon a writ of *habeas corpus* and was by that Court admitted to bail. In the judgment of the Court, delivered by Wurtele, J., it is stated that in the case of indictable

MAN.

K. B.

THE KING v. RUSSELL.

Mathers, C.J.K.B.

offences which were classed as misdemeanours before the distinction between felonies and misdemeanours was abolished by the Code, the accused is entitled to bail as of right but that in all other cases the granting or refusing bail rests in the sound discretion of the Court. This statement of the law is a mere *obiter dictum*; as it was not at all necessary to the decision of the matter before the Court. Theft, one of the charges upon which Fortier had been committed, was, before the Code, a felony. At common law forgery was a misdemeanour, but forgery of a document such as Fortier was charged with forging had been made a felony by the Forgery Act, 1861. The case before the Court was therefore one which before the Code would have been classed as felony and consequently the question of whether or not bail in the case of a misdemeanour was a matter of right or a matter of discretion was not in issue.

Although the *Fortier* case is not binding upon me, I would be very reluctant indeed to refuse to follow a decision in point of so distinguished a Court as that of the Court of Appeal of Quebec, arising upon a law common to both Provinces but a mere dictum is not entitled to the same consideration.

In England it is said that in cases of misdemeanours bail is a matter of right: Archibald, Criminal Pleading, 112; in cases of felony there is no doubt that it is discretionary. The same rule prevailed in Canada until 1869, when by the Act, 32-33 Vic. 1869, Can. stats. c. 30, s. 53, the question of granting or withholding bail was made discretionary in cases of misdemeanour as well as in cases of felony. Manitoba had not then been taken into the Dominion, but this particular section was re-enacted in the Code and so became the law of Manitoba. That section is the prototype of s. 698 of the Code, and since its enactment both classes of crime have been on the same footing with respect to bail. I have read the judgment of Cameron, J., and I entirely agree with him on that point.

Mr. McMurray urged the somewhat novel argument that although the Court had a discretion, if the application were made summarily under s. 698, yet it had no such discretion if the application were made by writ of *habeas corpus*. In other words, that the jurisdiction of the Court depended upon the avenue through which it was approached. The object of the writ is to bring the party into Court in order that he may make his appli-

MAN.

K. B.

THE KING v. RUSSELL.

Mathers, C.J.K.B.

cation, but the law to be administered is the same as though the application were made in a summary way. I hold therefore that notwithstanding that the offence charged is a midsemeanour, the question of bail is in the sound discretion of the Court.

Upon the question of discretion Mr. McMurray contended that the only matter to be considered was whether or not the accused, if admitted to bail, would be likely to appear for trial. I am not prepared, without much fuller consideration, to hold that regard may not also be had to questions of public safety and that the Court would not be justified in refusing the application upon the sole ground that the public safety might be endangered by permitting the accused to be at large. That was apparently the ground upon which Cameron, J., refused to accede to the application made to him. He was influenced by the allegation that the accused had broken the undertaking upon which they were released when first taken into custody. Affidavits by T. J. Murray, one of the counsel for the accused, and by three of the accused, William Ivens, John Queen, and George Armstrong, were read before me. These affidavits are uncontradicted, and they explain the circumstances upon which that allegation was founded. They shew that after having been bailed upon their undertaking not further to participate in the strike then prevailing, certain statements were published which placed them, as they allege, in a false light. They then went to Mr. Andrews, the prosecuting counsel, and stated that they refused to be longer bound by the undertaking, whereupon, by arrangement with him, they again surrendered into custody and were unconditionally re-admitted to bail in double the amount previously fixed. The affidavits of the three accused further state that to the best of their knowledge none of them since that time have been active in promoting strikes or disturbances, although some of them did address meetings protesting against the recent amendment to the Immigration Act. This material was not before Cameron, J. No evidence was adduced before me upon which I could find either that the accused would not likely appear for trial if granted bail or that permitting them to be at large on bail would be likely to endanger the public peace, if that be a proper matter for consideration, as to which I express no opinion. Under all the circumstances I think bail should be

MAN.

K. B.

THE KING v. RUSSELL.

Mathers, C.J.K.B.

granted. If when at large they or any of them do anything which brings them within the ambit of the criminal law they may be re-arrested upon that new charge.

Because of the great public interest involved in this prosecution and because bail had once been refused by a brother Judge, I asked my brothers Macdonald and Metcalfe to sit with me while hearing this application, and I have the satisfaction of knowing that they both concur with me in the views here expressed.

I therefore order that the accused be admitted to bail in $4,000 each, with two sufficient sureties in $2,000 each.

Application granted.

ONT.

S. C.

HENDERSON v. STRANG.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Latchford, JJ. March 7, 1919.

COMPANIES (§ IV D—60)—COMPANIES ACT OF CANADA (R.S.C. 1906, c. 79) REAL SUBSCRIPTION FOR SHARES—CONTRACT FOR UNREAL SUBSCRIPTION—ULTRA VIRES—POSITION OF SUBSCRIBER.

The Companies Act of Canada (R.S.C. 1906, c. 79) requires a real subscription and real payment for the shares of the capital stock of a company, a plan whereby there is an unreal and fanciful subscription and payment for shares, and whereby no money was ever paid nor intended to be paid to the company for the shares is *ultra vires* the company. The alleged subscriber cannot retain the position of a paid-up stockholder, nor can he be put in the position of a holder of stock upon which nothing has been paid, nor can the company recover the amount, as money payable by him to them for money lent by them to him.

Statement.

APPEAL by the defendants from the judgment of MASTEN, J., (1918), 43 O.L.R. 617. Reversed.

D. L. McCarthy, K.C., and *A. W. Langmuir*, for the appellants.

I. F. Hellmuth, K.C., and *S. J. Birnbaum*, for the respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plan devised, and carried into effect by the two persons most substantially concerned—with the concurrence of every one else having any interest in the company, however comparatively insignificant it might be, and to which no objection of any character was made by any one until recently, though it has been in force, and constant operation, for upwards of 8 years, and to which objection is made now really only because of matters personal to the plaintiff's husband, one of the substantial owners of the concern—seems to have been a plan well suited to the purposes of the business of the company and of all persons who were and are its shareholders; though as to possible future shareholders and creditors it might be very different.

ONT.

S. C.

HENDERSON v. STRANG.

Meredith, C.J.C.P.

The main feature of the plan, so far as the disposition of this appeal is affected, was: that the defendant William Strang should have a controlling interest in the company as if the holder of more then one-half of its capital stock, and as if fully paid-up, though in reality nothing was actually paid by him for the stock. The form of payment gone through was really nothing but a form; the cheque sent in payment was never cashed by any one and was never intended to be cashed by any one.

The Act requires a real subscription and real payment for the shares of the capital stock of the company. There was only an unreal, a fanciful at most, subscription and payment for the 51 shares in question. It was entirely a matter of form—pantomime one might say. No money was ever paid to the company for the shares; and none was ever to be paid.

No deposit of the $51,000, or of a farthing of it, was ever made with the Strangs' co-partnership firm; nor ever was to be made. No dividends were really ever to be paid upon the stock; nor was any interest ever to be paid upon the imaginary deposit. No security was given or was ever to be given by the Strangs' firm for the $51,000 of the company's money lying idle without interest in their hands—in imagination. The money was never to be repaid to the company: that is plain, for, if it were, the real owner of it—Strang—would get neither dividends nor interest upon it. And it is all very well to say now, for the purposes of this argument, that perhaps creditors of the company might reach it and perhaps in case of a winding-up it might be reached; but if any such events were reached a very different story would be told, and would probably save it from all claimants—that is, the true story that it was never to be actually paid; the whole scheme was to give Strang a controlling voice in the concern without in reality having bought or paid for any shares in the stock of the company.

Though it was the scheme of every one concerned in this action and acted upon for upwards of 8 years, and though beneficial to them during all that time and likely to be as beneficial in the future if the plaintiff's husband would perform his part of it, it cannot stand if it were *ultra vires* the company, which is a company incorporated under the provisions of the Companies Act of Canada. The rights and interests of present shareholders are not

ONT.
S. C.
HENDERSON
v.
STRANG.
Meredith, C.J.C.P.

alone concerned, the rights and interests of possible future shareholders and creditors must, equally, be considered.

That the plan was one which the company could not lawfully act upon I can have no doubt; the Act (R.S.C. 1906, ch. 79, secs. 58 *et seq.*) requires payment for stock, payment with interest at 6 per centum per annum upon all arrears; and, as it seems to me, it is a waste of energy to contend that there was, or was intended to be, any kind of payment in this scheme: the defendant Strang was to have the position, or power, of a paid-up stockholder without having paid anything in any real way for the stock; but there was nothing fraudulent or morally wrong in that, because he was not to be paid dividends, nor was he to obtain any other money advantage, through such nominal ownership.

The plan being *ultra vires*, the defendant Strang cannot retain the position of a paid-up stockholder; nor, on the other hand, can the company put him in the position of the holder of stock upon which nothing has been paid, for the stock was not so taken, it was taken only as a part of the whole plan; neither the company, nor the Court, has any power to make, or enforce against him, a new and different contract; if the plan fall to the ground, it must fall altogether. As was said in *Carling's Case* (1875), 1 Ch.D. 115, 122, and, as I think, must occur to any one considering the subject: there was no contract to take any but fully paid-up shares; are you not altering that if you fix the subscriber with unpaid shares?

The result is, if these views are right, that the plaintiff's action should have been dismissed. I would, therefore, allow this appeal and direct that the action be dismissed, both with costs.

It may follow that the company, based so much on that *ultra vires* scheme, must for all practical purposes come to an end; but that is a stage which it had reached before this action was commenced, owing to the quarrel between the two principals concerned in it, resulting, for one thing, in the plaintiff's husband leaving, apparently without leave, the employment of the company and setting up a business in opposition to it.

And I feel bound to add that in any case I should have been unable to agree in the conclusion of the trial Judge that the scheme in question comprised a loan of the amount of the nominal value of the Strang stock to the defendant Strang. no loan was

ONT.

S. C.

HENDERSON v. STRANG.

Meredith, C.J.C.P.

intended, nor any loan effected. How could the company recover the amount from him as money payable by him to them for money lent by them to him? If the plan were *intra vires*, the imaginary money—there was no real money in the transaction—should remain with the Strang firm under the terms of the agreement embodying that plan: if the money had become the money of the company, and if for any reason the company were entitled to recover it, it would not be as money lent but as money payable under the terms of the agreement, or as money payable by the firm to the company for money received by the firm for the use of the company. Nor am I prepared to assent to the proposition that a loan, in good faith, to a co-partnership firm, of which a shareholder of the company is a member, is within the statutory prohibition against making any loan to a shareholder of the company; apart from such a provision there would be the right; in curtailment of it Parliament has not said that there shall be no loan to a company incorporated, or unincorporated, or co-partnership firm, of which the shareholder is a member, and we have no right to add to its prohibitions. It seems to be admitted that a loan to a "one-man corporation," of which the shareholder is the one man, would be unobjectionable, yet in fact it might be far more dangerous than if the loan were to a co-partnership firm or company of unlimited liability.

Nor am I at all able to agree in the notion that the law does not recognise—and if it did not Parliament does—Imperial, Federal, and Provincial; Imperial providing that Scottish firms such as the Strang company partnership are legal entities—the separate existence of co-partnership firms; that they are in no sense legal entities. They may sue and be sued; execution may issue against them or in their favour; their separate existence is recognised, and separate provision is made for the payment of their debts; so that in most of their attributes they are much the same as incorporated companies of unlimited liability; and I can imagine no good reason for lawyers shocking business men and business methods with fine-drawn notions regarding the want of legal existence of concerns the actual existence of which is ever before the eyes of every one.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

Britton, J.

ONT.

S. C.

HENDERSON v. STRANG.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of Masten, J., reported in (1918) 43 O.L.R. 617.

The argument upon the appeal took a very wide range, the common and statutory law of Scotland being included. In the view I take of the case the facts are these:—

The firm of J. B. Henderson & Co., of which J. B. Henderson was the sole partner, was carrying on business as a dry goods agent in Toronto, and was the agent of the manufacturing firm of William Strang & Son, of Glasgow, Scotland, composed of four brothers (now three), including William Strang. The Toronto firm was both purchasing and selling agent, and received large credits from the Glasgow firm. In 1909, Henderson was in ill-health, and, William Strang being in Toronto, they arranged to form a joint stock company, J. B. Henderson and Company Limited, to take over the Henderson business. The company was to have $100,000 capital, 1,000 shares of $100 each. Henderson was to receive shares to the amount of $3,000 for his stock in trade and $20,000 for his goodwill; his wife, the plaintiff, to invest $1,000; McJ., a traveller, $5,000; the cashier, $100; Miss S., $100. Strang was to "invest $51,000," to be deposited with his firm in Glasgow as security against any advances they were to make for payment of goods sold through them and to pay for goods supplied by them—the Glasgow firm to receive interest from the Toronto company at 6 per cent. for any such sums. Then Strang was not to be paid any interest on his shares, and his firm not to pay any interest on the $51,000 to be deposited by them. The $51,000 stock was to be issued as paid-up, but the amount was to be at once deposited with the Glasgow firm. The object of the arrangement was to secure to the company the best buying terms in the European market by prompt payment for goods bought and also to save exchange.

The charter was obtained, William Strang applying for it through his attorney, Mr. G., and being allotted one share. Henderson was allotted 235 fully paid-up shares (the 22nd November, 1909). Strang was elected a director.

Then the problem of how to carry out the proposed $51,000 transaction so that Strang might be safe and the law of companies satisfied, arose. In view of the arrangement already made, the company allotted the whole 510 shares to Strang, but he would

ONT.

S. C.

HENDERSON v. STRANG.

Riddell, J.

not accept them except as fully paid-up shares, and the agreement was drawn up and executed which appears in 43 O.L.R. 619, 620. Clause (3) of the by-law authorising this contract reads:—

"That as soon as William Strang shall have paid in full the amount payable in respect of the 510 shares subscribed by him, the sum of $51,000 be remitted to William Strang & Son, of the city of Glasgow, merchants, to be held by the said firm subject to the order of the company pursuant to the agreement which is appended, and the execution thereof under the seal of the company be and is hereby authorised."

This was approved in general meeting, at which Strang was present, and Mrs. Henderson, the plaintiff, was represented by proxy. The same by-law made Strang's shares common stock and the remainder preference stock, with a fixed cumulative dividend of 6 per cent.

Strang sent out a cheque for a sum in sterling money, which it was believed would realise $51,000. This was at once endorsed on behalf of the company and sent to the Glasgow firm. This scheme was adopted to save exchange etc.

The company allotted the $51,000 stock as paid-up stock—all parties considering the transaction as a payment to the company by Strang of $51,000 and a deposit by the company with the Glasgow firm of the same sum.

This took place in the summer of 1910, and there was no objection taken until some years later. Henderson fell out with the Glasgow people—friction arose—and this action was brought in July, 1916, for the relief mentioned in the report, 43 O.L.R. 617, where the result at the trial is given. The defendants now appeal.

The first question for determination is whether the transaction constituted a payment in full of the shares. Further consideration of the facts and the law has convinced me that my learned brother is right in holding the $51,000 shares paid-up.

Apart from the fact that our present statute, R.S.C. 1906, ch. 79, is different from the former statute, R.S.C. 1886, ch. 119, sec. 27, this seems sufficient payment.

The transaction is not, baldly, "You give me paid-up stock and I will give you credit," but "I will pay you $51,000 on condition that you will at once deposit the sum with my firm on a special account." The result is that, had the transaction been carried out

ONT.
S. C.
HENDERSON
v.
STRANG.
Riddell, J.

precisely, Strang would have paid the company $51,000 in cash, and the company would have at once handed the same sum to Strang for his firm. The setting off (so to speak) of the one payment against the other, so that there is no actual passing of money by one to the other, is considered sufficient in *Spargo's Case* (1873), L.R. 8 Ch. 407, approved in *Larocque* v. *Beauchemin*, [1897] A.C. 358. "If bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back" (p. 365 *ad fin.*), seems to be the test.

I am, however, unable to attach great importance to this question. If we should hold that the stock was not paid-up, the logical result would be that the money would be paid to the company, and by the company at once to the Glasgow firm, unless the agreement is illegal, so that the money could not be "legitimately" so paid. If then the agreement is valid, the whole effect of such a holding would be to cause an idle but expensive form to be gone through. The Court does not lend its assistance to such proceedings.

Moreover, the transaction has been acquiesced in, acted upon, made the basis of business, and it would be inequitable now to set it aside, if the agreement is *intra vires:* Brice on Ultra Vires, 3rd ed., p. 612.

The real question, as it seems to me, is, whether the agreement is *intra vires*. In this I entirely agree with the learned trial Judge in his conclusions under heads (b) and (c), but I am unable to agree as to (e).

I do not think that the deposit under such a contract as this is a loan within the meaning of R.S.C. 1906, ch. 79, sec. 29 (2).* No doubt it has been held in such cases as *Carr* v. *Carr* (1811), 1 Mer. 541 (note) 35 E.R. 799, *Devaynes* v. *Noble* (1816), 1 Mer. 530, 568, 35 E.R. 767, *Sims* v. *Bond* (1833), 5 B. & Ad. 389, 110 E.R. 834, *Foley* v. *Hill* (1844), 1 Ph. 399, 41 E.R. 683, that an advance to or deposit with a banker is in truth a loan and he becomes at once a debtor for the amount. But that is because he is debtor for the amount and it can be reclaimed at once. Here the amount cannot be reclaimed; it is not a debt, it is a deposit on special terms.

Moreover, the firm is not the shareholder. We need not con-

*2. The company shall in no case make any loan to any shareholder of the company.

ONT.
S. C.
HENDERSON v. STRANG.
Riddell, J.

sider what the legal status of a partnership and its members might be in the absence of a statute. The Imperial Act, 1890, 53 & 54 Vict. ch. 39, sec. 4 (2), expressly enacts: "In Scotland a firm is a legal person distinct from the partners of whom it is composed." (This is but a restatement in statutory form of the Common Law of Scotland, which differs from ours. See Bell's Principles of the Laws of Scotland.) The status of a partnership in Scotland determines its status in Ontario. The Courts have not been quite uniform in decision, but "a comparison of more or less recent cases exhibits a distinct and increasing tendency on the part of English Courts to approximate in practice to the theory that a person's status is governed by his *lex domicilii*:" Dicey, Conflict of Laws, 1896, p. 480, and notes; *cf.* Bigelow's edition of Story's Conflict of Laws (8th ed., 1883), sec. 320 *a*.

The deposit with the Glasgow firm was no more a deposit with William Strang than the dealings of Salomon & Company Limited were those of Aron Salomon: *Salomon* v. *Salomon & Co.*, [1897] A.C. 22.

A loan to the Strang firm was not then, in my opinion, a loan to the separate individual William Strang. It is not material that William Strang made or might make a profit out of the transaction. Shareholders are not prevented from obtaining casual advantages from their position, and the Court should not impose a prohibition where the statute has not.

I agree with the learned trial Judge in his conclusions (d) and (f).

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

Latchford, J.

LATCHFORD, J.:—I have had the advantage of reading the judgments of my Lord the Chief Justice and of my brother Riddell, and, while I agree in the result, I wish to guard myself against assenting to the proposition that the plan according to which the $51,000 was deposited with the Glasgow firm was *ultra vires* of the company. I regard the stock subscribed for by William Strang and allotted to him as having been fully paid-up. The agreement by which the amount which he paid for his stock was deposited with his firm was undoubtedly greatly to the advantage of the company, and was for good consideration. I do not, however, regard the $51,000 as a loan to one of the company's share-

ONT.
S. C.
HENDERSON v. STRANG.

holders—the Scottish firm not being a shareholder of the company—and the provisions of R.S.C. 1906, ch. 79, sec. 29 (2), were not, in my opinion, contravened.

Appeal allowed.

ONT.
S. C.

RICHARDSON v. McCAFFREY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 10, 1919.

MOTIONS AND ORDERS (§ II—10)—ORDER OF MASTER—STAYING PROCEEDINGS—SUIT PENDING—APPEAL—ORDER OF JUDGE REVERSING—INTERLOCUTORY—LEAVE TO APPEAL—ONTARIO JUDICATURE ACT (R.S.O. 1914, c. 56).

An order of a Judge in chambers reversing an order of a Master in Chambers staying proceedings upon a reference pending an appeal is an interlocutory order within the meaning of s. 25 of the Ontario Judicature Act (R.S.O. 1914, c. 56) and leave to appeal from it must be obtained before an appeal is competent.

Statement.

APPEAL by the defendant from an order of MEREDITH, C.J.C.P., in Chambers, reversing an order of the Master in Chambers whereby the proceedings upon a reference were stayed pending an appeal by the defendant to the Supreme Court of Canada.

The action was for foreclosure, and the judgment was the usual foreclosure judgment.

H. J. Scott, K.C., for the appellant.

A. C. Heighington, for the respondents.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from an order of the Chief Justice of the Common Pleas, dated the 19th December, 1918, reversing an order of the Master in Chambers, dated the 2nd day of that month, staying proceedings under the reference directed by the judgment, pending an appeal by the appellant to the Supreme Court of Canada.

The action is for foreclosure, and the judgment is the usual foreclosure judgment.

The contention of the appellant is, that the effect of sec. 76 of the Supreme Court Act, R.S.C. 1906, ch. 139,* is automatically

*Section 75 of the Act provides that "no appeal shall be allowed until the appellant has given proper security to the extent of $500, . . . that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court."

Section 76 provides that, "upon the perfecting of such security, execution shall be stayed in the original cause," subject to certain provisoes.

ONT.
S. C.
RICHARDSON v. MCCAFFREY.
Meredith, C.J.O.

to stay proceedings in the action after security for costs has been allowed; and, if that is not the case, the Court, in the exercise of its discretion, ought to stay the proceedings until the appeal to the Supreme Court of Canada has been heard and determined.

The preliminary objection is taken by the respondents that the order appealed from is an interlocutory order, and that, leave to appeal from it not having been obtained, the appeal is not competent.

We think that this objection is well taken, and that the order appealed from is an interlocutory order within the meaning of sec. 25 of the Judicature Act, R.S.O. 1914, ch. 56*: Holmested's Judicature Act, 4th ed., p. 117, and cases there cited.

An order for security for costs which directed that if security should not be given within the time limited the action should be dismissed, was held by the Court of Appeal to be an interlocutory order: *Stewart* v. *Royds*, 118 L.T. Jour. 176; and, if such an order be an interlocutory one, I see no reason why an order refusing to stay proceedings pending an appeal is not interlocutory. Reference may also be made to *Gibson* v. *Hawes* (1911), 24 O.L.R. 543, in which it was held by a Divisional Court that an order staying all proceedings in the action until after the disposition of an action in the High Court, was an interlocutory order.

If there was any doubt as to the order in question being an interlocutory one, we should exercise the power conferred upon the Court by sub-sec. 2 of sec. 25 and determine that it is an interlocutory order.

If Mr. Scott's contention as to the effect of sec. 76 of the Supreme Court Act is well-founded, I doubt whether an order to stay was necessary, and it may yet be open to the appellant to invoke the section upon the reference; and if the officer to whom the reference is directed decides to proceed with the reference, to apply for a direction to him to refrain from so doing until the appeal to the Supreme Court of Canada is heard and determined.

As bearing upon the question as to the effect of the section, reference may be made to what was said by Bankes, L.J., in *In re Weatherley*, [1918] W.N. 366, at p. 367. I must, however, not be

*25.—(1) There shall be no appeal to a Divisional Court from an interlocutory order of the High Court Division, whether made in Court or Chambers, where before The Ontario Judicature Act, 1881, there would have been no relief from a like order by an application to a superior court.

(2) Any doubt which may arise as to what orders are interlocutory shall be determined by the Divisional Court.

ONT.
S. C.
RICHARDSON v. MCCAFFREY.
Meredith, C.J.O.

understood to express any opinion as to the effect of the section; and it may be that, even if Mr. Scott is right, the order appealed from, being unreversed, will be an answer to any such application as I have mentioned.

The appeal must be dismissed as incompetent, and I see no reason why the costs here and below should not follow the result; and I would so direct. *Appeal dismissed with costs.*

ONT.
S. C.

COWAN v. FERGUSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. February 10, 1919.

COVENANTS AND CONDITIONS (§V—60)—BUILDING RESTRICTION—GENERAL CHANGE IN CHARACTER OF NEIGHBOURHOOD—EXTINGUISHMENT.

Where after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the Court will not enforce the covenant.

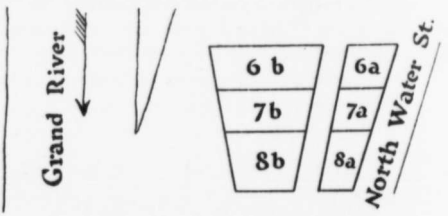
[*Sobey* v. *Sainsbury*, [1913] 2 Ch. 513, referred to.]

Statement.

APPEAL by plaintiffs from judgment of Latchford, J., in an action to restrain the building of a foundry under a covenant in an agreement. Affirmed.

The judgment appealed from is as follows:—The plaintiffs are manufacturers of wood-working machinery in the city of Galt, and, as an incident to their business, and only for their own requirements, maintain an iron foundry. From the Hon. Robert Dickson, who, in 1842, owned a large area of land in Galt, they have acquired, through one N. D. Fisher and others, a title in fee simple to lots 8a and 8b as shewn on a plan prepared for Mr. Dickson.

The defendant is an iron-founder, who, through many mesne conveyances, has become the owner in fee of lots 6a and 6b and 7a and 7b as shewn on the same plan. The root of her title, like that of the plaintiffs, is in Dickson. The relation of the properties of the parties may be made clear by a diagram:—



The defendant does not in any way enter into competition with the plaintiffs; and the business which she carries on causes no appreciable damage to the plaintiffs—not even, as I find, increasing their fire-risk or their insurance-rates.

The plaintiffs seek in this action an injunction restraining the defendant from carrying on the business of a foundry, and, in addition, damages.

After the plaintiffs knew the purpose to which the defendant intended to devote her property, they not only made no objection, but actually encouraged the defendant in establishing her foundry. There is no merit whatever in the plaintiffs' action. They base it wholly upon a restriction to which Dickson wished to subject purchasers from him of the lands in question and other lands further north, which were served, like the properties of the parties, by an hydraulic canal which Dickson had constructed.

It is undoubted that a restriction was imposed in 1842 upon the predecessors in title of the parties, that only one foundry should be carried on upon the lots served by the canal. At the time no power except that of water was in use, ordinarily, in Upper Canada. Dickson's intention was, it would seem, to prevent competition among the lessees from him of the power which he had made available.

The restriction was contained in a form of agreement, which was not registered; and the defendant is, I think, a purchaser for value without notice of such restriction.

Since 1842, conditions have so changed in this Province that the object of the restriction cannot be attained. As in *Sobey* v. *Sainsbury*,] 1913] 2 Ch. 513, to give effect to the plaintiffs' contention would be to perpetuate, far beyond the real intention of the original contracting parties, restrictions which by the course of time have become obsolete and meaningless. The plaintiffs may not be actuated by mere caprice, or by a desire to make money out of a possible breach by the defendant of technical and obsolete restrictions; but, in the altered state of circumstances, the enterprise of the defendant should not be prohibited at the instance of persons who have not sustained and are never likely to sustain damage by what the defendant has done.

In my opinion the action fails, and it is dismissed with costs.

R. McKay, K.C., and *Gideon Grant*, for the appellants.

M. A. Secord, K.C., for the respondent.

ONT.

S. C.

COWAN v. FERGUSON.

Meredith, C.J.O.

The judgment of the Court was read by

MEREDITH, C.J.O.:—The appellants are the owners of two lots on the hydraulic canal in the city of Galt, being lots 8a and 8b as shewn on a plan prepared by Deputy Surveyor Kerr in or about the month of February, 1842, and the respondent is the owner of lots 6a and 6b and 7a and 7b according to the same plan.

The action is brought to restrain the respondent from erecting any building for a foundry and from carrying on the business of a foundry on her lots.

The right to this relief is based upon a covenant contained in an agreement between Robert Dickson, the then owner of these and other lots, and one Fisher, dated the 15th February, 1842, by which Dickson covenanted with Fisher, his heirs and assigns, that in sales and agreements for sale by Dickson or his heirs or assigns of water-lots or lots of land in the village of Galt, with the privilege of using water-power thereon, there should be inserted in the instrument or instruments evidencing such sale or agreement for sale, a clause restraining and prohibiting "such purchaser or purchasers or person or persons from carrying on the business of a foundry on the land so sold or agreed to be sold to him or them as aforesaid."

The title of the appellants is derived through Fisher and the title of the respondent through William Boyce, to whom the devisees in trust under the will of Dickson, on the 27th February, 1849, conveyed lots 7a and 7b (described in the conveyance as lot 7), and to lots 6a and 6b through James Blain, who derived title from Dickson.

In the view I take, it is unnecessary to consider the question whether the respondent is bound by the covenant which Dickson entered into with Fisher, or the question whether the appellants are entitled to the benefit of it.

When the covenant was entered into, Galt was a small country village, and water-power was that used in manufacturing industries. Galt has now become a thriving industrial city, having within its limits many manufacturing establishments, and steam and electrical power have to a very large extent replaced water-power.

When Fisher purchased from Dickson and established his foundry business, it was, no doubt, important to him that he should not be subjected to the competition of other foundries; and

the covenant was, doubtless, entered into for the purpose of protecting him from such competition by persons who should thereafter purchase Dickson's lots on the canal.

The case is, therefore, one, I think, for the application of the principle which my brother Latchford applied—that where, after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the Court will not enforce the covenant.

Dealing with this principle, Sargant, J., said in *Sobey* v. *Sainsbury*, [1913] 2 Ch. 513, 529, 530, referring to *German* v. *Chapman* (1877), 7 Ch. D. 271, and *Knight* v. *Simmonds*, [1896] 2 Ch. 294:—

"The effect would, but for the principles applied in the cases I have referred to, have been to stereotype and perpetuate, far beyond the real intention of the contracting parties, and to the prejudice of successive generations, restrictions which had in the course of time become obsolete and meaningless. And, having regard to the great number of persons who in the case of building schemes may be originally entitled to enforce these covenants, it would, I think, be an undue limitation of the discretion of the Court to refuse specific performance of the covenant if the refusal should be restricted to cases where there was some personal or individual default on the part of the plaintiff or his predecessors in title. This might easily result in the enforcement of such restrictions after long intervals of time and under totally changed conditions from motives of spite or caprice, or from a desire to make money out of the relaxation of technical but obsolete restrictions. And it is for reasons of this kind that I understand James, L.J., and Lindley, L.J.,* to have carefully stated that the Court may refuse to specifically enforce such obligations in an altered state of circumstances: 'Whatever the explanation of the altered state of things may be.'"

While the change of circumstances in the case at bar differs from those which had taken place in the case just referred to, the principle enunciated by Sargant, J., is equally applicable.

It was contended by counsel for the appellants that this principle was applicable only when the party seeking to enforce the covenant or his predecessor in title had been a party to making

*In the *German* and *Knight* cases, *supra*.

ONT.

S. C.

COWAN v. FERGUSON.

Meredith, C.J.O.

the changes; but the contrary is emphatically stated by Sargant, J., in the passage from his judgment which I have quoted, and the observations of James, L.J., and Lindley, L.J., support his view, for they speak of the doctrine applied by Sargant, J., as being applicable not only where the changes have been permitted or acquiesced in, but also where they are the result of "a long chain of things."

The judgment of my brother Latchford may also, I think, be supported upon the ground that the appellants, knowing that the respondent was erecting a building to be used as a foundry, acquiesced in what she was doing and even made suggestions as to the mode of constructing part of the building.

It is, besides, conceded that the appellants have not sustained and will not in the future sustain any injury from the use to which the respondent has put her property.

For these reasons, in my opinion the case is not one in which the Court should interfere to enforce the covenant; and I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

ALTA.

S. C.

STOVER v. GOLD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Simmons and McCarthy, JJ. October 20, 1919.

CONTRACTS (§ IV B—335)—OPTION AGREEMENT—BREACH—NOTICE—ACTION FOR DAMAGES—TIME LIMIT—TENDER OF PURCHASE MONEY.

Where there has been a breach of an option agreement to purchase land, the holder of the option may, upon receiving notice of the breach, bring an action for damages, although the time limit named in the option has not expired. It is not necessary for him to tender the purchase money required under the option to be paid within the time limit, before bringing the action.

Statement.

APPEAL from the judgment of Stuart, J., in an action for damages for breach of an option agreement. Reversed.

The judgment appealed from is as follows:—

On November 16, 1916, an agreement in writing was executed by the defendant as party of the first part and the plaintiff as party of the second part in the following terms:

"The first party in consideration of $100.00 in hand paid by the second party, the receipt of which is hereby acknowledged, agrees and covenants with the second party to sell him the option to purchase the following described lands, . . . containing 1,440 acres, more or less, according to Government survey thereof, for the sum of $21,690.00.

"The second party shall have until March 1, 1917, to pay the first half of

the above and in case he fails to do so shall forfeit all money paid down and this agreement shall become null and void.

"The first party may have the right to sell the above property himself, without advertising same or through other agents, and in case he does shall sell at not less than $16 per acre, and in such case shall pay the second party $300 for such privilege.

"R. F. Gold.
"C. C. Stover."

On January 11, 1917, the defendant wrote the plaintiff a letter informing him that he had sold the property and enclosing a cheque for $300 "to take up (as he said) the option which I gave you on the Countryman property." He also said: "I have sold it to a pretty good man, who expects to handle it himself. You will have to buy me a dinner on this. Please return option to me."

On January 24, the plaintiff, who had been absent in Spokane, wrote acknowledging the receipt of the letter and cheque. He went on to enquire to whom the property had been sold and whether defendant had sold it without the aid of a third party or of advertising. He said he thought there was a third party in the deal. He also claimed another $100, the amount paid for the option "in case the sale is *bonâ fide* as per our option."

On January 31, the defendant replied saying he had sold the land to one Ponsford for $20 an acre and denying that he had either advertised it or sold it through an agent. He declared that Ponsford had come to him directly and had asked to purchase it. He also denied any obligation to return the $100. The defendant was a banker or investor in Minneapolis and the plaintiff lived at Milk River, Alberta.

Prior to November, 1916, the property had been owned by one Countryman who had been in great financial difficulty and had become heavily indebted to the defendant. The defendant had taken a transfer of the property from Countryman and had become the registered owner but he still held the title merely as security for his debt. Countryman, however, was not a direct party to any of the transactions but seems in fact to have ratified all that Gold had done. Were it not for this it seems to me that a grave question might have arisen as to Gold's real authority, as, to some extent, a trustee for Countryman, to make the contracts which he did. Doubtless the giving of the transfer was intended to cover such a point as that.

After the defendant's letter of January 31, there seems to have been a considerable period during which the parties were considering their position. On May 18, defendant wrote enclosing a cheque for $100 from Countryman himself. This letter was not produced but in a subsequent one of May 24, the defendant said he had done this at Countryman's suggestion but that he was still confident that he was not obliged to pay that amount.

The plaintiff on May 19, had acknowledged by letter the receipt of this cheque but had refused to accept it and had returned it. In this letter the plaintiff declared that he would not release a caveat which he had filed on the land.

The plaintiff never returned the cheque for $300. He said that he had not done so at first because he then thought the defendant was acting in good faith, but his reason for not returning it later, when he thought he had discovered otherwise, was not very clearly explained, if explained at all.

ALTA.

S. C.

STOVER v. GOLD.

The defendant did not succeed in making a transfer of the land to Ponsford until after the plaintiff had filed a caveat. According to the statement of claim this caveat was filed on Feb. 5, 1915; on May 20, 1917, the defendant executed his transfer to Ponsford; and this transfer was registered and certificate issued to Ponsford, subject to the caveat, on May 29, 1917. On Sept. 6, 1917, Ponsford served a notice under s. 89 of the Land Titles Act, Alta stats. 1906, c. 24, demanding that the plaintiff proceed to establish his claim under his caveat.

On Oct. 29, 1917, the plaintiff began this action and in his statement of claim, after setting forth his option agreement he alleged that the defendant had subsequently sold the land to Ponsford contrary to the provision of the agreement and in violation of its terms (meaning of course not in either of the ways permitted by the agreement) and that he still refused and neglected to carry out that agreement. He alleged that he had always been ready and willing to carry out the provisions of the agreement. He alleged further that by reason of the defendant's breach of the agreement he, plaintiff, had been prevented from procuring title to the said land or dealing with or disposing of the same and had lost a sale at $20 an acre and so had suffered great damage.

Subsequently Ponsford applied to be made a party defendant and an order to the effect was made on Nov. 29, 1917. This was after Gold had filed a defence. On Jan. 4, 1918, the plaintiff filed an amended statement of claim referring to Ponsford also as a defendant and while making the same claim for damages only as against Gold, asked also for a lien for the amount thereof upon the land.

Next Ponsford began to attack the caveat because action thereon had not been begun in time. Apparently this matter did not come to an issue. On March 30, 1918, the plaintiff agreed to release the caveat upon receiving a sufficient bond securing him repayment of any damages and costs he might recover against Gold. This bond was given, the caveat was withdrawn, title was given to Ponsford apparently with the plaintiff's consent and Ponsford dropped out of the case.

I have ascertained the exact facts in regard to these latter occurrences by reference to the file though the documents I have looked at were not put in as exhibits. But I understood counsel to have made at the trial explanations as to the state of the parties to the action to substantially the effect I have mentioned because it was necessary to explain the absence of anyone representing Ponsford.

Now the most important fact in the case remains to be mentioned. On account of the receipt of the notice from Gold that the land had been sold to Ponsford the plaintiff never gave any notice that he took up the option which had been given him by the defendant and made no tender either on March 1, 1917, or at any other time of the one-half of the purchase price mentioned in the agreement which was by its terms to have been paid by that date.

The first matter to be dealt with is the interpretation of the contract. What was the real restriction placed upon Gold with regard to his right of sale? Notwithstanding some carelessness in the wording I think it is clearly the meaning of the contract that Gold was not to be at liberty either to advertise the property or to sell it "through other agents." The word "without" must be read, I think, as grammatically connected with the second phrase as well as with the word "advertising" so that the real sense is "without advertising or (without doing so) through other agents." Giving a negative

sense to the word "without" which it really has in any case, we get, what was quite obviously really intended, negation of action through other agents.

We have then this peculiar contract. For a consideration of $100, Gold bound himself to keep his offer to Stover open till March 1. Yet he was free to sell to other parties in the meantime but not by means of advertising and not through an agent and also at not less than $16 an acre. If he did sell within the strict limit of the right reserved to do so, he was to pay Stover $300.

The plaintiff's case is that the sale Gold made was made through an agent, one Lee, of Minneapolis, that therefore it was a sale not permitted at all, that Gold therefore violated his contract and that in consequence the plaintiff was relieved from the obligation of taking up the option on March 1, by paying one-half the purchase-money.

I do not propose to deal in detail with the facts about the method of the sale to Ponsford. In reality it was not a sale but an exchange. Ponsford exchanged a tenement house in Minneapolis for the Countryman land here in question. Whether this was in itself a violation of the agreement is a point which was not raised. Gold testified that he got in the tenement house the equivalent of $20 an acre for the land. However this may be, I think the proper inference to be drawn from all the facts is that the so-called sale was made through Lee. Whether Gold really directly employed Lee or not seems to me to be immaterial if it was in fact through Lee that the dealing was initiated. Lee was a real estate agent and had the property listed with him by some one according to Leffingwell's evidence. He was not called to testify. The denials contained in his letters, while obviously lies, simply serve to strengthen my belief that he was for a purpose trying to cover something up which somebody wanted to conceal. There was obviously more behind the whole thing than was revealed in the evidence. Possibly Countryman did the listing with Lee. Even if it were not, as I have suggested, quite immaterial who did the listing as long as the sale was in fact initiated by Lee by bringing the parties together, still the connection between Countryman and Gold and, at least immediately after the exchange, between Gold and Lee, was so close that I cannot resist the conclusion that Gold was in a real sense responsible for the listing with Lee although he may not, as he said in the box, actually have done it himself.

