Dominion Law Reports

CITED "D.L.R."

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

VOL. 16

EDITED BY

W. J. TREMEEAR

C. B. LABATT *and*

EDWIN BELL

ASSISTED BY A STAFF OF EDITORS

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO., LIMITED

84 BAY STREET

1914

CASES REPORTED
IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 16 INCLUSIVE
OF THE DOMINION LAW REPORTS.

WORDS AND PHRASES

JUDICIALLY CONSIDERED IN THIS VOLUME.

INDEX OF SUBJECT MATTER, VOL. XVI., PART 1

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XVI., PART 1.

DOMINION LAW REPORTS

HART v. RYE.

ALTA.

S. C.

1914

Alberta Supreme Court, Beck, J. February 7, 1914.

1. HOMESTEAD (§ I C—10)—ESTABLISHMENT BY OCCUPANCY—ACTUAL RESIDENCE—EXEMPTION.

The "homestead" which, as against execution creditors, is under sec. 2 of the Alberta Exemption Ordinance, ch. 27, protected as exempt, means the "home residence" or "home place" or "actual residence" of the debtor and his family.

[*Re Claxton* (1890), 1 Terr. L.R. 282; *Re Hetherington* (1910), 3 S.L.R. 232, applied.]

2. HOMESTEAD (§ I C—10)—ACTUAL OCCUPANCY—TEMPORARY ABSENCE—INTENTION TO RETURN.

"Actual occupancy" of a homestead to satisfy the requirements of the Alberta Exemption Ordinance N.W.T. 1911, ch. 27, does not necessarily imply constant personal presence there, and a temporary absence necessitated by some casualty or for the purposes of business or pleasure may be consistent with "actual occupancy," provided there is a constant and abiding intention to return.

[*Re Hetherington* (1910), 3 S.L.R. 232, at 235, applied.]

3. EXECUTION (§ I—8)—LIEN ON LANDS—CLAIM OF HOMESTEAD EXEMPTION.

The burden of proof and of expense in a claim for a homestead exemption as against an execution lodged in the land titles office against the debtor's lands lies upon the debtor, and when he succeeds only upon proof of extraneous facts as to intermittent actual occupation of the lands and the effect of a cropping agreement with a tenant, he may properly be ordered to pay the execution creditor's costs of an application by originating summons to declare the exemption.

4. EXEMPTIONS (§ II A—5)—WHEN PROPERTY EXEMPT FROM SEIZURE.

In a simple case, if clear proof were presented to the execution creditor by affidavit or otherwise that land apparently affected by the execution lodged by him in the land titles office was exempt under the homestead exemption law, he should, at the expense of the debtor, do what was necessary to remove the cloud on the title. (Dictum *per* Beck, J.)

[See Annotation on exemptions from execution process, at end of this case.]

Statement

APPLICATION by way of originating summons under the Alberta Exemption Ordinance, N.W.T. Ord., ch. 27, to have certain lands as homestead declared to be exempt from seizure under execution.

The application was granted.

Hector Cowan, for plaintiff.

W. J. A. Mustard, for defendant.

ALTA.

S. C.
1914

HART
v.
RYE.

Beck, J.

BECK, J.:—This is an application on an originating summons for a declaration that a certain quarter section of land transferred by the plaintiff's husband to the plaintiff on March 31, 1913, was on that date his "homestead" and therefore exempt from seizure under execution in view of the provisions of the Exemptions Ordinance (Consol. Ord. N.W.T. 1898, ch. 27) and consequently that the memorandum of an execution obtained in an action by the defendant against the husband registered on September 30, 1911, noted upon the plaintiff's certificate of title be cancelled.

The Ordinance, sec. 2, enacts that:—

> The following real and personal property of an execution debtor and his family is hereby declared to be free from seizure by virtue of all writs of execution, namely, . . .
>
> 9. The *homestead*, provided the same be not more than 160 acres; in case it be more the surplus may be sold, subject to any lien or encumbrance thereon;
>
> 10. The house and buildings *occupied* by the execution debtor, and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of $1,500.

Sec. 5 says:—

> In case of the death of the execution debtor, his property, exempt from seizure under execution, shall be exempt from seizure under execution against the personal representative if the said property is in the *use and enjoyment* of the widow and children, or widow or children of the deceased and is necessary for the maintenance and support of said widow and children or any of them.

It has long been settled that "homestead" in this Ordinance is used in the sense of "home residence" (*Re Claxton* (1890), 1 Terr. L.R. 282), or, in other words, "the home place, the house and the adjacent lands occupied as a home, the actual residence of the debtor and his family" (*Re Hetherington* (1910), 3 S. L.R. 232).

Lamont, J., at 235, in the last cited case, develops in a very satisfactory way the full sense of these brief definitions:—

> The leading and fundamental idea connected with a homestead is, unquestionably, associated with that of a place of residence for a family, where the independence and security of a home may be enjoyed without danger of loss, harassment or disturbance by reason of the improvidence of the head or any other member of the family. It is a secure asylum, of which the family cannot be deprived by creditors: Thomson on Homesteads and Exemptions, p. 99. The purpose of the Exemption Ordinance being to preserve to the debtor and his family a home in which they can dwell without risk of disturbance from creditors, it follows that to secure the protection of the Ordinance there must be actual occupancy of the place as a home. But the term "actual occupancy" is not to be understood as requiring constant personal presence, so as to make a man's residence his prison, or that a temporary absence enforced by some casualty or for the

purposes of business or pleasure would constitute a ceasing to occupy or an abandonment of the homestead: Cyc. 474. But where the execution debtor or his family is not living on the homestead claimed as exempt at the time of the seizure, it is *primâ facie* not exempt, and the onus is cast on the claimant to shew that the land is still within the protection of the Exemption Ordinance. To do this he must shew that the place is still his actual and *bonâ fide* residence, and that his absence therefrom has only been of a temporary character. In other words, he must satisfy the Court that he has not abandoned the place as his home. What constitutes abandonment? It is a removal from the premises with the intention of acquiring elsewhere a residence which is not merely of a temporary character and which is taken for purposes not consistent with the retention of the original premises as his home. The character of the new residence acquired and the purposes for which it was acquired seem to me to be important factors in determining whether or not the debtor has abandoned the premises claimed as exempt as his actual place of residence. A man might close up his house and go on an extended tour without abandoning his home, or he might move into town to enable his children to attend school during school term, and still preserve the right to hold his homestead exempt. But where a new residence is acquired, it must only be a temporary one for a definite purpose, with a constant and abiding intention to return as soon as that purpose is accomplished. The exemption from seizure given by the Exemption Ordinance being in derogation of the rights of the creditor, under the general law to realize his debt out of the property of his debtor, is to be strictly construed: *Harris* v. *Rankin*, 4 Man. L.R. 135; *Dickson* v. *McKay*, 12 Man. L.R. 514.

The facts in this case are as follows: The land is situated about thirty-five miles from Edmonton, which is the principal market town for people living in that neighbourhood. Hart entered for the land in question as a homestead under the Dominion Lands Act. He went into occupation about April 1, 1909. Having no house, he lived in a tent. His wife joined him in June and remained with him till some time in November. He left the place temporarily about December 14, 1909, and was "in the east" during three months of the winter, and spent the remaining couple of weeks in Edmonton in a house in which he then had some interest, which he immediately parted with, returning to the homestead in April, 1910. He continued in occupation—including the winter of 1910-1911—until November, 1911. His wife was with him during the summer of 1910 but spent the winter of 1910-11 in Edmonton, the daughter going to school there. I gather, though it is not very clear, that his wife and daughter spent the summer of 1911 on the place with him. The family spent the winter of 1911-1912 in Edmonton, Hart going out occasionally to the farm where he had a hired man, who looked after the farm stock, some cattle, sheep and poultry owned by Mrs. Hart. His work in town during this winter was "warehouse work usually," by which I understand working in a warehouse for wages. He returned to the place

ALTA.
S. C.
1914
HART
v.
RYE.
Beck, J.

in March, 1912, and remained there till October, 1912, his wife and daughter being with him at least during the summer. During these years Hart had fenced the whole quarter section; had erected a log dwelling-house with shingle roof 20 x 20 feet; a log barn with lumber roof 20 x 24 feet; a cattle shed with hay roof, 24 x 30 feet, and had during the seasons of 1910, 1911, and 1912 raised a crop on about 10 acres and had kept on the land the farm stock, belonging to his wife, there being some 30 acres of hay land.

He had during this time sufficient farm implements for his purposes and sufficient furniture for himself and his family consisting of his wife and daughter. It was this occupation and these improvements which earned the patent for the land. The patent was issued to Hart some time in March, 1913, or, perhaps, earlier. It is quite clear, of course, that the land was, and had been continuously, exempt from seizure up to October, 1912, by reason of Hart's occupation, and up to the date of the issue of the patent by reason of the express provision to that effect of section 29 of the Dominion Lands Act (ch. 20 of 1908). In October, 1912, he made an arrangement with a man named Ives. Ives says it was a lease to him of the entire farm for one year upon the terms that Hart was to supply seed and one yoke of oxen and Ives was to crop "the said lands" and deliver to Hart one half of the crop. Only Hart and Ives were present at the conversations at which the arrangement was made. Mrs. Ives says Hart told her of the arrangement. She says the terms were that Ives was to crop the broken land *and to look after the cattle, sheep and poultry* and was to give Hart *one half of the crop and of the increase of the stock and poultry.*

Ives' son says:—

> My father, John F. Ives, leased the said quarter section by a verbal lease in October, 1912, from C. W. Hart, for half of the 1913 crop, the seed for which was to be supplied by the said C. W. Hart, and the work done by my father and myself, and went into possession on the said date.

He was not present at the conversations at which the arrangement was made and does not give the source of knowledge on which he makes this statement. Hart's version of the arrangement is that Ives was to work the broken land, 8 to 10 acres, during the season of 1913; that Hart was to supply the seed and a yoke of oxen and that Ives was to care for the cattle and sheep belonging to Mrs. Hart during the winter, and that Ives was to have the use of the dwelling-house with the right on Hart's part for himself and his wife and child to occupy part of it during the summer. Both Hart and his wife swear that they intended to return and reside on the place in the spring, *i.e.*, of 1913. As a matter of fact, they did, and without objection on the part of Ives, occupied the upper storey of the

dwelling-house, supplying their own provisions and taking their meals in common with Ives and his wife. In August, Hart and his wife were in Edmonton for a week, leaving their daughter, who was returning to school, there.

They both immediately returned and remained on the farm till the middle of September, when an altercation took place between Hart and Ives in which Hart was rather badly hurt so that he could not work for some weeks. Hart and his wife then came to Edmonton and an agreement of settlement was signed by both parties whereby there was a division of grain, hay and vegetables (some grown—presumably by Ives—on other land) and animals, and concluding:—

> I (Ives) will leave house . . . on or before 18th October, 1913, you (Hart and his wife) to have all former rights exercised by you on said quarter.

Hart and his wife returned to the farm on October 8, but were refused admittance to the house and had to return to Edmonton, where they remained till Ives left on October 18, when they went back to the farm, where they now are. During the summer of 1913, Hart did a considerable amount of work on the farm in breaking more land, repairing the buildings and fences and cutting hay for the farm stock.

Though the whole evidence before me is by way of affidavit and the depositions of Hart and his wife, and Ives, taken by way of cross-examination, I am less favourably impressed with the evidence of Ives than with that of Hart and his wife. I think, too, the probabilities are rather in favour of Hart with regard to the terms of the arrangement between them, especially as the subsequent conduct of the parties seems to me to corroborate Hart's version.

A doubt may be raised of the fixed intention of Hart to occupy the farm after the issue of the patent independently of an idea that such occupation was necessary in order to endeavour to satisfy the Court of such intention by conduct, in view of this very application, which the evidence discloses he probably contemplated as early as April, 1913. But, on the whole, I think he had independently the *bonâ fide* intention of returning to the land in the spring of 1913, and remaining on it during the ensuing summer, although prior to obtaining patent he had already made up his mind to transfer the land to his wife, in consideration, they both say, of some $4,000 advanced to him by her from moneys which came to her from her mother's estate and which some time previously to his taking up the homestead he had lost in business.