The proper conclusion, therefore, is, in my opinion, that the defendant went beyond the rights reserved to him in the agreement and the situation becomes just the same as it would have been if the agreement had been an option in the usual form and the defendant had, without waiting till the expiration of the time allowed to the plaintiff to accept, agreed to sell the property to another person and had at once informed the plaintiff of the fact.

I think the plaintiff must fail. I can see nothing in what occurred to relieve the plaintiff from his obligation to accept the option on March 1, by notifying Gold that he had done so and by paying or offering to pay one-half the purchase-price. It may be that his uncertainty as to whether Gold had or had not sold within the rights given him by the agreement might relieve him from indicating his acceptance in the required form on the exact date fixed and that he would have been held to have still accepted in time if he had done so as soon as he had discovered that Gold had exceeded his rights. But even when he did think he had discovered this, he made no tender and indicated in no other way his desire to exercise his rights under the option by obligating

ALTA.

S. C.

STOVER v. GOLD.

himself as a purchaser. But the plaintiff became suspicious at once, as is indicated in his letter of Jan. 24. He was informed very early in February by the letter of Jan. 31, to whom the property had been sold and for what amount. He had considerable time to make enquiries and unless something had occurred to remove his suspicions, I cannot see anything which would justify him in failing to indicate on March 1, in the proper method, that he was then ready and willing to buy the property or which would excuse him from doing so if he really desired to retain his rights. He could have secured higher rights than Ponsford and, as his filing a caveat shews, he would have been absolutely secure. It may be suggested that he was not obliged to buy a second law-suit with Ponsford. But I cannot really understand how the plaintiff can expect to declare upon a contract of purchase and sale until one is formed. There never was a contract of purchase and sale formed at all. The only contract ever concluded between the parties was the option. Even admitting that on receipt of the notification of the sale to Ponsford the plaintiff was justified in assuming that the defendant did not intend to carry out his part of the bargain —a very large assumption because it might have been that Gold wanted the Minneapolis apartments and that Ponsford was ready to take the Alberta land even subject to the option in exchange therefor and ready to fulfil Gold's obligations with respect thereto—yet what was the consequence? It is somewhat illogical to say that Stover was on that account relieved from doing his part because he was not yet legally bound to do anything, under the terms of the option contract. Then assuming that Gold's action did put it out of his power to fulfil his bargain with Stover what did Stover lose? I do not think he can be said to have lost a contract of purchase and sale until one was formed and one has never been formed. The plaintiff has never even up to the trial indicated his readiness and willingness to buy. Did he ever really mean to buy or did he not? Who knows? My impression is, from the way he and his witness Madge, who had agreed to go in with him, spoke, that they were simply expecting to resell and to do this not after themselves taking up the option and binding themselves by a covenant to pay but by using the option as a means of delay until they could find someone who would yield them a profit by buying the option from them. But Stover had no right to sell the option. An option is not assignable unless it is agreed to be so and the one in question says nothing about "assigns." His option was, therefore, of no value as something which he could transfer to another without coming into an obligation of any kind himself and he cannot recover therefore any damages in that regard for the loss of it. It was indeed of value as giving him a right to buy himself, a right to create, if he so pleased and fulfilled the necessary conditions, a contract between himself and Gold which Gold would be bound to observe, for the purchase and sale of the land. But he never exercised his right to create such a contract. Even giving him all the time he could ask he never took the steps necessary to create the contract for the breach of which he is really in substance seeking damages. He did not prove to my satisfaction that he was ever ready and willing to perform his part even assuming that the contract had been created.

The plaintiff has misapplied, in my opinion, the principle that where two parties are both bound by a contract and one of them declares his intention not to fulfil his part the other is thereby relieved in some cases from performing his part. It is, I think, an altogether unwarranted extension of this principle to say that in the circumstances of this case the plaintiff was by Gold's action

relieved from the necessity of doing what he needed to do to create a contract of sale and purchase at all and therefore entitled to sue just as if one had been created.

ALTA.
S. C.
STOVER v. GOLD.

The action will be dismissed with costs.

Shepherd, Dunlop and *Rice*, for appellant.

Ball and *Holyoak*, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.

HARVEY, C.J.:—It is contended by counsel for the respondent that the interpretation placed on the terms of the contract by the trial Judge was erroneous and that there was, in fact, no breach, even though the sale made by the defendant was made through an agent.

The term in question might, no doubt, be interpreted in the manner contended for on behalf of the defendant if one had regard only to the English but one must look at the purpose, and doing so the only sensible interpretation seems to me to be that given by the Judge. Moreover, that is the interpretation which the plaintiff put on it, which was accepted without question by the defendant. There was, therefore, it appears to me clearly a breach of the agreement to give the defendant until March 1 to accept the offer to sell by paying the amount specified, and upon receipt of the letter of Jan. 11 notifying the plaintiff that his rights were terminated, in my opinion the latter at once had the right to bring an action for damages for breach.

In *Roots* v. *Carey* (1914), 17 D.L.R. 172, 49 Can. S.C.R. 211, the vendor, after giving an option, as in the present case, conveyed the land to another and at p. 182 (17 D.L.R.) and at p. 224 49 Can. S.C.R., Duff, J., says:

> It may very well be that on discovery of the conveyance to Brown, the respondent could have treated the execution of the conveyance as a breach of the contract embodied in the memorandum of November and have sued for damages.

In that case it was sought to establish a complete contract of purchase and sale by acceptance of the option, which, however, failed. In the present case, however, no such attempt is made.

The trial Judge seemed, however, to be of opinion that the plaintiff was bound to offer to take up the option according to its terms in order to succeed. With all respect I think that is not the correct view. As soon as the defendant notified the plaintiff of his repudiation of the agreement the plaintiff might, I think, have brought his action and might have had it tried before March

ALTA.

S. C.

STOVER v. GOLD.

Harvey, C.J.

1. It may be a difficult question to determine what the damages are but whatever they are the plaintiff is entitled to recover. The damages are not necessarily the difference between the price at which the land is offered and its real value because the damages suffered by the plaintiff are not what he lost by not getting the land which he was ready and willing to buy, but what he lost by not having the right to get it if he were ready and willing to do so.

In my opinion he does shew that he could, and probably would, have taken up the option, though he had not the money to do so himself. Though the trial Judge points out that the option was not assignable, plaintiff's counsel points out that all the plaintiff required to do was to intimate his acceptance of the offer when he would have a contract which would be assignable.

The evidence shews that it was through one Madge that the plaintiff proposed to take advantage of the option and Madge states that he was prepared to advance the money and that it was agreed between him and the plaintiff that they would share equally in the profit on a sale. It seems fairly clear from the evidence that $20 an acre was a fair value for the land, for which they might have sold it and it was the price at which the defendant did sell it.

This would be $7,110 more than the price at which the plaintiff had the right to purchase it. If the plaintiff had accepted the offer and assigned a half interest to Madge it may well be that the two would have had a good right to claim damages and that $7,110 would be the proper amount of such damages but he did not do that and all the damages he, himself, has suffered is one-half of that amount, since it is only one-half of that which he would have received. I cannot see any way in which he can maintain any claim for the portion which Madge would have gained.

The plaintiff paid $100 which was to be credited on the purchase price. Though the defendant offered to return this he still has it. He, however, paid the plaintiff $300 when he made the sale, which the plaintiff still has. The plaintiff thus has benefited to the extent of $200 which should be deducted from the amount of his damages.

I would allow the appeal with costs and give judgment for the plaintiff for $3,355, being one-half of $7,110, less $200, with costs.

Appeal allowed.

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER Co. Ltd.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. May 8, 1919.

NEGLIGENCE (§ I C—50)—TRESPASSER—INTELLIGENT BOY—DANGER SIGNALS AND SIGNS—DISREGARD OF—INJURY—ACTION FOR DAMAGES.

The negligence of an intelligent boy who is able to read, in disregarding danger-signs and warnings put up at or near the place where he is injured, in a place where boys are not in the habit of frequenting, disentitles him to damages for the injuries sustained.

[*Cooke* v. *Midland Great Western R. Co. of Ireland*, [1909] A.C. 229, distinguished.]

Statement.

APPEAL by plaintiff from the judgment of Masten, J., in an action by an infant, suing by his next friend, to recover damages for injuries sustained from an electric shock, when he was walking upon one of the defendants' pipe-lines. Affirmed.

By his statement of claim the plaintiff alleged:—

2. That the defendants were an incorporated company, engaged in the production, transmission, and sale of electricity and compressed air for power and light purposes.

3. That the defendants' plants for generating and producing the electricity and compressed air were situated on the Montreal and Matabitchouan rivers, several miles south-easterly from the town of Cobalt, and the electricity was transmitted by wires strung on poles, and the compressed air was conducted through iron pipes placed above the surface of the ground from the said plants to the town of Cobalt, with branches of each running to various mines between the plants and the town. The wires and pipes passed through what was known as "Gillie's Limit."

4. That on the 31st July, 1917, the plaintiff was walking along one of the said branch-pipes of the defendant company upon or near the property known as the "Provincial Mine," situate at or near the boundary-line between the said Gillie's Limit and the township of Coleman, where it crossed a shallow ravine, and, while so walking, came in contact with an electrical transmission wire belonging to the defendants. The transmission wire was heavily charged with electricity and crossed the pipe at right angles, between 3 and 4 feet above the surface of the pipe.

5. That, as a result of coming into contact with the said high-power transmission wire, the plaintiff was knocked off the said pipe to the ground, a distance of 12 feet, and was badly bruised and

ONT.

S. C.

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LTD.

injured by the fall, and his face, body, and feet were severely burned by the electricity, with the result that his face is badly disfigured, parts of his feet have had to be amputated, and he is permanently crippled and disabled.

6. That the defendants well knew that the public were accustomed to walk along the said pipes in the locality where the plaintiff was injured, and the defendants were negligent in not properly guarding the said pipes, and were further negligent in constructing and maintaining the said high-power transmission wire in such close proximity to the said pipe, and in not properly guarding the said wire to prevent the possibility of coming in contact therewith.

7. That the plaintiff had been ill and suffered continually since he sustained the said injuries, heavy medical and other expenses had been incurred, and the plaintiff would always be prevented from engaging in manual work or exercises.

The plaintiff claimed $5,000 damages.

The defendants denied negligence and alleged that the plaintiff's injury was due to his own negligence, particularly in disregarding danger-signs and warnings put up by the defendants at or near the place where the plaintiff was injured.

The action was tried before MASTEN, J., and a jury, at Haileybury.

Questions were left to the jury, and these with the jury's answers thereto were as follows:—

1. Was the plaintiff on the pipe-lines where the accident occurred with the knowledge or permission of the defendants? A. No.

2. Were children and other persons in the habit of walking on the defendant's pipe-lines to the knowledge of the defendants? A. Yes.

3. If so, did the defendants object or seek to prevent it? A. No.

4. Were children or others in the habit of walking on the defendants' pipe-lines at the place where the accident occurred? A. No.

5. If so, were the defendants aware of the practice? A. No.

6. Was the plaintiff aware that the barricade and notice thereon were intended to warn persons not to walk on the pipe-lines at that place? A. Yes.

ONT.

S. C.

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LTD.

7. In the construction or maintenance of their lines were the defendants guilty of any negligence which occasioned the accident? A. Yes.

8. If so, in what did such negligence consist? A. In the electric wires being too close to the pipes.

9. If you find that the defendants are liable, at what sum do you assess the damages? A. (1) To the infant plaintiff, $2,500. (2) To the father, $410.

The judgment appealed from is as follows:—At the close of the plaintiff's case, counsel for the defence moved for a nonsuit, and the hearing of that motion was enlarged until after the evidence for the defence had been put in and the case had gone to the jury. The motion was then renewed.

Notwithstanding the very able argument of Mr. Allen in answer to the motion for a nonsuit, I am of opinion that it must succeed.

Without determining whether the plaintiff was a trespasser or a licensee when walking upon the pipe-line of the defendants, I find that the evidence adduced fails to disclose any duty owing to the plaintiff by the defendants which they failed to observe and perform. There was no evidence proper to be submitted to the jury in support of question No. 7, or upon which they could find as they have. Consequently the motion for a nonsuit must be allowed, and the action dismissed with costs, if demanded. I trust, however, that the defendants may see their way to forego their claims for costs.

A. G. Slaght, for the appellant.

R. S. Robertson, for the respondents.

Meredith, C.J.O.

MEREDITH, C.J.O. (at the conclusion of the argument for the appellant):—The fatal difficulty in the way of the success of this appeal is that the jury have found that boys were not in the habit of frequenting the place where this boy was when he was injured. That seems to me to be conclusive against the appellant. The only ground upon which the respondent company could be made liable would be upon the application of the principle of such a case as *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, where on the premises of a person there is something which is dangerous to children who resort there to play, and it is known to the person that children do resort there. That doctrine has, in my judgment, been pressed in that case to the utmost limit.

ONT.

S. C.

SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LTD.

Meredith, C.J.O.

Then, if that difficulty were not in the way, I do not see what the respondents could or ought to have done that they failed to do. The places on their line which are dangerous they took pains to surround with barricades, and they put up notices with large letters upon them, and they also indicated by the notices why they were placed. The boy saw these notices, was able to read them; he was an intelligent boy and knew that it was dangerous to go into the enclosure surrounded by the barricade.

Now, as far as I am concerned, I cannot follow the argument that, if he did not know of the existence of the danger from the wire, he was only warned against the danger of slipping off the pipes. What seems to me to be a complete answer to that is that, if that were the case, there would have been notices all along the pipe-line, but it was only at these dangerous places that the notices were put. What the respondents did was just the same as if they had a patrolman who said "Don't go over into that enclosure, it is dangerous to go there," and it shocks my common sense to think that a boy or other person who has been warned in that way and chooses to go there, and is injured by something that he did not expect to find, should be entitled to recover.

The appeal is dismissed without costs.

Maclaren, J.A.

MACLAREN, J.A.:—I cannot quite agree with the learned Chief Justice in the latter part of his deliverance. I concur in the result.

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

MAGEE and HODGINS, JJ.A., also concurred.

Appeal dismissed without costs.

ONT.

S. C.

HESS v. GREENWAY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. February 12, 1919.

LANDLORD AND TENANT (§ III C—63)—LEASE—SUB-LEASE—DEFECTIVE PREMISES—INJURY TO PROPERTY OF SUB-TENANT—RIGHTS OF PARTIES.

A lease under the Short Forms of Leases Act, R.S.C. 1914, c. 116, contained a clause under which the owner agreed to heat the demised premises "during all lawful working days to a reasonable extent." The lessor was not to be responsible for damages "during necessary repairs to the heating plant, nor if the parties under contract with the lessor to heat said building fail to do so, until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of the said building himself and shall have had a reasonable opportunity of remedying such conditions."

The lessees sublet part of the premises to the plaintiff, who suffered damages through the freezing of the water pipes between Saturday and Monday morning during an unusually cold period.

ONT.

S. C.

HESS v. GREENWAY

Held, that the sublessee did not incur any liability to the owner on the covenant of his immediate landlord to "repair, reasonable wear and tear only excepted," but took subject to the obligation of such immediate landlord, and had no right to look to the owner to repair any part of the demised premises. He and his immediate landlord took the premises as they were and were not entitled to damages for loss sustained owing to the defective condition of the premises.

[*Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, distinguished.]

Statement.

An appeal from the judgment of Latchford, J., in an action for damages for the loss sustained by the plaintiff owing to the bursting of a steam-pipe in a room occupied by him in a building owned by the defendant Elliott. Affirmed.

The judgment appealed from is as follows:—For some time prior to December, 1917, the plaintiff carried on the business of type-setting in part of a building, extending from Nelson street to Richmond street west, in the city of Toronto, owned by the defendant Elliott. On Nelson street the building was numbered 74 and 76, and on Richmond street 229, 231, and 233. Hess occupied part of the Richmond street front, under a lease from the owner. In July of 1917 the defendant Greenway, who carried on business as "The Greenway Press," arranged with Hess and Elliott that Hess would surrender the lease which he held, that Elliott would demise to Greenway the ground-floor of No. 74 Nelson street for three years from the 1st September, 1917, and that Hess would sublet from Greenway for the same term a part of such floor fifteen feet in width on Nelson street "and five windows back from front of building"—a distance of between thirty-five and forty feet—"heat to be provided as specified in the Greenway Press lease with the owner David Elliott."

Elliott and Greenway, on the 1st September, 1917, executed a lease pursuant to the Short Forms of Leases Act. It contained a clause under which Elliott agreed to heat the demised premises "during all lawful working days to a reasonable extent." The lessor was not to be responsible for damages "during necessary repairs to the heating plant, nor if the parties under contract with the lessor to heat said building fail to do so, until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of the said building himself, and shall have had a reasonable opportunity of remedying such conditions."

The "parties" who were so under contract to heat the build-

ONT.
S. C.
HESS
v.
GREENWAY.

ing are the Sinclair & Valentine Company, defendant, to whom, on the 1st September, 1917, Elliott demised for three years No. 233 Richmond street west, running through to, and including, Nos. 76 and 78 Nelson street; "also the basement and boiler rooms under Nos. 229 and 231 Richmond street west, in the said building."

The lease contains an agreement by the Sinclair & Valentine Company to furnish fuel and a competent man so as to provide heat in the several sections of the building "to the reasonable satisfaction of the tenants therein."

The lessor agreed to change the boilers from low to high pressure, and to put on a reducing valve "to step the steam pressure down to the necessary pressure to heat the building."

The plaintiff entered into possession under his agreement with Greenway, and proceeded to cut off the portion he had leased, by partitions extending from floor to ceiling. Greenway urged Hess to use woven wire instead of glass in the partitions above a height of six or seven feet, so as to permit an equalisation of the temperature between the plaintiff's premises, exposed as they were, owing to the many windows on the east, to extremes of heat and cold, and that portion of the ground-floor occupied by Greenway. Hess, however, used glass.

The only means of heating the linotype room and office of the plaintiff consisted of one end of a radiator or set of ten or twelve one-inch steam pipes, seventy-two feet in length between the headers, suspended from hangers along the east wall of the building under the windows. The length of the end of the radiator projecting into the plaintiff's premises was about thirty-five feet. From the south end of the lowest pipe a half-inch pipe led to a valve in the distant basement near the boiler. This small pipe was a necessary part of the system at one time, but not after high pressure boilers had been installed by Elliott, as he had agreed in his lease to the Sinclair & Valentine Company. It was, however, allowed to remain in its old position. It was not intended to be used to drain the radiators; but at times, when steam was turned into the heating system after being off, as it sometimes was from Saturday afternoon until Sunday or Monday morning, the opening of the valve at the end near the

boilers induced a more rapid circulation of steam than would otherwise have been possible. To allow the valve to remain open more than a few minutes would have occasioned a loss of steam, and consequent lessening of the effect which the steam was generated to produce.

On the 28th December, 1917, during a period of extreme cold, water accumulated in this small pipe, as a result no doubt of condensation, and there froze, bursting the pipe and causing leaks. Hess called in a foreman of the defendant Greenway, who promised that something would be done "as soon," to use Hess's words, "as the cold spell was over." Before that period was over—next day in fact—Saturday the 29th December, about half-past ten in the morning, the engineer of the Sinclair & Valentine Company, who was in control of the heating plant, after communicating with Mr. Elliott, cut off the small pipe where it had burst, and placed a plug in the end connected with the radiator. The return-pipe from the radiator was not interfered with. Steam was shut off while the work was being done —a period of less than half an hour.

The weather was intensely cold that day. At the observatory a minimum of 17 degrees below zero was recorded.

Hess closed his shop about noon. He returned about 4 p.m., and then noticed that the temperature in it was unusually low. He did not, however, report the fact to Greenway or to either of the other defendants, or to the engineer of the Sinclair & Valentine Company, or open a door which led from the linotype room to the Greenway premises. Steam had been cut off for an hour or more in the interval between noon and 4 o'clock, but was on again from 4 or 4.15 until 5.15, when it was cut off, as was usual on Saturday afternoon. The steam remained off until Sunday morning. It continued on until Sunday night, when it was again turned off until Monday morning.

The weather in the interval, while it had moderated a few degrees, continued to be excessively cold—11 degrees being the recorded minimum.

In consequence of a message from Greenway's foreman, Hess came down early on Monday to find his type-setting machines badly rusted and damaged owing to a series of bursts in the

ONT.
S. C.
HESS
v.
GREENWAY.

steam-pipes. On Saturday night, or Sunday night, water had accumulated by condensation in the lower tubes of the radiator, along a sag, greatest about midway between the headers. The water froze while the steam was off, and expanding burst the pipes, causing water and steam to escape into the plaintiff's premises when steam was turned on, and occasioning serious damage to the plaintiff's delicate and costly machines. For such damage and the loss consequent upon it, the plaintiff seeks to hold the defendants, or one of them, liable.

As against Greenway it is contended that his agreement—"heat to be provided as specified in the Greenway Press lease with Elliott"—amounts to an undertaking on his part that heat as so specified shall be provided.

It may also be regarded, it is said, as an assignment of the agreement—a covenant it is not, as the lease is not under seal—as to heating expressed in Elliott's lease to Greenway—and that, viewed in that aspect, Elliott, as well as Greenway, is liable. Liability of Elliott in tort is also put forward, on the ground that the pipes which Elliott had placed in position were so faultily arranged, or hung, that they sagged and thus caused damage to the plaintiff. Another ground of his claim against Elliott is that Elliott ordered or sanctioned the cutting and plugging of the small pipe, on the 29th, by the engineer of the Sinclair & Valentine Company. The company is to be held liable because its engineer cut the small pipe, and, by shutting off the steam on Saturday, and overnight on Saturday and Sunday, occasioned the damage sustained by the plaintiff.

I find, upon the evidence, that the work done on the small pipe on Saturday had nothing to do with the accident. Ordinarily that pipe was closed as effectively by the valve near the boiler as it was by the plug put in by the Sinclair & Valentine Company's engineer. Nor did the bursts result from the shutting off of the steam on Saturday morning while the work was being done. Elliott's sanction—properly sought and properly given, as he was the owner of the building—is therefore immaterial. A circumstance tending to shew the want of relation between the cutting and plugging of the small pipe is that no change was afterwards made in that pipe, and that no

trouble arose when later in the same winter the mercury fell to 20 degrees below zero. The only change in the plaintiff's premises during the winter was that a door from the linotype room to the Greenway premises was left open whenever the weather was very cold. A much greater equalisation of temperature would, in my opinion, have been effected had Greenway's recommendation as to the use of wire instead of glass in the upper part of the partitions been adopted by the plaintiff.

Upon the most favourable construction to the plaintiff of the agreement as to heating between Greenway and Hess, the latter was entitled to nothing more than what Elliott had bound himself to furnish Greenway. By the reference to the Elliott-Greenway lease, all the conditions affecting Elliott's liability to Greenway for damages equally affected Greenway's liability to Hess for damages. The premises were to be heated only during working days, and Greenway was not to be responsible for damage arising during necessary repairs, nor if the "parties" (Sinclair & Valentine Company) under contract with Greenway to heat the building failed to do so, until Greenway had received reasonable notice of the conditions, had taken over the heating of the building himself, and had been afforded a reasonable opportunity of remedying the conditions.

The interval between Saturday and Monday, in which the accident occurred, was not a lawful working day. Even if it was, and the Sinclair & Valentine Company failed to heat the premises, Greenway was entitled to notice of their failure, and to an opportunity of remedying it. He had no such notice and no such opportunity. The leak in the small pipe, of which he had notice, caused no damage and had no connection with the damage sustained.

I am, therefore, of opinion that no liability can be held to attach to Greenway.

The action of the engineer of the Sinclair & Valentine Company in cutting and plugging the small pipe having no relation to the accident, the action as against that company also fails.

It is urged that Elliott is liable owing to the defective construction of the heating system, or the negligent inspection and maintenance thereof.

ONT.
S. C.
HESS
v.
GREENWAY.

A defect undoubtedly existed in the radiator at the time of the accident—a sag of about an inch—and but for the sag it is improbable that the accident would have happened. Other causes undoubtedly contributed, as the shutting off of the steam during part at least of what was not a working day, the isolation of the plaintiff's premises from other portions of the same floor in which the other half of the same pipes did not burst, and then the intensely cold weather.

But, even if the sag in the radiator was the sole and direct cause of the accident, no liability attaches to Elliott. No contractual relation whatever existed between him and the plaintiff. He had not, either in his lease to Greenway, or in his lease to the Sinclair & Valentine Company, covenanted to repair. There was, in the circumstances, no breach of any duty which Elliott owed to his tenants, or, for a greater reason, to the plaintiff: Halsbury's Laws of England, vol. 18, p. 504; *Lane* v. *Cox*, [1897] 1 Q.B. 415.

The action wholly fails and is dismissed with costs.

If the plaintiff was entitled to succeed, I should have estimated his damages at $700.

T. N. Phelan, for the appellant.

H. J. Scott, K.C. for the defendant the Sinclair & Valentine Company, respondent.

William Proudfoot, K.C., for the defendant Elliott.

G. H. Gilday, for the defendant Greenway, respondent.

The judgment of the Court was read by.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 2nd November 1918, which was directed to be entered by Latchford, J., after the trial before him, sitting without a jury, at Toronto, on the 22nd September in that year.

The action is brought to recover damages for the loss sustained by the appellant owing to the bursting of a steam-pipe in a room occupied by him in a building owned by the respondent Elliott. Parts of the building were let by the respondent Elliott: one part to the respondent Greenway and another part to the respondent the Sinclair & Valentine Company, and the appellant was subtenant of the respondent Greenway of part of that part of the building of which he was tenant.

The building was steam-heated, and the boiler by which the

steam was produced was in the basement, and was included in the lease to the Sinclair & Valentine Company.

The steam was carried through the building by means of iron pipes attached to the outer walls of it; the piping in the premises let to the respondent Greenway consisted of ten pipes hung horizontally for the distance of seventy-one feet, part of which was in the part sublet to the appellant, and the remainder in the other part of the premises let to the respondent the Sinclair & Valentine Company, by whom it was occupied.

By the terms of the lease to the respondent Greenway, the respondent Elliott agreed to "heat said premises during all lawful working days to a reasonable extent, but will not be responsible for damages in case fuel is unobtainable, nor during necessary repairs to heating plant, nor if the parties under contract with the lessor to heat said building fail to do so, until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of said building himself, and shall also have had a reasonable opportunity of remedying such conditions."

The lease to the respondent the Sinclair & Valentine Company contains the following provisions as to the heating system and its operation:—

"It is understood and agreed by and between the parties hereto that the lessee will furnish sufficient fuel provided same can be obtained and a competent man to look after the heating apparatus so as to provide heat in the entire six sections or block, to the reasonable satisfaction of the tenants therein.

"Provided always that if the lessor receives complaints from the other tenants in said block or is called upon to pay any claim for or in connection with insufficient heating therein, he may himself at any time or from time to time undertake the furnishing of fuel, the employment of a competent man as aforesaid, or any other thing in connection with said heating, and charge the lessee with all expenses for the same or in reference thereto, such expenses to be payable forthwith upon demand and to be and be treated and collectable as rent in arrear hereunder, and in any such case the lessee shall not in any way interfere with the lessor or any person or persons employed by him in connection with the heating aforesaid.

ONT.
S. C.
HESS
v.
GREENWAY.
Meredith,C.J.O.

"The said lessor agrees to change boilers in said building to high pressure and have same tested to fifty lbs. pressure by Casualty Company. Put on reducing valve to step the steam pressure down to the necessary pressure to heat the said building. Also install two traps to return the water to boiler. The entire work to be completed on or before August 31st, 1917."

The lease to the appellant contains a provision that heat will be provided, "as specified in the Greenway Press lease with the owner David Elliott."

It is clear from the provisions of these leases that all the parties knew of the terms of the lease to the respondent the Sinclair & Valentine Company as to the heating of the building, and that the heating of the building and the heating appliances were to be under the control and management of that company, subject to the right, reserved by the lease to that company, of the respondent Elliott himself to take over the heating of the building in certain events, upon the happening of which it was provided that he should have the right to do so.

The questions to be determined are:—

(1) Whether there was any duty resting upon the respondent Elliott, in the operation of the heating system, to take care that the piping in the part of the building occupied by the appellant was in a proper state of repair and condition.

(2) Whether that duty, if it existed, was an absolute one or only a duty to take reasonable care.

(3) Whether, if the duty was only to take reasonable care, the respondent Elliott failed to discharge that duty.

No question arises as to the right of the respondent Elliott to delegate any duty resting upon him as to the heating of the premises, because it is clear, as I have said, that the appellant knew of the arrangement as to the heating system and the heating of the building that had been entered into with the Sinclair & Valentine Company, and must be taken to have assented to the delegation of the duty.

I am unable to agree with the contention of Mr. Phelan that the duty which, as he contended, the respondent Elliott owed to the tenants of the building, was an absolute duty, and I am of opinion that, if he owed any duty to the appellant, it was a duty,

in the operation of the heating system, to take reasonable care to see that the heating appliances were and were kept in such a state of repair as that injury would not result to the occupants of the part of the building leased to the respondent Greenway from the operation of the heating system—in other words, not to be negligent in the performance of that duty.

Negligence has been defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do:" *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784; and negligence is not "absolute or intrinsic," but "is always relative to some circumstance of time, place, or person," imposing a duty to take care: *Degg* v. *Midland R. W. Co.* (1857), 1 H. & N. 773, 781.

Before dealing with the question of negligence as applied to the circumstances of the case at bar, I will state shortly the reasons why I do not think that the duty of the respondent Elliott—which for the present I will assume he owed to the appellant—was an absolute one, but only a duty not to be guilty of negligence.

Counsel for the appellant relied upon the judgment of Scrutton, J., in *Hart* v. *Rogers*, [1916] 1 K.B. 646, but I prefer the reasoning and decision of Lush, J., in *Dunster* v. *Hollis*, [1918] 2 K.B. 795, and it is to be observed that the question in *Hart* v. *Rogers* was an entirely different one from that presented for consideration in the case at bar. In that case the landlords let to a tenant a flat on the top-floor of a building, but retained possession and entire control of the roof. Water found its way into the flat through cracks in the roof, and what was held was that the landlords were bound to repair the roof, and that they did not discharge that obligation by shewing that they took reasonable care to keep it in repair.

In the case at bar, the heating plant, to the knowledge and with the assent of the appellant, was not being managed by the landlord, but by the respondent the Sinclair & Valentine Company, and it was the means by which heat was to be supplied to the premises occupied by the appellant and the respondent

ONT.
S. C.
HESS
v.
GREENWAY.
Meredith,C.J.O.

Greenway, and the plant was therefore being operated for their benefit as well as that of the landlord. Nor is it a case to which the maxim *sic utere tuo* applies.

If the principle of the decision of the House of Lords in *Rylands* v. *Fletcher* (1868), L. R. 3 H.L. 330, is applicable to the case at bar, it may be that we are bound to hold that the duty of the respondent Elliott was an absolute one, and that he is answerable for the consequences of the bursting of the pipes.

In some of the Courts of the neighbouring States, the view is taken that the principle is so broadly stated that it is applicable where a man has brought on his land for the purpose of his business something necessary for carrying it on, which is neither in itself nor in its operation a nuisance, but which without negligence causes injury to another; but these Courts have declined to apply the principle to such cases.

The reasoning of Beasley, C.J., in *Marshall* v. *Welwood* (1876), 38 N.J. Law 339, against its applicability and combatting "the broad doctrine . . . that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others" (p. 343), commends itself to me as sound, and it is difficult to see how, if it were otherwise, the business of a modern town or city could be carried on.

A similar view was taken by the Commission of Appeals of the State of New York in *Losee* v. *Buchanan* (1873), 51 N.Y. 476.

In these two cases, the question was as to the liability of a person on whose premises a steam-boiler was operated to answer in damages to his neighbour for injuries caused by the explosion of the boiler, and the holding was that if it was operated with care and skill so that it was no nuisance, in the absence of proof of negligence on his part, he was not liable.

In *Cosulich* v. *Standard Oil Co.* (1890), 122 N.Y. 118, it was held by the Court of Appeals that "the law does not impose upon one conducting a lawful business upon his own lands the obligation of saving others harmless from the consequences of inevitable accidents; the limit of his duty where no contract relations exist, is the exercise of reasonable care and caution to save others from injury."

Jaffe v. *Harteau* (1874), 11 Sickels (N.Y.) 398, is a case somewhat similar to the case at bar. The defendant was the owner of a house leased to one Van Duzer. Van Duzer sublet a part of it to the husband of the plaintiff. She was injured by the explosion of a kitchen-boiler, used by the tenants, which was situate in the top of the house. The action, which was brought to recover damages for injuries sustained by the plaintiff owing to the explosion, failed, the Court being of opinion that the defendant was not liable, there being no evidence that he knew of or had any reason to suspect any defect or that any danger was to be apprehended from the use of the boiler for the purpose intended.

In *Peil* v. *Reinhart* (1891), 127 N.Y. 381, the plaintiff sued to recover damages for injuries sustained owing to her having tripped on a stairway carpet which, to the knowledge of the defendant, was in a defective condition, used by the defendant's tenants, of whom the plaintiff was one; and in delivering the judgment of the Court, Bradley, J., stated the duty of the defendant to be "to use reasonable care to keep this stairway in repair and suitable condition for the safe passage by his tenants over it in their way to and from their rooms."

It is satisfactory to know that the English Courts have not pressed the doctrine of *Rylands* v. *Fletcher* as far as in the view of these American Courts it logically extends, and that at all events it is not to be applied to such a case as this, where the thing which causes the injury is not operated solely for the benefit of the owner of it, but for the benefit of the person who suffers the injury as well as of the owner.

Such a case was *Carstairs* v. *Taylor*, L.R. 6 Ex. 217. In that case the facts were that the plaintiffs hired of the defendant the ground-floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, and through this hole the water entered the warehouse and wetted the plaintiffs' goods. The defendant had used reasonable care in examining and seeing to the security of the gutters and the box. The doctrine of *Rylands* v. *Fletcher* was invoked by the

ONT.
S. C.
HESS
v.
GREENWAY.
Meredith, C.J.O.

plaintiffs, but the action failed, the Court holding that the defendant was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. Bramwell, B., stating his opinion (pp. 221, 222), said:—

"In *Rylands* v. *Fletcher* the defendant, for his own purposes, conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiffs. If they had been adjacent owners, it would have been for the benefit of the adjacent owner that the water from *his* roof was collected, and the case would have been within the decision in *Rylands* v. *Fletcher;* but here the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit."

In *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661, the facts were that the plaintiff occupied for business purposes the ground-floor and the defendants the second-floor of the same house, respectively, as tenant from year to year. There was a water-closet on the defendants' premises to and of which they alone had access and use. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first-floor to the plaintiff's premises and caused damage to his stock in trade. The overflow was owing to the valve of the supply-pipe to the pan having got out of order and failed to close and the waste-pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence. The action, which was brought to recover damages for the injury done to the plaintiff's stock-in-trade, failed, the Court being of opinion that there was no obligation on the defendants to keep the water in at their peril, and they, having been guilty of no negligence, were not liable to the plaintiff for the damage he had sustained. *Rylands* v. *Fletcher*, which was relied on by the plaintiff's counsel, was distinguished, and the proposition of counsel, "that, the plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper storey, contracted an obligation binding them in

favour of the plaintiff, the occupier of the lower storey, to keep the water in at their peril," was negatived. It was also held that the maxim *sic utere tuo ut alienum non lædas* did not apply.

The distinction between cases of occupiers of adjacent lands and cases of occupants of separate storeys in the same house, established by these two cases, was recognised in *Humphries* v. *Cousins* (1877), 2 C.P.D. 239, 246, and the principle of the decision in *Carstairs* v. *Taylor* was applied by the Court of Appeal in *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602, in which case it was held that, as the water which escaped was stored in a cistern for the benefit of the plaintiffs as well as of the other tenants, the doctrine laid down in *Rylands* v. *Fletcher* did not apply. The same principle was applied in *Blake* v. *Woolf*, [1898] 2 Q.B. 426. I refer also to *Gill* v. *Edouin* (1894-5), 71 L.T.R. 762, 72 L.T.R. 579. It was also recognised by a Divisional Court in *Powley* v. *Mickleborough* (1910), 21 O.L.R. 556; see also *Childs* v. *Lissaman* (1904), 23 N.Z. L.R. 945, where the cases are collected and dealt with, which was referred to with approval in *Powley* v. *Mickleborough*.

It is also to be observed that, as Wright, J., pointed out in *Gill* v. *Edouin*, 71 L.T.R. at p. 763, the doctrine established by *Rylands* v. *Fletcher* is subject to several qualifications, one of which is that, "where a man uses his land in the ordinary and reasonable manner of use, and damage happens to his neighbour without wilfulness or negligence, no action lies."

I have thus far dealt with the case apart from the fact that the piping, which, according to the contention of the appellant, was defective and out of repair, was situate in that part of the building leased to the respondent Greenway and sublet to the appellant.

By the lease from the respondent Elliott to the respondent Greenway, the latter covenanted with Elliott "to repair, reasonable wear and tear, lightning and tempest, only excepted;" and, although the appellant, being only a sublessee of part of the premises, did not incur any liability to Elliott on the covenant, he took subject to the obligation on the part of his immediate landlord and had no right to look to Elliott to repair any part

ONT.
S. C.
HESS
v.
GREENWAY.
Meredith, C.J.O.

of the demised premises. He and his immediate landlord took the premises as they were, and it is well-settled law that in such circumstances the tenant is not entitled to claim from his landlord damages for loss sustained owing to the defective condition of the premises when they were let, or to any want of repair arising during the term.

It is clear, therefore, that if the heating appliances in the premises demised to Greenway were in bad condition or out of repair or became so during the term, no liability attached to the landlord to put them in proper condition or to repair them.

Then as to negligence. Mr. Phelan's argument failed to satisfy me that any negligence on the part of Elliott was proved. The proximate cause of the bursting of the pipes was the freezing, after the heating plant had been shut down, of water formed by the condensation of the steam which had lodged in a slight sag or depression in the pipes. It is clear that this sag or depression had existed from the time when the pipes had been first attached to the wall of the building, which was eleven years before the trial. The heating system had been operated during all those years without anything untoward happening, and nothing had occurred that shewed that any trouble or danger was to be apprehended from the existence of the sag; and it is, I think, impossible, on that state of facts, to find that the respondent Elliott was negligent because he did not take steps to have the sag taken out. Neither the respondent Greenway nor the appellant appears to have anticipated danger from the existence of the sag; and I do not see why, if they did not anticipate it, negligence should be attributed to Elliott because he did not.

It is also clear law that a landlord does not, in the letting of a building such as Elliott let, warrant that the building is reasonably fit for the purpose for which it is intended that it will be used, but that the tenant takes it as it is, and his landlord is under no obligation to repair or to make good anything that is found to be defective or out of repair.

On this branch of the case, *Barker* v. *Ferguson* (1908), 16 O.L.R. 252, *Rogers* v. *Sorell*, 14 Man. R. 450, and *Betcher* v. *Hagell* (1906), 38 N.S.R. 517, may be referred to.

ONT.

S. C.

HESS v. GREENWAY.

Meredith, C.J.O.

In *Barker* v. *Ferguson* it was held that "a tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damage caused by such defects."

The case at bar is an *à fortiori* one for the application of the principle of this decision, because the defect existed in the demised premises.

I would, for these reasons, affirm the judgment dismissing the action as against the respondent Elliott, and dismiss the appeal from the judgment with costs. The same result must follow as to the other defendants. No case was made against the respondent Greenway, and the case against the respondent the Sinclair & Valentine Company also failed, for the reasons I have given in dealing with the case against the respondent Elliott, and for the additional reason that that company owed no duty to the appellant except the duty, in operating the heating plant, to do him no intentional injury.

Appeal dismissed.

DUTCHZESAN v. BRONFMAN.

SASK.

C. A.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

CONTRACTS (§ III B—200)—VOID—LORD'S DAY ACT—COMPENSATION—DUTY OF COURT.

A contract entered into by a tradesman on the Lord's Day for the sale of goods is void. The purchaser, however, having received the goods must either return them or compensate such tradesman (R.S.S. 1909, c. 69).