On these facts I hold that the land in question was, at the time of the transfer from Hart to his wife, the homestead of Hart and therefore exempt from seizure under the defendant's

ALTA.

S. C.
1914

HART
v.
RYE.

Beck, J.

execution, and that an order accordingly should go: *Fredericks* v. *N.W. Thresher Co.*, 3 S.L.R. 280, *sub nom. Northwest Thresher Co.* v. *Fredericks*, 44 Can. S.C.R. 318.

As to the costs, the defendant Rye, the execution creditor, was entitled to lodge his execution in the land titles office and was under no obligation to go to any expense to prevent it appearing as a charge against any property standing in the name of the execution debtor, which could only, by reason of extraneous facts, be shewn not to be properly a charge. I think the whole burden of proof and expense lies in such a case upon the execution debtor. In a simple case if clear proof were presented to the execution creditor by affidavit or otherwise before action that land apparently affected was in reality not so, I think he would be bound, at the expense of the execution debtor, to do what would be necessary to remove the cloud.

In the present case it is obvious that only by such a motion as this could the question of the execution creditor's duty be determined, and I think, therefore, he should not be at any expense in connection with this enquiry. I therefore direct that the costs of the defendant Rye be paid by the plaintiff Hart.

Application granted.

Annotation

Exemptions from execution

Annotation—Exemptions (§ II A—5)—What property is exempt.

Following is a summary of the exemption laws of the different provinces.

ALBERTA.

The Province of Alberta by the Exemption Ordinance, N.W.T. ch. 27, provides for the following exemptions from execution:—

Sec. 2: The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely:—

Sub-sec. (1). The necessary and ordinary clothing of himself and his family;

Sub-sec. (2). Furniture, household furnishings, dairy utensils, swine and poultry to the extent of $500;

Sub-sec. (3). The necessary food for the family of the execution debtor during 6 months which may include grain and flour or vegetables, and meat either prepared for use or on foot;

Sub-sec. (4). 3 oxen, horses or mules or any 3 of them, 6 cows, 6 sheep, 3 pigs, and 50 domestic fowls besides the animals the execution debtor may have chosen to keep for food purposes and food for the same for the months of November, December, January, February, March and April, or for such of these months or portions thereof as may follow the date of seizure provided such seizure be made between the 1st day of August and the 30th day of April next ensuing;

Sub-sec. (5). The harness necessary for 3 animals, 1 waggon or 2 carts, 1 mower or cradle and scythe, 1 breaking plough, 1 cross-plough, 1

Annotation (*continued*)—**Exemptions** (§ II A—5)—**What property is exempt.**

ALTA.

Annotation

Exemptions from execution

set of harrows, 1 horse rake, 1 sewing machine, 1 reaper or binder, 1 set of sleighs and 1 seed drill;

Sub-sec. (6). The books of a professional man;

Sub-sec. (7). The tools and necessary implements to the extent of $200 used by the execution debtor in the practice of his trade or profession;

Sub-sec. (8). Seed grain sufficient to seed all his land under cultivation not exceeding 80 acres, at the rate of 2 bushels per acre, debtor to have choice of seed, and 14 bushels of potatoes;

Sub-sec. (9). The homestead, provided the same be not more than 160 acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon;

Sub-sec. (10). The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of $1,500.

Sec. 4: Nothing in this Ordinance shall exempt from seizure any article (except for the food, clothing and bedding of the execution debtor and his family) the price of which forms the subject-matter of the judgment upon which the execution is issued.

BRITISH COLUMBIA.

The British Columbia Homestead Act, R.S.B.C. 1911, ch. 100, exempts from execution the following property:—

Sec. 5: A homestead, after the same shall have been duly registered, shall be free from forced seizure or sale by any process for or on account of any debt or liability incurred after the registration of such homestead in manner aforesaid, up to $2,500.

Sec. 17: The following personal property shall be exempt from forced seizure or sale by any process at law or in equity; that is to say, the goods and chattels of any debtor at the option of such debtor, or if dead, of his personal representative, to the value of $500; provided that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels; provided further that this section shall not be construed so as to permit a trader to claim as an exemption any of the goods and merchandise which form a part of the stock-in-trade of his business.

MANITOBA.

The Manitoba Executions Act, R.S.M. 1913, ch. 66, provides for the following exemptions from execution:—

Sec. 29: Except as otherwise by any Act provided, the following personal and real estate is hereby declared free from seizure by virtue of all writs of execution issued by any Court in this province, namely:—

Sub-sec. (*a*). The beds and bedding in the common use of the judgment debtor and his family and also his household furniture and effects not exceeding in value the sum of $500;

Sub-sec. (*b*). The necessary and ordinary clothing of the judgment

ALTA.

Annotation

Exemptions from execution

Annotation (*continued*)—Exemptions (§ II A—5)—What property is exempt.

debtor and his family and the necessary fuel for the judgment debtor and his family for six months;

Sub-sec. (*c*). 12 volumes of books, the books of a professional man, 1 axe, 1 saw, 1 gun, 6 traps;

Sub-sec. (*d*). The necessary food for the judgment debtor and his family during 11 months, but this exemption shall only apply to such food and provisions as may be in his possession at the time of seizure;

Sub-sec. (*e*). 3 horses, mules or oxen, 6 cows, 10 sheep, 10 pigs, 50 fowls, and food for the same during 11 months;

Sub-sec. (*f*). The tools, agricultural implements and necessaries used by the judgment debtor in the practice of his trade, profession or occupation, to the value of $500;

Sub-sec. (*g*). The articles and furniture necessary to the performance of religious services;

Sub-sec. (*h*). The land upon which the judgment debtor or his family actually resides, or which he cultivates either wholly or in part, or which he actually uses for grazing or other purposes: provided the same be not more than 160 acres;

Sub-sec. (*i*). The house, stable, barns and fences on the judgment debtor's farm, subject, however, as aforesaid;

Sub-sec. (*j*). All the necessary seeds of various varieties or roots for the proper seeding and cultivation of 80 acres;

Sub-sec. (*k*). The actual residence or home of any person other than a farmer, provided the same does not exceed the value of $1,500;

Sub-sec. (*l*). The chattel property of any municipality or school district in this province, where the writ of execution issued after the 1st day of January, 1911.

Sec. 30: Exempts insurance on exemptions.

Sec. 31: Exempts the interests of annuitants under the Government Annuities Act, 1908.

Sec. 37: Nothing herein contained shall be construed to exempt from seizure any real or personal estate mentioned in sec. 29, sub-secs. *a*, *c*, *e*, *f*, *g*, *h*, *i*, *j*, and *k*, the purchase price of which is the subject of the judgment proceeded upon either by way of execution or certificate of judgment or attachment.

NEW BRUNSWICK.

The New Brunswick Memorials and Executions Act, Consolidated Statutes N.B. 1903, ch. 128, exempts from execution the following property:—

Sec. 34: The wearing apparel, bedding, kitchen utensils and tools of his trade or calling to the value of $100 of any debtor shall be exempt from levy or sale under execution.

NOVA SCOTIA.

The Nova Scotia Exemption Law, statutes of 1885, ch. 34, exempts from seizure under writs of execution the following property:—

Annotation (*continued*)—**Exemptions** (§ II A—5)—**What property is exempt.**

ALTA.

Annotation

Exemptions from execution

Sec. 1: The following goods and chattels shall be privileged and exempted from seizure under any writ of execution, namely:—

Sub-sec. (*a*). The necessary wearing apparel, beds, bedding and bedsteads of the debtor and his family;

Sub-sec. (*b*). 1 stove and pipe therefor, 1 crane and its appendages, 1 pair of andirons, 1 set of cooking utensils, 1 pair of tongs, 6 knives, 6 forks, 6 plates, 6 teacups, 6 saucers, 1 shovel, 1 table, 6 chairs, 1 milk jug, 1 teapot, 6 spoons, 1 spinning wheel and 1 weaving loom, if in ordinary domestic use, and 10 volumes of religious books, 1 water bucket, 1 axe, 1 saw, and such fishing nets as are in common use, the value of such nets not to exceed $20;

Sub-sec. (*c*). All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for 30 days, and not exceeding in value the sum of $40;

Sub-sec. (*d*). 1 cow, 2 sheep, and 1 hog, and food therefor for 30 days;

Sub-sec. (*e*). Tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of $30.

Sec. 2: Nothing in the aforesaid sections contained shall exempt any article enumerated in sub-secs. (*b*), (*c*), (*d*), and (*e*) of said section from seizure in satisfaction of a debt contracted for such identical chattel.

ONTARIO.

The Ontario Execution Act, 9 Edw. VII. ch. 47, as carried into R.S.O. 1914, ch. 80, provides for the following exemptions:—

Sec. 3: The following chattels shall be exempt from seizure under any writ issued out of any Court, namely:—

Sub-sec. (*a*). The beds, bedding and bedsteads (including cradles) in ordinary use by the debtor and his family;

Sub-sec. (*b*). The necessary and ordinary wearing apparel of the debtor and his family;

Sub-sec. (*c*). 1 cooking stove with pipes and furnishings, 1 other heating stove with pipes, 1 crane and its appendages, 1 pair of andirons, 1 set of cooking utensils, 1 pair of tongs and a shovel, 1 coal scuttle, 1 lamp, 1 table, 6 chairs, 1 washstand with furnishings, 6 towels, 1 looking glass, 1 hair brush, 1 comb, 1 bureau, 1 clothes press, 1 clock, 1 carpet, 1 cupboard, 1 broom, 12 knives, 12 forks, 12 plates, 12 tea cups, 12 saucers, 1 sugar basin, 1 milk jug, 1 teapot, 12 spoons, 2 pails, 1 wash tub, 1 scrubbing brush, 1 blacking brush, 1 washboard, 3 smoothing irons, all spinning wheels and weaving looms in domestic use, 1 sewing machine and attachments in domestic use, 30 volumes of books, 1 axe, 1 saw, 1 gun, 6 traps, and such fishing nets and seines as are in common use, the articles in this sub-division enumerated not exceeding in value $150;

Sub-sec. (*d*). All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for 30 days, and not exceeding in value $40;

Sub-sec. (*e*). 1 cow, 6 sheep, 4 hogs, and 12 hens, in all not exceeding the value of $100, and food therefor for 30 days, and 1 dog;

ALTA.

Annotation

Exemptions from execution

Annotation (*continued*)—Exemptions (§ II A—5)—What property is exempt.

Sub-sec (*f*). Tools and implements of, or chattels ordinarily used in the debtor's occupation, to the value of $100; but if a specific article claimed as exempt be of a value greater than $100 and there are not other goods sufficient to satisfy the writ such article may be sold by the sheriff who shall pay $100 to the debtor out of the net proceeds, but no sale of such article shall take place unless the amount bid therefor shall exceed $100 and the cost of sale in addition thereto;

Sub-sec. (*g*). 15 hives of bees.

Sec. 4: The debtor may, in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in clause (*f*) of sec. 3, elect to receive the proceeds of the sale thereof up to $100, in which case the officer executing the writ shall pay the net proceeds of the sale if the sum do not exceed $100, or, if the sum exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under clause (*f*).

Sec. 5: The sum to which a debtor is entitled, under clause (*f*) of sec. 3, or under sec. 4, shall be exempt from attachment or seizure at the instance of a creditor.

Sec. 8: Nothing herein shall exempt any article enumerated in clauses (*c*) to (*g*) of sec. 3 from seizure to satisfy a debt contracted for such article.