It is the duty of the Court to notice that such contract was made in violation of the Lord's Day Act although no objection on that ground is taken in the pleadings.

Statement.

APPEAL by defendant from the judgment at the trial in an action on a contract for the sale of an automobile. Reversed.

L. Nick Robinson, for appellant.

A. F. Sample, for respondent.

Newlands, J.A.

NEWLANDS, J.A.:—The objection was taken before this Court that the contract upon which the plaintiff sues was made on a Sunday and is, therefore, null and void.

SASK.

C. A.

DUTCHZESAN v. BRONFMAN.

Newlands, J.A.

R.S.S. 1909, c. 69, s. 3, makes any contract for the sale or purchase of chattels made on the Lord's Day null and void. The contract in question is dated June 30, 1918, which was a Sunday. The contract is therefore null and void and the plaintiff cannot recover.

It is unnecessary for me to express an opinion on any of the other questions raised, I being of the opinion that the appeal should be allowed with costs, for the above reasons.

Lamont, J.A.

LAMONT, J.A.:—On June 27, 1918, the defendant signed an order which in part reads as follows:—

Yorkton, Sask.

City Garage, Ltd.

Motor Cars.

I hereby order of you the following goods, which you are to deliver F.O.B. Yorkton, on or about at once barring delays in transportation, or delays caused by circumstances beyond our control Oldsmobile Model 37.

Extra Equipment. Ordinary.

Terms, One Chevrolet Car. $850.00, Cheque $770.00, two notes signed by Wassill Bachinoff & Son. $400.00.

On June 30 he saw the automobile which the City Garage proposed to deliver in fulfilment of his order, and was not satisfied with it. So he entered into another agreement with them, which in part reads as follows:—

Yorkton, Sask., June 30th, 18.

City Garage Ltd.

Motor Cars.

I hereby order of you the following goods, which you are to deliver F.O.B. Yorkton, on or about at once barring delay in transportation or delays caused by circumstances beyond control.

Nash Six Model.

Extra Equipment, Standard. By Chevrolet Car Cheq. $770.00 and post date chq. $365.00, and notes $400.00.

The first arrangement was made with one Weinmeister, and the second with the plaintiff himself.

The notes referred to in the order, as found by the trial Judge, are (1) a note for $200, falling due in the spring of 1919, and (2) a note for a like amount, falling due in the spring of 1920 made by Wassill Bachinoff & Son. The defendant was unable to deliver these two notes, and the plaintiff brought this action for $400, the face value of the notes, and interest thereon at 8%, and also for $16.30, repairs. These repairs were likewise ordered from the City Garage Co.

The defendant denied that the plaintiff had sold and delivered

to him the Nash automobile referred to in the statement of claim, or any other goods. It was admitted that the contract for the Nash automobile was made on Sunday, June 30.

The trial Judge gave judgment for the plaintiff for the amount claimed, overruling the objection on part of the defendant that the City Garage, Ltd., should have been the plaintiff. He overruled this objection on the ground (1) that there was no evidence that the City Garage, Ltd., was an incorporated company, and (2) that Bronfman had stated that he was its sole proprietor.

That the contract was made with City Garage, Ltd., the documents prove. That the plaintiff was the sole proprietor thereof or had any interest therein there is, in my opinion, absolutely no evidence before us, nor was there any before the trial Judge. At the trial no evidence was given on the point. It is not referred to in the Judge's notes. In his examination for discovery the plaintiff does say (Q. 2) that he owned and operated "the City Garage at Yorkton." This question, however, was not put in evidence. Counsel for the defendant put in questions and answers 1, 365, etc., deliberately leaving out question 2 and answer. That question and answer not being in evidence, the trial Judge was not entitled to consider it, nor are we, although the whole of the examination is copied into the appeal book.

At this point it may not be inadvisable to call attention to the impropriety of printing in the appeal book the whole of an examination for discovery where only certain questions and answers have been put in evidence. Only those parts which are put in should appear in the appeal book, and it is the duty of the taxing officer to see that the printing of such only are taxed.

I draw attention to this, because we have had a number of cases in which the entire examination has been printed although only certain portions thereof were put in evidence.

The contract having been made with the City Garage, Ltd., and the plaintiff not having shewn that he is entitled to the money due thereunder to that company, the action must fail on that ground.

But even had the plaintiff established his right to sue, I am of opinion the action must still fail as it stands. It is brought on a contract made on the Lord's Day. C. 69 of the Revised Statutes prohibits, under penalty, any merchant, tradesman, etc., from

SASK.

C. A.

DUTCHZESAN v. BRONFMAN.

Lamont, J.A.

selling personal property on the Lord's Day, and from exercising on that day "any worldly labour, business or trade of his ordinary calling" (save as to certain exceptions not material here), and also provides that all contracts for the sale of personal property made on that day shall be utterly null and void.

Assuming the contract in question to have been made with the plaintiff, he was, in making it, exercising his ordinary trade or calling on the Lord's Day. This is what the statute prohibits, and no action can be brought on such a contract. It was, however, objected that we could not consider this point as it was not raised in the pleadings.

In *The Association of St. Jean-Baptiste* v. *Brault* (1900), 30 Can. S.C.R. 598, the contract was one in connection with a scheme for the operation of a lottery, forbidden by the criminal statutes of Canada. It was held that such a contract was illegal and that it was the duty of the Court *ex mero motu* to notice the illegality at any stage of the case and without pleading. The duty of the Court in this regard was discussed at length in *The Consumers Cordage Co.* v. *Connolly* (1901), 31 Can. S.C.R. 244, where, at p. 297, Girouard, J., says:

> These decisions, and the language of all the Judges in the other cases, proceed upon the ground that if, from the statements of one of the parties, either in the Courts below or in appeal, or otherwise, the cause of action appears to arise *ex turpi causâ*, or out of the transgression of a positive law, "there," continues Lord Mansfield, "the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

I am therefore of opinion that, where a tradesman comes into Court upon a contract entered into on the Lord's Day for the sale by him of goods in the exercise of his ordinary trade or business, it is the duty of the Court to notice that such contract was made in violation of the statute, even although no objection on that ground is taken in the pleadings. The statute was passed for the preservation of the sanctity of the Sabbath, and effect should be given to it, notwithstanding that its violation by one party to an agreement may have been condoned or waived by the other party.

The contract therefore, in my opinion, is unenforceable. The view of the trial Judge that the plaintiff could succeed upon the order of June 27, because the defendant failed to perform

his contract of June 30, is, in my opinion, untenable. The first order was for an automobile which was never delivered or accepted, and which all parties understood to be abrogated by the second order. Although the contract made on the Lord's Day cannot be enforced, the defendant, if he has obtained possession of the Nash automobile, is not entitled to keep the car and refuse payment. He must return it or compensate the vendor therefor.

The appeal, in my opinion, should be allowed and the action dismissed. As the plaintiff has not shewn that he had a right to sue, and as his right was questioned by the Court below, I think the defendant is entitled to his costs both here and in the Court below.

ELWOOD, J.A., concurred with LAMONT, J.A.

Appeal allowed.

SASK.

C. A.

DUTCHZESAN v. BRONFMAN.

Lamont, J.

Re STANDARD LIFE ASSURANCE Co. AND KRAFT.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 28, 1919.

INSURANCE (§ IV B—170)—BENEFICIARY—ASSIGNMENT OF INTEREST—WIFE OF ASSURED—DIRECTION BY ASSURED AS TO PAYMENT—STATUTORY RIGHT—ESTOPPEL.

An assured who has by the terms of the policy made the insurance money payable to his father, who has in effect made an assignment of his interest to the wife of the assured, may under his statutory right by a second designation direct that the insurance money be paid to the father to the exclusion of the wife. The doctrine of estoppel does not apply to such a case.

APPEAL by Flora Elizabeth Kraft from the order of Meredith, C.J.C.P., in a motion by the Standard Life Assurance Company (upon originating notice) for an order for leave to pay into Court the amount due upon a policy of insurance upon the life of Irvin Kraft, deceased, and for an order determining to whom the amount should be paid. Affirmed.

Statement.

The judgment appealed from is as follows:—The single question involved is: whether the second designation, made by the insured, of his father, is valid.

After the first designation of the father, the father assigned his right under it to the son's wife, and afterwards he "designated" the son's son; but that designation was admittedly ineffectual, even if treated as an equitable declaration of trust, because of the prior "assignment" to the son's wife. The insured admittedly and obviously could change the beneficiary—a beneficiary could not.

ONT.

S. C.

RE STANDARD LIFE ASSURANCE CO. AND KRAFT.

For reasons which apparently son and father considered imperative, they desired, and took steps, to deprive the wife and her son of all interest in the insurance: the means taken were the second designation by the insured of his father, which, if valid, had the desired effect.

But, though it is admitted and is obvious that the insured had power to deprive his son and wife, because he had power to deprive his father of his former right, and they took only under the father and had no higher right than he, it is contended that that object was not effected by the second designation of the father—that the insured had no power to make the later designation directly of him; that that could be effected only by first a designation to some third person and after that a designation to the father again.

That contention I decline to consider seriously. If it is to be held that the law requires such useless, for any sensible purposes, "circumlocution," some other Court must put the stigma upon it.

If the "assignment" to the wife—assuming the interest of the father—a changeable beneficiary only—to have been assignable, without considering the point—though really in effect but a secondary designation, and if it had been an assignment or declaration of trust for value, effect should not be given to it, not because the second designation was invalid, but because equity would attach to the fund again in the father's hand for his own benefit the right of the wife in it previously acquired for value.

Mr. Smith may take out an order for payment of the money in question into Court as sought by the insurance company; and, should no appeal against my ruling as to the right to the money be taken within 30 days, Mr. Secord may then take out an order for payment out of Court of the money to the father of the insured, less the costs of all parties of this motion, which are to be paid to them respectively.

J. M. Ferguson, for the appellant.

M. A. Secord, K.C., for the respondent Dilman Kraft.

E. C. Cattanach, for the Official Guardian.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by Flora Elizabeth Kraft from an order dated the 20th December, 1918, made by the Chief Justice of the Common Pleas, on an originating motion for the determination of the question as to the person entitled to the

ONT.

S. C.

RE STANDARD LIFE ASSURANCE CO. AND KRAFT.

Meredith, C.J.O.

proceeds of a policy of life insurance effected by Irvin Kraft, deceased, the husband of the appellant, on his own life.

By the terms of the policy, the insurance money was payable to the respondent Dilman Kraft, who is the father of the deceased. After effecting the insurance, the deceased married the appellant, and what is in effect an assignment of his interest under the policy was made by the respondent Dilman Kraft to the appellant.

Subsequently differences arose between the deceased and his wife, and they separated, and the deceased then made a direction that the policy should be for the benefit of his father. The manifest purpose of this direction was to prevent the appellant from receiving, under the assignment which the respondent Dilman Kraft had made to her, the insurance money.

The appellant claims that she is entitled to the money; that whatever interest in it passed to the respondent Dilman Kraft, either under the terms of the policy or by virtue of the subsequent declaration, passed by the assignment from him to her.

I am of opinion that that contention is not well-founded. All that passed to her by the assignment was what the assignor was then entitled to. If no subsequent direction had been made by the deceased, she would have been the person entitled to the insurance money; but the deceased, in the exercise of his statutory right, determined that it should not go to her, but should go to his father, and so directed. The right of the father under this subsequent direction was a different right from that which had been assigned to the appellant. There is no room for the application of the doctrine of estoppel; that doctrine is applicable to a case where a person, who assigns something that he has no right or title to, subsequently acquires it, and, by the application of that doctrine in such a case, the assignment passes the interest acquired, and it is said to "feed the estoppel," and the assignment then takes effect in interest and not by estoppel. That doctrine has no application where some interest has passed by the assignment, as was the case here.

I would affirm the order appealed from and dismiss the appeal with costs.

Appeal dismissed.

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S. C.

Re SUN LIFE ASSURANCE Co. AND McLEAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Sutherland and Middleton, JJ. March 5, 1919.

INSURANCE (§ IV B—160)—ENDOWMENT POLICY—CHANGE OF BENEFICIARY —ONTARIO INSURANCE ACT, (R.S.O. 1914, c. 183).

An endowment policy differs from a policy payable at death. The assured after maturity but before actual payment has a right to change the beneficiary but not to alter or divert the benefit of any beneficiary for value, nor the benefit of a preferred beneficiary to a person not of that class. The naming of a beneficiary under such a policy, if it creates a trust in favour of that beneficiary, creates only a trust in the event of death; and is subject to the right of alteration by the assured, as set out in the Ontario Insurance Act (R.S.O. 1914, c. 183, s. 171.)

Statement.

APPEAL by a beneficiary named in an endowment policy from an order of Rose, J., on a motion by the insurance company for leave to pay into Court the amount said to be sufficient to discharge the company of all liability upon the policy. Varied.

The order appealed from is as follows:—This is a motion, made on behalf of the Sun Life Assurance Company of Canada, for leave to pay into Court the amount said to be required to discharge the company of all liability upon a certain endowment policy. The policy is dated the 4th October, 1898. By it the company assured the life of D. B. McLean in the sum of $1,000 and contracted to pay that sum to the assured on the 1st October, 1918, or, should the assured die before that day, then to his mother, Ophelia McLean; and it was provided that, should the policy be in force on the 1st October, 1918, the assured should be entitled to certain optional benefits, e.g., to convert the sum assured and profits into a paid-up policy payable at the death of the assured, or to withdraw a certain sum in cash and receive in addition a paid-up policy for $1,000.

By an instrument dated the 21st August, 1906, D. B. McLean declared "that the said policy and the assurance thereby effected" should "be for the benefit of Adèle Caroline McLean, and" did thereby "specially appropriate the said policy accordingly and revoke all interest any other person or persons" might "have in it." Adèle Caroline McLean is the wife of the assured.

After the 1st October, 1918, the company issued a cheque in favour of Adèle Caroline McLean for a sum said to be the amount of the policy with profits, less the amount of a loan standing against the policy, and sent the cheque to the assured for delivery to the payee. The assured returned the cheque, and filed with the company a new designation of beneficiary, in which he declared that "the said policy and the assurance thereby effected" should

ONT.

S. C.

RE SUN LIFE ASSURANCE CO. AND MCLEAN.

be for the benefit of his mother "in the place and stead of Adèle Caroline McLean," and that he did "specially appropriate the said policy accordingly and revoke all interest of the said Adèle Caroline McLean or of any other person or persons in it."

Adèle Caroline McLean asserts that on the 1st October, 1918, she became entitled to payment of the sum assured and profits, and that neither the assured nor his mother has any present interest. She, therefore, supports the company's application and asks that the money be paid into Court and be paid out to her. The assured and his mother oppose the application, the assured alleging that it is his desire to exercise the option to convert the sum assured and profits into a paid-up policy payable at his death.

A question has been raised as to whether the instrument of the 21st August, 1906, which does not purport to be an assignment of the policy, but merely an "appropriation" made "in accordance with the terms of the statutes in that behalf," had the effect simply of substituting Adèle Caroline McLean for Ophelia McLean, as the person to receive the sum assured in case D. B. McLean should die before the 1st October, 1918, or really amounted to a designation of Adèle Caroline McLean as the person entitled not only to receive whatever money might become payable upon the death of D. B. McLean before the 1st October, 1918, but also to receive any sum that might be payable by reason of D. B. McLean surviving until the 1st October, 1918, and to exercise whatever options might, but for the instrument, have been exercised by D. B. McLean after the day mentioned. I do not think it necessary or desirable to express any opinion upon that question on the present application: because it appears to me that, as regards the relief now sought, the result is the same whichever view of the effect of the instrument is correct. The company's contract is with D. B. McLean: he is the assured, and, whether his designation of Adèle Caroline McLean as beneficiary had the effect of designating her merely as the person to receive the money in case of his death or designated her also to receive the money (or, instead of receiving the money, to receive, e.g., some money and a new policy) in case he lived, I cannot find in the statute anything to deprive him, during his life and prior to the discharge of the policy by payment or otherwise, of his statutory right to sub-

ONT.

S. C.

RE SUN LIFE ASSURANCE CO. AND MCLEAN.

stitute a new beneficiary. Notwithstanding the fact that the company had issued a cheque, which had not reached the hands of Adèle Caroline McLean, if she was the proper person to receive payment, the policy was a subsisting policy, and the company's contract with D. B. McLean had not been discharged, when, in November, 1918, he attempted to revoke the benefits theretofore conferred upon his wife and to substitute his mother as beneficiary; and I think that his attempt was successful, and that whatever rights Adèle Caroline McLean had theretofore possessed passed to Ophelia McLean. See the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 171.* From this it seems to follow that D. B. McLean or Ophelia McLean has some right to select some benefit other than the payment of the cash which the company desires to pay into Court, and that the order asked for could not be made without defeating that right. The motion, therefore, fails and will be dismissed. Adèle Caroline McLean must pay the costs of the assured and his mother—the issue was really between her and them; the company will neither receive nor pay costs.

There is no issue raised as between D. B. McLean and Ophelia McLean, and I express no opinion as to their respective rights under the policy and the instrument of November, 1918.

J. F. Holliss, for the appellant.

J. W. Payne, for the assured and for Ophelia McLean, respondents.

L. Macaulay, for the insurance company.

At the conclusion of the hearing, the judgment of the Court was delivered by

*171.—(1) Every person of the full age of 21 years shall have an unlimited insurable interest in his own life and may effect *bonâ fide* at his own charge insurance of his own person for the whole term of life, or any shorter term for the sole or partial benefit of himself, or of his estate, or of any other person, whether the beneficiary has or has not an insurable interest in the life of the assured, and the insurance money may be made payable to any person for his own use or as trustee for another person.

. . . . . .

(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing . . . and may by that contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself or to his estate.

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ONT.

S. C.

RE SUN LIFE ASSURANCE CO. AND MCLEAN.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is admitted that, under the policy, upon the expiry of the endowment period, the assured is given several "options;" and that, at the time of the making of the application for leave to pay the money into Court, he had not exercised any; and also that, when it was pending, he elected to take a paid-up policy, payable at his death. The application of the insurance company for leave to pay the money into Court was therefore rightly dismissed.

But the order of the learned Judge went beyond that and purported to deal with the claims of the wife and mother to the money.

Until the policy has matured, any such adjudication is premature: the assured may change his "beneficiary."

The appeal should be dismissed, but the order should be varied so as to confine it to a dismissal of the motion, and there should be no costs here or below. *Order varied.*

SCOTLAND v. CANADIAN CARTRIDGE Co.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Middleton, JJ. May 30, 1919.

MASTER AND SERVANT (§ II B—136)—MUNITION FACTORY—EMPLOYEE—POISONOUS GASES—VENTILATION—INJURY TO HEALTH—PROXIMATE CAUSE—PROOF.

In an action brought by a workman to recover damages for injury to his health caused, as he alleged, by neglect of his employers' duty to him as their servant while working in their munition factory to ventilate the building in which he worked so as to keep the air reasonably pure so as to render harmless, as far as reasonably practical, vapours generated in the course of the work. *Held*, that the fact the Workmen's Compensation Board had rejected the claim on the ground that it was not a case of "personal injury by accident" and so was not within the Workmen's Compensation Act, did not stand in the way of the present action. *Held*, also, that there was no evidence on which reasonable men could find in plaintiff's favour, he having failed to prove absence of proper ventilation, the presence of poisonous vapours, or that the two combined were the proximate cause of his ill health.

Statement.

APPEAL by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages for injury to the plaintiff's health by his being compelled to breathe gas-fumes while at work for the defendants in their munitions factory, in a room said to be without ventilation. Reversed.

Strachan Johnston, K.C., and *H. A. Burbidge*, for the appellants.

W. S. MacBrayne, for the plaintiff, respondent.

ONT.

S. C.

SCOTLAND v. CANADIAN CARTRIDGE CO.

Meredith, C.J.C.P.

The judgment of the Court was read by

MEREDITH, C.J.C.P.:—This action was brought by the plaintiff, a workman, to recover from the defendants, his employers, $5,000 damages for injury to his health, caused, as he alleged, by neglect of their duty to him as their servant while he was working for them in their ammunition factory, at Hamilton, from the month of October, 1916, until the month of February, 1917. The action was begun on the 27th May, 1918: and was based upon an alleged breach of duty under the "common law," and also under the Factories Act: at the trial an amendment was allowed, and made, extending the claim to one under the Public Health Act also.

The duty alleged by the plaintiff throughout was to ventilate the building in which the plaintiff worked in such a manner as to keep the air reasonably pure so as to render harmless, as far as reasonably practical, vapours generated in the course of the work done there: the breach alleged was a neglect of such duty; and the consequence was the emission of strong, irritating, and poisonous gases, which, owing to the absence of such ventilation, permanently injured the plaintiff's health.

The "gases," or "fumes" as they were generally called throughout the trial, were alleged to have arisen from small tanks into which hot metal, in the process of manufacture into ammunition shells, was dipped in a solution of prussic acid and a solution of sulphuric acid.

In order to succeed in the action it was therefore necessary for the plaintiff to prove: that such vapours or fumes did arise from such tanks; that so arising they were injurious to health; that the defendants were guilty of a breach of duty to ventilate the building; and that the plaintiff's health was injured, and to what extent, by such vapours, by reason of such absence of ventilation.

The case was tried by a jury, who found: that harmful gases were so generated, "the three fumes of gases combined sulphuric acid, cyanide of potassium, and natural gas;" that the building was not ventilated in such a manner as to keep the air reasonably pure and so as to render harmless so far as reasonably practicable all gases, vapours, or other impurities generated in the course of the manufacturing process carried on by the defendants while the

plaintiff was in their employment; that the conditions of the factory where the plaintiff worked caused his present and possibly future disability; that the injury complained of by the plaintiff was caused by the defendants' negligence; that the negligence was, "sufficient ventilation was not provided while the plaintiff worked there;" and that the plaintiff was not guilty of contributory negligence: and they assessed the plaintiff's damages at $3,500 under the common law, and at $3,664.44 under the Factories Act.

The assessment at the greater sum under the Act seems to have arisen from the fact that the jury did not understand that compensation only could be given, that the limitation provided in the Act was the maximum, that no more could be awarded, nor could more than the loss be awarded if it were less than the maximum: however, judgment was properly directed to be entered for the lesser sum, and that is not now objected to.

The next preliminary matter which arises is involved in the question: why is this case here, why is the claim not one for the Workmen's Compensation Board? The answer is: that it was twice before that Board, and was rejected as one not within the provisions of the Workmen's Compensation Act. It appears, however, that on both occasions the claim was entertained by the Board, and that one of its members went to the building and inspected it and was satisfied that it was well-ventilated; and that a medical referee was appointed under sec. 22 of the Act, and that he made a thorough examination of the plaintiff, and from such examination was satisfied and certified to the Board that the man was suffering from diseases of long standing which were in no way connected with his employment by the defendants: but the Board rejected the claim on the ground that, if it could be supported in fact, it would not be a case of "personal injury by accident" (sec. 3 (1) in Part I. of the Workmen's Compensation Act), and so it could not be one within the Act; and, whether that conclusion was right or wrong, it is made final and conclusive by sec. 15 of the Act, as enacted by sec. 8 of an Act to amend the Workmen's Compensation Act, 5 Geo. V. ch. 24. Therefore the Act does not stand in the way of this action.

And the only ground upon which this appeal can be allowed is: that there was no evidence upon which reasonable men could find in the plaintiff's favour; and, if that be so as to any one of the

ONT.

S. C.

SCOTLAND v. CANADIAN CARTRIDGE CO.

Meredith, C.J.C.P.

essential findings, the defendants should have judgment dismissing the action notwithstanding the verdict.

The action is one of a somewhat unusual character: one giving rise to questions with which jurors, and Judges too, are likely to be unfamiliar, questions of a more or less scientific and difficult nature; and necessarily a case in which the onus of proof resting on the plaintiff is a difficult one: proof of absence of ventilation; proof of the presence of poisonous vapours; and proof that the two combined were the proximate cause of the plaintiff's ill-health; and also proof of the amount of damages.

Yet little effort seems to have been made to prove some of these things. Let us deal with them in the order in which I have just stated them.

Instead of calling some competent witness to prove defective ventilation, the plaintiff based his case mainly on the testimony of a foreman of the work in which he had been employed; but a man with no special knowledge and a man who had been discharged by the defendants from their employment on the complaint of some of the men under him. There may, of course, be sufficient proof without the testimony of those who have studied the subject or learned from experience: there may be proof from circumstances alone. But the mere fact that the plaintiff worked in the building, and ever since has been in ill-health, is not proof; that other workmen complained is not proof. The men were working from 6.30 in the morning till 6.30 in the evening, with only a half-hour's intermission for dinner: they were so working in order to make extraordinary wages and to help to fill the urgent need of ammunitions. In such circumstances, more than the usual indispositions were sure to occur, and there are always more or less.

Then, against this somewhat haphazard proof, the defendants called first the member of the Workmen's Compensation Board who inspected the building, upon the plaintiff's claim made under the Act, in September, and he described, in evidence at the trial of this action, the ventilation as "splendid ventilation," at the time of his inspection. Their next witness was a consulting engineer of over 20 years' experience, and he firmly testified to the sufficiency of the ventilation, describing the building as a typical modern mill building, which, from the character of its construction,

ventilates itself. He also made it plain that a hood over the tanks, as suggested by the discharged foreman, would afford no protection to any one working where and as the plaintiff was. This witness was followed by a building contractor, who had had 7 years' experience as a construction engineer, and was a Bachelor of Applied Science of the McGill University. He described the ventilation in question as good, and added that he did not believe it could be improved on in a building of that kind. And lastly a number of workmen and officers of the defendant company also testified to the sufficiency of the ventilation; the latter also testifying to the usual inspections, by provincial officers under the Factories Act, of the building, without fault having ever been found with it.

Having regard to the onus of proof, I am of opinion that the plaintiff did not prove any *primâ facie* case of neglect of duty towards him in this respect.

Upon the next vital question—proof of the presence of poisonous vapours—the plaintiff's case was even more halting. Not a witness was called having any knowledge of the subject; and the circumstances, upon which only any contention in the plaintiff's behalf can be made, really proved nothing. All the symptoms of illness of the plaintiff deposed to were, by all the physicians, stated to be symptoms of a common, everyday character that may arise from any one of many common ailments; they proved nothing: nor did the fact that out of place prussic and sulphuric acids might be virulent poisons, though it may well be that some jurors might wrongly consider it conclusive against the defendants. And here again the defendants supplied the proper evidence. It was obtained from a witness, a chemist and chemical engineer, who was in the employment of the Government of the United States of America, as inspector of the making of munitions. His testimony, briefly stated, was that no poisonous gases could come from the tanks because of the dilute character of the solution; and in cross-examination, on questions framed so as to elicit such answers, said the effect of the solutions, as to poisoning by gases, would be just about the same as a glass of water: that the tanks were, so far as poisoning by inhalation went, absolutely harmless; and that if the plaintiff got sick there it must

ONT.

S. C.

SCOTLAND v. CANADIAN CARTRIDGE CO.

Meredith, C.J.C.P.

have been from some other cause: and he gave fully, in cross-examination, the reasons why that was so.

In this connection it should be stated that the jury—without knowledge of the subject—rejecting the whole testimony added natural gas as a poison which contributed to the plaintiff's injury.

No attempt was made to controvert this evidence: and, obviously, nothing is gained by relying on the proof of the pudding until there is proof that it was eaten: proof of consequences will not help if that which was eaten was really something else.

In these circumstances, no other conclusion can be reached by me than that reasonable men could not find, upon the evidence alone, that the plaintiff was injured by poisonous vapours arising from these tanks: though reasonable men might be led by their impulses to do so: but verdicts cannot stand upon generous impulses, and are not commendable from any point of view when they cost the impulsive nothing, when they put the burden upon others who have done no wrong. Therefore, on this ground also, in my opinion, the action failed and should have been dismissed at the trial.

The third ground presents also a formidable obstacle in the plaintiff's way to success in this action. Was there any evidence upon which, even if it had been proved that the tanks did emit poisonous vapours, reasonable men could find that such vapours were the proximate cause of the plaintiff's ill-health?

The man testified that he had always, before going to work in this building, been in good health; but he admitted that his discharge from military service in Canada a few months after he entered it purported to be a discharge because of physical disability, and surgical photographs—"X rays"—taken by the medical referee demonstrated to him that the man had long suffered from rheumatism affecting the bones of the spine and had been tuberculous.

But, for the plaintiff, three physicians were of opinion that his state of health at the present time and ever since he left the defendants' employment was caused by the vapours of prussic acid or sulphuric acid—one condemning the prussic acid only. All of these physicians were examined as witnesses before the expert in chemistry witness was called; and none of them was confronted with it; nor was any attempt made to recall them

ONT.

S. C.

SCOTLAND v. CANADIAN CARTRIDGE CO.

Meredith, C.J.C.P.

in view of it. None of them professed to have any special knowledge in chemistry or toxicology, indeed the most emphatic of them in support of the plaintiff was also most emphatic in asserting his lack of knowledge of poisons and their effects. And all three admitted that the man's symptoms of disease were common symptoms that might arise from any of many ordinary causes—that there was no distinctive symptom; that without the man's statement of the cause of his ailments they would be without the groundwork of their opinions: that they never went to test the tanks or see the building, and that they had to rely altogether upon the man's "history" of his ailment and its causes: but that what they saw, and what they were told accorded with the conclusion reached by them. One only of them professed to have seen another case of such poisoning; but even in that case it depended, just as this case does, on his own diagnosis only, and so cannot be treated as an authenticated case. If the plaintiff really thought he had a good case against these defendants, it is extraordinary that he did not call as a witness some one who had some knowledge of and experience in such cases.

For the defence the medical referee before mentioned testified, with much confidence apparently, that the plaintiff's ill-health was not at all attributable to poisoning by prussic or sulphuric acid, but that he was suffering from long standing bacterial diseases, osteo-arthritis—chronic rheumatism affecting the bones—and pleurisy, which he thought "was an old tuberculosis;" and he testified that this was demonstrated by the photographs which he had taken of the man and produced at the trial. And to this must be added the testimony of the chemist, which it bears out.

In these circumstances, how could reasonable men, of the ordinary class in inexperience and want of knowledge of such things, say that the plaintiff's injuries were not caused by germ diseases, but were caused by prussic and sulphuric acid and natural gas poisoning; adding the last of the three adds, to the minds of all who have lived in natural gas and oil-producing districts, an additional reason for the conclusion that reasonable men trying and determining a case according to law, without fear, favour, or affection, could not find for the plaintiff on this question: see *Jackson* v. *Hyde* (1869), 28 U.C.R. 294, and *Reed* v. *Ellis* (1916), 32 D.L.R. 592, 38 O.L.R. 123.

ONT.

S. C.

SCOTLAND v. CANADIAN CARTRIDGE CO.

Meredith, C.J.C.P.

It may be added that, if the case had happened to have been one within the Workmen's Compensation Act, the plaintiff's claim would have failed upon this ground, on the report of the Board's medical referee, as well as the investigation made by one of its members.

I am accordingly in favour of allowing this appeal and dismissing this action, for each of these three reasons.

Appeal allowed.

N. S.

S. C.

MILLS v. BIDEN.

Nova Scotia Supreme Court, Chisholm, J. September 7, 1918.

WILLS (§ III G—120)—CONSTRUCTION—ESTATE IN FEE OR FOR LIFE—POWER OF SALE AT COMMON LAW—IMPLIED POWER IN EQUITY—ESTOPPEL—TORTIOUS ENFEOFFMENT—STATUTE OF LIMITATIONS.

A devise to the testator's wife of "all my real and personal estate of which I shall die seised and possessed or to which I shall be entitled and all debts which may be due to me at the time of my decease with full power and authority for her to dispose of the same at her discretion by absolute deed or deeds of conveyance executed by her or by her last will and testament among my children or any one of them and should she die without executing such deed or deeds or last will and testament then the same to be divided among my children surviving . . . "

Held, that the widow took a life estate only with power of appointment to the children or to some of them and a gift over to the children if the power were not exercised.

The widow having purported to convey the fee, the Court further *held*, that the mode of conveyance adopted by her amounted to a bargain and sale, taking effect under the Statute of Uses, and was not a tortious feoffment which under the law would work a forfeiture under the Statute of Limitations (R.S.N.S. 1900, c. 167).

Statement. ACTION to recover possession, and rents and mesne profits of certain property, the devisee having purported to convey the fee.

V. J. Paton, K.C., and *E. T. Parker*, for plaintiffs; *F. L. Milner*, K.C., for defendant.

Chisholm, J. CHISHOLM, J.:—One William Nelson Mills died at Amherst, N. S., on Aug. 16, 1862, and was at the time of his death the owner in fee simple of certain parcels of land in and near Amherst. One of these was his homestead property, on a portion of which the Terrace Hotel now stands. Another portion of the homestead is in the occupation of the defendant and is the subject-matter of this action. William Nelson Mills executed a will, dated Aug. 8, 1862, which said will was duly proved on Jan. 13, 1863, in the Court of Probate in and for the County of Cumberland. The will, it may be here noted, is in the handwriting of one James E. Purdy, the Registrar of Deeds for the County of Cumberland, who was not a solicitor, had never studied law, and was not, so far as the evidence taken on the trial shews, in the habit of writing wills.

N. S.
S. C.
MILLS
v.
BIDEN.
Chisholm, J.

The will (testator's own punctuation being observed) is as follows:—

This is the last Will and Testament of me William Nelson Mills of Amherst in the County of Cumberland, Carriagemaker, I give and devise and bequeath unto my wife Elizabeth Mills all my real and personal estate of which I shall die seized and possessed or to which I shall be entitled and all debts which may be due to me at the time of my disease with full power and authority for her to dispose of the same at her discretion by absolute deed or deeds of conveyance executed by her or by her last will and testament among my children or any one of them and should she die without executing such deed or deeds or last will and testament, then the same to be divided among my children surviving or their legal representatives if dead share and share alike, And I commit the guardianship of my children Elizabeth and Hibbert until they attain full age unto my said wife whom I also constitute and appoint sole Executrix of my last will, testament and devise. In Witness Whereof I have hereunto set my hand and seal the Eighth day of August A.D. 1862.

The above instrument was subscribed by William Nelson Mills the Testator in the presence of each of us and was at the same time declared by him to be his last Will and Testament and we at his request sign our names hereto as subscribing witnesses.

(Sgd.) Jas. E. PURDY (Sgd.) W. N. MILLS
(Sgd.) J. A. CHIPMAN. (L.S.)

The testator's real and personal property was appraised at £1145.5.0, the homestead property being appraised at £350. The testator left him surviving his widow and executrix, Elizabeth Mills, and three children, namely, Byron Mills, Elizabeth Mills (Fowler) and the plaintiff, C. Hibbert Mills. The widow Elizabeth Mills died on March 12, 1901. The elder son, Byron Mills, was born about the year 1839. He lived in Amherst after his father's death, married, and later moved to Boston where he died some years ago, leaving the plaintiff B. Walton Mills the sole issue of his marriage. The daughter, Elizabeth Mills, born about 1843, married one William Fowler and died on Nov. 15, 1871. By her marriage with Fowler she had two sons, Carl W. Fowler, who is still living and not a party of this action, and Herbert Fowler, who died intestate and unmarried on Jan. 1, 1914. William Fowler married a second time and by his second wife had two children, the plaintiffs, Nell Martin and Jennie Pope; his second wife died in his lifetime and he married a third time, and by his third wife he had two children, the plaintiffs Constance Frith and A. McK. Fowler. The children of his second and third marriage claim an interest in the lands which are the subject-matter of this action through their half-brother, Herbert Mills, who, as already stated, died intestate and unmarried.

N. S.

S. C.

MILLS v. BIDEN.

Chisholm, J.

The third child of the testator, the plaintiff C. Hibbert Mills, was born on April 20, 1850. He left Nova Scotia on April 20, 1873, and never returned to the Province until a few days before the trial.

The widow of the testator, being then in possession of the property, conveyed or attempted to convey in fee simple the homestead property to one William J. Hamilton, his heirs and assigns by deed dated May 6, 1873, and recorded in the office of the Registrar of Deeds at Amherst, in Book RR, p. 288. The purchase price was $2400. Hamilton enlarged and improved the dwelling house and started the hotel known as the Terrace Hotel, which is still in operation. Following the conveyance to Hamilton there have been numerous other conveyances, of the property or of portions of it, down to the conveyance, dated October 12, 1911, to the defendant of the portion of the original Mills homestead on which defendant now does business. In all these conveyances a title in fee purports to be given and the various deeds contain covenants for good title. The property purchased in 1873 for $2,400 has in the interval increased enormously in value. The defendant paid $10,000 for the place where she does business. The plaintiffs contend that under the will of William Nelson Mills his widow took only a life estate, and that upon her death in 1901, they became entitled to the possession of the real estate by virtue of the gift over in the will. In this action they claim possession, rents and mesne profits.

The defendant pleads that she is in possession, which is equivalent to a denial of the whole of the plaintiff's case. In the alternative she contends:

(a) That Byron Mills in his lifetime, Elizabeth Mills (Fowler) in her lifetime, and the plaintiff C. Hibbert Mills, had notice of the said several conveyances and of the great increase in the value of the said lands and never asserted any title to the said lands and never until action brought gave notice to the purchasers that they had any title in said lands, and that the plaintiffs are now estopped from asserting any title to said lands.

(b) And in the further alternative, that said Byron Mills and the plaintiff C. Hibbert Mills received from their mother the said Elizabeth Mills large sums of money realized by the said Elizabeth Mills from the sale of said lands, the said Byron Mills and the plaintiff C. Hibbert Mills knowing that said moneys were realized from the sale of said lands and that they thereby elected to affirm the said sale and they are now estopped from asserting title to the lands;

(c) And as a further alternative, defendant says that the plaintiffs' claim is barred by the Statute of Limitations;

(d) And that if it is held that the widow took only an estate for life when under the general power of disposition given to her under the will, she had in equity a power of sale and that power was validly exercised.

The defendant pleads also a counterclaim, asking for a declaration that the testator's widow took an estate in fee simple under the will and that the gift over is void; or in the alternative, that if she took an estate for life only, she had power under the will to convey to persons other than the children of the testator.

The defendant gave notice of trial by jury and the evidence was taken in the presence of a jury. The defendant's counsel prepared 26 questions for submission to the jury, and plaintiffs' counsel 14 questions; but in consequence of some conversation which took place between one of the jurymen and a party interested in the result of the action, after an adjournment for the day, the action had to be withdrawn from the jury.

1. The first question to be determined is whether the widow took a life estate or an estate in fee simple under the will. Counsel for the defendant contends that she took an estate in fee; and, after dividing the will into three parts, he invokes the rule of law, which is laid down in 28 Halsbury's Laws of England, pp. 771-2, par. 1408, and is to be found also in Farwell on Powers (3rd ed., 1916) p. 75. It is stated in Halsbury as follows:

Where there is first a clear absolute gift or gifts in fee simple followed by words sounding like a power the Court *primâ facie* gives effect to the absolute gift or gift in fee simple as such and even where there is a gift over, if the power is not exercised, holds the gift over inconsistent with that absolute gift; the context may shew however that the first gift was not intended to be unrestricted and absolute.

And in Farwell the rule is given in the following words, par. 7:

Where there is an absolute gift, whether of realty or personalty, followed by words sounding like a power, whether general or limited, with a gift over, if it be not exercised, the gift over is repugnant and void.

The counsel divides the will into three distinct parts as follows in order to show the application of the principle of law upon which he relies:

I give devise and bequeath unto my wife Elizabeth Mills all my real and personal estate of which I shall die seized and possessed or to which I shall be entitled and all my debts which may be due to me at the time of my decease.

With full power and authority for her to dispose of the same at her discretion by absolute deed or deeds of conveyance executed by her or by her last will among my children or any one of them;

And should she die without executing such deed or deeds or last will and testament, then the same to be divided among my children or their legal representatives, if dead, share and share alike etc.

N. S.
S. C.
MILLS v. BIDEN.
Chisholm, J.

Applying the rule of law to the will so divided, he contends that in the first clause we have the absolute gift or gifts in fee simple; and following it in the second clause are the words sounding like a power; and in the third clause is the gift over in the event of the failure to exercise the power, which gift over, he argues, is inconsistent with the absolute gift, and must be held to be void.

It is true that it was not a document so dissected that the testator executed; but nevertheless it may be helpful to consider it in the way suggested. Then the first question that presents itself is this: Have we in this will an absolute gift of the lands to the widow? Before the enactment of the statute containing the rule of construction hereinafter mentioned, a general devise without words of limitation or other words shewing either expressly or by implication that the testator intended to pass the fee—and there are no such other words in the will under consideration—passed to the devisee an estate for life only: Theobald, pp. 407-8; 2 Jarman, pp. 1806-7; Armour on Real Estate, pp. 439-40. The transfer of a fee must be found, if it is to be found at all, as the result of the application to the will of the rule of construction contained in the statute. S. 23, c. 114 of the Revised Statutes, second series, which was the statute in force when the will was made and proved, is substantially the same as s. 28 of our present Wills Act (R.S.N.S. 1900, c. 139) and it reads as follows:

> Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real property, unless a contrary intention appears by the will.

This is a rule of construction which must be applied to the will. If an intention contrary to the passing of a fee simple is to be found in the will, then an estate in fee simple is not devised. It is only by the absence of words expressing such contrary intention that defendant can be heard to say that there is in the first part of the will a gift in fee simple to the widow. Can we find in the will such contrary intention? A perusal of the will cannot fail, in my opinion, to lead one to the conclusion that such contrary intention appears abundantly by the will. Writ all over it is the intention to keep the property in the family. It is first given to the widow. She is authorized to dispose of it either by deed or by will, not to anybody outside the family, but to the children or some of them and in the event of failure to exercise that authority

by passing the title by her act to the children, the testator by his own will provides that in that contingency it shall pass direct to the children. I am unable to see therefore how the rule laid down in Halsbury can, in view of the provisions of s. 23, be applied in this case; and that independently altogether of the concluding sentence in the citation from Halsbury where it is stated that "the context may shew however, that the first gift was not intended to be unrestricted and absolute." If the initial requirement to shew that a title in fee passed to the widow is not satisfied, then the whole argument on the proposition fails.

It is familiar law expressed by eminent Judges in a great number of cases that in construing a will we must first ascertain what its meaning is according to the ordinary use of language; we must look at the words used by the testator in the will and gather from them what he meant, without regard to technical rules of construction. And leaving out of consideration the provisions of s. 23, and taking the words as they stand in the will, it is not unreasonable to conclude that the testator meant to pass a life estate only to the widow, with power of appointment to the children or to some of them, and a gift over to the children if the power were not exercised. Such a construction, moreover, gives effect to every clause in the will, whereas to yield to the construction urged by defendant's counsel, the second and third clauses of the will would have to be rejected. If the testator had sent a writing in the words of the will to a solicitor, stating that it contained what he wished to have embodied in his will and requested the solicitor to put it in the usual legal and technical form, would there be any doubt about the form in which the solicitor would draw it?

A power can be created by informal words and it cannot be said of the words used in this will that they are vague or difficult to understand. I think the language used is quite sufficient to create the power intended. The language of the power, together with the limitation in the gift over seem to me to shew the controlling purpose of the testator, namely, that his property should either in his widow's lifetime or at her death pass to the children. The circumstance that the power is a special one under which only the children or some of them can be appointees and that the gift over is to the same objects of testator's bounty, is to my mind

N. S.

S. C.

MILLS v. BIDEN.

Chisholm, J.

important and distinguishes this case from several cases cited on the trial. In *Howorth* v. *Dewell* (1860), 29 Beav. 18, 54 E.R. 531, there was no gift over; and the same is true of *McIsaac* v. *Beaton* (1905) 38 N.S.R. 60; 37 Can. S.C.R. 143. And without discussing them at length, I find support for my conclusions in the cases of *Constable* v. *Bull* (1849), 3 DeG. & Sm. 411, 64 E.R. 539; in *re Stringer's Estate* (1877), 6 Ch. D. 1; *Bibbens* v. *Potter* (1879), 10 Ch. D. 733; in *re Pounder* (1886), 56 L.J. (Ch.) 113; in *re Sanford*, [1901] 1 Ch. 939; and *Comiskey* v. *Bowring-Hanbury* [1905] A.C. 84. The case differs also from those cases in which there is an absolute gift followed by precatory words which have been held to be mere suggestions on the part of the testator for the guidance of the devisee in the distribution of the property.

2. The next defence raised is that of estoppel; and to determine the question of estoppel it will be necessary for me to make findings on some of the facts involved in the case. In making my findings of fact, regard will be had, so far as I consider them essential, to the questions which were prepared for submission to the jury. I feel that upon the evidence I am on strong ground in finding—as I do find—that Elizabeth Mills the widow, William J. Hamilton the first purchaser, and every subsequent grantor and grantee of the property down to and including the defendant honestly believed as to every conveyance purporting to pass a fee simple, that a good title in fee simple passed. With respect to Byron Mills, who was about 22 years of age when his father died, I am of the opinion that he honestly believed that the property was devised to his mother in fee and was conveyed by her in fee to Hamilton; and that Byron Mills so honestly believed down to the day of his death. Elizabeth Fowler died in 1871 and before the conveyance to Hamilton. I am of opinion that her son Herbert Fowler honestly believed that his grandmother had a title in fee and conveyed such title to Hamilton and that he was of that belief down to his death. I believe that the plaintiff C. Hibbert Mills thought as his brother did as to the title until a short time before this action was brought. I find also that the price paid by Hamilton for the homestead, $2400, represents fairly the value of the property in 1873. I find further that Byron Mills and the plaintiff C. Hibbert Mills knew that Hamilton was erecting a hotel on the property.

I do not think that any facts have been proved to bring the case within the case of *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129, 66 E.R. 812, cited by the defendant's counsel or within the rules laid down by Fry, J., in *Willmott* v. *Barber* (1880), 15 Ch. D. 96, cited by the plaintiff's counsel. I cannot find that there was any fraudulent standing by on the part of the plaintiff C. Hibbert Mills, or on the part of the other plaintiffs or anybody through whom they claim. These parties were not aware of their own rights, nor were they aware of the ignorance or mistake of the purchasers as to their rights. Without such knowledge there was no duty cast upon them. If there was no duty, there can have been no breach of duty, and it is upon such breach of duty that this doctrine of estoppel by standing by is based.

It was argued that the two sons received a part of the proceeds of the sale of the homestead property, but that circumstance, even if proved beyond controversy, will not and for the same reason work an estoppel against them. I think the defence of estoppel must fail.

3. The defendant, as a further alternative, pleads the Statute of Limitations (R.S. N.S. 1900, c. 167). It is urged on her behalf that if Elizabeth Mills took only an estate for life, by conveying in fee to Hamilton she destroyed her life estate. She made thereby a "tortious feoffment," which gave an immediate right of entry to those who held in remainder. S. 9 limits the period for those who were not under any disability to bring their action. A right of entry, it is argued, accrued to Byron Mills and the plaintiff C. Hibbert Mills when the conveyance was made to Hamilton in 1873. As to the plaintiffs who claim through Herbert Fowler, who was at that time under the disability of infancy, it is pointed out that s. 9, notwithstanding all disabilities, limits the time within which to bring action to 40 years next after the time when the right first accrued; and the time of the accrual of the right is fixed by s. 10 (e) which is the same as 3 & 4 Wm. IV., c. 27, s. 3 [E.]

If the conveyance to Hamilton was by way of feoffment, it seems clear that the widow's life estate would be destroyed and the persons holding the interest in remainder would have an immediate right of entry if they chose to enforce it: 24 Halsbury, 291 note K; 177, note P.; *Goodright* v. *Forrester* (1807), 8 East 552, 103 E.R. 454.

N. S.

S. C.

MILLS v. BIDEN.

Chisholm, J.

In England that was the result until 1845, when, by 8 & 9 Vict. c 106, s. 4, it was provided that a feoffment should not thereafter have a tortious effect. One of the reasons given for the principle is that the act of the life tenant amounted to a renunciation of the feudal connection between the tenant and his lord and of the dependance of the former upon the latter. By the common law a bargain and sale would not have the same effect it being the general rule that no alienation which is not made by livery of seisin or its equivalent can work a forfeiture or discontinuance.

It becomes necessary then to determine whether the property passed to Hamilton by a feoffment or by some other mode of conveyance, which would not work a forfeiture or discontinuance. The form of deed commonly in use in this Province was used for the purposes of this conveyance. It is said in 2 Murdoch's Epitome, p. 240:

> The bargain under these statutes [that is, the Statute of Uses and the Statute of Enrolments] has not been adopted in this colony: but our ordinary deeds of sale partake of the character of a feoffment and also of a bargain and sale and the registration operates in the same way as an enrolment. Our ordinary deeds are in form like the deed of release in fee (used in England with a lease for a year) but they also contain a clause of warranty borrowed from the ancient feoffment and the use of the word enfeoff as well as grant, bargain, sell, alien, release and confirm.

In *Simpson* v. *Foote* (1844), 3 N.S.R. 240, it was decided that the delivery of a deed gives constructive possession of the land and the title of the purchaser is complete. Halliburton, C.J., in that case, said:

> Under our simple system of conveyancing which was well adapted to the state of the country, actual livery is not necessary; that when there was no adverse possession . . . the delivery of the deed carried with it the constructive possession.

These authorities do not conclude the question; and it may be desirable to see how such conveyances have been regarded in the United States, where the conditions were very similar to our own.

Chancellor Kent (4 Comm. 489, 12th ed., p. 490) says:

> The conveyance by feoffment with livery of seisin has long since become obsolete in England; and though it has been, in this country, a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the Statute of Uses or short deeds of conveyance in the nature of the ancient feoffment and made effectual on being duly recorded without the ceremony of livery.

This again leaves the matter open. I find the rule laid down in one case (*Jackson* v. *Mancius* (1829), 2 Wend. 357) that where

a life tenant conveys a greater estate than he has, a feoffment with livery of seisin which would work a forfeiture will not be presumed, it being equally probable that the more common species of assurances of leave and release, or bargain and sale, was adopted. This last was in a case where it was not clear on the evidence what mode of conveyance was used.

The like principle would seem to be a reasonable one to apply in the case where the circumstances point to both a feoffment and to a bargain and sale, for the Court should, if possible, avoid a construction that would work a forfeiture.

Any words that will raise a use will, with a valuable consideration, amount to a bargain and sale. No particular words are necessary to raise a use. Any words will be sufficient which shew an intention to convey.

Hare, J., in his notes *Roe* v. *Tranmarr* (1757), Willes p. 682, Smith's Leading Cases, 8th Am. Ed., p. 534, says:

> Any instrument which shews that a title was meant to be given in return for value received will be equally effectual with the most formal deed; words to raise a use and a consideration to support it, being all that is requisite to call the Statute of Uses into operation, and constitute a bargain and sale.

Where there is so little direct authority to guide one one cannot in a matter of this kind arrive at a conclusion with very great confidence; but, on the whole, I have formed the opinion that the mode of conveyance adopted by Elizabeth Mills amounted to a bargain and sale, taking effect under Statute of Uses, and was not a feoffment which, under the law, would work a forfeiture.

Even if a forfeiture were the result of the conveyance there might be still some question as to whether the remaindermen would not have two rights of entry, one when the forfeiture took place, which they might waive, and another at the natural termination of the life tenancy; *Hunt* v. *Burn* (1689-1711), 2 Salk. 422, 91 E.R. 367; *M'Kee's Lessee* v. *P fout* (1798), 3 Dall. (Pa.) 486; *Doe* v. *Danvers* (1806), 7 East 299, 103 E.R. 115; *Wells* v. *Prince* (1813), 9 Mass. 508; *Stevens* v. *Winship*, [1823] 1 Pick. 318; *Jackson* v. *Mancius* (1829), 2 Wend. 357; but on account of the conclusion I have come to as to the nature of the conveyance, it is not necessary to discuss whether under our statute, the plaintiffs could rely upon a second right of entry.

4. The defendant takes the further point that if it is held that the widow Elizabeth Mills took an estate for life only in

N. S.

S. C.

MILLS v. BIDEN.

Chisholm, J.

equity a general disposition among a class such as is found in the second clause of this will includes a power of sale, and consequently the power of sale is incidental to the power of disposition of the property in such manner and form although the original will does not expressly include a direct power of sale. The cases of *Kenworthy* v. *Bate* (1802), 6 Ves. 793, 31 E.R. 1312, and *Fowler* v. *Cohn* (1856), 21 Beav. 360, 52 E.R. 898, are cited in support of this contention. In Farwell on Powers, p. 366, the proposition is laid down that appointments made in substantial accordance with the expressed purpose of the power, although not strictly in accordance therewith *modo et forma*, are good appointments in equity and the cases cited by defendant's counsel support that proposition. It appears from the evidence that the widow sold for £300 to George Christie and Charles Christie the mill property, a portion of the testator's real property, which was appraised at that amount. The deed is to the Christies and their heirs and is dated Oct. 1, 1863. I believe—and I so find it—that from and out of the proceeds of such sale, the marsh lands conveyed by the sheriff of the County of Cumberland to Byron Mills were paid for. The sheriff's deed is dated July 5, 1865; and the price paid was $809. The sale to Christies and the purchase of the marsh lands under the cases cited would in equity be held to be a good appointment of the mill property to Byron Mills; but it would not exclude the appointment of the remaining property to him and the other children or some of them, or preclude him from participating in property which might be the subject of the gift over. The power of appointment among children need not be exercised *uno flatu*, and the real property may be appointed at intervals, if not full exercised at first; provided that the party in the whole execution does not transgress the limits of the power; *Doe* v. *Milborne*, (1788), 2 T.R. 721, Farwell on Powers, pp. 44 and 188.

The homestead property was not sold until 1873, and on the evidence before me it is impossible to follow the proceeds of that sale. If it were shewn that either of the sons had received the proceeds of that sale, then there would probably be in equity a good appointment of that portion of the real estate. I cannot regard as a substantial execution of the power a transaction which discloses a sale but no application of the proceeds to the proper objects of the power.

Besides I do not think that the sale to Hamilton was made with any intention of exercising the power; I am of the opinion that the widow believed that she owned the property in fee simple and made the conveyance accordingly. In *Kenworth* v. *Bates*, *supra*, the estates conveyed to trustees were, after other designated uses:—

To the use of such child or children of said Bartholomew Penny on the body of said Ann his wife begotten or to be begotten as the said Bartholomew Penny, should in and by his last will and testament in writing under his hand and seal duly executed, give, direct, limit and appoint.

By his will after reciting the said power, he devised his estate to trustees to sell and dispose of and he directed them to divide the proceeds among his children.

It was held that the power was sufficiently executed.

In *Fowler* v. *Cohn*, *supra*, the devise was to trustees to the use of C. for life

with remainder to the use of all and every or such one or more of the children of his said son whether born in his lifetime or after his disease and then his or her heirs for such estate and estates by such parts or proportions and in such manner and form as his said son should by deed appoint.

It was held that the power authorized the parties to sell and divide. In this case Sir John Romnily, M.R., said:

I find it quite settled by the authorities that a general power of disposition of the whole property includes the power of sale, and consequently the power of sale is incidental to the power or disposition of the property in such manner and form, although the original will does not include a direct power of sale.

In each case the donee intended to exercise the power, and the intention appears plainly in the case. The appointments were made in substantial compliance with the expressed purpose of the power. If a general power of disposition includes a power of sale in all cases, without regard to the donee's intention and without regard to the distribution of the proceeds of the sale among the objects of the original settler's bounty, then, on the strength of the language of Sir John Rommily above quoted, I should feel obliged to give effect to the defendant's contention. But I do not think that the rule laid down in the extract was intended to have such wide effect.

I decide this point also in favour of the plaintiffs as I do not think there was an appointment of the homestead property.

There will be judgment in favour of the plaintiffs and the counterclaim will be dismissed. Costs will follow.

Judgment for plaintiffs.

Appeal pending.

ONT.

S. C.

Re NEW YORK LIFE INSURANCE Co. AND FULLERTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Middleton, JJ. May 30, 1919.

INSURANCE (§ VI D—390)—ONTARIO INSURANCE ACT—FRAUD ON CREDITORS —LIMITATION OF CLAIM.

A life insurance policy effected in pursuance of the Insurance Act (R.S.O. 1914, c. 183), may be attacked as being a fraud on creditors, but even where it is proved to have been made with intent to defraud the creditors, their claim is limited to the amount of the premiums fraudulently paid.

Statement.

APPEAL from a judgment of Rose, J., ordering payment of insurance money to the beneficiary named in the policy. Affirmed.

J. B. Clarke, K.C., for the appellants.

J. E. Lawson, for Elizabeth Fullerton, the respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The one question which need now be considered in this case is: whether, and if at all to what extent, the insurance moneys in question can be reached by creditors of the assured, who is now dead, assuming that the policy was obtained, and kept in force, for the purpose of evading their claims: and that question presents some difficulties.

Unless a statutory provision, relied upon by the respondent, prevent, I am unable to perceive why the money should not be reached by defrauded creditors. Why not? As against such creditors the money in question is the money of the debtor's estate: the fraud avoids, as against them, the interest that the respondent acquired in the money: except as against them the money is hers.

But sec. 171 of the Insurance Act, R.S.O. 1914, ch. 183, is a formidable obstacle in the appellants' way. If it apply to this case, the creditors' rights extend only to the amount of the premiums paid by the insured with intent to defraud his creditors. That part of the section directly affecting the question is in these words:—

"171.—(1) Every person of the full age of twenty-one years shall have an unlimited insurable interest in his own life and may effect *bonâ fide* at his own charge insurance of his own person for the whole term of life, or any shorter term for the sole or partial benefit of himself, or of his estate, or of any other person, whether the beneficiary has or has not an insurable interest in the life of the assured, and the insurance money may be made payable to any person for his own use or as trustee for another person.

"(2) If the premiums on such insurance were paid by the assured with intent to defraud his creditors they shall be entitled to receive out of the insurance money an amount not exceeding the premiums so paid and interest thereon."

Sub-section 2 was apparently first introduced to the statute-law of this Province in 1884, as sec. 21 of an Act to Secure to Wives and Children the Benefit of Life Insurance, and was confined to insurance of that character; and it so remained, apparently, until the year 1897, when it was carried into the Ontario Insurance Act, which dealt with the subject of insurance generally in the Province, and was something in the nature of a codification of the provincial laws on the subject; and there it lost its expressed restrictive application, being, substantially, there introduced in its present form in so far as this question is affected by it.

The language of sub-sec. 2, standing alone, would be anything but a clear and explicit answer to the creditors' claims: and it would be much less so after the Act of 1897 than before: when embodied in an Act making provision for wife or widow and children only, it might have an irresistible power to shield them; whilst, if used to protect those who had neither legal nor moral claim on the insured, it might be a shield easily pierced. The difficulty now is to make it apply to any one without making it applicable to every one. And the difficulty seems to have arisen from the draftsman or codifier of the law being under the impression that without such a provision the creditors could take nothing: at all events that is the only explanation of the legislation which at the moment occurs to me. He must have failed to observe the general words of protection against creditors in sec. 178 (2), else he should either have made the sub-section in question a sub-section of sec. 178, and so restricted its effect to wife and children and others of the preferred class, or else have added to sub-sec. 2 of sec. 171 the protective words contained in sec. 178 (2).

However, it is manifest that some effect was intended to be given to sub-sec. 2, and the only effect which, as it seems to me, can be reasonably given to it is: that expressly the limited relief is given to creditors and impliedly greater relief is withheld; and that no interpretation can apply it logically to any class or person without applying it to all.

ONT.

S. C.

RE NEW YORK LIFE INSURANCE CO. AND FULLERTON.

Meredith, C.J.C.P.

I therefore reach the conclusion that the appellants, if they should prove the fraud, could have the limited relief but that only; and, as I understood counsel, that is not sought; but, if it be, the parties should go to a trial of an issue about it.

The case of *Holt* v. *Everall* (1876), 2 Ch. D. 266, has not afforded me much assistance, the statute there in question being so plainly worded that the only question which arose, or could have arisen, in that case was: whether it was one within the provisions of the Act. It is much to be regretted that the Act in question in this appeal was not expressed as the Act in question in that case is—if that which is there expressed were really meant by the Legislature here.

That enactment (the Married Women's Property Act, 1870, sec. 10) is in these words:—

"A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of his estate.

"If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid."

This legislation is therefore precisely as the legislation here in question would be if sub-sec. 2 of sec. 171 were sub-sec. 3 of sec. 178, instead of as it is, and then, as I have said, the law here would be as it is in England—except that the preferred class here includes wife and children only.

No words like the words "shall not . . . be subject to the control of the husband or his creditors or form part of his estate' are contained in the enactment in question in this case, though they are contained in sec. 178 (2), as I have said; and it is not, as the other is, for the benefit only of wife or widow and child or children. To make this case like the case of *Holt* v. *Everall*, sub-sec. 2 of sec. 171 must be taken away from its present place and made part of sub-sec. 2 of sec. 178. It is, however, to

ONT.

S. C.

RE NEW YORK LIFE INSURANCE CO. AND FULLERTON.

Meredith, C.J.C.P.

be borne in mind that the Act in question does not permit of abstractions from the debtor's property for the benefit of others than creditors, but makes them good to the creditors, and gives to the third person the benefit of the lottery only, if such it may be called.

I would therefore dismiss this appeal, but only on the ground that the statute prevents the relief sought being given, relief which, but for it, the appellants should have if they proved their allegations of fraud: but subject to this: that they should be at liberty to seek the limited relief in the way I have mentioned, though, in any case, they must pay the costs of this appeal.

MIDDLETON, J.:—The Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (1), permits an insurance by any person for the benefit of another, whether the beneficiary has or has not an insurable interest in the life of the assured. Middleton, J.

By sub-sec. 2, if the premiums paid are paid by the assured with intent to defraud his creditors, they shall be entitled to receive out of the insurance money an amount not exceeding the premiums so paid and interest thereon.

The history of this section is given in the judgment in review and need not be repeated.

In *Holt* v. *Everall*, 2 Ch. D. 266, the Court of Appeal dealt with the effect of the similar provision found in the Married Women's Property Act, and held that the effect of the legislation was to give to the beneficiary the right to the insurance money, subject to the provision for payment to the creditors of the amount of any premium fraudulently paid.

Bunyon, Law of Life Assurance, 4th ed., pp. 564, 565, recognises this as the law, saying: "It would seem, therefore, that in case a settlement is made by means of a policy effected in pursuance of this Act, even where it is proved to have been made with intent to defraud the creditors, their trustee will not be entitled to claim the policy, but merely to the amount of the premiums fraudulently paid."

If the statute had not made this provision, there is abundant authority for holding that an assignment or settlement of insurance money may be attacked as being a fraud upon creditors. The cases are collected in Bunyon, p. 525 *et seq.*

The appeal should be dismissed with costs.

BRITTON and RIDDELL, JJ., agreed with MIDDLETON, J. Britton, J. Riddell, J.

Appeal dismissed with costs.

ONT.

S. C.

PARSONS v. TORONTO R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Magee, J.A., Britton and Riddell, JJ. June 13, 1919.

STREET RAILWAYS (§ III C—48)—DRIVER OF MOTOR CAR—NEGLIGENCE OF—NEGLIGENCE OF STREET CAR CONDUCTOR PROXIMATE CAUSE OF INJURY—DAMAGES.

The negligence of the plaintiff in misjudging the speed of an oncoming street car will not prevent him from recovering damages for injuries caused by his car being hit by such street car, where the real proximate and decisive cause of the injury was that the motorman was running the car at such an excessive rate of speed that he could not stop the car within a reasonable distance and avoid the result of the plaintiff's negligence which might have been anticipated.

Statement.

APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of York, upon the findings of a jury, in favour of the plaintiff, in an action, brought in that Court, to recover damages for injuries sustained by him when a motor vehicle which he was driving was struck by a street-car of the defendants. Affirmed.

The plaintiff alleged negligence on the part of the employees of the defendants in charge of the car.

The questions given to the jury and the answers thereto were as follows:—

"1. Was there any negligence on the part of the defendants or their motorman which caused the collision? A. Yes.

"2. In what did such negligence consist? A. In that he did not have his car under control to stop in case of an emergency.

"3. Was there any negligence on the part of the plaintiff Parsons which caused or contributed to the collision? A. Yes.

"4. In what did such negligence consist? A. He misjudged the distance the street-car was from him when he started from the kerb.

"5. Notwithstanding the negligence, if any (if you find the plaintiff negligent in any way)—notwithstanding that negligence of the plaintiff Parsons, could the defendants' motorman, by the exercise of reasonable care, have prevented the collision? A. Yes.

"6. Could the motorman, by the exercise of reasonable care, have prevented the collision, and, if so, what should he have done which he did not do or left undone which he did? A. He should have had his car under control."

D. L. McCarthy, K.C., for the appellants.

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

ONT.

S. C.

PARSONS v. TORONTO R. Co.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The case, as it appears to me, is not one in which any question of primary, secondary, and tertiary negligence arises: it is simply a case of negligence on the part of the plaintiff which does not prevent him from succeeding in this action, because, notwithstanding such negligence, the defendants might, by the exercise of ordinary care, have avoided injuring him. It is a breach of that duty, owed to the negligent, and that alone, which gives the right of action.

The jury seem to have dealt intelligently and accurately with the case in finding the plaintiff guilty of a breach of the duty which he owed to the defendants, in putting himself and his car and their car and its passengers and crew, in danger, by moving out of a place of safety into a place of danger upon the defendants' tracks and in front of their oncoming car without any reason for doing so beyond a disinclination to wait, as ordinary care demanded, until the street car had passed and the way was safe; and also in finding that, notwithstanding the plaintiff's negligence, the defendants might, by the exercise of ordinary care, have avoided the injury which they inflicted upon him.

They cannot excuse themselves, in such a case as this, from that duty by shewing that, owing to their own prior want of ordinary care, they had deprived themselves of the power to perform the duty they owed to the plaintiff.

The case is quite different from one in which the negligence of each is, for instance, the neglect to see the other and the danger into which each is running. In such a case the neglect of each may very well be set off against that of the other; and another duty arises only when the danger is realised and can be averted by the exercise of ordinary care—that which is ordinary care having regard to all the circumstances; and that duty is applicable to each alike—the third and, as to liability, concluding negligence.

Much was said upon the argument of this appeal, and indeed much is said in many cases of negligence here now, about the case of *British Columbia Electric R.W. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4; but I am unable to perceive that it is at all applicable to this case. It is said that it may be that it is not, but that it overrules the judgments in favour of the defendants in the case of *Brenner*, in the provincial and federal Courts here; and that, if that case was wrongly decided, this case was rightly decided at

ONT.

S. C.

PARSONS v. TORONTO R. Co.

Meredith, C.J.C.P.

the trial. But I cannot consider that that case has been in any sense overruled, nor see that it in any sense stands in the way of the plaintiff in this case. It is true that the learned Judge who spoke for the Judicial Committee of the Privy Council, in pronouncing judgment in the case of *Loach*, said that the facts of the case of *Brenner* were closely similar to those of the case he was dealing with; and it is also true that the defendants failed in the one and succeeded in the other; but, so far as overruling is concerned, the cases could hardly be more dissimilar. In the case of *Brenner*, the jury's findings were altogether in favour of the defendants: they found no negligence of the defendants; in the case of *Loach*, they were altogether in favour of the plaintiff. In the case of *Brenner*, the single question was, whether the plaintiff should have a new trial on the ground that the trial Judge had misdirected the jury as to the effect of the defendants' rule regulating the running of their cars as evidence at the trial: in the case of *Loach* the single question was whether the defendants should have the judgment upon, or notwithstanding, the findings of the jury. It needs much more than anything said in the case of *Loach* to throw any doubt upon the accuracy of the judgments in the case of *Brenner*, in the mind of any Judge of any of the Courts of this Province; a judgment with which the parties were apparently ultimately content, at all events they went no further, and which has, nowhere hitherto, met with disapproval; I speak of the case itself, not any "abstract" question of law, not affecting the question of misdirection, discussed in the Divisional Court; nor is it likely to be by those who take the trouble to know what it was all about and what was decided in it, not to speak of what the evidence in it really was.

I am in favour of dismissing the appeal.

Magee, J.A.

MAGEE, J.A., agreed that the appeal should be dismissed.

Riddell, J.

RIDDELL, J.:—The plaintiff, driving a Ford touring car on the afternoon of the 5th June, 1918, stopped on the south side of Dundas street, a few feet behind another motor-car, in order to make some purchases in a shop adjoining—his car was of course facing east. Coming out of the shop, he looked to the west and saw a street-car some 250 to 300 yards away: he then passed around the back of his car and entered it on the north or left side. Before starting his car, he looked in the mirror, and judged the

ONT.

S. C.

PARSONS v. TORONTO R. Co.

Riddell, J.

street-car then to be about 150 yards west, although he says it was impossible to judge correctly by looking in the mirror. He then started up his car to pass around the car which was immediately in front, and therefore he turned to the north. In this way he placed the left wheel of his car on the railway track, although apparently there was room for him to pass between the standing car and the rail. He had got up speed of some 8 to 10 miles an hour, and had turned to the right or south in front of the standing car, when he was struck by the street-car and driven some 18 or 20 yards against a trolley-pole.

The evidence for the plaintiff indicates that the street-car was going very fast, at all events from 20 to 25 or 30 miles an hour: the evidence for the defence makes it much less, but apparently the jury accepted the figures of the plaintiff's witnesses.

Upon an action being brought and coming on for trial, the following questions were submitted to the jury, to which they returned the answers thereto annexed (as set out above).

The learned Judge (Judge Winchester) of the County Court of the County of York thereupon directed judgment to be entered in favour of the plaintiff with costs.

The defendants now appeal.

The main—indeed the only—ground of appeal is that the jury have made the same negligence answer for primary negligence and ultimate negligence, that is, that the only negligence found is the great speed at which the street-car was going.

It seems to me to be the fair result of the cases in the Judicial Committee and in the Supreme Court of Canada, *British Columbia Electric R.W. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4 and *Columbia Bitulithic Limited* v. *British Columbia Electric R.W. Co.* (1917), 55 Can. S.C.R. 1, 37 D.L.R. 64, that, if the motorman was running his car at so great a speed as that he could not, by the exercise of proper care, avoid the result of a negligence of the plaintiff which might be anticipated, then this excessive speed was in itself the efficient the proximate, the decisive cause of the accident, and that the contributory negligence of the plaintiff does not in law at all neutralise its effect.

It seems to me that it is not necessary to discuss previous cases in our own or in the English Courts: our duty is loyally to follow the *ratio decidendi* of decisions of Courts by whose decisions we are bound.

ONT.

S. C.

PARSONS v. TORONTO R. CO.

Riddell, J.

It is quite true that in the case in the Privy Council there was another negligence which was considered the ultimate negligence, differing from that which was considered the primary or original negligence: it is also true that in the case in the Supreme Court the majority of the Court of Appeal in British Columbia and also the Supreme Court of Canada considered the same state of affairs to exist; but the reasoning of the Courts, as it seems to me, compels us to hold that if the accident was due to the excessive speed preventing the stopping of the car in time, the defendants would not be excused.

In the present case, I think that the jury intended to find that the motorman failed to stop his car by reason of the fact that he was going too fast; and, if that was so, the defendants are liable. I can see no kind of difference between sending a car out without proper brakes and running a car at such a speed that proper brakes are useless.

The much canvassed case of *Brenner* v. *Toronto R.W. Co.* 13 O.L.R. 423, 15 O.L.R. 195, 40 Can. S.C.R. 540, was just such a case as this, and I think the result of the cases in the Judicial Committee and the Supreme Court of Canada is to hold that the judgment of the Divisional Court in that case is good law.

It may be that the last word has not yet been said in such cases; but, as the authorities stand, I am of the opinion that this appeal should be dismissed.

Britton, J. BRITTON, J., agreed with RIDDELL, J.

Appeal dismissed with costs.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

CRERAR AND PATTERSON v. BRAYBROOK.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 4, 1919.

PRINCIPAL AND AGENT (§ II C—20)—*Sale of land—Commission—Payment by agent apparently on behalf of disclosed principal—Agent secretly acting for unrevealed third party—Fraud of agent.*]—Appeal from trial judgment dismissing a claim for commission on sale of farm. Affirmed.

N. D. Maclean and *J. A. McCaffry*, for appellant.

J. E. Wallbridge, for respondent.

HARVEY, C.J., concurred with Simmons, J.

STUART, J.:—I think this appeal should be dismissed with costs. The trial Judge found upon conflicting testimony that Patterson told the defendant when he gave him the $200 cheque, that he was paying it on behalf of Powers and that Powers had instructed him to do so. Patterson was the defendants' agent. With defendants' knowledge and assent he no doubt had a right to assume also the position of agent for Powers for the purpose of advancing some money on behalf of Powers. But, having assumed that position, he had no right, without his principal's assent and agreement thereto, to change his position into that of an agent for still another unknown purchaser and to insist that the defendant should then hold the money as coming from or paid on behalf of such third party. The $200 was, upon the facts found by the trial Judge, a deposit made for Powers. We have nothing to do with any secret uncommunicated knowledge of Patterson's that he was in fact acting, though without authority, for some unrevealed third party. The parties' rights must be determined upon the facts of the communications which passed between them. There is no ground for reversing the trial Judge's finding of fact. As between plaintiff and defendant, the defendant received the $200 as a deposit from Powers and as the latter failed to go through with the purchase the deposit must be forfeited. The plaintiff made his own bed and must lie in it.

ALTA.

S. C.

SIMMONS, J.:—This is an appeal from the judgment of Scott, J., dismissing plaintiffs' claim for a commission of $480 on an alleged sale of defendants' farm, and also for the return of a deposit of $200 made to the defendants by the plaintiffs.

The plaintiffs also appeal against the judgment awarding to the defendants damages on their counterclaim against the plaintiffs for expenses incurred by the defendant in the removal of a caveat filed by the plaintiff.

The shorthand notes of the evidence are not available and the findings of fact of the trial Judge upon conflicting evidence can not be disturbed.

The plaintiffs, however, admit that when the deposit of $200 was made the same was paid by Patterson, a member of their firm, and that at that date they had negotiations with prospective purchasers but did not have a buyer who was willing to complete the purchase on the terms set out in their contract of agency with their principal. They had hopes of closing with one Powers and another agent named Bezanson with whom they had an understanding to share commissions had in view a purchaser named Nashburn. Patterson admits that when he made the deposit of $200 he did not know who Bezanson had in view as a purchaser. It appears to me he must either rely upon his claim for a return of the money on the ground that it was paid on behalf of Powers or in the alternative that he made the payment for the sole purpose of inducing the defendant to believe he had an actual purchaser, notwithstanding the fact that he now admits he had no authority from any principal to make any payment on behalf of the principal. Bezanson says he told Patterson to make the deposit of $200 for him but that he had no instructions from Nashburn to make a deposit. Bezanson says he took the risk upon himself of putting up the $200 deposit to secure the land.

The defendant Braybrook says that Patterson informed him that Powers had wired Patterson to pay $200 as a deposit on the purchase price and he accepted the $200 as such a payment. He says he extended the period of the agency until July 15 in order to enable plaintiffs to complete the Powers deal and if it was not closed then the deal would be treated as at an end. The deal with Powers did not materialize and on July 17 plaintiffs offered Nashburn as a purchaser and he was accepted by the defendant.

ALTA.

S. C.

Plaintiffs tendered the amount of the cash payment less $200, claiming that the $200 already paid as a deposit should be applied on the Nashburn sale. Defendant claimed the payment was made on behalf of Powers and that he was entitled to retain it by way of forfeit as a deposit upon a sale which the purchaser failed to complete. In the result the Nashburn deal fell through as Nashburn refused to pay the full cash payment of $1,500, and therefore no commission was earned.

It is to be noted that Nashburn does not give evidence and makes no claim in this action for the $200.

The trial Judge accepted the defendants' statement of fact that the payment of $200 was made on behalf of Powers, and that the Powers sale was to be treated as at an end on July 15, if it was not completed on that date.

The vendor has a right to treat the deposit as a guarantee of completion by the purchaser although taken as part payment of the contract if it is completed. *Howe* v. *Smith* (1884), 27 Ch. D. 89.

I do not think the plaintiff can succeed in having the counterclaim dismissed or reduced in amount as the notes of evidence taken by the trial Judge do not disclose any ground upon which an appellate Court could interfere.

In view of the findings of fact of the trial Judge it would seem that the plaintiff can not succeed on either branches and the appeal should be dismissed with costs.

MCCARTHY, J., being absent, took no part in the judgment.

Appeal dismissed.

STANDARD TRUSTS CO. v. CANADA LIFE ASSURANCE CO.

Alberta Supreme Court, Stuart, J. September 26, 1919.

INSURANCE (§ VI D—390)—*Contract—Assignment to mortgagee of insurance policy as collateral security for a mortgage—Agreement with certain purchasers of the land—Provision to buy back policy—Failure of purchasers to keep agreement—Death of assured—Error of assured in stating age in policy—Rights of estate.*]—Action by executors of an estate, in respect of an insurance policy and an agreement between purchasers of land subject to mortgage which had been assigned by assured.

James E. Wallbridge, K.C., for Standard Trust Co.

C. F. Newell, K.C., for Canada Life Assurance Co.

S. B. Woods, K.C., for the other defendants.

ALTA.

S. C.

STUART, J.:—One Ernest L. Ferris and one James Brennand were on November 20, 1912, the owners of certain lands in the City of Edmonton and on that date executed a mortgage thereon in favour of the defendant, the Canada Life Assurance Company, for the sum of $50,000 with interest at 7% per annum, the principal being repayable as follows: $5,000 on the first day of January in each of the years 1914, 1915, 1916 and 1917 and the balance on January 1, 1918.

On October 22, 1913, Brennand transferred his undivided one-half interest in the lands to a company called the London and British North America Co. On June 16, 1914, Ferris transferred an undivided one-sixth interest to the defendant Thomas Buttar. On June 17, 1914, Ferris transferred another sixth interest to the London and British North America Co. On June 24, 1914, Ferris transferred another sixth interest to the defendant Proctor. On July 24, 1914, the London and British North America Co. transferred a one-sixth interest to the defendant Innes. On May 27, 1915, that company transferred their remaining one-half interest to the defendants Innes, Balfour and Proctor, Innes getting a one-fourth interest and the other two each an eighth. As a result Proctor held an undivided seven twenty-fourths interest, Balfour an eighth, Innes ten twenty-fourths, and Buttar a sixth.

All of these transfers were subject to the mortgage to the Canada Life Assurance Co.

The mortgage in question contained a clause reciting that it had been agreed that the mortgagee, the insurance company, should issue a policy for $50,000 on the life of Ferris, and that Ferris should deposit the same and, if required, assign it as collateral or additional security for the repayment of the debt, and then proceeding to declare that Ferris did so deposit the policy and that he covenanted to pay all premiums necessary to keep the policy on foot, that the company could, in default of his paying, pay the same itself and that in such case the sums so paid should be repayable forthwith by Ferris to the company bearing interest at the rate of the mortgage and that these sums, together with interest, should form part of the moneys secured by the mortgage.

Brennand was a joint mortgagor with Ferris but the above mentioned stipulation as to the insurance policy was printed on an attached slip and was signed and sealed separately by Ferris only.

ALTA.

S. C.

On November 20, 1912, the date of the mortgage, Ferris also executed under seal what was on the face of it an absolute assignment of the policy to the Canada Life Assurance Co., the insurers.

Ferris paid the initial premium, which was the sum of $1,187.50, and also the second annual premium in November, 1913, collecting half of it, however, from his then co-owners the London and British North America Co. The payment of $5,000 due on principal was by agreement postponed until July 1, 1914, though Ferris paid the interest due January 1, 1914.

It appears that the company above referred to, called The London and British North America Co., were never beneficially interested in the property but were at all times merely trustees for the defendants Proctor, Balfour, Innes and Buttar, or some of them.

It will be observed that it was at slightly varying dates in the month of June, 1914, that Ferris made his three transfers of an undivided one-sixth interest. The second of these, that of June 17, was to the company but undoubtedly this was only to that company as trustee or agent.