As to free grant lands in Ontario, the Public Lands Act of that province, 3-4 Geo. V. ch. 6, sec. 45, enacts:—

(1). Neither the land nor any interest or right therein shall in any event be or become liable for the satisfaction of any debt or liability contracted or incurred by the locatee, his widow, heirs, or devisees, before the issue of the letters patent;

(2). After the issue of the letters patent, and while the land, or any part of it, or any interest in it is owned by the locatee or his widow, heirs, or devisees, the same shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for the payment of debts, and shall not be or become liable for the satisfaction of any debt or liability contracted or incurred before or during that period, except a debt secured by a valid mortgage or charge of the land made after the issue of the letters patent. [Now R.S.O. 1914, ch. 28.]

PRINCE EDWARD ISLAND.

The Prince Edward Island Exemption Law, statutes of 1851, ch. 2, exempts from execution the following property:—

Sec. 15: And be it enacted that in all cases where a writ of *fieri facias*, or statute execution, shall be issued, upon any judgment obtained or to be obtained in the said Supreme Court, it shall not be lawful for the sheriff or other officer executing such writ to seize or levy upon the necessary apparel and bedding of the debtor or debtors against whom such judgment shall be obtained or of his, her or their family or families, or the necessary tools of his, her or their trade or occupation in satisfaction of such judgment: provided always that such apparel, bedding and tools, so to be exempted from being seized or levied upon as aforesaid shall not exceed the value of £15 in the whole to any one debtor.

Annotation (*continued*)—**Exemptions** (§ II A—5)—**What property is exempt.**

ALTA.

Annotation

Exemptions from execution

QUEBEC.

The Quebec Exemption Law, Revised Statutes Quebec, 1909, articles 2091, 2092 and 2093, exempts from execution the following property:—

Art. 2091: No public lands granted to a *bonâ fide* settler by instruments in the form of location tickets, occupation licenses, or certificates of sale or other titles of a similar nature or to the same effect, are liable to seizure under execution, for specified period.

Art. 2092: Public lands patented as homestead are exempt up to 100 acres, together with the buildings and appurtenances thereon erected, for 15 years.

Art. 2093: Without prejudice to articles 598 and following of the Code of Civil Procedure, the movables and effects hereinafter enumerated, whether they be in the possession of a *bonâ fide* settler, as described in art. 2091, or in the possession of his widow, or of his or their children or descendants in the direct line, shall, so long as the party upon whom the seizure is made, is owner or proprietor of the land in virtue of the said article, be exempt from seizure and execution for any debt whatsoever, except for the payment of the taxes, charges and dues mentioned in art. 2091, from the date of the grant of such lands and during 15 years from the issue of the letters patent, to wit:—

Sub-sec. (1). The beds, bedding and bedsteads in ordinary use by his family;

Sub-sec. (2). The necessary and ordinary wearing apparel of himself and his family;

Sub-sec. (3). 1 stove and pipes, 1 crane and its appendages, 1 pair of andirons, 1 set of cooking utensils, 1 pair of tongs and a shovel, 1 table, 6 chairs, 6 knives, 6 spoons, 6 forks, 6 plates, 6 tea cups, 6 saucers, 1 sugar basin, 1 milk jug, 1 teapot, all spinning wheels and weaving looms in domestic use, 1 axe, 1 saw, 1 gun, 6 traps, and such fishing nets and seines as are in common use, and 10 volumes of books;

Sub-sec. (4). All necessary fuel, meat, fish, flour, and vegetables sufficient for him and his family for 3 months;

Sub-sec. (5). Seed grain necessary to sow his land;

Sub-sec. (6). 2 draught horses or 2 draught oxen, 10 other head of horned cattle, 6 sheep, 5 pigs, all the poultry, and the grain and other forage intended for the support or fattening of such animals and poultry;

Sub-sec. 7. Farm implements and implements of agriculture;

Sub-sec. (8). The building materials intended to be employed in the construction of or repairs or improvements to buildings and mills on his land: provided the chattels mentioned in sub-secs. 3, 4, 5, 6, 7, and 8, of this art. (2093) shall not be exempt from seizure and execution for the purchase price thereof.

Art. 2095: The proprietor of a homestead and all public lands in virtue of arts. 2091 and 2092, has the right to alienate the same by gratuitous or by onerous title, even without the consent of his consort expressed in a notarial deed.

SASKATCHEWAN.

The Saskatchewan Exemptions Act, R.S.S. 1909, ch. 47, provides for exemption from execution as follows:—

ALTA.

Annotation

Exemptions from execution

Annotation (*continued*)—Exemptions (§ II A—5)—What property is exempt.

Sec. 2: The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely:—

Sub-sec. (1). The necessary and ordinary clothing of himself and his family;

Sub-sec (2). Furniture, household furnishings, dairy utensils, swine and poultry to the extent of $500;

Sub-sec. (3). The necessary food for the family of the execution debtor during 6 months which may include grain and flour or vegetables, and meat either prepared for use or on foot;

Sub-sec. (4). 3 oxen, horses or mules or any 3 of them, 6 cows, 6 sheep, 3 pigs, and 50 domestic fowls besides the animals the execution debtor may have chosen to keep for food purposes and food for the same for the months of November, December, January, February, March and April, or for such of these months or portions thereof as may follow the date of seizure, provided such seizure be made between the 1st day of August and the 30th day of April next ensuing;

Sub-sec. (5). The harness necessary for 3 animals, 1 waggon or 2 carts, 1 mower or cradle and scythe, 1 breaking plough, 1 cross-plough, 1 set of harrows, 1 horse rake, 1 sewing machine, 1 reaper or binder, 1 set of sleighs and 1 seed drill;

Sub-sec. (6). The books of a professional man;

Sub-sec. (7). The tools and necessary implements to the extent of $200 used by the execution debtor in the practice of his trade or profession;

Sub-sec. (8). Seed grain sufficient to seed all his land under cultivation not exceeding 80 acres, at the rate of 2 bushels per acre, debtor to have choice of seed, and 14 bushels of potatoes;

Sub-sec. (9). The homestead, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon;

Sub-sec. (10). The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of $1,500.

Sec. 4: Nothing in this Act shall exempt from seizure any article (except for the food, clothing and bedding of the execution debtor and his family) the price of which forms the subject-matter of the judgment upon which the execution is issued.

YUKON TERRITORY.