Then on July 10, 1914, Ferris entered into an agreement with Proctor, Balfour, Innes and Buttar, which appears, and indeed was on the argument admitted (though there is really no direct evidence on the point), to have been made as part of the deal or bargain by which Ferris at least transferred his half interest in the property to the individual defendants or to their trustee. The typewritten agreement seems to have been drafted as early as April, 1914, for the date originally inserted was April 30, but this was changed to July 10. Whether the agreement was in contemplation when Brennand in the preceding October transferred his half interest to the company does not at all appear. However this may be, the agreement, omitting the first paragraph giving the parties, reads as follows: (the word "assured" meaning Ferris and the word "owners" meaning Proctor, Balfour, Innes and Buttar):—

Whereas the assured and one James Brennand were at one time the owners in fee simple as tenants in common of lots 28, 29, 30 and 31, in block 6, river lot 12, plan D in the said City of Edmonton (hereinafter called "the mortgaged premises"):

And whereas the assured and the said James Brennand mortgaged the mortgaged premises to the Canada Life Assurance Company (hereinafter called the company) to secure the repayment of the sum of fifty thousand dollars ($50,000.00) and interest as therein mentioned, and concurrently

ALTA.

S. C.

with the execution of the said mortgage the assured effected a policy of insurance (hereinafter referred to as "the said policy") on his life with the company for the sum of fifty thousand dollars ($50,000.00) the said policy being dated November 12, 1912, and numbered 144578 and assigned the same to the company as collateral security for the repayment of the moneys secured by the said mortgage, the premiums payable from time to time in respect of the said policy forming a charge upon the mortgaged premises:

And whereas the owners are now the registered owners in fee simple as tenants in common of the mortgaged premises subject to the said mortgage and the moneys thereby secured:

And whereas the assured has requested the owners in the event of the said policy not having become previously payable by reason of the death of the assured to make over and assign the same to him at the date of the repayment of the moneys secured by the said mortgage upon payment of a sum equivalent to the cash surrender value at that time of the said policy and the owners have agreed so to do upon the terms and subject to the conditions and stipulations hereinafter contained:

Now this indenture witnesseth that in consideration of the premises and in pursuance of the said agreement it is hereby mutually agreed by and between the parties hereto as follows:—

1.—The assured hereby assigns transfers and makes over unto and to the use of the owners, their executors, administrators and assigns all the the said policy and all the benefits and advantages thereof to have and to hold the same unto and to the use of the owners, their executors, administrators and assigns forever subject nevertheless to the payment of the premiums from time to time payable in respect thereof (other than the premiums hereinafter covenanted to be paid by the assured) and to all claims and rights of the company thereto under and by virtue of the said mortgage and the assignment of the said policy as collateral security as aforesaid.

2.—In the event of the said policy not having become payable by reason of the death of the assured previous to the date of the repayment of the moneys secured by the said mortgage, the owners hereby covenant and agree to and with the assured to assign and make over the same at such date to the assured upon payment by him to the owners, their executors, administrators and assigns, of a sum equivalent to the cash surrender value of the said policy at such date and the assured hereby in such event covenants and agrees to and with the owners, their executors, administrators and assigns to pay the said sum forthwith after the repayment of the moneys secured by the said indenture of mortgage.

3. Upon repayment by the owners, their executors administrators or assigns of any and every instalment of the principal secured by the said mortgage or any other sum on account of principal in accordance with the terms of the said mortgage and assured shall forthwith upon demand pay to the owners, their executors, administrators or assigns a sum equivalent to what would be the cash surrender value under the said policy of the amount of each such instalment or other payment or both at the date or respective dates of payment based on the proportion which the amount of any such instalment or other payment bears to the total surrender value of the said policy at such date or respective dates and shall thereafter pay to the owners, their executors, administrators or assigns as and when the same become payable a sum equivalent to the premiums in respect of any such instalment or other payment so

ALTA.
S. C.

repaid based on the proportion which the premiums in respect of the instalment or instalments or other payment so repaid bears to the total premium payable in respect of the said policy. In the event of any default or delay on the part of the assured in payment of the sum or sums equivalent to the said cash surrender value or in payment of the proportion of the said premium or premiums as aforesaid, the assured shall pay to the owners, their executors, administrators or assigns interest on such sum or sums from the due date or respective dates until the actual date of payment at the rate of 10% per annum.

4. In the event of the said policy becoming payable by reason of the death of the assured before the due date of the said mortgage but after the assured shall have paid to the owners, their executors, administrators or assigns the cash surrender value in respect of any instalment or other payment on account of principal paid by the owners, their executors, administrators or assigns as aforesaid, the owners shall pay to the estate of the assured or the parties entitled thereto under any will testamentary or other disposition of the assured the amount of any instalment or other payment on account of principal repaid by the owners and in respect of which the assured shall have paid them the equivalent of the cash surrender value as hereinbefore provided upon receipt of the same by the owners from the company.

5. Upon payment by the assured of the said cash surrender value and all other moneys payable by the assured to the owners by virtue hereof, the owners, their executors, administrators or assigns hereby covenant and agree to assign, transfer and make over unto the assured the said policy and all the benefits and advantages thereof.

6. In the event of the mortgaged premises being sold by the owners or of any one of them disposing of his interest therein during the currency of this agreement, the owners or the owner so disposing of his interest shall be entitled to have this agreement cancelled and be freed and released from all further obligations or liability hereunder upon procuring the purchaser or purchasers to enter into an agreement with the assured in the same terms as this agreement.

The deferred first instalment of principal, viz., $5,000, was not paid on July 1, but was at the request of the new owners again deferred until the succeeding January, *i.e.*, of 1915, and on the latter date that sum was paid to the mortgagees by the London and British North America Co. on behalf of the defendants. There was never anything more paid on account of the principal of the mortgage, and thereafter all payments of interest or premiums were made by the defendants.

When the defendants in January, 1915, paid the sum of $5,000 on the mortgage on account of principal, Ferris, pursuant to clause (3) of the agreement of July 10, 1914, above quoted, paid to the defendants the sum of $110 which was one-tenth of the surrender value of the policy at that time, *i.e.*, it was the surrender value applicable to a $5,000 policy. On March 7, 1916, Ferris also

ALTA.
S. C.

paid to the defendants the sum of $118.75, being the proportion of the life insurance premium for the current year applicable to $5,000 of the policy.

During 1915, Ferris endeavoured to induce the Canada Life Assurance Co. to cancel the existing policy and to issue two new ones for $45,000 and $5,000 respectively, the former to cover the mortgage, the latter to him personally and to promise to do similarly each year as additional payments were made. This the company declined to do. Eventually Ferris enlisted and went to war and was killed in action on Sept. 15, 1916.

The plaintiff company is the executor of the estate of the deceased Ferris.

Shortly after his death, apparently when proof was being made in regard to his age and death, it was discovered that inadvertently a mistake had been made in the statement of his age when the policy was applied for, and it was arranged or agreed that the policy should only stand good for the amount for which at his correct age the premium agreed upon would buy, viz., $47,500.

As the insurance company held the policy as collateral security for the repayment of the mortgage they made up as of the date of proof of death, viz., Jan. 16, 1917, a statement of the account between them and the mortgagor as follows:—

By sum assured		$50,000.00
By prospective profits		755.10
		$50,755.10
Less arrears for error in age		2,500.00
Amount payable under policy		$48,255.10
To amount principal unpaid on mortgage	$45,000.00	
To half yearly interest due Jan. 1, 1917	1,580.40	
To interest 1st to 16th Jan., 1917	129.45	
	$46,709.85	
Balance owing on policy	1,545.25	
	$48,255.10	$48,255.10

However, the company agreed to demand only one-half the interest from Oct. 1, 1916 to Jan. 16, 1917, and to throw off the other half, viz., $461.70. This sum they added to the $1,545.25 above mentioned and admitted liability for the sum of $2,006.95.

The purchase price of the property as agreed upon between the

ALTA.

S. C.

defendants and Ferris had been $131,000 of which $50,000 was to be paid by the assumption of the mortgage. At least this is the inference I make from the somewhat meagre evidence given upon the matter which was due partly, no doubt, to the death of Ferris.

The consequence of the death of Ferris and the falling in of the policy on his life was that, taken with the single cash payment of $5,000, the mortgage was more than paid off as shewn in the above statement.

A contest soon arose between the representatives of the Ferris estate and the individual defendants as to which of them were legally entitled to reap the benefit of the policy. The defendants demanded a discharge of the mortgage from the insurance company, but that company refused to execute and deliver such a discharge owing to the fact that the plaintiffs as executors of Ferris also claimed the benefit of the insurance. The present individual defendants brought an action against the Canada Life to compel them to discharge the mortgage and the plaintiff sued in the present action both the Canada Life and the purchasers, asking (1) for a declaration in favour of their contention as to the meaning of the agreement of July 10, 1914; (2) in the alternative a declaration that under clause 4 of that agreement they are entitled to the amount of the instalment paid on account of principal on the mortgage as well as to the amounts which according to the terms of the mortgage the purchasers should have paid on principal but did not pay less the cash surrender value of a proportionate part of the insurance policy; (3) for an accounting of the money due to the plaintiff and an order for payment thereof; (4) for a declaration that the plaintiff as executor of Ferris is entitled to be subrogated to the rights of the life insurance company under the mortgage, and (5) costs and other relief.

Inasmuch as all persons interested were parties to the present action but not to the other one, the latter was stayed pending the trial of this. Where I speak, hereafter, of the defendants, I mean of course the individual defendants, the purchasers.

Practically everything depends upon the proper interpretation of the agreement of July 10, 1914, and this is a matter which appears to me to present some difficulty.

ALTA.
S. C.

One observation seems to me to be worth making in the first place. Ferris had assigned the policy to the mortgagee (also the insurer) in the first instance to secure repayment of the mortgage; Ferris then had only an equity of redemption in the policy. This redemption would take place progressively as he made repayments on the mortgage. It was this equity of redemption only that Ferris was in a position on July 10, 1914, to assign. Aside therefore from the circumstances connected with the sale of the land upon which the mortgage stood the assignees under the document of July 10, 1914, could only acquire, and indeed in any case perhaps did only acquire, the equity of redemption in the policy. I doubt whether this however aids very much in the solution of the problem. Of course if the debt due to the lenders, the Canada Life, had been merely a personal debt owing by Ferris and had not been charged on the land which the defendants had bought so that they also were, if not personally (as to which there may be a question), at any rate through the encumbrance on their property, objected to make payment of the debt, the defendants would only have acquired an interest as Ferris repaid his debt and so redeemed his policy. If he never repaid any of it then upon his death the benefit of the proceeds would all in such a case have gone to his estate by the removal of the debt resting upon him alone and the assignees would have got nothing. The assigned equity would have been worth nothing. There would have been no difficulty of course on the score of insurable interest because it is only the original assured, and not the assignee of a life policy, who must have an insurable interest. But, for the debt of Ferris and Brennand the Canada Life held as a first security a mortgage on the land of which they were co-owners. This land they had transferred to the defendants and the latter had become the registered owners of it subject to the encumbrance of the mortgage and all the provisions of the mortgage one of which was that the payment of the premiums on the policy was secured by their being added, in case of non-payment, to the amount of the mortgage and so charged on the land.

Ferris remained liable upon his covenant to repay the mortgage moneys. The question is, for whose benefit should the proceeds of the policy fall, upon his death? Of course for his own were it not for the agreement of July 10, 1914. Then was it the intention and

ALTA.
S. C.

effect of that agreement that the benefit should fall to the purchasers and if so to what extent?

I confess to some wonder why no evidence was given of the negotiations for the sale of the lots or of the agreements in respect of them. The death of Ferris could account only partially for this. The result is that aside from a subsequent letter or two we have only the bare transfers and the agreement of July 10, 1914, from which to make any inference as to the intention of the parties with respect to personal liability upon the covenants in the mortgage. Yet the question as to what extent the purchasers were under an obligation to Ferris to pay the mortgage moneys including interest and premiums, as well as the nature of that obligation if any, and the question of the nature and extent of their personal obligation to the mortgagee, if any, seem obviously to be questions of much importance when we approach the agreement of July 10, and seek to interpret it. The then existing legal relations between the three parties were the atmosphere in which that agreement was entered into. They formed those "surrounding circumstances" the light of which must be thrown upon the agreement before it can be properly understood.

It is to be observed that the London and British North America Co. had bought out Brennand's half interest in October, 1913, and that on Dec. 31, 1913, Ferris had rendered to that company an account of how matters stood between them as co-owners, and one of the items with which they were debited was one-half the premium which Ferris had paid in the November preceding. This would indicate that even as between Ferris and Brennand the latter was supposed to pay one-half the life insurance premium and that the London and British North America Co., as his successors, were understood to be under obligation to do the same.

I have no doubt, after examining the agreement of July 10, and some of the letters which passed, that the purchasers from Ferris of his one-half interest were also bound to Ferris by an implied agreement, even if no express written or oral agreement is revealed by the evidence, to pay the mortgage moneys including principal, interest and premiums on the policy and to save him harmless therefrom. It is true that in two of the transfers from Ferris, viz., that of June 16, 1914, to the London and British North America Co. of a one-sixth interest in the property, and that of

ALTA.
S. C.

June 24, 1914, to Proctor of a one-sixth interest, a clause was inserted whereby it was declared that the covenant implied by s. 52 of the Land Titles Act, 6 Edw. VII. 1906, c. 24, Alta. stats., was expressly negatived while in another although a similar clause was inserted in the draft it was erased before execution. But taking everything into consideration I think even these clauses should be treated merely as intending to negative the covenant declared by s. 52 to be implied in favour of the mortgagee. Section 52 refers to more than one covenant in my opinion although the word appears there only in the singular. It was certainly not the intention of the Legislature to make the mortgagee and the transferrer the joint covenanters in respect of a single covenant, but rather to give the mortgagee the benefit of a covenant with him and the transferrer the benefit of another distinct covenant with him. And it was the former covenant that I think was being dealt with in the two transfers in question. The very making of the agreement of July 10, in the terms in which it was made, seems to me to shew that it was still the intention that the personal individual purchasers were under an obligation personally to Ferris to make the payments under the mortgage. There is no doubt that the making of the series of transfers and the agreement of July 10 were obviously all part of one transaction and this was, I think, admitted on the argument and therefore we should attempt to reconcile the various documents as far as possible. I do not see how the clauses in the transfers in question can be reconciled with the terms of the agreement otherwise than by interpreting those clauses as referring only to the covenant implied in favour of the mortgagee.

The intervention of the London and British North America Co. does indeed cause some uncertainty but I think that throughout they were simply agents for the defendants. I think the covenant declared by s. 52 to be implied in favour of the transferrer ought to be considered as implied as against the defendants. Even as early as July 10, 1914, they join in an agreement the recital of which declares that they were then the registered owners in fee simple as tenants in common of the mortgaged premises although it would appear that the London and British North America Co. did not transfer into their individual names all the legal estate on the property until as late as May 27, 1915. The fact that they recognized themselves as the registered owners of the whole prop-

erty in July, 1914, serves also to distinguish the case from those cases where the purchaser has got only a part of the property.

Assuming, then, that s. 52 of the Land Titles Act has the full efficacy that it was obviously intended by the Legislature to have, and this, I think (apart from its application to this particular case), was common ground upon the argument, and also assuming that the individual defendants are properly to be treated as transferees within the meaning of that section, which, for the reasons given, I think is the true position, it would seem to me that the individual defendants were bound by a covenant to Ferris to pay the principal, interest and premiums. If this be so then the obligation was more than one merely to indemnify Ferris if he was forced to pay them. It would it seems to me give him a right to recover any damages that he may in other respects have suffered as a consequence of their failure to pay as agreed.

Now the first and most extensive claim made by the plaintiff, as executor of Ferris, is that the assignment of the policy made by the agreement of July 10, 1914, was merely as a security to the purchasers to protect them against their liability to pay the premiums on the policy and as a security that Ferris would reimburse them for any such payments of premiums that they might make. This contention amounts in effect to saying that the proceeds of the policy were intended by the parties, in the case of the death of Ferris before the mortgage was paid, to fall to the benefit of Ferris or his estate charged only with the premiums that the purchasers may have paid. If that had been the understanding there would have been no reason why the purchasers should pay premiums at all except to prevent action by the mortgagee against them under the implied covenant or by foreclosure in default.

It is a pity that the draftsman of the agreement left out what would have been the most important recital, viz., one giving the real reason for the assignment. It is scarcely a reason for the assignment that Ferris had requested them to re-assign as given in the last recital.

Considering, however, the terms of the agreement as to payment by Ferris of surrender values and proportions of premiums paid and also his letter of Feb. 17, 1915, seeking to get the policy divided into two as well as his actual payment of the surrender value as to $5,000 of the policy and a corresponding proportion of the premium

ALTA.
S. C.

for the year 1915-16, I do not see how we can come to any other conclusion than that it was the intention of the parties that the purchasers should be the full beneficial owners of the policy to the extent that the mortgage remained unpaid. It was one of the advantages of the policy that if it fell in it practically cancelled whatever remained unpaid upon the principal of the mortgage and the first clause of the document in question declares that Ferris assigns to the purchasers "all the benefits and advantages" of the policy.

I think, therefore, that the first contention of the plaintiffs cannot be sustained.

The second contention is to this effect, viz., when the purchasers acquired the property in June, 1914, there were instalments of principal falling due as follows: July 1 (a deferred one), $5,000; January 1, 1915, $5,000; and January 1, 1916, $5,000. These were the only sums of principal which fell due prior to the death of Ferris. But the purchasers never paid any but the one payment of $5,000, and they secured extensions of time for the remaining $10,000 with the result that at the date of the death of Ferris only $5,000 had been paid. Therefore, it is said, owing to the default of the purchasers in making these payments, Ferris was prevented from redeeming or re-purchasing a corresponding part of the policy by paying them the surrender value and thereafter the proportionate parts of the premiums with respect to this $10,000 as is provided in clause 3 of the agreement. Therefore, so runs the contention, the Ferris estate is entitled to the benefit of $15,000 of the policy subject to the proper reduction for cash surrender value and proportion of premiums as of the date that the mortgage provided that these instalments of principal should have been paid.

This claim is not one for damages for a breach of covenant. I see no such claim on the record. As I understand it the claim is based upon some principle of equity. It is claimed that the Ferris estate is entitled to be placed in as good a position with respect to the insurance as it would have been if the purchasers had paid the instalments of principal according to the terms of the mortgage.

Notwithstanding the praise given to the drafting of the agreement by defendants' counsel I confess that I think it bears on its face very obvious signs that the draftsman was solicitor for the purchasers and it also contains what seems to me to be some

ALTA.
S. C.

peculiar inconsistencies. For instance, clause 2 obliges the purchasers to re-assign the policy to Ferris upon payment by him to them of the cash surrender value if he should happen to live till the mortgage was all paid off. But on its face clause 3 places no obligation upon the purchasers at all. There is not a single word in that clause by which the purchasers covenant to do anything. Yet it is the clause which pretends to fix the rights of the parties with respect to payment of instalments on the mortgage prior to its payment in full. It simply gives the purchasers the right to demand from Ferris payment of the cash surrender value of a part of the policy equal to the amount paid on the mortgage and obliges Ferris to pay that sum as well as a proportionate part of future premiums, but it does not oblige the owners to re-assign to Ferris any part of or interest in the policy upon payment of this cash surrender value by him. Again, while clause 2 gave Ferris an absolute right to take over the policy if he lived until the mortgage was fully paid so that the purchasers were not to have their choice in the matter of carrying on the insurance for their own benefit or not as they pleased (which would have been quite possible and legal) yet by clause 3 the choice seems to be left to them entirely even after they have made a payment of an instalment to continue the whole policy in their own favour and reap the benefit themselves. I know there is a seeming answer to this in the terms of clause 4 which apparently provides for the only case where they could reap any benefit by the death before the mortgage became due. But observe the difference in wording between clause 2 and clause 4. Clause 2 refers to the death not happening "previous to the date of the *repayment* (*i.e.*, actual repayment) of the mortgage moneys." Clause 4 refers to death before (not "repayment," observe, but) *the due date* of the mortgage. What would have happened if Ferris had lived until after Jan. 1, 1918, "the due date" of the mortgage or until after the mortgagee had, under the acceleration clause, fixed an earlier "due date," but had died before payment in full of the mortgage? What clause of the agreement would have given him or his estate in that case any right to a share of the insurance money even if the purchasers had paid $10,000 on the mortgage and Ferris had paid them or tendered them the proportionate surrender value? Not clause 3 because it mentions no obligation of the purchasers. Not clause 2 nor clause 4 because neither one would have applied.

ALTA.

S. C.

Reading the whole agreement together, I think one must conclude that Ferris had, not merely an obligation to pay the proportionate surrender value on demand whenever the purchasers paid an instalment of principal, but also a right to do so; so that his estate in case of his death could, under clause 4, demand from the purchasers the surplus of the insurance moneys over the debt created by the payment of such instalment. This perhaps will be admitted. But the crucial question is, had he not only the right to pay this cash surrender value whenever the purchasers were pleased or finally forced by the mortgagees to make a payment on principal, but a right to insist that they should do that thing which was necessary in order that he might enjoy the former right; in other words, had he a right to insist that they pay the instalments of mortgage principal as they became due so that he could then enjoy the right of carrying some of the insurance for his own benefit upon the condition laid down in clause 3? Or could the purchasers make the choice of securing by negotiation, as they did in fact, the postponement of the instalments and so put off the obligation of payment and incidentally reap the advantage of the chance that Ferris might die in the meantime and they thus get an added benefit from the insurance policy which it was not intended that they should get if they met their obligations under the mortgage as they became due? When the matter is put in this light it seems to me the proper result comes plainly into view. Assuming that Ferris had the right to insist upon the prompt payment of the instalments under the mortgage so as to give him the right to buy back a proportionate part of the insurance, the fact is, that he apparently never did insist that they should do so. He was undoubtedly aware that no more than the one sum of $5,000 had ever been paid. In March, 1916, after the last of the interim instalments was overdue, Ferris paid to the defendants the sum of $118 as his share of the premium paid in the November preceding for the then current year. He did not insist on his right to pay double that amount. He made no tender and never in any way insisted upon his right to buy back more of the insurance. He seems to me to have acquiesced in what was done or omitted to be done. Whether this should be sufficient to deprive his estate of the rights claimed is perhaps open to argument. But, however this may be, there is the further consideration that we have no means

ALTA.
S. C.

of knowing whether, even if the defendants had paid the two other instalments when they became due, Ferris would ever have exercised his further right of re-purchase. To give his estate judgment upon the assumption that he undoubtedly would have done so seems to me to be assuming too much. He might have preferred not to carry the insurance further or not to take over any more of it. Certainly there is no evidence in the case of any anxiety on his part to secure any more of it. It is true that the loss of the right to re-purchase part of the insurance may in one sense be looked upon as a damage resulting from the defendants' failure to pay the other two instalments and against which damage there was an implied covenant of indemnity; but in any case, even if the action were framed in damages, it would, it seems to me, be impossible to estimate the value of the right so lost at the full amount of the insurance which could have been re-purchased. That value would apparently have been just what he would have had to pay to get it so that he might thereafter keep up the premiums on it and as he did not have to pay that sum his loss would be nothing. Of course if he turned to a new application for insurance he would have had to pay a higher premium and would possibly have been met with difficulties in passing the doctor's examination as well as with questions of increased risk owing to change in occupation, but all this seems to me to be so uncertain, particularly in the total absence of any evidence of any effort on his part to increase the insurance available for his estate, that it would appear to me to be impossible even to attempt to make any estimate of probable loss.

The real basis of the claim made is, however, the alleged applicability of the maxim that equity considers that as done which should have been done. But I do not think that that maxim can in any case be so extended as to justify the Court in assuming that the person in whose favour it is invoked would himself have done what he had a right but was not necessarily bound to do in order to get the benefit claimed. He was only bound to pay the surrender value in case it was demanded from him. He was not bound to do it without demand, although, as I have said, I think he had a right to do so if he had chosen to insist upon it. But I cannot see that his estate can now say, after the favourable events of his death and the falling in of the insurance have happened, that it has a right to insist now upon the evident advantage when at

ALTA.
S. C.

the time that the event and consequent advantage were uncertain Ferris himself never made any effort or gave any sign of a desire to secure the benefit of the chance. I think the second contention therefore also fails.

There remains the final contention of the plaintiffs to be disposed of.

The Canada Life have paid into Court the sum of $2,228, which is made up in the way explained in paragraph 8 of their statement of defence with the addition of some interest. One objection that I see to the right of the plaintiff to get this sum of money is this, that in it is contained an allowance of $755.10 as prospective profits on the whole policy. I see no reason why these prospective profits should not be divided in the proportion in which the parties were interested in the policy. The policy was really only one for $47,500. This was due to a mistake of Ferris in stating his age. The insurers did not discover this until proof of death was made on Jan. 16, 1917. They then agreed to allow the policy to be good for $47,500 which was the amount the premiums paid would have carried at his true age. But Ferris had paid and the defendants had accepted the sum of $110 as the surrender value of $5,000 worth of the life insurance, that is one-tenth of it. At the time of this payment all parties thought the policy was good for $50,000. It turned out that it was only good for $47,500. Whether the profits were estimated on the basis of the full policy or only on the decreased amount of it is not clear but in any case that was a matter for the company, and if they have allowed the estimate of profits on the whole policy it is to the advantage of the other parties entirely. I can see no reason whatever why the Ferris estate should be entitled to the whole of them and I therefore think that in making up the amount to which the plaintiff estate is entitled there should be allowed only $75.51 or one-tenth of the profits. The rest belongs, I think, rightfully to the defendants.

But the plaintiff estate claims more than this. Its claim is that as between it and the defendants it should in any case be entitled to the benefit of one-tenth of the policy because it was the understanding of the parties that the payment of $5,000 of the principal of the mortgage should give Ferris the right to buy back at any rate one-tenth of the face of the policy, and that he did in

ALTA.

S. C.

fact so buy one-tenth of it back by paying the two sums of $110.00 and $118.00 as mentioned in the beginning.

The situation is of course unprecedented and I can only decide as to what seems to me to be right and just and in accordance, or at any rate not inconsistent with, the agreement.

I do not think it is enough to say that the obligations of the defendants to the Ferris estate must be found within the four corners of the agreement and that if there is nothing there to justify a judgment against them for the payment of a sum of money then there can be no judgment in the plaintiff's favour at all. What is substantially asked for is a declaration of the rights of the parties with respect to the proceeds of the insurance policy. I think it was undoubtedly the intention of the parties that, when the defendants paid out of their own pockets a sum of $5,000 upon the principal of the mortgage, they should not have any right to recoup themselves, either partially or wholly, for such a payment out of the insurance moneys, if they fell in, if Ferris did his part in buying back, and paying the future premiums on, that much of the policy. This Ferris did do, and if there was nothing more to be said his estate should not be deprived of the advantage. But on the other hand there is no doubt that when the agreement was made the defendants thought they were getting an assignment of a $50,000 policy, equal to the amount of the mortgage which they assumed, and they thought they were paying the premium on a policy of that amount. Through a mistake of Ferris alone they found themselves protected only by a $47,500 policy, which did not cover the whole mortgage as they had thought it did.

As I have pointed out there could, of course, be a personal judgment against the defendants only for the recovery of whatever moneys they may have received from the insurance company. If they never received any, of course, a personal judgment could not go against them. But it may be that they were never entitled to receive any money into their own hands, but that the insurance company, being informed of the terms of the agreement of July 10, 1914, and of the fact that Ferris had paid the surrender value of a portion of the policy, were bound to hold the money for the estate of Ferris. Clause 5 of the agreement indeed, may, in my view, be treated as an equitable assignment back to Ferris of a portion of the proceeds of the policy. I say "an equitable assignment" because it was only an agreement to assign property *in futuro*.

ALTA.

S. C.

The real question then is: Was Ferris or his estate entitled to say to the insurance company that, as between him or his estate and the defendants, he or his estate was entitled to the benefit of $5,000 of the proceeds of the policy, or could he claim only $2,500 of it? Upon whom should the loss, due to the error in age, properly fall?

Upon the whole it seems to me that, by the terms of the agreement, Ferris did, in effect, represent to the defendants that they, by keeping up the payment of the premiums, were at all times keeping alive a valid life insurance policy sufficient, if it fell in, to cover whatever, at any time, remained unpaid upon the principal of the mortgage. And I think that is the underlying principle upon which the rights of the parties should be decided. This will make the loss fall upon the estate of the person who was, innocently no doubt, responsible for the error.

My conclusion, therefore, is that the plaintiffs are entitled merely to a declaration that they are entitled to the moneys paid into Court by the Canada Life Insurance Co., less the deduction which I have indicated in respect of the share of profits. But I also think that there should be an allowance to the plaintiffs of one-half of each of the sums of $110 and $118, inasmuch as the Ferris estate in the result is to get back only one-half as much of the insurance as it was expected to get. Upon the basis thus indicated, and with proper calculations of interest, I imagine the parties can arrive at the proper amount to which the plaintiffs are entitled.

The individual defendants really never objected to the plaintiffs getting what I have awarded them, and if the plaintiffs had been willing to accept it there would undoubtedly have been no litigation. Substantially, therefore, the defendants have succeeded and are entitled to their costs which should also, when taxed, be paid out of the money in Court. The defendants, the Canada Life Assurance Co., are also entitled to their costs against the plaintiff and these also should be paid out of the money in Court. These latter costs, I think, should be a first charge upon the money, and if the balance is not sufficient to pay the individual defendants' costs execution should go for the balance. The Canada Life Co. should also be directed, upon receipt of their costs, to execute a discharge of the mortgage and deliver the same to the individual defendants so that all matters in issue between the parties will be finally disposed of.

ALTA.

S. C.

I would like to add, of course quite out of place, a reference to the peculiar wording of clause 3 of the agreement of July 10, 1914. I may put it in the form of a question, thus: In the phrase "based on the proportion which the amount of any such instalment or other payment bears to the total surrender value of the said policy," was it not meant to say, not "the total surrender value" but "the total *face* value?" That seems to be the way the parties interpreted the clause and to be its intended meaning.

B. C.

C. A.

WELLINGTON COLLIERIES v. PACIFIC COAST COAL MINES.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 15, 1919.

TRESPASS (§ IC—17)—*Consent to do the acts complained of—Evidence—Perjury.*]—Appeal by defendants from the trial judgment in an action for trespass. Reversed.

W. J. Taylor, K.C., and *Brethour*, for appellants.

Douglas Armour, K.C., for respondents.

MACDONALD, C.J.A.:—I would allow the appeal on the ground that the respondents consented to the acts complained of. The question is purely one of fact, and when we have the evidence of two witnesses, whose credibility is not called in question by the trial Judge, and who are men of standing in their respective callings, who gave explicit evidence that the respondents' late manager consented to the acts complained of, his authority to do so not being questioned, and when that evidence stands uncontradicted by any other witness and is not rebutted by any other fact or document put in evidence, there can, in my opinion, be no doubt as to the course which I ought to pursue. I must either accept the evidence of these two witnesses or in effect declare that they have been guilty of perjury. In the circumstances of the case there was no room for mistake. The consent was either given, as these witnesses have deposed to, or their evidence is false to their knowledge. We were asked to draw certain inferences in rebuttal of their evidence from what took place at an interview between Michener and Fleming, but such inferences are not necessary ones and cannot, in my opinion, prevail against the positive sworn testimony.

MARTIN, J.A., would allow the appeal.

B. C.
C. A.

GALLIHER, J.A.:—As I view this case either the defendants had leave and license as they allege or two witnesses have deliberately perjured themselves.

There can be no question of mistake or misunderstanding.

On reading the evidence and considering all the probabilities I cannot bring myself to say that these witnesses have committed perjury.

If their evidence is accepted the plaintiffs' case fails and the appeal must be allowed.

MCPHILLIPS, J.A. (dissenting):—This appeal is one calling for a rehearing of a question of fact and upon the authorities it must be shewn that the trial Judge went wrong in his conclusion that the case established a trespass, the mining of coal without colour of right, *i.e.*, that there was no sufficient evidence before the Judge entitling him to arrive at the conclusion he did. In arriving at his conclusion the trial Judge did not take into consideration the evidence in the former action, not admitting that evidence. With the greatest respect to the Judge that evidence was admissible, it was given in an action of like nature to this action in respect to mining in the same mine, acts of trespass therein and the evidence was given in an action between the same parties, and the trespass sued for in this action developed and was first discovered at the trial of that action (see *Town of Walkerton* v. *Erdman* (1894), 23 Can. S.C.R. 352, King, J., at pp. 365, 366, 367). However, the evidence the Judge had before him was sufficient to admit of the drawing of the inferences and finding as he did. I may say that it is without hesitation that I have come to the same conclusion as the trial Judge. The evidence in my opinion called for the defence fell very much short of that which must be forthcoming when it is sought to prove consent to the interference with the property of others, trespass thereon and the abstraction of large quantities of coal. At best all that was contended for was a verbal consent from the then general manager of the respondents (Coulson) to the appellant to mine the coal. That there should be only that form of consent in such an important matter is so unbusinesslike that at once we look for the establishment of such consent beyond a question of doubt, at least something in the nature of later acquiescence, but there is nothing whatever to indicate that the respondents were aware of the

B. C.
C. A.

mining going on, nothing in the way of corroboration or ratification of the alleged consent. There would seem to be some variance of view as to when it first became known to the respondents that the defence would rely upon this alleged consent. So far as I can see and this is shewn in the pleadings *consent* was not specifically pleaded until Dec. 21, 1918 (see para. 10 of the amended statement of defence, A.B., p. 23, and particulars of defence, Dec. 24, 1918, 2 (a) and (b)).

It is evident that it was not until Dec. 24, 1918, that it was made known to the respondents that the consent relied upon to justify the entering in the mine and the abstraction of the coal was an alleged consent of Coulson given some time in the year 1911 to Michener, the then managing director for the appellants. It is an admitted fact that Coulson died in October, 1918; therefore the evidence of consent must be looked upon in the light of being evidence incapable of being denied and, further, evidence of which no precise notification was made known until a couple of months after Coulson's death. Evidence of this class must always be looked upon with suspicion and when it goes the length of justifying the entry upon the respondents' mine and taking of coal therefrom, the closest scrutiny must be given to it and the greatest of care exercised in arriving at the conclusion as to whether it is worthy of credence or not. When all the attendant facts are looked at in the present case, the course of conduct of Coulson, where a consent was given to the appellants to mine certain other coal of the respondents, a consent later terminated, and the particulars of that consent we find *set forth with great particularity in writing*, it would appear to me to be overwhelmingly contrary to probability that Coulson gave the verbal consent contended for by the appellants. The balance of probabilities is all against any such consent being given. The onus is upon the appellants to establish in the clearest manner that there was authority to do that which they did. It is no light matter to make entry upon the property of another and to abstract therefrom thousands of tons of coal and by the method of work render thousands of tons valueless and a complete loss to the owners. Justification for conduct of this kind requires the clearest proof and in my opinion the trial Judge arrived at the right conclusion, he was not satisfied with the defence put forward by the appellants and I

B. C.
C. A.

am not satisfied with it; it is against all reason. The onus resting upon the appellants has not been discharged. I would make use of some of the language of Lord Brougham in *M'Gregor* v. *Topham* (1850), 3 H.L.C. 132, at pp. 151, 152, 10 E.R. 51, as well indicating my view in this appeal, "the great improbability of the appellant's case. I will not go into the evidence at all, because I am satisfied for the reason which I have given." My reason is that upon all the surrounding facts and circumstances a consent such as is alleged is against all probability, would be most unbusinesslike, it does not comport with reasonableness, it is repelled by the course of conduct of Coulson throughout, in fact it is unthinkable that any such consent was given. In my opinion this is not a case where it is possible to "reconcile all the testimony" (see Earl of Halsbury, L.C., in *"The "Ganges,"* [1900] A.C. 234, at p. 238), the trial Judge found it impossible to do this, I likewise find it impossible and the only proper course under the circumstances is to follow and affirm the view arrived at by the trial Judge unless one were of the opinion that the view of the trial Judge was wrong and unreasonable upon all the attendant facts. That, though, is not my view. I am satisfied of the reasonableness and correctness of the judgment of the trial Judge (see Strong, J., in *McKercher* v. *Sanderson* (1887), 15 Can. S.C.R. 296, at pp. 299, 300, 301, at p. 300, "The account . . . an extremely improbable one").

There remains but one point to deal with and that is whether the assessment of damages was rightly proceeded with and rightly arrived at by the trial Judge, the contention on the part of the appellants being that it was contemplated and that it was the course of the trial that if the question of damages required to be passed upon, a reference would be directed. Looking at the whole case, the evidence adduced and the course of the trial (*Seaton* v. *Burnand*, [1900] A.C. 135, at p. 145, Lord Morris), the trial Judge, in my opinion, was well entitled to proceed and assess the damages. All the relevant facts were before him—the situation of the coal, from what section of the mine it was taken, the cost of mining and raising the same and also the value of the coal rendered valueless consequent upon the workings of the appellants. Further, it is to be noticed that the trial Judge really proceeded upon the evidence of the defence as led at the trial in the assessment

B. C.
C. A.

of damages and I see no error in the assessment arrived at. (*McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299, Lord Moulton, at p. 309).

I would dismiss the appeal and allow the cross-appeal.

Appeal allowed.

VANCOUVER LIFE INSURANCE Co. v. RICHARDS.

British Columbia Court of Appeal, Galliher, McPhillips and Eberts, JJ.A. September 15, 1919.

COMPANIES (§ V F—262)—*Sale of shares—False and misleading statements—Fraud—Promissory note—Renewal—Waiver of fraud—Failure of consideration—Liability.*]—Appeal from a County Court judgment in an action on certain promissory notes given for shares in a company. Reversed.

E. J. Grant, for appellant;

C. W. Craig, K.C., for respondent.

GALLIHER, J.A. (dissenting):—The evidence of the defendant and her daughter is clear and definite that Cannon, the plaintiff's agent at Victoria at the time the application for shares was made, stated that the $50,000 required to be deposited before a license would be issued to commence business was actually deposited with the Government; that she could not lose her money as this money would be returned if they failed to write business and would be available.

Cannon was not called at the trial and there is no contradiction of this.

If Cannon had been called and had contradicted this I would have been inclined to think that Mrs. Richards and her daughter must have been mistaken in their understanding of what was said, as the deposit of this $50,000 was the last thing necessary to be done before procuring license to do business, but Mr. Craig in his cross-examination of these witnesses evidently, with that in mind, put it up to the witnesses very definitely as to whether the statement was not "that it had to be deposited" but elicited only further confirmation. I feel that I must accept the uncontradicted statement of these witnesses.

I think it is sufficiently proved that no such deposit was at the time made and has not since been made. The statement

B. C.
C. A.

therefore was false and misleading and was an inducing cause to enter into the contract according to the evidence.

But there is this further point to consider—the note sued on is a renewal of two notes given some months after the fraud, sworn to by Mrs. Richards and her daughter, was perpetrated.

These notes were procured by Van Sickle from the defendant through her husband acting at that time and since as her agent. What took place at that time is set out in the evidence of Richards a.b. 54, and is in these words:—

> He came and asked if I would obtain from Mrs. Richards two notes for $250 each, representing the sum of $500, which was the balance on an application for some shares which they had obtained from her in the Vancouver Life Ins. Co. The money was to have been paid on Jan. 15, 1914, on certain conditions, but the conditions had not been fulfilled and he then wanted to obtain notes for the $500 so that the application might be kept alive, as he explained it to me. He said they had difficulties in completing the organization, but that in another 60 days why they would be fully completed and able to do business.

After taking the application, Cannon seems to have dropped out of it and all future transactions as to renewals of these notes, of which there were a number, were carried on between Richards and Van Sickle.

Can it be said from the above evidence and the general tenor of the whole evidence and the conduct of the parties that Mrs. Richards or her agent were aware that this condition had not been fulfilled at the time these notes were taken or at the time any of the renewals were obtained and had elected to waive the fraud and go on with the contract?