Under the Yukon Territory Consolidated Ordinances (1902) ch. 25, the following property is exempt:—

Sec. 2: The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely:—

Sub-sec. (1). The necessary and ordinary clothing of himself and his family;

Sub-sec. (2). Furniture, household furnishings, dairy utensils, swine and poultry to the extent of $500;

Annotation (*continued*)—Exemptions (§ II A—5)—What property is exempt.

ALTA.

Annotation

Exemptions from execution

Sub-sec. (3). The necessary food for the family of the execution debtor during 6 months which may include grain and flour or vegetables, and meat either prepared for use or on foot;

Sub-sec. (4). The books of a professional man;

Sub-sec. (5). The tools and necessary implements to the extent of $500 used by the execution debtor in the practice of his trade or profession;

Sub-sec. (6). The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate, according to the registered plan of the same to the extent of $1,500.

Sec. 4: Nothing in this Ordinance shall exempt from seizure any article, except for the food, clothing, and bedding of the execution debtor and his family, the price of which forms the subject-matter of the judgment upon which the execution is issued.

BURTON v. HYLAND.

N. S.

S. C.

1914

Nova Scotia Supreme Court, Graham, E.J., Meagher, Russell and Ritchie, JJ. February 14, 1914.

1. Costs (§ I—2)—Interlocutory motion—New point.

Costs should not be refused the successful party upon an interlocutory motion merely because the point of practice raised is new in that jurisdiction.

Statement

Appeal by defendant from the order of Wallace, County Court Judge, dismissing without costs to either party plaintiff's application under summons for direction for leave to give notice of trial to defendant "on October 22, 1913, for the present sittings of this honourable Court, but that the said action shall not be tried before the day of A.D., 1913," that the issues of fact should be tried by a jury, and that plaintiff should be at liberty to enter the cause for trial with a jury at the present sittings, etc.

The affidavit of plaintiff's solicitor read in support of the application stated among other things that it was in the interest of justice that the cause should be set down for trial at the present sittings, as otherwise it might be impossible to obtain payment of any judgment plaintiff might obtain.

The ground for refusing costs on the application to the County Judge, as stated in the order dismissing the application, was that this was the first time that the question involved had been brought before a Court in Nova Scotia, and there was no decision directly on the doubtful point.

The appeal was allowed.

J. J. Power, K.C., for appellant.

C. J. Burchell, K.C., for respondent.

N. S.

S. C.
1914

BURTON
v.
HYLAND.

Graham, E.J.

The judgment of the Court was delivered by GRAHAM, E.J.:—Apparently the plaintiff made two mistakes. He took out a summons for directions when he had already taken a step after the appearance in the action, namely, serving a statement of claim. This he may not do by order 29, r. 1*b*.

Then in the summons he asked for permission to give notice of trial for a date in the sittings of the Court then commenced when the first day of that sittings and the entry day of the cause for the list were already past.

The learned Judge of the County Court dismissed the summons, and that is not before us, but he dismissed it without costs on the ground that the point was new. There is an appeal.

Now I think, when the letter of a rule is clear, that this excuse for depriving a suitor of his costs does not avail. In respect to the second mistake, the plaintiff would have been right according to the decision of the Court of Appeal, *Baxter* v. *Holdsworth*, [1899] 1 Q.B. 266, if our rules were the same as the English rules. But they are not. We have O. 24, rr. 20 and 21, contemplating the preparation of a docket from entries of the causes to be entered on the Tuesday preceding the first day of the sittings. Those and those only are the causes for trial at that sittings.

If the plaintiff had applied on the ground of urgency under the County Court Act, R.S.N.S. 1900, ch. 156, sec. 27 (2), I have no doubt he could have got the cause set down for trial at a special sittings, and I think his affidavit did shew some such urgency or a good cause for a special trial. The Judges of this Court try such cases very frequently out of the regular sittings under O. 34, r. 1*a*. But the plaintiff apparently did not apply on this ground, and I suppose that the application was technically wrong.

I think that the defendant should not have been deprived of costs on that ground.

The appeal must be allowed, and the defendants' costs of opposing that application and the costs of this appeal will be his costs in any event, and to be set off against plaintiff's judgment, if any.

Appeal allowed.

Re CANADIAN GENERAL SERVICE CORPORATION.

(Decision No. 1.)

MAN.

K. B.

1914

Manitoba King's Bench, Curran, J. February 3, 1914.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—"TRADING COMPANY"—OBJECTS OF INCORPORATION.

For the purposes of bringing a company within the scope of the Winding-up Act (Can.) as being a "trading company," any of the objects of incorporation stated in the letters patent creating the company may be looked at.

[*Re Lake Winnipeg L. & T. Co.*, 7 Man. L.R. 255, followed; *Re Anchor Investment Co.*, 7 D.L.R. 915, referred to.]

Statement

PETITION for a winding-up order under the Winding-up Act, R.S.C. 1906, ch. 144.

F. M. Burbidge, for petitioner.

A. E. Hoskin, K.C., for the company.

H. W. Whitla, K.C., for Ryckman.

Curran, J.

CURRAN, J.:—Upon the petition for winding-up this company being heard by me in Chambers on January 26 last, objection was taken by counsel for the company and others that the petition did not allege what business the company carried on so that it could be determined from the petition itself whether or not the company was one to which the Act applied. There were other objections urged going to the merits of the case, which I intimated I would not deal with until I had reached a conclusion as to whether or not the company was one to which the Dominion Winding-up Act, R.S.C. 1906, ch. 144, applied.

The company was incorporated by letters patent under the Manitoba Joint Stock Companies Act, on or about April 1, 1913, and the head office is at the city of Winnipeg in the Province of Manitoba. The petition sets out at length a number of objects for which the company was incorporated, some of which, at all events, I think, might fairly be held to fall within the provisions of sub-sec. (*d*) of sec. 2 of the Act, which section defines what companies are deemed to be "trading corporations" within sec. 6 of the Act. The petition does not state in express language that any of the various businesses or undertakings which the company is authorized to carry on were in fact carried on, although it might well be inferred from the various allegations in the petition that the company did some business which involved its incurring financial obligations, and I presume such business ought to be presumed to be within the scope of the company's powers.

Sub-sec. (*d*) of sec. 2 says:—

In this Act, unless the context otherwise requires, "trading company" means any company, except a railway or telegraph company

MAN.

K. B.
1914

RE CANADIAN GENERAL SERVICE CORPORATION (No. 1).

CURRAN, J.

carrying on business similar to that carried on by, etc. (then follows a long list of businesses or avocations).

The petition alleges that one of the objects of incorporation of the company was to carry on the business of contractors, *builders*, architects and engineers. This brings the company squarely within the interpretation clause, if this allegation is sufficient without going further and alleging the exercise or operation of such business.

My impression from reading sec. 2 was, that there must be operation proved because of the phraseology used in defining what constituted a trading company, namely, "'trading company' means any company . . . carrying on business similar to, etc."

Stroud's Judicial Dictionary, vol. I, p. 267, defines the expression "carrying on" as implying a repetition or series of acts, and, applying this definition to the words of the statute, I would have thought that a company, no matter what its powers may be, is not carrying on business unless it actually puts its powers or some of them into active operation or uses them by engaging in actual business within their scope.

However, the contrary has been held in British Columbia in the case of *Re Anchor Investment Co., Ltd.*, 7 D.L.R. 915, when the very objection now taken was there taken and overruled. The learned Judge says:—

> It is argued that I must have regard only to its operations and not to its powers. I cannot agree. To do so would be to concede that a company might be at one moment within the scope of the Act and at another without it, according as it was exercising one or other set of powers conferred upon it by its memorandum of association. Further, it has been held that if the company for any purposes for which it exists comes within the terms defined by the Act it is sufficient: *Re Lake Winnipeg L. & T. Co.*, 7 Man. L.R. 255.

I have looked at this latter case and find, at p. 259, the following expression:—

> It was further objected that the purposes and objects for which this company was incorporated do not bring it within "trading company" as defined in the Winding-up Act, sec. 2, sub-sec. (c). It seems to me that if the company for any of the purposes for which it exists comes within the term as defined in that sub-section it is sufficient.

The statute then under consideration was ch. 129, R.S.C., the former Winding-up Act. Sec. 2, sub-sec. (*c*) of this Act is identical with sec. 2, sub-sec. (*d*) of the present Act, ch. 144, R.S.C. 1906.

While I do not feel bound to follow the British Columbia case, I am, I think, bound by the latter case, which is an unchallenged decision of our own Court, and I must therefore hold that the company referred to in the petition is a trading

company within the meaning of the Winding-up Act, sec. 6, and sec. 2, sub-sec. (*d*), and that the petitioner has the necessary status in this respect to ask the intervention of this Court, and I must overrule the objection referred to.

I, of course, say nothing as to the sufficiency of the petition in other respects and of the grounds alleged therein for the interference of the Court.

By request of counsel this matter was reserved for further argument.

Ruling accordingly.

Re CANADIAN GENERAL SERVICE CORPORATION.
(Decision No. 2.)

Manitoba King's Bench, Curran, J. February 11, 1914.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—AMENDING PETITION.

The court has ample discretionary powers under secs. 128 and 129 of the Winding-up Act, R.S.C. 1906, ch. 144, to allow amendments to the petition and will exercise them in favour of the petitioner where the right and justice of the case seem to call for such amendments to place petitioner's case properly before the court.

[*Re Rapid City Farmers Elevator Co.*, 9 Man. L.R. 574; *Re Abbott Mitchell Iron & Steel Co. Ltd.*, 2 O.L.R. 143; *Re Redpath Motor Vehicle Co.*, 4 O.W.R. 515, referred to.]

Statement

APPLICATION to amend a petition for the winding-up of a company.

The application was granted.

F. M. Burbidge, for petitioner.
A. E. Hoskin, K.C., for the company.
H. W. Whitla, K.C., for Ryckman.

Curran, J.

CURRAN, J.:—A petition for the winding-up of this company having been filed and upon the matter coming before me on January 26 ult. for hearing, I adjourned the hearing upon the merits to consider an objection which was taken to the status of the petitioner because it was contended the company was not shewn on the face of the petition to be a trading corporation within the meaning of the Winding-up Act, ch. 144, R.S.C. 1906. I overruled the objection, holding that the petition sufficiently disclosed this fact; or rather, that it disclosed enough of the purposes and objects of incorporation of the company to bring it within the interpretation clause of the Act, sec. 2, sub-sec. (*d*).

An application to amend the petition was made at the same time, which I took to refer only to the question of the petitioner's status raised under the foregoing objection, and I in-

MAN.

K. B.

1914

RE CANADIAN GENERAL SERVICE CORPORATION (No. 2).

Curran, J.

timated then that if it was held to be necessary for the petitioner to allege in his petition an actual carrying on of such business by the company to bring it within the scope of the Act instead of, as had been alleged, merely the possession of corporate powers within the scope of the Act, I would allow an amendment in this respect.

Apparently, the petitioner's counsel intended his application for amendment to go beyond this one point, and he applied subsequently to me to fix a date for the hearing of a further application to amend, or a renewal of his former application to amend, before proceeding to argue the case on its merits. I accordingly fixed February 9 inst. for this purpose, and application was then made by the petitioner to amend his petition in respect of the following matters:—

1. To set up facts which would bring the company within sub-secs. (*a*), (*d*), and (*f*), of sec. 3, from which the company could be deemed to be insolvent.

2. To add to clause 23 of the petition (and following sub-section (*d*) of sec. 11), an allegation that the lost capital will not likely be restored within one year.

3. Allegations of fact as to the business actually carried on by the company.

The latter is sought more by way of precaution than present necessity in the event of the matter going to appeal.

These amendments, or any amendments, are strenuously opposed by counsel for the company and for John W. Ryckman, its president and a shareholder.

Sections 128 and 129 of the statute deal with amendments and confer ample power upon the Court to make the amendments asked for if it is proper that such amendments should be made.

No objection founded upon surprise, prejudice or injustice to the company in point of fact has been raised.