I find some difficulty in deciding this point. The trial Judge has given no reasons but I think we must assume that he either found no fraud or that there was a waiver of the fraud and an election to go on with the contract.

In view of what took place at the time of signing the notes and at the time of the different renewals of same, I cannot rid my mind of the view that the defendant, knowing that the conditions had not been fulfilled, was, like Van Sickle himself, hoping that the necessary subscriptions would be obtained and elected to keep the contract alive.

As to the representations made by Van Sickle to Richards. Where it was known, as it was here, that certain sums had to be subscribed and certain amounts paid up before the business of

B. C.
C. A.

writing insurance could be commenced, or even a meeting of shareholders could be held, and that these sums were dependent on the success of obtaining subscriptions, any statements as to when they would be ready to do business were and must have been known to Richards to be problematical, in other words they were not direct statements of a fact and this is all the stronger from the number of times the original note was renewed. At most, as I view it, it was the expression of a belief and I see no reason to class that belief as dishonest. Moreover, there is a direct conflict of evidence between Van Sickle and Richards.

As to failure of consideration. The appellants rely (among other cases) on *Bullion Mining Co.* v. *Cartwright* (1905), 5 O. W.R. 522. Affirmed on appeal to the Divisional Court (1905), 6 O.W.R. 505.

In that case there never was any allotment or issue of any of the stock contracted for.

In the case at Bar the stock was allotted, notice of allotment given, and the defendant was entered in the books of the company as entitled to the stock.

It is true no certificate of title to the stock has been issued, but it has been held that stock is issued when allotment is made, notice given and the transaction entered in the books of the company. The position then is that the defendant purchased stock in the company and had that stock issued to her.

It turns out that the stock is worthless and that the company failed to qualify to do business and in fact cannot qualify as the Dominion Government from which the charter was obtained have refused an extension of time.

I do not think it can be said the defendant did not get what she purchased. If she did then there is no total failure of consideration as argued.

In *Lambert* v. *Heath* (1846), 15 L.J. Ex. at 298, on a *rule nisi* for a new trial on the ground of misdirection, Baron Alderson, with whom the other Barons concurred, held that the question for the jury was not whether the scrip purchased was genuine, but whether it was the scrip intended to be sold and bought, and made the rule absolute for a new trial.

On the last ground action was brought before the winding-up proceedings were instituted and the defendants, pressing the

B. C.
C. A.

plaintiffs either to proceed or discontinue, the liquidator applied for and obtained an order to proceed with the action.

The parties went to trial and after judgment an application was made by the defendant to have the official liquidator removed, but no order was taken out, the parties apparently having agreed that the appeal to this Court should be proceeded with and in the meantime the liquidation should be stayed.

The appeal books were settled and the matter came on for hearing before us. Under these circumstances I think the objection fails.

MCPHILLIPS, J.A.:—This appeal discloses a manifest case of fraud and misrepresentation and the fraud and misrepresentation continued throughout the whole time and in connection with all the dealings of the agents of the respondent with the appellant. I do not consider it necessary in view of the patent case of fraud established to in detail review all the evidence as taken with an analysis of it but will content myself with only a few references. Before I do so, I cannot help remarking upon the effrontery, I would say the temerity, of the respondent in even attempting to recover upon the promissory note sued upon. I can only conclude that the trial Judge in giving judgment in the action for the company (the respondent) must have decided that although there was fraud, that after the knowledge thereof the defendant (the appellant) elected to be bound by the contract to take the shares and had, in some way by subsequent conduct, precluded objection being taken to the imposition practised upon her by the agents of the company. The trial Judge gave no reasons for judgment, and with great respect to the Judge I find myself unable to arrive at any such conclusion. The organization of the company, so far as it went, which was no distance at all (as it never was in the position to have a meeting even of shareholders nor had it in any way complied with the statutory requirements) was the launching upon the public of a professed company capable of doing business, a wholly fictitious position, and in fraud of the investing public, the appellant being one, moneys were obtained on the sale of shares to the extent of $65,000, of which all, or nearly all, viz. $57,000, was taken by the agents of the company for commissions and not devoted to the purpose for which such moneys should have been legitimately devoted, *i.e.*, the establishment of the

B. C.
C. A.

company upon the basis called for by statute. The company never achieved the position of being able to write insurance and failed to make the necessary statutory deposit which, amongst other things required to be done, was a condition precedent to the commencement of business, although the agents of the company specifically represented to the appellant time and again that all the statutory requirements had been complied with, and thereby induced the appellant to give the promissory note sued upon as well as the promissory notes which preceded it, the one sued upon being the last renewal, the fraud practised being maintained to the end and at the end when the appellant failed to give any further renewal the action was brought the appellant then for the first time becoming aware of the fraud practised upon her. The company is now in liquidation, never having arrived at the position of commencing business, the resolution to wind up being passed on Sept. 22, 1917. The shares, 25 in number, par value of $100 per share, were sold at a premium of $25 per share and the appellant paid in cash $375, a promissory note being given for $500. The appellant has met the action by the allegation of fraud and counterclaimed for rescission and delivery up of the promissory note and return of the money paid and in my opinion the appellant has, upon the facts, established her right to this form of relief. (See *International Casualty Co.* v. *Thomson* (Decision No. 2) (1913), 11 D.L.R. 634, 48 Can. S.C.R. 167.)

One specific misrepresentation made which induced the giving of the promissory note was the statement that the company had made the required statutory deposit of $50,000 with the Government.

It was strongly pressed at this Bar that there was long delay or laches which disentitled the appellant to now set up fraud and ask for rescission, but upon all the facts and circumstances attendant upon this fradulent transaction and foisting upon the public of this company and no knowledge of the fraud perpetrated upon her until asked for a further renewal note, I cannot persuade myself that there can be any bar to the giving of the relief claimed by the appellant, and upon this point of laches I would refer in particular to the following cases: *Armstrong* v. *Jackson*, [1917] 2 K.B. 822; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899); 68 L.J. Ch. 699 (C.A.); *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 A.C. 1218; 1279.

B. C.
C. A.

As to interference with the judgment of the trial Judge, even if it could be interpreted he did not find fraud or that the Judge found there was an election by the appellant to abide by the contract, I would refer to *Barron* v. *Kelly* (1918), 41 D.L.R. 590, 56 Can. S.C.R. 455; *United Shoe Mfg. Co. of Canada* v. *Brunet* (1909), 78 L.J.P.C. 101, at p. 104, [1909] A.C. 330.

I would, therefore, for the foregoing reasons allow the appeal, the action to be dismissed and upon the counterclaim the appellant is entitled to rescission and the delivery up of the promissory note to be cancelled and the return of the money paid, together with interest thereon from the date of payment with costs here and in the Court below.

EBERTS, J.A., would allow the appeal. *Appeal allowed.*

DOMINION LUMBER Co. v. HODGSON AND KING.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. September 15, 1919.

SALE (§I D—20)—*Contract—Deliveries unsatisfactory—Continued acceptance of shipments—Evidence—Rights of parties.*]—Appeal from the trial judgment in an action on a contract for the sale of lumber. Affirmed.

R. Symes, for appellant.

W. J. Baird, for respondent.

MACDONALD, C.J.A.:—I would allow the appeal and dismiss the cross-appeal.

MARTIN, J.A., would dismiss the appeal.

GALLIHER, J.A.:—I would dismiss the appeal and cross-appeal.

With regard to the former the only doubt I entertain is as to whether the $22.50 per thousand feet should be allowed the plaintiffs as per letter of July 11.

I am unable to say, however, that the trial Judge came to a wrong conclusion upon the evidence, or placed a wrong conclusion on the agreement between the parties at that time.

It is true deliveries were unsatisfactory, yet the defendants continued to accept same although in their letters they point out that unless deliveries are promptly made the $22.50 per thousand will not be paid.

We must, I think, look at the state of mind of the parties when the letter of July 11, 1918, was signed.

B. C.
C. A.

It seems to me that King made the choice of paying $22.50 rather than take the chance of realizing any damages for nonfulfilment by winding-up of the plaintiffs' company.

This $22.50 was less than the lumber could have been bought for elsewhere, and it was known that plaintiffs were making a loss in carrying out their contract. The proper course for defendants to have taken, as I view it, would be to have cancelled the contract when deliveries were not satisfactory, bought elsewhere, and charged plaintiffs with any extra cost they were put to in doing so.

Instead of doing this, defendants kept accepting shipments under the contract, while, I admit, protesting that they would not pay the $22.50 unless shipments according to schedule were made.

These letters subsequent to July 11 and the conduct of the defendants rather impress me that defendants, while outwardly protesting, had concluded to (if possible) get all the material from plaintiffs and then pay for it only at the original price of $21 per thousand.

In other words, if I may use the expression, they were "holding a card up their sleeve" when final settlement came to be made.

The letter of July 11 does not make the delivery of the timber within the time limited a condition precedent to the payment of the $22.50, but on the other hand provides a remedy by way of damages for non-fulfilment.

This letter was dictated in the presence of King, who made some changes therein, and was then signed by the company and taken away by King.

I do not regard the heading to the schedule of even date delivered by King, when all the circumstances are taken into consideration, as altering the effect of the letter or the agreement of the parties at that time.

With regard to the counterclaim. I think the trial Judge was justified in the conclusions he arrived at.

MCPHILLIPS, J.A.:—In my opinion the judgment of Macdonald, C.J.A., was right, and this appeal accordingly fails; likewise the cross-appeal fails.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

B. C.

C. A.

SAWYER v. MILLETT.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. July 15, 1919.

CONTRACTS (§ I D—55)—*Definiteness—Negotiations—Concluded contract.*]—Appeal from the trial judgment in an action on a contract. Affirmed.

S. S. Taylor, K.C., for appellant; *M. A. Macdonald*, K.C., for respondent.

MACDONALD, C.J.A.:—I would dismiss the appeal.

MARTIN, J.A., would dismiss the appeal.

GALLIHER, J.A.:—The trial Judge in my opinion came to the proper conclusion, and the appeal should be dismissed.

MCPHILLIPS, J.A. (dissenting):—I do not think it at all necessary to go into all the evidence in detail, but it is clear to me that what took place never resulted in a concluded contract. At best it never went beyond negotiations—the contemplated contract was a discount of notes which never took place. Further, the plaintiff was evidently well aware that no contract had been entered into, to accentuate this it is only necessary to refer to the following letter, with an appendant agreement which the plaintiff requested the defendant to sign, and which was never signed, plainly indicating that there was no concluded contract:—

Kingsgate, B.C., Nov. 1st, 1916.

Geo. Millett,
Elko, B.C.

Dear Sir,

I have no proof that you will give me these notes of $3,000 face value less 10%, that will be $2,700.

I have to pay you in cash. I get the interest on them.

If this is satisfactory, sign this paper and return to me.

H. L. SAWYER

I agree to the above agreement if paid before Nov. 15, 1916, in the Canadian Bank of Commerce, Cranbrook, B.C.

Signed:

(Sign here).

The above letter was written on Nov. 1, 1916. It will be seen that $300 was to be the amount the defendant was to pay the plaintiff, if an agreement was come to. To further indicate that there was no concluded agreement see the letter of Dec. 1, 1916, after suit was brought against Mutz and the plaintiff garnisheed. In this letter the plaintiff asks $320, not $300, proposing an increased payment of $20.00. In the face of all this

B. C.
C. A.

and considering that the notes never were discounted by the plaintiff, but paid by pressure of the garnishee process, how can it be said that there was any concluded contract or performance of any contemplated contract? Then there was this further letter:—

Kingsgate, B.C., Dec. 1st, 1916.

Geo. Millett,
Elko, B.C.

I instructed my lawyer to pay the notes off, $3,200. He wrote me that everything would be completed. So I have done my part. Now I will expect you to do what you agreed to do. Pay me 10% which comes to $320.00. Please send cheque.

Yours truly
H. L. SAWYER.

The case should have been withdrawn from the jury at the close of the plaintiff's case. This the Judge did not do. The defence was then gone into—upon the whole case it was not one that should have been submitted to the jury—but going to the jury the verdict for the plaintiff in my opinion cannot stand, as the evidence does not support a concluded contract and judgment should be entered for the defendant and the action dismissed, as but one conclusion could be come to, *i.e.*, no concluded contract has been made out (see *McPhee* v. *E. & N. R. Co.* (1913), 49 Can. S.C.R. 43, Duff, J., at p. 53).

The necessary certainty of contract is absent. In *Jackson* v. *Galloway* (1838), C.P. 5 Bing. N.C. 74-75, at p. 75, Tindal, C.J., said (50 R.R. 608, at p. 611): "Every contract consists of a request on one side and an assent on the other." In the present case we find the plaintiff saying he was to get $300, then later desiring $320, and no assent proved to any such contract on the part of the defendant; further, an agreement in writing was requested by the plaintiff but never executed by the defendant, The plaintiff and defendant were not *ad idem*—Lord Loreburn in *Love* v. *S. Instone* (1917), 33 T.L.R. 475, at 470, said: "The law would not come in and say that they must agree on what was reasonable. It would say that there was no bargain (also see *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616, and Lord Cozens-Hardy, M.R., in *Perry* v. *Suffields* (1916), 85 L.J. Ch. 460, at p. 463.

In the present case upon the facts, it is incontrovertible in my opinion, with great respect and deference to the opinion of my

B. C.
C. A.

learned brothers who take a contrary view, that there was no contract in fact come to. The plaintiff must fail, and it is a proper case, notwithstanding the verdict of the jury, to enter judgment for the defendant.

I would therefore allow the appeal.

Appeal dismissed.

MAN.
K. B.

FINKELMAN v. LYONS WINE AND SPIRIT Co.

Manitoba King's Bench, Prendergast, J. October 1, 1919.

CONTRACTS (§ IV C—350)—*Subletting of export liquor warehouse—Conditions—Permit to carry on business—Permission of license commissioners—Permission not obtained—Failure of consideration.*]—Action for breach of a written agreement providing for the subletting of a certain warehouse, and the carrying on of an export liquor business.

H. J. Symington, K.C., and *S. Hart Green*, for plaintiff.

W. H. Trueman, K.C., for defendant.

PRENDERGAST, J.:—This is an action for breach of a written agreement providing for the subletting of a certain warehouse situated at Fort William in Ontario, and the carrying on of an export liquor business therein.

The habendum of the agreement, wherein the Lyons Wine & Spirit Co. Ltd. are parties of the first part; Alex. Adilman, party of the second part; and the plaintiff, party of the third part, is in the following terms:—

1. The party hereto of the third part shall execute and deliver to the parties hereto of the first and second parts (a) an assignment of a certain indenture of lease bearing date the fifteenth day of June, 1917, made between John M. King, grain merchant, of the City of Fort William in the Province of Ontario, as lessor, and the said Joseph Finkelman as lessee, of all that messuage or tenement situate, lying and being on lots 15, 16 and 17, in block "B", McVicar addition, on the south side of Victoria Avenue, and commonly known as the "Roy Block", that portion of the export warehouse formerly used and occupied by the John King Co. Ltd., with the exception of the Customs & Inland Warehouse Bond Room, subject to the payment of the rent and the keeping, observing and performing of all the covenants, agreements and provisoes therein set forth and contained, and (b) an assignment of all his right, title, interest, property claim and demand in and to a certain export warehouse permit formerly held by the said John M. King and purchased from him by the said Joseph Finkelman.

2. The said parties hereto of the first and second parts covenant, promise and agree to and with the party of the third part that they will well and truly

pay and reimburse to him all moneys heretofore or which shall hereafter be paid by him for the rent of the said premises, expenses of obtaining the said permit and lease and otherwise in connection with the said business, the same to be paid as soon as a proper memorandum of account of same shall be delivered by the said Joseph Finkelman to the parties of the first and second parts.

3. The business of export liquor warehouse shall be carried on at the said City of Fort William by the party hereto of the first part, and it shall pay all moneys required to be paid in connection with the said business, the purchase of goods, rents, salaries, taxes, and other outgoings and expenses occasioned by the said business, and shall render a just and true account thereof to the said Joseph Finkelman and pay to him one-quarter of the net profits arising from the said business: accounts to be taken and settlement made for profits every 60 days; first account and settlement to be made in 60 days from the date hereof.

4. The said Joseph Finkelman gives to the parties of the first and second parts, and each of them, an option irrevocable for the purchase of his said interest in the profits of the said business for the sum of $1,500, and agrees, upon receipt of written notice within 60 days of the exercise of the said option by them, or either of them, and payment of the said sum of $1,500, to transfer to the party or parties exercising the said option all his right, title and interest to said profits in the said business.

5. The parties hereto of the first and second parts shall well and truly pay all outgoings and expenses in connection with the said lease, permit and business accruing from this date, and agree that they will indemnify and save harmless him the said Joseph Finkelman of and from all actions, suits and demands in respect thereof.

The statement of claim sets forth that:—

Pursuant to the said agreement the plaintiff did on July 26, 1917, deliver to the defendants the original lease and the assignment thereof in accordance with the said agreement, and the permit to carry on an export liquor business, together with an assignment to the defendants of all his right, title and interest therein.

The plaintiff claims: for default in reimbursing him moneys expended as provided in clause 2 of the agreement, $379.20; for default in payment of rent, $240; for failing to carry on the said export liquor warehouse business and to pay him profits, $1,500, or in all $2,119.20.

The two statements of defence besides denying specifically the plaintiff's allegations also contain the following paragraphs (which are here numbered as in Adilman's defence):—

12. This defendant says that negotiations in connection with the making of said alleged agreement were carried on between the plaintiff and this defendant and it was stated in said negotiations by the plaintiff to this defendant that he, the plaintiff, had an export warehouse permit, and that he, the plaintiff, could get permission and the necessary authority from the Board of License Commissioners of Ontario to transfer the said permit to the defendants to enable the co-defendant to make use of the said license and to carry on the business of export liquor dealers in the name of the co-defendant. The

MAN.

K. B.

plaintiff represented and warranted in said negotiations to this defendant that he, the plaintiff, had the necessary authority or would procure authority and permission from said Board of License Commissioners to enable the co-defendant to carry on business under said permit in their own name. This defendant alleges and claims that in said negotiations it was stated by him as a condition precedent to the making of said agreement, that the plaintiff must procure the consent of the said Board to the transfer and assignment of said permit and license to the co-defendant, so that the co-defendant could make use of the same and could carry on an export liquor business under said permit, and that the plaintiff undertook and agreed to procure said consent. This defendant further alleges and claims that the basis of all negotiations connected with the making of said agreement and the basis of said agreement was that the co-defendant would be put by the plaintiff in a position to carry on an export liquor business under the said permit in their own name, and that it was a condition precedent to entering upon said negotiations and to making the said agreement that the consent of the said Board to the assignment of said export warehouse permit by the plaintiff to this defendant would be obtained, and that if said consent were not obtained said agreement would have no effect, and would be null and void. In the alternative this defendant alleges and claims that the whole consideration for the carrying on of said negotiations between plaintiff and this defendant for the making of said agreement was a transfer of said export warehouse permit to this defendant under the proper consent and authority of the said Board. This defendant alleges and claims that the plaintiff has not obtained consent of said Board to the assignment or transfer of said export warehouse permit to the defendants, and that by reason thereof the conditions, terms and consideration for making of said agreement have failed, and said agreement is void and of no effect.

13. This defendant says that said agreement was prepared by solicitors for plaintiff, and was signed by this defendant upon the representation and assurance by the plaintiff and said solicitor that said agreement carried out and contained the agreement arrived at between the plaintiff and this defendant, and provided for the carrying on of an export liquor business by the co-defendant under said permit. This defendant believed the said statement and assurance, and believed that said agreement provided for the proper transfer of said export warehouse permit under consent of said Board of License Commissioners for Ontario. This defendant did not have legal or other advice as to the terms and legal effect of said agreement. If it is the meaning of said agreement that the plaintiff is not required to obtain the consent of the said Board to the assignment of the said permit to the co-defendant, this defendant alleges and claims that the said agreement does not truly set forth the agreement arrived at between the plaintiff and this defendant in that it does not provide that said export warehouse permit should be assigned by the plaintiff to the defendants with the proper consent of the said Board. This defendant alleges and claims that without said consent the co-defendant and this defendant are not able to make use of said permit or to engage in the export liquor business provided for and contemplated by the said agreement. By reason whereof this defendant asks that said agreement be set aside, or in the alternative that the same be rectified by providing that said assignment of said permit shall be with consent of said Board, and that the plaintiff shall obtain the said consent.

14. It was a term and condition of said agreement that the plaintiff should obtain consent of said Board to assignment of said permit to the defendants. The plaintiff did not obtain the said consent. By reason thereof said agreement is at an end and of no effect.

The defendant company's statement of defence alleges also that the agreement, as to which all the negotiations with the plaintiff were carried on by defendant Adilman, is not its agreement; and both defences pray that the agreement be declared to be at an end, or be rectified.

The lease of the said premises from John King to the plaintiff, was for the term of one year from May 1, 1917. The agreement sued upon was made July 7, 1917.

Then on July 25, the plaintiff made over to the defendants two indentures as being in full compliance with clause 1; of the agreement, being: (a) An assignment in the usual form of the lease from John King, accompanied by the latter's consent to the assignment; (b) An assignment of permit in the words following:—

Whereas the party hereto of the first part has purchased from one John M. King, grain merchant, of the City of Fort William in the Province of Ontario, a certain export warehouse permit to sell intoxicating liquors under s. 46 of the Ontario Temperance Act.

And whereas by memorandum of agreement made in duplicate and dated July 7, 1917, between the said Lyons Wine & Spirit Co. Ltd., party of the first part, and the said Alex. Adilman party of the second part and the said Joseph Finkelman party of the third part, it was *inter alia* agreed that the party hereto of the first part should execute and deliver to the parties hereto of the second part, an assignment of all his right, title, interest, property, claim and demand in and to the said export warehouse permit.

Now therefore this indenture witnesseth that in pursuance of the said agreement and in consideration of the premises the party hereto of the first part doth bargain, sell, and assign unto the parties hereto of the second part all his right, title, interest, property, claim and demand in and to the said export warehouse permit, and all evidences of title to the same.

As to rectifying the agreement, I will dispose of the matter at once. Adilman, who conducted all the negotiations on the defendants' side, was not called to substantiate any of the allegations set forth in the two defences as proper ground for rectification, nor was there any other evidence for the defence on the matter; while Mr. Green who took the parties' instructions for the preparation of the agreement contradicts absolutely the defence's contention that there were other verbal undertakings on the plaintiff's part than those embodied in the written agreement.

I also think that the defendant company's contention that the agreement is not their agreement should also be dismissed.

MAN.

K. B.

The Companies Act, R.S.M. c. 35, s. 66, states that the seal is not necessary.

Lyons' actions also go to shew that he considered the agreement as that of the company. Mr. Isaac was also considered by both Adilman and Lyons as the company's solicitor, and his letters, exhibits 13, 18, 20 and 23, shew that he considered that the company was a party to the transactions.

Neither does the company appear to have reprimanded Adilman or even objected in any way for his having unwarrantedly brought the name of the company in the agreement; and they never repudiated.

The only question really offering any difficulty in my opinion, is whether the plaintiff performed the second part (b) of the first clause of the agreement, that is to say, whether he has executed and delivered to the defendants "an assignment of all his right, title, interest, property, claim and demand in and to a certain export warehouse permit formerly held by the John M. King Company, etc."

The storing and selling of liquor in Ontario was at the time subject to the Ontario Temperance Act, 6 Geo. V. 1916, c. 50, s. 46, of which is in the following terms:—

(1) Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse, provided such liquor warehouse and the business carried on therein complies with the requirements in subs. 2 hereof mentioned, or from selling from such liquor warehouse to persons in other Provinces or in foreign countries.

(2) The liquor warehouse in this section mentioned shall be suitable for the said business, and shall be subject to the approval of the Board, and shall be so constructed and equipped as not to facilitate any violation of this Act, and not connected by any internal way or communication with any other building or any other portion of the same building and shall be a wareroom or building wherein no other commodity or goods than liquor for export from Ontario are kept and wherein no other business than keeping or selling liquor as aforesaid is carried on.

The defendants contend that the plaintiff undertook to assign something which was not in existence, and that the so-called assignment of permit assigned nothing at all, as no permit had ever issued to John King or the plaintiff and none is contemplated by the said Act; while the plaintiff claims to have discharged his obligation by delivering to the defendants the documents in question, inasmuch as the combined effect of the two was to assign over all that he had or ever had in the premises.

MAN.

K. B.

The carrying on of an export sale of liquor and the keeping of liquor for that purpose in a warehouse are matters with which the Dominion Government had nothing to do. It was wholly a matter of Provincial domain, for the regulation of which the Legislature passed s. 46 of the Ontario Temperance Act.

This section, without making any reference to the business itself, imposes conditions only with regard to the warehouse in which the liquor is stored, and these are substantially that it shall be so constructed and equipped as not to facilitate any violation of the Act, and that it be approved by the Board of Commissioners.

It appears, however, from the examination of the Chairman that the Board had taken the position that the character of the applicant was also an element that should be considered. Whether this view be warranted or not by the enactment, the latter at all events does not provide what form the approval of the Board should take, and makes no mention of permit or license either in these words or any other words of the same general meaning.

The chairman says that the approval or permit as it might be called, is "a matter in the minutes," meaning that there is no formal document issued, but that the approval is shewn by resolution in the minute book.

A bonded excise warehouse or a bonded Customs warehouse cannot, however, be operated except under license from the Departments of Customs or Inland Revenue, and such licenses in 1917 were issued on recommendation by the chairman of the Board of Commissioners, stating that the applicant was "entitled to store intoxicating liquors, the Board having approved of his export warehouse, under s. 46 of the Ontario Temperance Act."

John King had in fact obtained the approval of his warehouse by the Board, and on the latter's recommendation, licenses from the two Dominion Departments had been issued to him.

Later, when transferring his business to the plaintiff, he notified the Board of Commissioners of the fact stating: "We wish to have the permit transferred to him."

In what form the Board approved of this does not appear; but it did make to the two Dominion Departments the recommendation that the licenses issue, with the usual statement that the applicant was "entitled to store intoxicating liquor, the Board having approved of his export warehouse under, etc.," and the two licenses had issued.

MAN.

K. B.

Such was the plaintiff's standing with the authorities, when the agreement in question was passed.

As already stated, the making of the agreement was followed by the plaintiff delivering to the defendants an assignment of the lease from John King, and the document referred to as the assignment of permit.

This was done under cover of a letter of July 26, 1917, from Chapman & Green, plaintiff's solicitors, who also transmitted therewith the two letters of the chairman of the Board of License Commissioners addressed respectively to the Departments of Customs and Inland Revenue, recommending the plaintiff's application for licenses, and also two letters from the plaintiff to the said Departments stating that the writer had sold out his export liquor business at Fort William to the defendants, requesting that they be granted licenses, and stating that they were entitled to store intoxicating liquors on the said premises.

The assignment of permit purports to be of: "a certain export warehouse permit to sell intoxicating liquor under s. 46 of the Ontario Temperance Act," but the last words "under s. 46," do not restrict the meaning of the words "export warehouse permit" as used in clause 1 of the agreement, as the purpose of s. 46 is all that such a permit could be used for.

There then followed correspondence between plaintiff's solicitor and the defendants' solicitors, in which the position generally taken by the latter is shewn by the following extract from their letter of August 30.

> When your client will produce evidence that he has the power and right, and is capable of effectuating a transfer of the liquor permit to my clients, by shewing us a consent from the authorities in Ontario, then we will be prepared to acknowledge that the assignment has been made.

The replies from the plaintiff's solicitor were in effect that by delivering over the assignment and other documents above mentioned, he had performed his part of the agreement.

It does not appear that the defendants ever made any kind of application to or enquiry from, either the Ontario Board of License Commissioners, or the Department of Customs or of Inland Revenue.

Of course, the agreement is not conditioned upon the defendants procuring the permit, but only provides that the plaintiff shall "execute and deliver to the defendants an assignment of all his

right, title, etc., in and to a certain export liquor warehouse permit, etc."

It is clear also that no formal permit in the sense of a written document had ever issued to John King, or the plaintiff, and that never was such a permit issued to anyone under s. 46.

Flavelle said, as already stated, that it was "a matter in the minutes," and he himself used in his examination the expression "permit" to designate generally the position of one properly authorised to store intoxicating liquor for export.

The terms "assignment of permit" not being strictly applicable to the circumstances, the question is whether the defendants took them in the strict and absolute sense of there being a formal document, or whether they used them in the sense that Flavelle did, as the best term to designate concisely the position of a successful applicant under s. 46, and this question will be sufficiently answered in my opinion by determining whether the defendants were aware of all the conditions, both as to the exigencies of the law and the plaintiff's standing.

I am convinced that Adilman was quite aware of all the conditions, and understood that the word "permit," although not quite appropriate, was meant to express those conditions as they were.

The defendant company have been doing business in every one of the three Prairie Provinces, and I cannot conceive that Lyons, and more particularly Adilman, were not familiar with the workings and requirements of the law through all its changes since the prohibition movement has set in.

The stand taken by the defendants assumes that the plaintiff undertook to place them in a position to do business, and that the agreement was all conditioned upon that.

But Mr. Green's evidence shews that Adilman did not so understand it, as he also contemplated the possibility of the Board refusing to recognise the transfer, and then remarked that in that case he might have to take Finkelman in, to which Finkelman replied that he was willing to join, so as to assist in any way he could. This part of Mr. Green's testimony stands uncontradicted, as Adilman did not appear as a witness, and seems to me to be conclusive.

MAN.
K. B.

With respect to the claim for one-quarter of the net profits under clause 3 of the agreement, which counsel for the plaintiff asks the Court to fix at $1,500 on the strength of the option contained in clause 4, I would observe that this option was presumably on the basis of the business being conducted till the end of the lease, or for ten months; while it was only at the end of July that the plaintiff delivered over the assignments, and the export trade in Ontario was stopped at the beginning of March following, which reduces the term during which business could have been conducted by about 3 months.

I cannot also but believe that while the agreement was passed when the Saskatchewan Legislature had prohibited the carrying on of export trade within its limits, the declaration by the Courts soon after this Act was *ultra vires*, must have had a depressing effect on the same business carried on at Fort William, and this also should be taken into consideration.

I would assess the loss of profits, as to which there is practically no evidence, on a very conservative estimate, say, $400.

There will be judgment for the plaintiff for loss of profits $400; and on the two other items of claim as prayed for, or in all, for $1,019.20, with costs. *Judgment accordingly.*

MAGER v. BAIRD RANCH AND COMPANY Ltd.

Manitoba King's Bench, Curran, J. October 6, 1919.

SALE (§ II C—35)—*Tractor—Assignee—Action to recover purchase price—Warranty—Failure of engine to do work required—Undertaking by Vendor—Defective engine—Retention—Evidence.*]—Action by the assignee under successive assignments, to recover the balance of the purchase price of a Cleveland tractor.

A. C. Campbell, K.C., for plaintiff.

J. H. Howden, K.C., for defendant.

CURRAN, J.:—The plaintiff, as the assignee under successive assignments, sues the defendants to recover the sum of $775 and interest, the balance of the purchase price of a Cleveland tractor, sold on March 26, 1918, by the Guilbault Company, Ltd., through its president and manager Victor Guilbault, to the defendant company through its president, Samuel G. Baird.

The purchase is evidenced by the sales order, exhibit 5, signed by the defendant company, and further by the lien note or agree-

MAN.

K. B.

ment, exhibit 6, for which a few days later, according to agreement, there was substituted the lien note or agreement, exhibit 7, endorsed by the defendant Elsie K. Baird, who thereby guaranteed the payment of this balance to the Guilbault Co., Ltd., by the following guarantee: "For value received I hereby guarantee payment of the within note and waive notice of non-payment thereof."

The Guilbault Company Limited was the agent at Winnipeg for the sale of the Cleveland tractor, and was the sole distributor for Manitoba of this machine. S. G. Baird, the president of the defendant company met Victor Guilbault either in Winnipeg or St. Boniface, and the sale of one of these Cleveland tractors to the defendant company was discussed.

Guilbault's evidence upon this point was as follows:

I first met Baird in Winnipeg. He told me he was a farmer, and that he wanted a tractor and what he wanted a tractor for, namely, to pull three plows on stubble and prairie breaking; that he needed the tractor for his farm to use instead of horses; that he had never worked a tractor. I won't deny that he told me he had placed an order for a Titan engine which he had the right to cancel. I told him our engine would pull three plows, and if it did not pull three plows, we would take it back. I won't say I told him we would take it back if it did not work to his satisfaction, but I won't say I did not say so.

The foregoing evidence was brought out on cross-examination.

The following is Baird's version of what took place:

I told Guilbault that I had ordered a tractor, but that I liked their machine, and might buy one. He said he would guarantee their tractor would do the work, or give the money back. I told him I wanted to plow and do general farm work with it; that men were hard to get. If she would not pull three plows, I did not want her; that my desire was to save men and horses. He guaranteed her to do the work of 8 horses on the farm, and that she would pull three plows. We agreed on terms—half cash and a note for the balance. He was to send out a man with the tractor, get her started off, and shew me how she worked. If she did not give satisfaction, he was to take her back, and return the money. I signed exhibit 5, the sales order which Guilbault wrote out, saying we have to keep a record of the sales. I did not read it over.

Exhibit 6 was signed at the same time when it was arranged that Mrs. Baird, the other defendant, was to endorse as guarantor exhibit 7, also to be signed by the defendant company and returned to the Guilbault Co. Ltd., upon which being done, exhibit 6 was to be returned to Baird.

This was done a few days later, and the transaction closed.

A copy of the sales order signed by Baird, exhibit 30, was sent out with the new note, and retained by Baird. On its face it contains in print the following:

MAN.

K. B.

It is understood that the tractor above ordered is subject only to the warranty published by the Cleveland Tractor Co., and that no other warranty is, or will be given, and that there is no understanding or agreement whatsoever between the undersigned and Guilbault's Ltd. or its dealers with respect to the above order, except such as are embraced in the terms therein.

Upon the back of this document appears the following in print:

Warranty.—The company warrants the tractors to be well made and of good material, and to do good and serviceable work if properly adjusted and operated by a competent person. The company guarantees its tractors against defective material, and will replace f.o.b. cars Euclid, Ohio, within a period of 60 days from the date of sale any portion shewing manifest defects, providing such defective parts are returned to the factory of the Cleveland Tractor Co. at Euclid, Ohio, charges prepaid, properly tagged, giving the serial number of the tractor from which the same were taken; name and address of the owner, date of sale of the tractor when new, date when such parts were removed from tractor.

It is understood and agreed that the company shall be the sole judge as to any such defects. The company shall in no case be responsible for any trouble caused by careless or improper handling by purchaser, and all expense incurred by the company in remedying such trouble shall be paid by the purchaser. No dealer of the company has any authority to alter or to add to the above warranty and agreement, or to waive compliance therewith at any time, and the purchaser understands and agrees that there are no oral implied warrants.

The tractor was shipped to the defendant company at Erickson, and arrived there on April 5, 1918. Edgar Guilbault, an employee of Guilbault Co. Ltd., was sent out to take the tractor from the station to the defendants' farm, and shew Baird how to operate it. He did so. Trouble developed on the way out. The transmission heated, necessitating a stop to allow it to cool. On reaching the ranch it was taken out into a field to plow, Edgar Guilbault driving. Baird was with him. He says Guilbault started plowing, went about 20 yards when the tractor stopped. The plow was set too deep. They altered the set of the plow and started again, did about 300 yards and then hitched on to 9 sections of harrows, a load for six horses. The tractor would not pull these harrows. The engine began missing and stopped after going 20 or 30 yards. They ran the tractor into a shed for the night on three cylinders. The next day Guilbault cleaned out the carbon, cleaned the spark plugs, greased the wheels and started into the field with the three plows. They worked about 1½ hours, and quit, as it began to snow. The tractor stalled several times going up a hill. It could not pull three plows on this up-grade. No more tests were then made,

MAN.

K. B.

and Edgar Guilbault returned home. After he had gone Baird took out the tractor into the field himself, and trouble developed with the spark. He got a mechanic from Erickson, who adjusted this difficulty, and they got the machine going again.

Baird then wrote to Guilbault Co. Ltd. exhibit 20, dated April 11. This letter appears to have been the first complaint made about the machine not working properly.

It is unnecessary to recount all the difficulties and troubles which followed—suffice it to say that on May 8, a new motor, complete with magneto and carburetor, costing about $500 was shipped out and placed on the tractor, because as Victor Guilbault testified: "The motor which went out with the tractor was reported to us as defective."

August Guilbault, an expert, was sent out by the Guilbault Co. Ltd. to install the new motor. He found one cylinder of the old motor scored, necessitating reboring. Subsequently, further new parts of the tractor to replace broken or defective parts were sent out by the Guilbault Co. Ltd. as follows:

On May 14, radiator and gasoline tank, which had proved defective, costing $65; on May 19, 2 lower track wheel assembly, costing $67.50; on May 28, one rear wheel bearing and two rear wheel pinions, costing $42.15; on August 8, 2 rear wheel drive pinions, costing $31, and on August 20, various articles enumerated in exhibit 22, costing in all $42.69.

All of these repairs or new parts were furnished free of cost to the defendant company, and put in place on the tractor by the Guilbault Co. Ltd., also free of cost to the defendant company.

The total value of these, according to the invoices, including the new motor, was $748.34, and the original price of the tractor was $1,550.

I find upon the evidence that the tractor did not answer or fulfil the representations or verbal warranties given by Victor Guilbault to Baird at the time of the sale and upon the faith of which I find as a fact the defendant company agreed to the purchase.

I find also that the tractor did not answer or fulfil the warranty published by the Cleveland Tractor Co. printed upon the back of the sales order, exhibit 5, and formally stated in the sales order as a warranty given by and binding upon the vendors, the Guilbault Co. Ltd.; namely that the tractor was well made and of good material and would do good and serviceable work if properly adjusted and operated by a competent person.

MAN.

K. B.

It seems clear to my mind that this particular tractor was not well made and of good material throughout. It certainly did not develop the power represented, namely, that it was capable of pulling three plows, and do general farm work such as Baird informed Victor Guilbault prior to the sale he required a tractor to perform.

Victor Guilbault was told that Baird had no previous knowledge or experience of tractors, and that he was about to purchase one to save on men and horses in his farm work.

I think there have been clear breaches of warranty on the part of the Guilbault Co. Ltd., for which they are liable in damages, and that such breaches are breaches of the contract assigned to the plaintiff, or directly connected with it, and as such are the subject of set off in this action against the plaintiff as assignee of that contract. *The Government of Newfoundland* v. *Newfoundland Railway Co.* (1888), 13 App. Cas. 199 at p. 213.

I distinguish the case at Bar very clearly from that of *Cummings* v. *Johnson* (1913), 13 D.L.R. 343, 23 Man. L.R. 740, strongly relied on by the plaintiff. It may be said that both the verbal and written warranties cannot stand together in view of the language used in the contract, exhibit 5, but I have no difficulty in fixing the responsibility upon the vendors under the admitted warranties given, whether verbal or written.

I have now only to consider the question of consequential damage to the defendant company. It claims

(1) For loss of time in endeavouring to make the tractor work, $300; (2) For loss of profit on land, which would have been put in crop had the tractor fulfilled the warranty, $1,000; (3) For moneys expended in connection with repairs and loss of time on the tractor, $100, or $1,400 in all.

Baird testified that he had lost at least 3 months of his own time over this tractor, which time he says is worth $100 per month, or $300. As to money expended he gives items properly claimable aggregating $123.90. And lastly he claims $1,000 for loss of profits on land uncropped by reason of the failure of the tractor to do its contemplated work.

I think profits derivable from crops to be grown upon the defendants' lands under the facts and circumstances of this case were or ought to have been in contemplation of the parties when the contract was entered into, and loss of them a proximate consequence of a breach of the contract properly recoverable—

Rivers v. *George White & Sons Co.*, (1919) 46 D.L.R. 145; *Hydraulic Engineering Co. Ltd.* v. *McHaffie Goslett & Co.* (1878), 4 Q.B.D. 670.

Upon this claim Baird testified that in the previous year the defendant company's farm produced 45 bushels of wheat to the acre, oats 35 to 40 bushels; and barley 28 bushels to the acre. Their wheat averaged $1.71 per bushel; oats 60c. per bushel; and barley $1.00 per bushel.

Assuming an equally good yield for 1918 on 150 acres:—the wheat alone would have amounted to 6,750 bushels. Even putting the yield at 20 bushels to the acre and cutting down the acreage to 50, the loss would still at then prevailing prices exceed half the cost of the tractor.

I see no difficulty in reaching a conclusion on the facts that the defendant company's loss, due to the breach of warranty, far exceeds the value or cost of the tractor itself.

The difficulty I now have to face is to give effect to my findings by reason of the form of the defendants' pleadings.

He sets up the verbal representations before referred to as a condition upon which the sale was made, which if it failed of fulfilment entitled the purchaser to return the tractor and get his money back.

Neither defendant pleads the written or printed warranty actually given and its failure. The two warranties, one verbal and one written cannot stand together. The writing must prevail. Had no sales order been signed by the purchaser, there might have been a possibility of treating the representations made by Victor Guilbault at the time of negotiations as to the fitness and capability of the tractor for the defendant company's farm work as a condition, and the sale as one upon condition, but it is impossible so to view it now, nor can rescission be granted even if ground for that at one time existed. I can only treat the contract as subsisting and binding upon each of the contracting parties.

An amendment to the statement of defence setting up the written warranty and its breach, followed by loss and injury to the defendant company should in my opinion have been pleaded, and is necessary to enable me to do justice in this case. I would therefore at this stage allow such an amendment.

The warranty, however, does appear upon the record, having

MAN.
K. B.

been pleaded by the plaintiff in his reply, and all evidence is in both documentary and oral to enable me to deal with this question and do justice between the parties.

The plaintiff is entitled to judgment against the defendant company for the sum of $775, with interest at 5%, since Nov. 1, 1918. The defendant company is not sued upon the lien note or agreement, which alone provides for a higher rate of interest, but for the balance due upon the purchase. If liable at all, the defendant Elsie K. Baird is liable only upon her written guarantee endorsed upon the second lien note.

I cannot understand why the defendant framed his statement of claim in the way he has. However, the guarantor can only be held liable for the amount due by the principal debtor. This amount is wholly offset by the amount I find due to the defendant company upon the set-off, and my findings as to the principal debtor enure to the benefit of the surety, and thereby discharge her.

I find that the damages of the defendant company proved at the trial are considerably in excess of the amount I find due to the plaintiff. Of course no award of damages for which the assignor is liable can be made against his assignee in excess of the amount of his claim as such assignee. The right of set-off attaches to the original cause of action assigned, and so the assignee takes it subject to this right. He may be liable to have his claim as assignee wholly wiped out by a contra claim or account of the debtor, against the original creditor, but can be injured no further. I find the defendant company entitled upon its set-off to judgment against the plaintiff for the amount equal to the plaintiff's claim, with interest. The plaintiff will be entitled to his costs of the action, and proving his claim at the trial, because the defendants denied their liability and put him to this expense. On the other hand, the defendants will be entitled to tax and set-off against the plaintiff's costs, their costs of defence connected with the claim of set-off only. As the time of the trial was almost wholly taken up with these defences, these costs will naturally be the greater, and after set-off any excess will be paid by the plaintiff to the defendants. *Judgment accordingly.*

BRITISH AMERICA ELEVATOR Co. Ltd. v. BANK OF BRITISH NORTH AMERICA.

MAN.

K. B.

Manitoba King's Bench, Galt, J. October 10, 1919.

COSTS (§ II—24)—*Examination for discovery—Removal of statutory bar—Further allowance.*]—Application for allowance of a counsel fee and disbursements arising out of an examination for discovery. Application refused.

H. Phillips, K.C., for plaintiff; *A. C. Ferguson*, for defendant.

GALT, J.:—This is an application on behalf of the plaintiffs for the allowance of a counsel fee and disbursements arising out of the examination of the defendants' manager for discovery at Rosthern, Saskatchewan.

At the trial I pronounced judgment in favour of the plaintiffs for the sum of $13,528.10, together with costs. An application was then made on behalf of the plaintiffs to remove the statutory bar as regards the cost of action. Upon that application I gave a written judgment, from which I extract the following statement:

It was necessary to examine the defendants' manager for discovery at Rosthern, because the books and documents of the defendants were there, and it was very necessary for counsel who attended the examination to carefully inspect many of the entries whether or not to put them in evidence. The examination was very ably conducted; so much so that the depositions of the manager at Rosthern comprised the whole of the plaintiffs' case. It was necessary for the plaintiffs to take a special stenographer to Rosthern, as none could have been found there. The examination lasted two days. Under our tariff of costs it appears that the most that could be taxed by the plaintiffs on this very important examination is $3 per hour, and that no allowance would be made by way of disbursements or otherwise for counsel's loss of time in attending the examination. Some 173 documents were produced by the plaintiffs and 181 by the defendants, and over 100 of these were put in evidence at the trial, which lasted two and one-half days. Under the above circumstances I think that this was a case of special difficulty and that it would be unfair to the plaintiffs to impose such a heavy burden of costs upon them as they would have to bear unless the statutory limit were removed. For this reason I remove the statutory bar.

It is manifest from the above extract that my judgment in removing the statutory bar was very largely based upon the statement made by plaintiffs' counsel that the plaintiffs, on taxation, could only recover $3 per hour for the examination, and that no allowance would be made by way of disbursements or otherwise for counsel's loss of time in attending the examination.

It is now urged that the remuneration provided for under the tariff then in force is entirely insufficient, and that some substantial

MAN.

K. B.

allowance should now be made for counsel's fee and disbursements in connection with such an important examination.

On the other hand, the plaintiffs are taxing their costs without regard to the statutory bar, and, as counsel admit, are thus recovering many hundreds of dollars from the defendants over and above the statutory amount.

It is not open to the plaintiffs to recede from the position they took on the former application. See *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, at pp. 79-80; *Corporation of St. John* v. *Central Vermont*, 14 App. Cas., at p. 595.

I must therefore refuse the application.

Application refused.

FIRST NATIONAL INVESTMENT Co. v. THORODDUR ODDSON, and FIRST NATIONAL INVESTMENT Co. v. LEIFUR ODDSON.

Manitoba King's Bench, Mathers, C.J.K.B. July 29, 1919.

LANDLORD AND TENANT (§III E—115)—*Mechanic's lien—Sale of property—Registration of title of purchaser—Refusal of lessee to give up possession—Allegation of Fraud—Rights of parties.*]—Actions to recover possession of two apartment suites which defendants continue to occupy and for which they refuse to pay rent.

W. C. Hamilton and *J. Auld*, for plaintiffs; *B. L. Deacon*, for defendants.

MATHERS, C.J.K.B.:—The first of these two actions was brought to recover the possession of suite No. 13 of an apartment block known as Thelmo Mansions; and the second action was brought to recover possession of suite No. 36 in the same apartment block.

The apartment block in question contains 78 suites and was erected in 1914 by Thorstein Oddson, the father of the defendants. Thorstein Oddson and his two sons had for a number of years prior to that date carried on a real estate business in the City of Winnipeg, in partnership under the firm name of Thorstein Oddson & Sons, and this partnership has ever since continued to be, and is still in existence.

When the apartment block was completed in Sept. 1914, Thoroddu Oddson went into possession of suite No. 13, and Leifur

MAN.

K. B.

Oddson went into possession of suite No. 28, and about six months afterwards transferred to suite No. 36.

The block is erected on lots 42 to 47, block 3, 35 St. James, and was mortgaged to the plaintiff company.

Shortly after the war broke out in August, 1914, Thorstein Oddson became financially embarrassed, had considerable difficulty in getting the block completed, and was unable to pay the contractor by whom the block was built. On May 1, 1915, the contractor filed a lien against the building for $15,469.04, pursuant to the Mechanics and Wage Earners Lien Act, R.S.M., 1913, c. 125, and on June 29, 1915, proceedings were taken in the County Court to enforce this lien. The matter was referred to the referee of the Court of King's Bench, pursuant to s. 54 of the Act, and on June 1, 1916, he disallowed the contractor's lien. From this judgment an appeal was taken to the Court of Appeal, and on April 16, 1917, the Court of Appeal by its judgment reversed the judgment of the referee, and directed that judgment be entered declaring the contractor entitled to a lien, for the sum of $16,938.56, and $10 costs of lien, together with interest from June 1, 1916, with costs both in the County Court and the Court of Appeal.

By its judgment the Court of Appeal ordered the action to be referred back to the referee to fix a time for payment for the sum named, and for sale in default of payment.

The referee appointed August 1, 1917, as the date on or before which payment of the sum then found to be due, namely $18,622.49, should be made into Court. The money was not paid and the property was offered for sale by public auction, but the sale was abortive. Subsequently the property was, with the sanction of the referee, sold by private sale to the plaintiff, and an order was made by him vesting the property in the plaintiff.

On Feb. 15, 1918, the plaintiff applied to be registered as owner of the land in question under the Real Property Act, R.S.M., 1913, c. 171. The application contains a statement by the company that

> It is not aware of any mortgage or encumbrances affecting the lands or that any other person hath or claims to have any estate or interest therein at law, in equity, possession remainder or expectancy, other than "none." That the said land is occupied and there is an apartment block on the land, and suites are occupied by various tenants.

I quote these statements because the defendants based a charge of fraud against the plaintiff upon them.

MAN.

K. B.

On March 4, 1918, a certificate of title was issued to the plaintiff, and the property now stands in its name.

The defendants have continued in occupation of suites respectively occupied by them, namely No. 13 and No. 36, and have each refused to pay rent or to give up possession, and these two actions are brought to recover possession.

The defences are identical, with the exception that Leifur Oddson also relies upon the War Relief Act, 5 Geo. V. 1915, c. 88.

The statements of defence contain a general denial of everything alleged by the plaintiff, except that the apartment block named is situated upon the lands in question, and they charge that the plaintiff procured the certificate of title to be issued to it without being subject to the defendants' rights by fraudulently stating in the application therefor that it was not aware of any mortgage or encumbrance, or that any other person had any claims or interest at law, in equity, possession, remainder or expectancy; whereas it is alleged that the defendants were in possession of the suites named, and had leases of the same, expiring July 1, 1920, to the plaintiff's knowledge. In the alternative it is alleged that each of the defendants had, at the time of the issue of the certificate of title, a non-registered subsisting lease or agreement for a lease for a period not exceeding 3 years, and were in actual occupation under the leases, to which the title of the plaintiff is by implication subject.

Two unregistered written leases were given in evidence in both of which Thorstein Oddson is the lessor, one to Thoroddur Oddson for suite 13, and the other to Leifur Oddson for suite 36. Both bear the date July 2, 1915, and the term in each case is five years. By neither lease is any rent reserved, but in each case the consideration is expressed to be "one dollar services rendered and other valuable consideration, the receipt whereof is hereby acknowledged." These leases were executed after they had been in occupation for about 9 months.

It is admitted that in August, 1917, the plaintiff took over the collection of the rents for the whole block, and then became aware that suites 13 and 36 were occupied by the defendants, but there is a dispute as to whether or not the leases were then brought to its attention. The point, however, seems to me to be immaterial. The leases were subsequent to the plaintiff's mortgage, and

consequently not binding upon it: Falconbridge on Mortgages 255. Whether or not the plaintiff had notice of the leases, as alleged, it had the right to eject the defendants; *Keech* v. *Hall* (1778), 1 Doug. (Q.B.) 21, 99 E.R. 17. Unless the plaintiff and defendants entered into a new agreement express or implied pursuant to which the defendants had a right to retain possession. *Evans* v. *Elliot* (1838), 9 Ad. & El. 342, 112 E.R. 1242; *Towerson* v. *Jackson*, [1891] 2 Q.B. 484.

The defendants did attempt to prove such an agreement. They both swore that when the plaintiff took over the collection of the rents in August, 1917, it was verbally agreed that they should be permitted to continue in occupation of the premises occupied by them until the expiration of the leases, without rent. This agreement is denied by the plaintiff, and I am not satisfied that any such agreement ever was made. But even if it had been made, it would be a mere *nudum pactum*, and unenforcible.

Secondly, the defendants argued that by s. 78, sub.-s. (d), of the Real Property Act, every certificate of title is by implication, and without special mention, deemed to be subject to any unregistered subsisting lease or agreement for a lease for a period not exceeding 3 years, where there is actual occupation of the land under the same. The leases in question are for 5 years from July 2, 1915, but because the unexpired portion of the lease at the time the certificate was issued was less than 3 years the defendants contend that they are in occupation under a non-registered subsisting lease for a period not exceeding 3 years. I cannot accept that interpretation of this section. It seems to me that when the section speaks of an "unregistered subsisting lease . . . for a period not exceeding 3 years" it means a lease which when entered into was for a period not exceeding 3 years, and that an unregistered lease originally for a longer period although the unexpired residue of the term was less than 3 years is not protected. These leases were entered into for 5 years and although less than 3 years remained when the certificate of title was issued, it is not in my opinion subject to the leases. But even if the defendants' contention be correct, I fail to see how their situation is thereby improved. In that case the plaintiff would hold subject to the defendants' rights under the leases. But I have just pointed out that the leases were not binding on the plaintiff, and therefore the defendants as against it have no rights thereunder.

MAN.

K. B.

The defendants seek to avoid the conclusive character of the certificate of title by charging that it was procured by fraud. The fraud they rely on is a statement by the company in the application that it was not aware that any other person had any claim or estate at law, in equity, possession, remainder, reversion or expectancy. The application at the same time states that the land is occupied, and that there is an apartment block on it, the suites of which are occupied by various tenants. It seems to me quite impossible under these circumstances to hold that the certificate of title was procured by fraud.

The defendant Thoroddur Oddson makes no claim under the War Relief Act, but the defendant Leifur Oddson, does. He says that he enlisted in the 197th Battalion in 1915, but that when the battalion went overseas in February, 1917, he did not accompany it. He has not been in receipt of army pay since the end of February, 1917, nor has he been performing any military duties.

I think the inference is clear that the defendant was discharged from the army in February, 1917. He nevertheless claims to be entitled to the protection of the Act for 1 year after peace has been finally made, whenever that may be. It is only necessary to state the defendant's case to see how little merit there is in it.

S. 2 of the War Relief Act of 1918, 8 Geo. V. 1918, c. 101, however, does not entitle the defendant to retain possession of this property. It says that during the continuance of the war, and for a period of one year thereafter it shall not be lawful to bring any action against a person who has enlisted and been mobilized as a volunteer,

for the recovery of any of his goods and chattels or lands and tenement. from his wife, if dependent, or from any members of his family, if dependents

There is nothing in the Act to prevent an action being brought to recover from him possession of his goods and chattels, lands or tenements. The protection in such a case is only extended to his wife, if dependent, or members of his family, if dependent.

By this action the plaintiff does not seek possession of the property from his wife, but from himself. He has, it appears, two infant children who live with him in the block. It was contended that they are dependent members of his family, and the effect of this action will be to recover possession of the property from them. They are not in possession, and no proceedings are taken against them.

The defendants raised the further point that they are "owners" within the meaning of the Mechanics and Wage Earners Lien Act, and should have been made parties to the lien proceedings. Whatever merit there might have been in this point if raised before the issue of the certificate of title, there is none now. The defendants were well aware of the lien proceedings, and attended and gave evidence at the trial.

The plaintiff had not, apparently, the conduct of the action, and as against it the defendants are estopped from objecting to the regularity of the proceedings, even if the certificate of title were not by virtue of s. 79 of the Real Property Act conclusive evidence of its title.

The defendants also attempted to question the constitutional validity of s. 54 of the Mechanics and Wage Earners Lien Act, empowering the County Court Judge to refer the action to the referee. As the defendants had not given the notices required by s. 28 of the King's Bench Act, I declined to allow the question to be argued.

On the whole, the plaintiffs are entitled in my opinion to recover possession of suite No. 13 from Thoroddur Oddson, and suite No. 36 from Leifur Oddson, and judgment will go accordingly in both suits, with costs. *Judgment accordingly.*

HITCHCOCK v. COLUMBIA VALLEY LAND Co.

Manitoba King's Bench, Galt, J. July 12, 1919.

VENDOR AND PURCHASER (§ I E—28)—*Contract for sale of land—Breach—Trial—Judgment in former action—Pleading—Evidence.*]—Action for damages for breach of an agreement for the sale of land.

G. A. Elliott, K.C., for plaintiff.

W. P. Fillmore, for defendants.

GALT, J.:—In this action the plaintiff claims damages for breach of an agreement for the sale of land and payment by the defendant of the sum of $1,000 heretofore paid by the plaintiff under the terms of his agreement.

At the trial leave was given to the defendant to plead a judgment delivered by Metcalfe, J., in a former case between the parties when the plaintiff was non-suited. On the other hand, I

MAN.
K. B.

have given leave to the plaintiff to add a claim against the defendants for money had and received.

In the year 1910, the Columbia Valley Land Co., Ltd. (a Manitoba corporation) as vendors, entered into an agreement for sale of a large quantity of land, consisting of about 5,000 acres, situate on or near the Columbia River in British Columbia with one Welford Beaton, of the City of Winnipeg, agent, as purchaser. Beaton was a member of the firm of Beaton & Vezina, real estate agents in Winnipeg.

It is necessary to refer to this original agreement as it forms the foundation of the dealings between the plaintiff and the defendants. The agreement is dated Dec. 1, 1910. The purchaser Welford Beaton appears from the evidence to have been a man of no particular repute or means, but he agrees to take the property in question at the price of $145,000. How it was that the defendant company was willing to accept Beaton as a purchaser without payment of even a deposit, appears clearly enough by the terms of the agreement. The company took good care to so protect themselves that until the purchaser succeeded in selling lots to the full extent of the purchase money he could get no title to any portion of the lands and in the meantime all the purchase money derived from future sub-purchasers was to be paid into the Merchants Bank of Canada at Winnipeg to the credit of the defendant company.

Under the agreement the vendors, who had paid $23.50 per acre for the land, stipulated that the property should be divided into 10-acre lots to be sold for a price of not less than $150 per acre; and upon 50 of the said lots of 500 acres being sold by the purchaser the vendor would proceed with the work of clearing and improving said 50 lots; and upon the purchaser effecting the sale of 200 of said lots the vendor would proceed to instal and complete a sufficient irrigation system to serve that number of the 200 lots and would plant the said lots with apple trees of at least one year's growth to the number of not fewer than 40 trees per acre.

The agreement further provided that every sub-sale by the purchaser would have to be approved by the vendor before it would be effective. No survey of any portion of the said lands should be made without the approval of the vendor in writing first had and obtained, and only such portion of the said lots should be surveyed as the vendor should designate.

MAN.

K. B.

Clause 17 of the agreement provides:—

17. If the purchaser shall fail to do, observe or perform the covenants, provisoes, agreements and conditions herein contained the vendor shall have the right to mail to the purchaser a notice in writing signed by or on behalf of the vendor enclosed in an envelope, postage prepaid and registered and addressed to the purchaser at Winnipeg, Man., indicating in what respect the purchaser has made default hereunder and unless such default be remedied within one calendar month from the mailing of said notice, this contract shall be void and every right and interest of the purchaser in said lands acquired by virtue of this indenture, or otherwise, shall revert to and invest in the vendor without any declaration or notice other than the notice hereinbefore mentioned and the purchaser shall not be entitled to a return of any portion of any moneys received by the vendor on account of any of said lands, or to any damages or recompense whatsoever, except a commission of twenty per cent (20%) to be paid to the purchaser on all sales effected by the purchaser and accepted by the vendor prior to the date on which this contract becomes null and void. This commission to be payable as moneys are received by the vendor from such sales effected by the purchaser. The vendor to have a right of set-off for all advances previously made to the purchaser for commission, expenses, etc.

Under clause 19 the purchaser agrees to act as agent of the vendor without salary or other remuneration and under the instructions and as directed by the vendor in arranging for and supervising the clearing, irrigating and planting of the said lands.

Finally, clauses 21 and 22 provide:

21. This contract is conditional upon the purchaser effecting sales satisfactory to the vendor of forty (40) lots within six months of the date of this agreement, upon effecting sales of one hundred (100) of said lots within twelve months of the date of this agreement, upon effecting sales of sufficient number of said lots to pay the vendor the one hundred and thirty-five thousand dollars ($135,000) and interest as aforesaid and the ten thousand dollars ($10,000) aforesaid at the times and in the manner aforesaid by Nov. 1, 1912, and the effecting of said sales by the purchaser shall be deemed a condition precedent to any obligation on the part of the vendor to perform this contract or any matter or thing herein contained notwithstanding anything herein contained and no part performance of the conditions of this paragraph on the part of the purchaser shall be deemed a waiver of any matter or thing by the vendor.

22. If the purchaser shall fail to make the payments aforesaid or any part thereof at the times above fixed, then the vendor shall have the right to mail to the purchaser a notice in writing signed by the vendor or by some person or persons on behalf of the vendor enclosed in an envelope postage prepaid, and registered and addressed to the purchaser at Winnipeg, Man., to the effect that unless the payment or payments or a part thereof in respect of which default has been made, is or are made within one calendar month from the mailing of said notice, this contract shall be void, and upon said notice being so mailed and upon said default continuing to exist for the space of one calendar month after the mailing of said notice, this contract shall be void and

MAN.

K. B.

all rights and interests hereby created or then existing or derived under this contract or otherwise shall forthwith cease and determine and all rights, title and interest of the purchaser in said lands shall revert to and revest in the vendor without any declaration or notice except as aforesaid and without any other act on the part of the vendor to be performed or without any suit or proceedings to be brought or taken and in any such event the purchaser shall not be entitled to be paid any of the purchase moneys hereunder, or to damages of any kind whatsoever and the purchaser doth hereby expressly release to the vendor all right and claim to payment of any of said moneys, except the twenty per cent. (20%) as hereinbefore provided for.

In May, 1911, the said Welford Beaton endeavored to interest the plaintiff with a view to purchasing one of the 10-acre lots. Plaintiff was a street car conductor and had not much available cash, but he was the owner of two lots on the outskirts of Winnipeg which he valued at something over $500. Beaton agreed to take a conveyance of these two lots as the first payment of $500 on a sale of a 10-acre lot in British Columbia, and on May 31 an agreement was drawn up by Beaton or his solicitor between Welford Beaton, of the City of Winnipeg, in the Province of Manitoba, agent, thereinafter called the vendor, of the first part, and the plaintiff, thereinafter called the purchaser, of the second part. This agreement recites the previous agreement between the defendants and Beaton of Dec. 1, 1910, and that the vendor had agreed to sell to the plaintiff one of the 10-acre lots "to be selected as hereinafter mentioned" for the sum of $1,500 of lawful money of Canada to be paid into the Winnipeg branch of the Merchants Bank of Canada at Winnipeg to the credit of the Columbia Valley Land Co. as follows: $500 at or before the execution of these presents; $500 on or before June 1, 1912; and the balance of $500 on or before June 1, 1913, without interest, save in case of default as hereinafter provided.

It was then agreed between the parties:

The ten acre lot hereby sold or intended so to be shall be selected or located in the following method, that is to say: On or before Nov. 1, 1911, the said lands or so much thereof as have been offered for sale will have been subdivided into ten acre lots all as nearly as may be equally good and equally well located and a plan of subdivision thereof will be provided for the inspection of the purchaser and the purchaser upon making the payment due hereunder on Nov. 1, 1911, shall have the right to select any ten acre lot included in such subdivision not previously allotted to any purchaser of any portion of said lands.

If the purchaser shall fail or neglect to make such selection on or before Jan. 1, A.D. 1912, the vendor may after such date by notice in writing to the purchaser addressed to him at Winnipeg post office in the Province of Manitoba

allot to the purchaser any one of said ten acre lots not previously selected or allotted.

If the purchaser after inspection of or settling upon the lot allotted to him or selected by him as aforesaid is not satisfied therewith he may select any other ten acre lot included in said subdivision, not previously selected by or allotted to another purchaser and the ten acre lot finally allotted to or selected by the purchaser as aforesaid shall be the lot hereby agreed to be sold and be subject to all the terms, conditions and provisoes of this agreement. As part of the consideration herefor the vendor agrees to clear said ten acre lot of all stumps and growth of any kind and properly prepare the same for planting trees and will plant at least nine acres of said lot with apple trees set thirty feet apart each way making four hundred and thirty-two trees in all, such clearing and planting to be completed on or before the date fixed for the final payment of the purchase money as aforesaid.

Under clause 20 of the original agreement the company agreed to assume the work of all bookkeeping and accounting in connection with sales of the said lands and to keep records of all sales and to notify purchasers of payments falling due and endeavour to collect all moneys payable under any agreement of sale, etc.

The company gave its written approval to the agreement of sale between Beaton and the plaintiff and as the company's bookkeeper had charge of the bookkeeping, it must be assumed that the company was aware of and consented to the first payment of $500 being made by the conveyance of the plaintiff's two lots to Beaton.

The second instalment of $500 falling due under the plaintiff's agreement was paid by him in cash.

On Sept. 6, 1913, the defendants served upon Beaton the cancellation notice provided for under par. 17 of their agreement with him. Carstens, the president of the defendant company, states in his examination at p. 72, that this cancellation was never waived; consequently under the terms of the agreement the contract became void and every right and interest of the purchaser in the lands reverted to and vested in the vendor.

On July 13, 1915, the plaintiff commenced an action against the defendants claiming payment to him of the sum of $1,579 and interest and further and other relief. This action came on for trial before Metcalfe, J., on Oct. 31, 1917. Counsel for the plaintiff says that owing to faulty instructions the case as then presented could not be established, and in the result Metcalfe, J., entered a nonsuit without costs. The defendants have, by

MAN.

K. B.

amendment allowed at the trial, been permitted to set up this previous judgment as a defence to the present action. But it now appears from an affidavit made by the plaintiff's solicitor and from the notes made by the court stenographer at the previous trial that at the conclusion of the case His Lordship delivered an oral judgment in which he stated: "There will be a nonsuit without the effect of a verdict and without costs and then we will have a clear record when we begin again." Under such circumstances I cannot regard the said nonsuit as establishing a *res judicata* between the parties.

The enterprise as originally started by the defendants was intended to create a large number of fruit farms along the Columbia River, but no attempt had been made to ascertain the suitability of the lands for that purpose. As soon as the attempt was made it was found that owing to the altitude of the property the district was subject to late frosts in the spring and early frosts in the fall, so that it was impossible to utilize the lands as intended. The whole adventure proved to be a "fizzle" and a loss to everyone concerned.

The first objection raised by Mr. Fillmore to the plaintiff's claim is that the plaintiff's agreement was with Beaton alone and was under seal and consequently the plaintiff's rights, if any, are against Beaton alone. In 1 Hals. s. 442, it is laid down: "A contract under seal executed by an agent in his own name cannot be enforced by or against the principal even though it is expressly stated that the agent is contracting on behalf of the principal." Such a rule of law as this is not calculated to assist a Judge in giving judgment according to the very right and justice of the case. By the mere technicality of affixing a wafer to an agreement of sale, an unscrupulous principal might easily arrange with a dishonest and impecunious agent to defraud those with whom the agent dealt. In the present case the agreement between the defendants and Beaton was not only an agreement of sale but an agreement of agency whereby Beaton was expressly to act as their agent. But accepting the rule of law laid down in Halsbury, I do not think that it deprives the plaintiff in the present case of the right to recover his money. The plaintiff's rights under his agreement have all vanished. He never agreed to take any particular 10-acre lot and if he had, the cancellation of the original

agreement between the company and Beaton deprived the plaintiff of any exercisable rights. He now sues for money had and received by the defendants for which he has received no consideration.

In *Sinclair* v. *Brougham*, [1914] A.C. 398, a claim for money had and received was exhaustively dealt with by the House of Lords. It was there held that moneys paid by depositors on an *ultra vires* contract of loan would not be recovered as moneys had and received. But in reaching that conclusion their Lordships dealt at large with the subject. Lord Dunedin says, at p. 436:

> It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a *jus in re*, for you cannot have a *jus in re* in currency. It shews that both an action founded on a *jus in re*, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.

The defendants next argue that the moneys paid by the plaintiff to Beaton cannot be recovered against the defendants because under both agreements there was a stipulation requiring such moneys to be paid into the Merchants Bank at Winnipeg. Doubtless there was such a stipulation, but the vendors in each case were at liberty to waive it. The evidence shews that for the most part Beaton collected the sales moneys without depositing them in the bank and that the moneys which they did deposit there were subsequently paid out to Beaton or Beaton and Vezina to meet the expenses of clearing the land. Then again, under the second agreement, Beaton was at liberty to waive his similar clause and if he chose to accept payment personally instead of requiring the plaintiff to pay his money into the bank he was, as between himself and the plaintiff, at liberty to do so.

Next it is argued that in any case the conveyance of the two lots which Beaton accepted from the plaintiff as equivalent to $500 cannot be charged against the defendants as money had and received by them. In 7 Hals., s. 970, the law is thus stated:

> It is always necessary that the money claimed as having been had and received to the plaintiff's use should be a defined and ascertained sum, and money or its equivalent must have been actually received by the defendant or at least the defendant must be estopped from denying its receipt. Thus no claim for money had and received can as a general rule be maintained where the defendant has in fact received goods and not money; but the action lies where there is a presumption that goods received by the defendant have been

MAN.

K. B.

converted into money and things which can readily be turned into money have often been treated as equivalent to money for this purpose. Moreover, the money must be either the plaintiff's money or money in which he is directly interested, and the money or its equivalent must be clearly proved to have come into the defendant's hands.

I have already shewn that Beaton acted throughout as the company's agent and that the company's own bookkeeper had charge of Beaton's transactions of sale. The conveyance in question was intended to operate as the very first payment made by the plaintiff under his contract with Beaton and the company signed its approval to this contract. Under these circumstances I am of opinion that the two lots were accepted, with the approval of the defendants, by the defendants' agent as the equivalent to $500 and that this amount is thus proved to have come into the defendants' hands. No claim for interest has been made, nor for further and other relief.

Judgment will therefore be entered in favour of the plaintiff for the sum of $1,000 together with his costs of action.

Judgment for plaintiff.

N. B.

S. C.

MYERS v. GIBBON AND COMPANY, Ltd.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White, and Grimmer, JJ. September 19, 1919.

SALE (§ I A—9)—*Of wood slabs—Delivery at wharf—Usage or custom—Expense of loading—Wood not in accordance with contract—Finding of jury—Evidence—Appeal.*]—Appeal by plaintiff from the trial judgment in an action to recover the price of wood sold and delivered. Affirmed.

APPEAL by plaintiff from the judgment of Crocket, J.

R. St. J. Freeze, for plaintiff; *G. H. V. Belyea*, K.C., for defendant.

The judgment of the Court was delivered by

GRIMMER, J.:—The plaintiff, who is a merchant residing and carrying on business at Norton, in the County of Kings, during the years 1917 and 1918 conducted a small lumbering business on the Vail lot at Springfield, near the highway leading from Hatfield's Point wharf to Belleisle Corner in said county. The lumber manufactured consisted of hard and soft wood in about the proportion of one to three, the edgings and slabs therefrom being

N. B.

S. C.

cut in four foot lengths and piled for sale. The plaintiff sold the slab-wood of the 1917 cut, estimated at about 200 cords, to one Messenger, who was to haul the same. When he had taken some two or three scowloads of the wood, Messenger died, and the plaintiff took over the remainder, sold some to local parties and had about 75 cords left. Previously the plaintiff had sold some 25 cords of wood to the defendants on the line of the Government Railways, of which at the commencement of this action 12½ cords had been shipped and received by the defendants but was not paid for. In March, 1918, the plaintiff wrote the defendants that he was cutting 400,000 feet of hard and soft wood lumber, which would make about 200 cords presumably of fire wood, and asked if they wished to buy the whole lot. They replied asking the price of from 50 to 75 cords and where and when it could be loaded. The plaintiff stated his price as $5 per cord delivered on the wharf so the boat could load it, and the defendants accepted the mixed slab-wood from 50 to 75 cords of the 1917 cut at the stated price. The defendants in trying to arrange for a boat had some difficulty in securing one, nor could they learn from the plaintiff when he would commence hauling. Later the plaintiff wrote he had been hauling for a week, whereupon the defendants wrote they had secured a boat and notified the plaintiff to start and deliver the wood to the boat over the rail according to the usual custom. The plaintiff declined to do this, insisting that by putting the wood on the wharf he complied with his contract to deliver so the boat could load it, and refused to recognize any custom or usage in the wood trade which required or compelled him to deliver the wood over the rail. The boat captain thereupon hired men and loaded 45 cords of wood at an expense of $36.60, leaving about 5 cords of the wood on the wharf, which the plaintiff afterwards repossessed without leave from the defendants. Upon receipt of the wood at St. John the defendants wrote plaintiff it was not as represented, there being very little hardwood in the lot, and that it was worth $3.50 per cord instead of $5, and that they must be allowed for the expense of handling the same from the wharf to the boat. Finally this action was brought for the price of 12½ cords of wood delivered at Norton, amounting to the sum of $53.12, and for the 75 cords at $5, in all making $428.12. The defendants counter-

N. B.
S. C.

claimed for the expense of handling the wood, for fifty cents per cord extra freight thereon and for loss of profit on 75 cords of wood, making a total counterclaim of $209.10. In answer to questions by the Court the jury found:—

1. That the plaintiff delivered 75 cords of wood for the defendants on the wharf at Hatfield's Point.

2. That the wood was piled on the wharf so it could be loaded on the boat as conveniently as was reasonably practicable.

3 and 4. That the wood delivered was slab-wood mixed with hardwood.

5. That it was the cut of 1917 except about 7 or 8 cords.

6. That the cut of 1918 was not worth less per cord than the cut of 1917.

7. That the defendants were not obliged to pay any sum for carrying the 45 cords of wood which the boat "J.A.H." loaded from the snore-end of the wharf by reason of any breach on the part of the plaintiff in connection with the piling of the wood on the wharf.

8. That the defendant was not obliged to pay any sum for extra freight by reason of the proportion of soft wood contained in the shipment.

9. That the value of the wood delivered on the wharf was $4 per cord.

10. That the defendant did not suffer any loss of profits by reason of the wood delivered not being soft wood mixed with hardwood of the cut of the year 1917.

11. That there is a uniform and generally recognized usage in connection with the sale of wood for shipment by boat on the St. John River and its tributaries where the wood is delivered in piles on a wharf and not direct to a boat that the vendor at his expense puts it over the rail of the boat, but that the plaintiff was not aware of such usage.

12. That the wood the plaintiff delivered on the wharf was not salable and merchantable as slab-wood mixed with hardwood of the cut of 1917.

To questions of the plaintiff the jury answered:—

1. There was less hardwood mixed in the wood placed on the wharf than the defendant had a right to expect.

2. That outside of the wood of the 1918 cut, the average condition of the wood was such as might reasonably be expected of the cut of 1917.

3. That the defendant did not suffer any damage by reason of the presence of the wood of the 1918 cut.

To those of the defendant the jury answered:—

1. That after placing the first 50 cords of wood on the wharf the defendant did notify plaintiff that he was expected to deliver the wood over the rail of the boat.

2. That after defendant received 45 cords at St. John they notified plaintiff the wood was not hardwood slabs mixed with hardwood and would not be paid for at contract price.

3. The plaintiff did not inquire of defendants if they wanted any more wood than the 50 cords as hauled.

4. That the plaintiff did haul the remaining wood without instructions under the inquiry.

The action was tried in the Kings County Circuit Court before Crocket, J., and a jury, and upon the answers above being given

N. B.

S. C.

to the questions asked, judgment was reserved by the Court, but was afterwards delivered on April 19, 1919, and a verdict was ordered to be entered for the plaintiff for $233.12, being the assessed value of 45 cords of wood at $4 per cord plus the sum of $52.12 admitted in the statement of defence, and upon the trial, for the 12½ cords of wood delivered at Norton, and the costs of the suit were ordered to be taxed upon the County Court scale. From this judgment the plaintiff now appeals, and moves to vary the same and to increase his verdict to the amount of the claim sued for.

The contract between the parties was established entirely by correspondence, and was intended to and did relate to the sale of slab-wood mixed with hardwood, from 50 to 75 cords, which was to be hauled and placed on the wharf at Hatfield's Point, so that the boat could load it. As stated in the facts related, the jury found the plaintiff delivered 75 cords of wood on the wharf for the defendant and that it was piled so it could be loaded on the boat as conveniently as was reasonably practicable. Also that it was slab-wood mixed with hardwood, and except 7 or 8 cords, was of the cut of 1917. Forty-five cords of the wood was undoubtedly hauled and delivered to the plaintiff of the cut of 1917, save and except 7 or 8 cords, but there does not appear to be any evidence in respect to the balance of the wood hauled, which would indicate that it was from the lot of wood contracted for or the 50 to 75 cords. There is evidence that 70 cords of the wood was placed upon the wharf in the latter part of July or the first of August, but there is nothing in the evidence which distinguishes the wood or establishes that it was of the cut of 1917. One Bettle hauled 50 cords of wood to the wharf in June as stated of which 7 or 8 were of 1918 wood. Of this the defendants received 45 cords freighted on the wood boat "J.A.H.," leaving 5 cords which was repossessed by the plaintiff.

From the correspondence between the parties it appears the defendants claim the plaintiff had agreed to deliver the wood to the boat, and this the plaintiff disclaims, stating that all he had to do was to deliver the wood on the wharf. Further correspondence took place between the parties, and in August the plaintiff wrote defendants that he had the balance of the 75 cords of

N. B.
S. C.

wood on the wharf. One James Urquhart testified that he hauled 70 cords of slab-wood from the Vail property to the wharf at Hatfield's Point in the latter part of July and the first of August and piled it on the wharf. It was claimed 30 cords of this wood was piled on the wharf for the defendants.

On his direct examination the plaintiff said the wood for the defendants was piled on the outside of the wharf, in two long ranks, but having been recalled, on his cross-examination he said, at p. 187 of his evidence, that there were 8 or 10 ranks of wood on the wharf, each rank being close to the preceding rank and all piled practically together; that the first two ranks were the same length, the third was as long as the second rank, but that the fourth and other ranks were not quite as long as the first three. He also stated that he did not measure the wood and his only knowledge was gathered from what the man Urquhart who hauled the same had told him about it, though he himself had seen the wood after it had been piled on the wharf. He supplied no evidence as to whether the first two ranks claimed to have been set apart for the defendants were of the 1917 wood or the 1918 wood, neither did he inform the defendants that the first two ranks of the wood on the wharf were for them. At p. 187 he was asked the question:—

Q. When did you inform the defendant company that the first two ranks of wood on Hatfield's wharf were the two ranks that you delivered there for them?

A. I did not inform them at all. I told them the 30 cords were there.

Q. But you didn't tell them which of these eight ranks it was? A. No, I didn't suppose they would want to go away in around the pile and pick it out—they would want the first they came to.

At p. 188 he was further asked:—

Q. On August 17 you wrote the defendants: "I have the balance of the 75 cords of wood on the wharf at Hatfield's Point delivered according to my offer and which you accepted, and I am ready to deliver the hardwood." Now that is the letter you speak of? A. Yes.

Q. And that is all you told them about which part of those eight ranks was theirs? A. I think so.

Q. And will you come here to-day and swear that that wood which you delivered for Gibbon & Co. Ltd. was the two ranks lying on the outside of the wharf? A. Yes.

The witness Urquhart simply stated that he had hauled wood to the wharf and piled it there for the defendants, and when asked by the Court after his re-examination by plaintiff's counsel

N. B.
S. C.

how much he hauled, said 70 cords, in thirty-five 2-cord loads. He did not separate the 70 cords into two lots of 30 and 40, one for the defendant and the balance for the others, but described his work of hauling and piling as applicable alike to the entire 70 cords.

It seems to be very clear from the plaintiff's own testimony that the 70 cords could not have been from the lot of 50 to 75 cords of the cut of 1917, for as stated Bettle had already hauled at least 42 cords of this, and 37 of the 70 cords must have been wood which was not of the cut of 1917. Neither was there any evidence to prove that the first two ranks of wood which Urquhart piled and which the plaintiff alleged were for the defendants were the balance of the lot of the 1917 cut which plaintiff had agreed to deliver, even if the first two ranks were properly separable as the defendant's from the other rank. It follows therefore that the plaintiff did not deliver, or there is no proof that he did deliver on the wharf for the defendants the lot of wood he contracted to deliver beyond the 42 or 43 cords hauled in June. Beyond reasonable doubt it is clear that the last 30 cords claimed for were contained and mixed in the quantity of 70 cords in such a way it is impossible to distinguish or separate them as the defendant's property, and this I take it is the actual test of the merits of the claim sued for, and I am of the opinion that the plaintiff has not established his claim so as to entitle him to recover on the special contract for the 75 cords of wood. It was strongly urged on behalf of the plaintiff that he was entitled to Supreme Court costs because he was forced to bring his action in the Supreme Court, the amount of the contract in dispute being $375, and the undisputed item of $53.12 made the amount sued for $428.12, which amount was beyond the jurisdiction of the County Court. The trial Judge, however, had ordered that the costs should be taxed according to the scale of the County Court, and in view of the provisions of Order 65, r. 12 of the Judicature Act, N.B. 1909, which provides that:—

> In actions founded on contract, in which the plaintiff recovers by judgment or otherwise, a sum (inclusive of costs), not exceeding $400, and in actions founded on tort in which the plaintiff recovers by judgment or otherwise a sum (exclusive of costs) not exceeding $200, he shall be entitled to no more costs than he would have been entitled to, had he brought his action in a County Court, unless the Court or a Judge otherwise orders.

N. B.

S. C.

I am of the opinion that the Judge was right in the conclusion he arrived at in respect to the taxation of costs. A new trial was not asked for by the defendant on the question of counterclaim, and under the findings of the jury I am of the opinion the defendants are not entitled to recover thereon.

This appeal will be disallowed with costs, and the verdict of the plaintiff will stand. *Appeal dismissed.*

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S. C.

BAILEY v. BAILEY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Latchford, and Middleton, JJ. March 20, 1919.

ALIMONY (§ V—20)—*Wife leaving husband on account of cruelty—Acts of violence—Apprehension of future danger—Offer to receive back.*]—Appeal by plaintiff from the judgment of Masten, J., in an action for alimony. Affirmed.

The judgment appealed from is as follows:—

MASTEN, J.:—The defendant is a bridge foreman in the employ of the Canadian Pacific Railway Company, residing at North Bay, in the district of Nipissing, and the plaintiff is his wife. The parties were married on the 8th September, 1892. The plaintiff is 52 years of age, and I should judge that the defendant is approximately of the same age, though his age was not stated in evidence. They have seven children.

The plaintiff is not living with her husband at the present time. She left him on the 24th March, 1917, and the writ in this action was issued on the 2nd May, 1917.

The trial of the case was adjourned at the last sittings in order that efforts might be made to bring the parties together, but the plaintiff now firmly asserts that she has no notion of going back to live with her husband. The husband, on the other hand, has a house in North Bay, and offers to take back his wife and family at any time, and desires them to return to his home and live with him. I find that this offer is *bonâ fide*. As to its effect—see *Evans* v. *Evans* (1916), 27 O.W.R. 69, at p. 70, 11 O.W.N. 34, 35, and *Forster* v. *Forster* (1909), 1 O.W.N. 93.

The matter therefore resolves itself into a question of whether, upon the evidence as adduced, 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

ONT.
S. C.

calculated permanently to affect her bodily health or endanger her reason, and that there is a reasonable apprehension that the same state of things will continue—so that there is an absolute impossibility that the duties of the married life can be discharged.

Upon the most careful consideration that I have been able to give to the evidence, I have, with much doubt, arrived at the conclusion that the case has not been brought within the principles established in the jurisprudence of Ontario relative to the granting of alimony; but, as the circumstances undoubtedly bring it very close to the line, I proceed to state my findings of fact for the assistance of any appellate tribunal before which the action may come on appeal.

It is clear, and I find as a fact, that the conduct of the defendant in his family has been habitually imperious, arrogant, and dictatorial, and at times mean and unreasonable, to such a degree that he has permanently alienated the affections not only of the plaintiff but also of all his children. He admits that they are all against him, and he characterises all their evidence as to his violent actions as sheer inventions.

In this statement I think he is incorrect, and I find that acts of violence are established.

My conclusion, however, is based upon the fact that these acts of violence are not of such a character as to have produced in the plaintiff physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and I find that it is not established that there is reasonable apprehension that in the future acts will occur likely to produce such a result. I think that she is not afraid of him, and I think she would not be in any danger if she continued to live with him.

I find that the statements made in evidence on behalf of the plaintiff as to the violence of the assaults upon her are seriously exaggerated. The defendant is a sober, industrious, hardworking man, holding an excellent and important position as foreman of bridge construction on a section of the Canadian Pacific Railway.

I find against the allegations as to his failure properly to maintain his family, and I am satisfied on the evidence that he did furnish the plaintiff with all proper necessaries according to his position in life.

ONT.
S. C.

Upon the whole testimony, and considering the demeanour of the witnesses and the manner in which their evidence was given, I find that the acts of violence proved were not such as to cause reasonable apprehension of danger to the life, limb, or health of the wife. In the witness-box the plaintiff appeared a strong and healthy woman, both able and willing to maintain her views and enforce her rights, real or supposed, in the domestic forum.

It was admitted by the plaintiff in the course of her evidence that for six years prior to her leaving her husband, in March, 1917, she had declined to have marital intercourse with him and had occupied a separate room.

The husband acknowledged that he had not specifically requested a resumption of marital intercourse, but said that the circumstances under which she had withdrawn herself were such as to make it plain that such a request was useless; and, having regard to the manner in which the plaintiff's testimony was given, I give credit to that statement of the husband.

Four specific cases of violence are specially detailed in the evidence:—

The first occurred in the year 1899, the second in the year 1912, the third in the year 1913, and the last in March, 1917.

I deal first with this more recent act, which was given in greater detail.

The plaintiff's account of the occurrence is that on the evening of the 21st March, 1917, the defendant came home to his supper, and, differences having arisen in regard to there being no table-cloth on the table, "he took up the table and struck me with it in the side and said, 'You had better pack your rags and get out of here or it will be the end of me.'" She says the blow was such that she was in bed for a week and had to have the doctor.

Dr. Ranney, a physician practising in North Bay, was called, and says he attended the plaintiff in March, 1917—paid one visit and found her in bed. He said there was a contusion on the hip, and from the statements made to him he believed the corner of the table had been pushed against her, and she had been struck with the corner in the hip. The doctor did not make a second visit, and the impression produced on my mind by his evidence is that he did not regard the bruise as serious.

ONT.

S. C.

Edith Bailey, a daughter living at home at the time, gives her account of the occurrence, saying that her father came in and demanded that the table be properly set and that a table-cloth be put on, and was told that he could not have one, as the table-cloth was dirty. On his further demand that it be put on anyway, this was refused by the plaintiff, and she says that the defendant then said "he would soon clear the table off," and that he tipped up the table, slid the dishes to the floor, tramped on them, and that his language to the plaintiff was very violent. "The dishes were thrown to the floor and the table was upside down." She said that, when her father demanded the table-cloth and her mother refused to put it on, she (Edith Bailey) went to get it, and her mother did not stop her—she went to the clothes-basket, but could not find it, and nothing further was done.

The defendant's account of the matter is that, upon his demanding that the table be set with a table-cloth, his wife refused to allow him to have a table-cloth, and that there was exasperation and a verbal quarrel over this phase of the matter for a time; that, when the daughter Edith went to get the table-cloth, her mother commanded her not to bring it out; that he then upset the dishes off the table. He denies that he lifted it or struck the plaintiff with it or that he injured her in any way. The size of the table is not mentioned by any witness.

There was evidently an undercurrent of animosity on both sides, which readily broke into a quarrel: I find that the husband did not pick up the table and hit his wife with it, but I also find that there was violence, and that the corner of the table struck the wife—whether or not by intention of the husband I cannot determine.

I think that a squabble of this kind would not have warranted the Court in pronouncing a decree of divorce *â mensâ et thoro* under the former laws of England. I can add nothing to the summary of our law on alimony as set forth by Riddell, J., in *McIlwain* v. *McIlwain* (1916), 28 D.L.R. 167, 172, 173, 35 O.L.R. 532, at p. 538:—

"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

ONT.
S. C.

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* (1873), 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. 616, at p. 635.

"It is useless to multiply cases—the law is authoratively 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 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."

The cases of *Payne* v. *Payne* (1905), 10 O.L.R. 742, *Ruttle* v. *Ruttle* (1912), 23 O.W.R. 575, 4 O.W.N. 457, *McIlwain* v. *McIlwain*, *supra*, and *Forget* v. *Forget* (1918), 40 D.L.R. 662, afford illustrations of the application of these principles in circumstances like the present.

I proceed to consider the earlier difficulties detailed in the evidence. Assuming that the quality of the later act is such that though repeated it would not support an action of alimony, I do not myself see how it can revive earlier acts of cruelty which have

ONT.

S. C.

been condoned. However, some of our decisions support the opposite view, and accordingly I proceed to discuss the evidence relating to the three earlier occasions mentioned above.

I pause, however, to say that, assuming them to be revived so that they are admissible in evidence, it yet remains to consider their effect and the real issue on which they bear. That issue is as to whether the earlier acts indicate such a lack of self-control on the part of the husband or such an habitual tendency to legal cruelty as to establish the conclusion that the earlier coupled with the later acts have produced physical illness or mental distress permanently affecting the wife's bodily health or endangering her reason, or that there is reasonable apprehension or fear that, if the wife were to return to the husband's house, she would suffer cruelty tending to the injury of her health.

In adjudicating on such evidence the conclusions to be drawn from events which took place, eighteen, six, or even five years ago, which have been condoned in law by subsequent co-habitation and again revived, must be largely influenced by the lapse of time and by the intervening conduct of the parties. They cannot, in my opinion, lead as sharply and definitely to a finding of legal cruelty as they might have done if the action had been brought at the time when they occurred. In this view I proceed to deal with these three earlier occasions on which cruelty is alleged to have been inflicted on the plaintiff.

Regarding the first occasion, that of 1899, the plaintiff says that the defendant struck her in the stomach and she was in the hospital for some weeks. When she got out she left him and lived away from him until 1902, at which time he promised her to be good, and she returned to him. During these three years the defendant had two of the children with him and the plaintiff had two with her. On this occasion the defendant was summoned before a magistrate for assault, and the charge was dismissed. They afterwards lived together from 1902 to 1912 without any outbreak of violence, so far as appears from the testimony, and three more children appear to have been born, as the family now consists of seven children.

The defendant denies the violence alleged against him and says that the statements made in that regard are sheer fabrications.

ONT.
S. C.

I do not give credit to so broad a statement: I think that there was violence, but it was so many years ago, that, coupled with the fact that the charge of assault in the police court was dismissed, I do not think that at this date it is sufficient to enable me to act on it.

With respect to the occurrences of 1912 and 1913, I find that on both these occasions there was considerable provocation on the part of the plaintiff, and that, as in the case of 1917, the whole occurrence was largely in the nature of a family squabble rather than in the nature of any dangerous violence.

The defendant undertakes to receive back his wife and children, and has always been ready and willing to do so, and desires her to return to his home in North Bay, and undertakes also to treat the plaintiff in all respects with consideration as a wife should be treated and to abstain from all acts of violence.

Upon this undertaking being formally given, signed by the defendant personally and filed with the Registrar, I direct that the action be dismissed. There will be the usual order for costs in case of dismissal as provided in Rule 388.

A. G. Slaght, for the appellant.

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

The judgment of the Court was delivered by

MEREDITH, C.J.C.P.:—After a careful and protracted trial, and after mature consideration after the trial, the learned trial Judge came to the conclusion that there were not sufficient grounds for the Court's approval of the wife's voluntary separation from her husband, approval evidenced by a judgment for alimony, so that such separation might be continued as long as the wife chose to continue it; that the husband's few and far apart acts of cruelty—though they could not be too strongly condemned—were not very likely seriously to affect the health of either of them: that they might and should live out what remains of their joint lives as husband and wife: and we agree with him in that.

The husband was at times harsh and domineering; and his conduct in his conflicts with his wife inexcusable in some respects: but, on the other hand, the wife, instead of being tactful, was, at such times, actuated by a rebellious and stubborn spirit: between them making such inexcusable family scenes as that arising out of the petty dispute whether or not the table-cloth

ONT.

S. C.

was "too dirty" to be used. To have awarded alimony would have been to do all the Court could to keep husband and wife and family always separated, always more or less at enmity one with the other: to have refused it was to have aided a reconciliation and living together; and all interests must be best served by that, if it be possible. The wife is not a woman weak in either mind or body, and she has all their children who are yet living at home, upon her side, so that serious bodily harm, at the hands of her husband, if he should be bad enough to attempt it, a thing very unlikely, is well guarded against: and, beside other things, this litigation has afforded another safeguard, and one of the greatest in such a case as this; it has made it plain to the man that misconduct towards his wife is unprofitable in a money sense, that it is very costly; and he has given his undertaking in writing to treat his wife in future, as he should have done in the past, in all things as a man should treat his wife—a wife of so many years and a mother of so many of his children.

It seems to me to be quite reasonable to hope that, now, husband and wife and family shall live together, the few at most remaining years of a long married life, at least in peace one with another; and so avoid the stigma upon the family of a separated mother and father and all the other disadvantages of such a divorce: but, if not, the mistake is not remediless; another action for alimony would lie, in which all that has taken place could be taken into consideration.

We are all in favour of dismissing the appeal: costs should be allowed to the wife in so far as Rule 388 permits.

Appeal dismissed.

Re THOMPSON.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 19, 1919.

WILLS (§ III—70)—*Construction—Direction to executors to "pay off the mortgage upon my real estate" out of specified part of estate—Mortgage existing when will made paid off by testator and new mortgage for lesser amount and to a different person substituted—Will speaking from immediately before death—"Contrary intention"—Wills Act, R.S.O. 1914, c. 120, s. 27 (1)—Division of estate into parts—One part to be "$5,000 less than the other three parts"—*

ONT.
S. C.

Meaning of.]—An appeal on behalf of all persons other than James E. Thompson interested in the estate of James Thompson, deceased, and a cross-appeal by James E. Thompson, from an order of Latchford, J., in the Weekly Court, Ottawa, declaring the construction of the will of the deceased in respect to a charge and the amount of a legacy. Reversed.

The following statement is taken from the judgment of HODGINS, J.A.:—

Only two points arise, on a portion of the will of the late James Thompson, as follows:—

"In the first place: I give devise and bequeath all my estate both real and personal unto my executors hereinafter named under the following trusts namely: first, to convert the same into cash and the proceeds thereof to divide into four parts so that three of such parts shall be equal and the fourth part shall be five thousand dollars less than the other three parts; secondly, to pay off the mortgage upon my real estate in the town of Perth out of the said fourth part and should the same not be sufficient for that purpose then the deficiency shall be taken equally from the other three parts and should the said fourth part prove more than sufficient to discharge said mortgage then upon trust to pay the surplus of such part to my son James."

The will is dated the 30th January, 1905, and there are three codicils in 1905 and 1908, not directly affecting these appeals. The testator died on the 28th October, 1912. At the date of the will a mortgage existed upon the real estate of the testator in Perth for $4,233.33 to the Mohr executors. This mortgage was afterwards paid off and discharged, the testator obtaining the money therefor partly from a new mortgage for $3,600 upon the same lands to one Spence, and partly from his own resources. Upon this last mentioned mortgage the testator paid $300 in 1910 and 1911, and at the time of his death it stood at $3,000 and interest. It has since been paid off by his executors.

The appellants in the main appeal contend that the present mortgage is to be deducted. The cross-appeal is directed to the division of the estate.

C. J. Foy, for the appellants.

R. McKay, K.C., and *R. J. Slattery*, for James E. Thompson the respondent and cross-appellant

ONT.

S. C.

The judgment of the Court was read by

HODGINS, J.A. (after stating the facts as above):—My brother Latchford has held that the later mortgage cannot be charged against the James E. Thompson share in the estate. He has also decided that the estate is to be divided into four parts, of which the fourth part devised to the son James E. Thompson is to be $5,000 less than each of the other parts.

The view of the learned Judge was that, in reference to the first question, sec. 27, sub-sec. 1, of the Wills Act, R.S.O. 1914, ch. 120, did not apply. That sub-section is as follows:—

"Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

There is nothing to prevent the application of that sub-section to the clause in question, unless it be the fact that, when the will was drawn, there was a mortgage existing upon the real estate of the testator which has since been discharged, though actually replaced by the present one.

The fact that property existed at the date of the will which is specifically described and clearly identified has been held sufficient to prevent the application of the provision of the Wills Act just quoted, if it is clear that reference is made to that property and that property alone. That is upon the principle that the Wills Act does not necessarily draw within its terms property obviously not intended to be so treated, if regard is had to the whole of the will itself. It is really a canon of construction which necessitates reference to the real wishes of the testator, as embodied in the will, in the effort to determine whether a contrary intention has been expressed.

Lord Hatherley, when Sir W. Page Wood, V.-C., in considering the effect of this particular section, then recently passed, says in *Douglas* v. *Douglas* (1854), Kay 400, at pp. 404, 405, 69 E.R. 169 at 171:—

"In *Cole* v. *Scott* (1849), 1 Mac. & G. 518, 41 E.R. 1366, Lord Cottenham says, what every one must agree in thinking correct, that the intention of the testator is not to be altered; and if it be clear that the testator is not referring to a general class of property, but to something specific, the new statute is not to have the operation

ONT.
S. C.

of passing property which evidently was not in the contemplation of the testator, where the subject of the gift appears to have been defined and marked out by him as existing at the period when he is speaking. I can imagine that, under the new statute, a gift of 'all my stock' would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of 'all my stock which I have purchased,' that would make a considerable difference, and would, I think, be enough on the face of the will to shew that the testator was defining the particular portion of the property which he intended to give, as being property then in his possession; so, if the gift were of 'all the debts due to me on judgments,' it is impossible that judgments obtained after the date of the will would pass; but if it were 'all judgments which I have registered,' that would be taking a particular class of judgments out of the general class, and would shew that the testator did not intend his will to have the sweeping operation of passing all judgment debts registered by the testator at the time of his death."

In *Goodlad* v. *Burnett* (1855), 1 K. & J. 341, 69 E.R. 489, he pointed out that the contrary intention could not be inferred from an expression equally applicable to the state of things at the date of the will and at the time of death, because the testator might well have used the language appealed to for the very purpose of passing the property as it existed at the later date.

In *In re Gibson* (1866), L.R. 2 Eq. 669, he says (p. 672):—

"I adhere to the opinion that I have before expressed as to the application of sec. 24 of the Wills Act, that when you find a mere specific thing, incapable of increase or diminution, in existence at the date of the will, but not in existence at the time of the testator's death, there is sufficient indication upon the will of the 'contrary intention' to which sec. 24 refers, to prevent the operation of the rule which makes the will speak from the death of the testator. . . . When there is a clearly indicated intention upon the face of the will to give the single specific thing, and nothing else, it would be a very narrow construction of the words of sec. 24 to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things existing at the date of the will."

ONT.

S. C

And again (p. 673):—

"I adhere to my view, that where there is a distinct reference to a distinct and specific thing, and not to a *genus*, there is sufficient indication of a 'contrary intention' to exclude the operation of the rule established by the 24th section of the Wills Act, and limit the operation of the will to the state of things existing at the date of the will. In this case the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the Court to suppose that, having once adeemed the specific bequest, the testator has replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death. That thing, and that only, can be considered as the subject of the bequest."

In these cases regard must be had to the limitations asserted, as they indicate to my mind the principle on which this case should be decided. In the earlier one the limitation is found in the words "defined and marked out by" the testator as existing at the period when he is speaking, and is illustrated by what follows in the judgment, i.e., that where the general expression is controlled it must be by some reference to that period, e.g., "which I have purchased" or "which I have registered."

This is equally clear from the later judgment. The learned Judge points out that the specific thing he refers to is one "incapable of increase or diminution," and must be distinct and specific and not one of a *genus* So that, if what is referred to is in one sense specific, yet is of a character which may increase or diminish, or is of a certain *genus* of whi h there may be more than one kind, the statutory presumption cannot be defeated because the thing is in a narrow sense specific.

This distinction runs through the cases I have consulted, and was in Mr. Justice Riddell's mind when, referring to a bequest of money to be paid out of an account in the Post Office Savings Bank which the testator had transferred to the Molsons Bank, he says in *Re Atkins* (1912), 3 D.L.R. 180 at 182, 21 O.W.R. 238 at 240, 3 O.W.N. 665, at 667:—

"There is nothing in this will indicating any such contrary

ONT.
S. C.

intention—the testator retained the power of increasing or diminishing the amount on deposit, and must be taken to have understood that it was the fund so increased or diminished upon which this clause of his will would take effect."

Lord Hatherley's opinion was approved by Boyd, C., in *Morrison* v. *Morrison* (1885), 9 O.R. 223, 10 O.R. 303. In *Hatton* v. *Bertram* (1887), 13 O.R. 766, the words "which I now reside upon" were held not sufficiently specific to exclude from the devise of the homestead known as "Walkerfield" the additions thereto made after the date of the will.

In *In re Holden* (1903), 5 O.L.R. 156, Meredith, C.J. (now C.J.O.), speaking of the rule in question, remarks upon the quality of the subject-matter (stock in trade) and its fluctuating nature thus (p. 159):—

"It is, in the first place, I think, highly improbable, having regard to the subject-matter of the gift, that the testator intended to limit it to the stock in trade and book-debts belonging to him at the date of the will. It was a gift of something the constituents of which were changing from day to day and even from hour to hour, and the same reasons which led to the decisions to which I have referred as to the effect of the new law on bequests of that which is generic, seem to me to apply in some degree at least to prevent, if it can be avoided, such effect from being given to the word 'now' in this case as would limit the gift to the very stock in trade and book-debts which belonged to the testator at the time when he made his will."

In *In re Portal and Lamb* (1885), 30 Ch. D. 50, Cotton, L.J., indicates that the words used, which may restrict the devise to the date of the will, must "aptly describe or apply to it" and must not be such as to be capable of including after-acquired additions; while in *Re Ashburnham*, (1912), 107 L.T.R. 601, Swinfen Eady, J., says it requires "distinct words" to shew that after-acquired property is not to pass.

In *Cave* v. *Harris* (1887), 57 L.T.R. 768, Kekewich, J., adopts Lord Hatherley's view of the Wills Act, and quotes, also with approval, what was said in *Dickinson* v. *Dickinson* (1878), 9 Ch. D. 667, 672: "I prefer the principle indicated by Hall, V. C., in *Dickinson* v. *Dickinson* (*ubi sup.*), where he says (9 Ch. D. 672): 'There are no words . . . which limit the property there to that which he possessed at the date of the will,' shewing that, in

his opinion, what you want are words which limit the devised property to that which is in question, to that which he held at the date of the will, rather than words which exclude something purchased afterwards."

In *In re Evans*, [1909] 1 Ch. 784, the decision of Joyce, J., is in line with the other judgments quoted.

In Halsbury's Laws of England, vol. 28, p. 692, the result of the decisions is well summed up thus:—

"In a case, therefore, where the thing given is generic, and may increase, diminish, or otherwise change during the testator's life, so that the description may from time to time apply to different amounts of property of like nature or to different objects, then the effect of the presumption, if applicable, is that the property answering the description at the death of the testator passes under the gift."

In this instance, if I read the foregoing cases aright, the words, "the mortgage upon my real estate," while in one sense describing the charge then existing, convey nothing in themselves clearly excluding another mortgage if substituted for it. The expression can be as appropriately and accurately applied to the mortgage *in esse* at the testator's death as to the incumbrance at the time he made his will. Nothing compels the conclusion that he intended that mortgage and that mortgage alone to be paid off. The word "mortgage" is equivalent to and means "debt secured by mortgage," and is generic in the same sense as the words "stock of goods." It may represent a charge then existing or the later one that replaced it, just as the more general expression can include the changed contents of a store. The debt it represents and secures may decrease by payment or may exist notwithstanding the discharge of the particular security. It is a valid charge on the real estate at the time of death, although the charge is held by a different mortgagee; it is within the expression used by the testator. Meredith, C.J. (now C.J.O.), so decided as to stock in trade in *In re Holden*, *ante*, and I can see no difference in principle when the word "mortgage," interpreted as "debt secured by mortgage," has to be dealt with. Each may include a substitute or substitutes; and, while one carries the idea of amplification or diminution, the other is equally descriptive of a larger or smaller charge held by the same or by a different mortgagee. I can see no

ONT.
S. C.

reason why the statute should not be appl'ed and this expression treated as meaning the mortgage in existence at the testator's death. There is nothing indicating a contrary intention, and certainly nothing in the words used which requires the Court to hold that the testator's intention was to limit them so as to exclude any mortgage or charge which remained outstanding at his death upon his real estate. Indeed the direction to pay it out of a specific fund which was to come into being only after his death indicates that he contemplated the existence of the mortgage to be discharged as continuing or as being a charge on his real estate at that time.

As to the cross-appeal, enough was said on the argument to indicate that no other conclusion than that reached by Latchford, J., was possible.

The appeal should be allowed and the cross-appeal dismissed, both with costs. *Order accordingly.*

SASK.
C. A.

McLEOD v. FISHER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, and Elwood, JJ.A. July 12, 1919.

ACCOUNTING (§ I—1)—*Company—Assets—New company acquiring—Trustee—Cestui que trust—Value of property—Reference to local registrar.*]—Appeal from the trial judgment in an action asking for an accounting. Reversed.

W. B. Willoughby, K.C., for appellant; *T. D. Brown*, K.C., for respondents.

HAULTAIN, C.J.S., concurs with Elwood, J.A.

NEWLANDS, J.A.:—In this case the defendant took over the assets of Hamelin Brothers and Co., and the plaintiffs asked for an accounting as of Jan. 31, 1911, on which date the property of the above company was transferred to a new company formed by defendant, called the McLeod Hamelin Co. This accounting was taken before the local registrar, and on the review of his certificate Lamont, J., made certain changes therein, held that the defendant was a trustee and made him an allowance for his services. No appeal is made from the finding that the defendant is a trustee, but the defendant appeals against the values allowed by the Judge for the Moose Jaw and Prince Albert properties and the plaintiff cross-appeals against the remuneration allowed him.

SASK.
C. A.

The date Jan. 31, 1911, is taken as the accounting date because at that time McLeod turned all the property over to a new company which he formed, the McLeod Hamelin Co., in which he held the majority of stock. Having held that he was a trustee, I think it should have been held that a sale by the trustee nominally to a company but actually to himself, was no sale at all, and that McLeod should have been required to account to date, and, at the completion of the accounting, if there was a surplus, the balance of the property should be handed over to the *cestui que trust*, and if a deficit, sold to pay same.

The Moose Jaw property having been finally disposed of, should be accounted for at value McLeod puts upon it, viz: 70 cents on the dollar, because the evidence is uncontradicted that, before selling same, he had added to the property out of his own assets and had made financial concessions to the purchasers, for which, under the trust, he was entitled to be paid.

I would not disturb the amount of remuneration allowed him by the Judge, and I would allow him to include in the accounting the cash shortage in the Northern Crown Bank at Prince Albert and the cash shortage in the till in the Prince Albert store.

There should be a further reference to the local registrar to finish the accounting as stated, and the appeal should be allowed and the cross-appeal dismissed with costs.

ELWOOD, J.A.:—The trial Judge having held that the defendant is a trustee, and that the sale to the McLeod Co., Ltd., was not binding on the plaintiffs, the defendant should be permitted to discharge his trust by turning over any assets belonging to the estate which he has on hand, or with respect to which he has not realized, and to account to the date of such turning over for all the moneys which he has received or which, but for his default, he should have received. The trial Judge did permit him to turn over some of the assets, and I cannot see why that principle should not be followed with respect to all the assets. In any event, I am of opinion that the valuation fixed by the trial Judge on the Prince Albert stock-in-trade and fixtures is excessive. The uncontradicted evidence is that these assets were not worth more than 70 cents on the dollar for stock-in-trade and 50c. on the dollar for uncollected bills receivable and open accounts. This evidence

SASK.

C. A.

was not attempted to be contradicted by the plaintiffs, although one of the Hanelins was manager of that store.

I am also of the opinion that the valuation put upon the Moose Jaw stock-in-trade and fixtures of 80 cents on the dollar should be reduced to 70 cents on the dollar. The uncontradicted evidence is, that on the date at which the valuation was fixed the stock-in-trade was very considerably less valuable than at the time of the sale; that it had been allowed to run down, while at the time of the sale the old stock had been largely worked off and new stock purchased; and taking the evidence of Joiner and McLeod—which is again uncontradicted by Hanelin—I think 70 cents on the dollar is not too little to charge the defendant with respect to that stock. I would not, however, disturb the valuation with respect to the fixtures, as the argument which applies to stock does not, in my opinion, apply to the fixtures.

I am of the opinion too that the defendant should be allowed cash shortage in the Northern Crown Bank at Prince Albert, $572.72, and cash shortage in till, $937.15.

These are matters that could be allowed by the trial Judge under further directions, and I see no reason why they should not be allowed on this appeal.

Carrying out the principle that I have propounded with respect to the right of the defendant to turn over the assets, I am also of the opinion that the defendant should only be charged with the actual amounts collected by him, less costs of collection on bills receivable and open accounts, and that he should be permitted to turn over to the estate any bills receivable and open accounts uncollected; unless he wishes to take them at 50 cents on the dollar, as, in my opinion, the evidence discloses that they are not worth more than that.

I am also of the opinion that the discretion of the trial Judge as to the amount of the remuneration which he allowed the defendant for his services in connection with the estate should not be disturbed. He has in his judgment given his reasons, and these reasons appeal to me as being sound.

I am therefore of the opinion that the cross-appeal should be dismissed with costs; the appeal allowed with costs, and the judgment appealed from varied, by directing that, as to the stock-in-trade at Moose Jaw, that the defendant, on the date to which

the accounting was taken, should be charged at the rate of 70 cents on the dollar; that, with respect to the balance of the estate, the accounting be continued up to the date of taking such further accounting, and that the defendant be permitted to transfer to the proper persons entitled thereto the stock-in-trade and fixtures of the Prince Albert store, and the bank accounts and bills receivable belonging to the estate uncollected; that the defendant be allowed for the shortage in the Northern Crown Bank at Prince Albert in the sum of $572.72, and the cash shortage in the till of $937.15; and, if the defendant prefers, he may take over the stock-in-trade and fixtures of the Prince Albert store, as of the date at which the accounting has already been taken, at 70 cents on the dollar, and the accounts and bills receivable uncollected, if he so desires, at 50 cents on the dollar.

Appeal allowed; cross-appeal dismissed.

McCABE v. CURTIS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1919.

SEDUCTION (§ I—3)—*Questions tending to impeach credit of seducer—Evidence—Credibility—Proper admission.*]—Appeal from the trial judgment in an action for damages for seduction of plaintiff's daughter. Affirmed by equally divided Court.

J. N. Fish, K.C., and *G. A. Ferguson*, for appellant; *W. F. Cameron*, for respondent.

HAULTAIN, C.J.S., concurs with Lamont, J.A.

NEWLANDS, J.A.:—The facts in this case are stated in my brother Elwood's opinion: I will therefore not repeat them. On a question of fact, upon disputed evidence, I am reluctant to interfere with the findings of the trial Judge. However, I am of the opinion that the evidence that the defendant had connection with his wife before marriage was improperly admitted and should not have influenced the trial Judge in coming to a decision, as he says it did. If this evidence had not been admitted, the fact that the defendant was at the time courting his wife, who lived in the same house as the plaintiff and was at the time of the alleged seduction in the vicinity, would have led to the conclusion, that it was not probable that he seduced the plaintiff's daughter at the

SASK.

C. A.

time and under the circumstances she states. I therefore agree that the appeal should be allowed, with costs.

LAMONT, J.A.—This is an appeal by the defendant in an action for damages for the seduction of the plaintiff's daughter. The girl states that the seduction took place on her father's premises on the evening of August 12, in a buggy in which she and the defendant were. The opening sentence of the judgment of the trial Judge is as follows:—

I find that the alleged seduction took place; and in believing the girl's story as against the man's I am influenced by the following reasons:

He then sets out four reasons. The first is that the opportunity for the alleged act was there.

This reason cannot be objected to because the defendant admits being in the buggy alone with the girl on the night in question. He says he was there for five minutes: the girl places the time at about ten. The defendant in his evidence stated that the buggy was some fifteen rods from the house, and on his examination for discovery, in answer to a question as to whether or not it was dark at the time, he said, "No, it was not very dark. Well, it might have been dark. I judge it would be about half past nine; it was not later."

The second of the trial Judge's reasons is in these words:

2. The defendant married Anna Milligan (a school teacher boarding at the plaintiff's house during 1917) on Dec. 22, 1917. They had a child born Feb. 23, 1918. Taking the ordinary period of gestation at nine months, defendant must have had connection with Anna Milligan about May 23, 1917, which shews that such an act was not beyond his scruples.

The fact of the marriage of the defendant on Dec. 22, 1917, and the fact that he had a child by his wife born Feb. 22, 1918, were admitted by the defendant. It was argued that this evidence was improperly admitted, and that the trial Judge should not have been influenced by it. The evidence was given on cross-examination, and without objection. Even if it had been objected to, I do not see how it could have been rejected. It is not evidence of the allegation that the defendant had carnal knowledge of Emma Curtis on the evening of Aug. 12, but it surely is evidence of the defendant's character and goes to his credibility. It is a well-established rule that on cross-examination a witness may be asked any question tending to impeach his character or credit, though he may not always be called upon to answer. 13 Hals. 601.

SASK.

C. A.

With a view to impeaching the character of a witness he may on cross-examination be asked questions with regard to alleged crimes or other improper conduct. Taylor on Evidence, 10th ed., p. 1040. I am therefore of opinion that the evidence of improper conduct on the part of the defendant with the girl Anna Milligan, tending as it did to degrade his character and therefore impeach his credibility, was properly admitted for that purpose. This evidence, the trial Judge says, shewed that such acts were not above the defendant's scruples. By this I understand him to mean that the defendant was of such a character that he would not be deterred by moral scruples from improper conduct, and he takes that character into consideration in determining whether he should believe the girl or the man. I cannot accept the argument that the language of the Judge means that he considered the fact that the defendant had been guilty of improper conduct on one occasion as evidence that he would likely be guilty of it on another occasion.

The next reason given was that the statement of the defendant as testified to by one Frank Holt pointed towards a willingness on the defendant's part to settle. Holt testified as follows:

> I asked him how he was getting along with the Curtis affair. He said he did not know anything about it. He says, "I don't know what they are going to do." He says, "If Frank had come over we might have done something." That was Mr. Curtis.

The trial Judge believed the evidence of Holt that the defendant had made these statements, and he interpreted the statement to mean that "if the plaintiff had come over, the defendant might have done something towards a settlement." It is not disputed that the statement of the defendant is capable of the meaning which the trial Judge put upon it, but it is urged that equal weight should have been given to the statement of the defendant that "he did not know anything about it." In my opinion the Judge was justified in the interpretation he put upon the evidence. I can well understand the defendant denying all knowledge of the matter when the subject is first broached, and afterwards, as the conversation went on, intimating that if he had been approached a settlement might have been arranged. The Judge was not bound to give the same weight to all statements made by the defendant.

The last reason given for believing the girl's story was her demeanour in the witness-box. She impressed the Judge that

SASK.
C. A.

she was telling the truth. This case is purely one of fact, and I do not see how we can reverse a finding based in part, at least, on the demeanour of the principal witness.

It was argued that the girl's story was highly improbable. She testified that there had never been any previous relations between herself and the defendant, that on the night in question there had been no word spoken between them from the time that her brother and Miss Milligan left them until the act was completed, that there was no preliminaries, no embracing, no pain to her or stain on her clothes after the act. If one were obliged to believe that part of her story in which she says there had never been improper relations between herself and the defendant on any former occasion, I admit her story seems improbable. But if that part of her story is rejected, what is otherwise improbable seems to me to be quite probable. It would also explain what seems to me to be improbable in the story of the defendant. He says he was engaged to Miss Milligan at the time, yet when young Curtis went to the stable and Miss Milligan said she was going to the house, the defendant did not offer to accompany her, but remained behind in the buggy with the Curtis girl. It does not seem to me that his conduct in allowing his betrothed to go to the house alone is likely. I think he would naturally walk to the house with her, but if one premises that he knew the girl beside him would receive any advances he might make without protest, his allowing his betrothed to go to the house alone is not difficult to understand. As I have already said, this is purely a question of fact. The trial Judge found the facts on contradictory evidence, and I cannot see how his finding can be properly interfered with.

The appeal in my opinion should be dismissed.

ELWOOD, J.A.:—This is an action brought by the plaintiff against the defendant, alleging that the defendant seduced and carnally knew plaintiff's daughter Emma Curtis, on Aug. 12, 1917. Judgment was given by the trial Judge for the plaintiff, and from that judgment this appeal is taken.

The plaintiff's daughter, Emma, alleges that on the evening of Aug. 12, 1917, she, her brother, and one Miss Milligan, returned home in a buggy from church; that the defendant was there, and the four of them, after the horse was unhitched from the buggy, talked for some time; that then Miss Milligan and her brother

SASK.

C. A.

went for a walk; whereupon the defendant got into the buggy, and was with her in the buggy about ten minutes, and while there seduced her; the buggy was fifteen or twenty yards from the house; it was between 9.30 and 10 o'clock at night—probably about ten o'clock; that prior to the seduction neither the defendant nor she said anything, he just lifted her clothes up and had carnal knowledge of her in the buggy; that nothing was said by either of them after that; that she went into the house, and the defendant went home; that neither of them alluded to it afterwards; that they had never been intimate before; that this was the first and only time that any person had ever carnally known her; that when she found she was in the family way she never spoke to the defendant about it nor reproached him about it; in fact, no accusation was ever made until some very considerable time after the defendant was married to Miss Milligan (which was on Dec. 22, 1917), and to whom he was engaged to be married prior to the said Aug. 12. The defendant absolutely denied having ever had carnal knowledge of Emma Curtis. The child born of the alleged carnal knowledge was born on April 8, 1918. According to the medical testimony, it was born before the time it should have been born if the defendant is its father, but there was no evidence to shew that the child was prematurely born.

The trial Judge attached considerable weight to the evidence of one Frank Holt as to a conversation which Holt had with the defendant, and laid particular stress on part of that conversation. I think that conversation must be taken as a whole; and the impression which Holt got from the conversation was that the defendant knew nothing about the alleged seduction. To my mind the story told by Emma Curtis is most improbable. According to her, it was a most cold-blooded affair. There were no preliminaries, and under the circumstances detailed by her it is inconceivable that she, a virgin, would have been seduced without any preliminaries either of word or act; and it is at least improbable that the defendant, who was engaged to Miss Milligan at the time of the occurrence, could have been guilty of the act when Miss Milligan had just left him a few minutes before, and according to Emma Curtis was liable to return at any moment. And there is the further improbability of the defendant being the father of

SASK.

C. A.

the child, because the child was born long before it should have been born if he had been its father.

Some evidence was introduced to shew that the defendant's wife had a child considerably less than nine months after her marriage to the defendant. This evidence, I suppose, was introduced for the purpose of shewing that seduction was not beyond the scruples of the defendant. Of course it was most improperly admitted. It was not evidence, but it was given by the trial Judge as one reason for accepting the girl's story rather than the story of the defendant.

While I would hesitate very much to over-rule a judgment on facts, yet the story of the girl in this case is so improbable that I cannot accept it. There is no corroboration of her statements, except that on Aug. 12, she and the defendant were in a buggy together for ten minutes, and that she had a child less than nine months after that time. The latter fact, however, to my mind, not only does not corroborate her but strongly points to the defendant not being the father. The presumption is that the child was born in the ordinary course. If it was a premature birth it was incumbent upon the plaintiff, in my opinion, to give evidence of that fact.

I would allow the appeal with costs and dismiss the plaintiff's action with costs.

Appeal dismissed, the Court being equally divided.

INDEX.

CASES—