Now, the petition alleges as a fact that the company is insolvent, and also that its capital stock is impaired to the full value thereof. I treat these as separate, distinct and substantive allegations of fact. A simple allegation of insolvency is not sufficient: *Re Rapid City Farmers Elevator Co.*, 9 Man. L.R. 574. Insolvency within the Act must be shewn. One of the amendments asked is for the express purpose of doing this, by alleging facts which will bring the company within the scope of sub-secs. (*a*), (*d*), and (*f*) of sec. 3.

To permit the amendment is not to permit the setting-up of new ground for invoking the statute not already stated in the petition. The case of *Re Abbott Mitchell Iron and Steel Co. Ltd.*, 2 O.L.R. 143, was cited by counsel for the company as an

authority that the Court would refuse to give effect to grounds not put forward in the petition, and of which the company had not had notice. It is to avoid being placed in just such a position as the petitioner was there placed in that the amendment in question is sought.

I am not now determining the matter on the merits as was the learned Judge in the case just referred to. In fact that case shews that an amendment had previously been allowed to set up a demand of payment and neglect for sixty days to comply with the demand, and the petition was amended accordingly. Whereupon the petitioner, instead of proving such a demand as the statute required, set up the service on the company of a specially endorsed writ in an action to recover the amount of the petitioner's claim as a sufficient demand in writing within the meaning of the statute. This the learned Judge held was not sufficient and he further decided that to hold it sufficient might sanction what would be calculated to mislead, as the company had not had notice of such a ground being put forward by the petition.

The case of *Redpath Motor Vehicle Co.*, 4 O.W.R. 515, is, I think, an authority for making the amendment, although cited as one against it. Stress is laid by counsel in citing this case on the expression in the judgment: "Sufficient is shewn to make it desirable that the company should be wound up," urging that such is not the case here. I think it is, and that the petition sets up several matters which, if true, would render it highly desirable that this company should be wound up.

Other cases were cited, by those opposing the amendments, but I think they are all more or less distinguishable.

In any event, the right to amend in any given case is discretionary, and while it is true that such discretion must be a judicial and not a whimsical or capricious one, still precedents, to be of service in such cases, ought to be those which establish judicial principles as a guide to action and none of these cases decide anything that ought to prevent my allowing the amendments asked for.

No meritorious reason has been assigned against allowing these amendments. On the contrary, the right and justice of the case seems to me to call for such amendments to place the petitioner's case properly before the Court.

The petitioner, therefore, will have leave to amend his petition in the particulars I have outlined and will re-serve the amended petition, which will be heard after the usual four days' notice has been given.

Costs of the application will abide the event of the petition.

Application granted.

B. C.

S. C.
1914

ANTICKNAP v. SCOTT.

British Columbia Supreme Court, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 22, 1914.

1. TRIAL (§ I C—10)—RECEPTION OF EVIDENCE—INADMISSIBILITY—SURVEYOR'S NOTES—MISTRIAL.

Where the trial judge bases his finding upon inadmissible evidence, this constitutes a mistrial, and on a boundary line dispute where the hearsay of witnesses as to the survey made to establish the line is received in support of the finding of the court instead of the primary and best evidence thereof being required, such is ground for a new trial.

Statement

APPEAL by the defendant from the judgment of Barker, County Court Judge, based on the reception of alleged hearsay evidence constituting a mistrial.

The appeal was allowed and a new trial granted.

Bray, for appellant.

V. B. Harrison, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The Court at the present moment is of opinion that there has been a mistrial. Though it is quite possible that the learned Judge was right, on the other hand it is quite as possible that he was wrong; he has given weight to evidence which may be hearsay or may not, so uncertain is the record.

Strictly, the Court might allow the appeal and dismiss the action, but I am not in favour of doing this, because I am convinced there may have been a mistrial. The plaintiffs should have made it clear by a survey and by putting the surveyor who made it into the witness-box, so that the Court could be satisfied where the true line is.

Mr. Harrison:—I should like your Lordships to examine Mr. Green's evidence.

MACDONALD, C.J.A.:—Can you shew me anywhere in this evidence that this witness says, "I ran the lines myself?"

What has apparently been lost sight of by counsel and probably by the Judge was that there might be an appeal, and evidence quite intelligible to local people might be unintelligible to those removed from the *locus in quo*.

We think there has been a mistrial, Mr. Harrison, and we are rather giving you the indulgence of a new trial, whereas we might dismiss the action altogether.

Mr. Harrison:—I am quite sure the statement made by Mr. King was given in evidence, although not here.

Galliher, J.A.

GALLIHER, J.A.:—That is unfortunate. You see that might have all been present to the Court below and to the counsel

below, and it is not present to us, and we are asked to draw inferences, which I am not myself prepared to do.

IRVING, J.A.:—Are you satisfied that the point of commencement should be 22 feet or links from that post—22 feet or links?

Mr. Harrison:—The trial Judge ascertained that it was 22 links.

IRVING, J.A.:—I am inclined to think he is right, but if there is to be a new trial I will not express any opinion. I cannot make up my mind on this appeal book one way or the other. The questions are asked and answered in such a way that no one reading the evidence can understand it. It is very badly taken down and there are also clerical errors in the transcribing. Irving, J.A.

Mr. Harrison:—This was an action over a boundary line.

IRVING, J.A.:—You have to shew what your position is.

Mr. Harrison:—Yes, but in the surveys that they did actually make we still have trespass.

MACDONALD, C.J.A.:—I don't think that you will be able to convince the Court, Mr. Harrison, and I think we have said practically all that is to be said on that point. Macdonald, C.J.A.

An additional difficulty about this case is the evidence of King and Green. To my mind these two men have not shewn that they or either of them made the survey of the line, and were not merely speaking from the notes and from the survey of their articled clerks, who, they say, did run the lines. If they had run the lines themselves there would not be much difficulty about the case.

But he bases his judgment upon the evidence of these two witnesses. He assumes that these two witnesses either made the survey originally, or were able to speak from surveys made by them. But it does not seem to me that these witnesses did make a survey so as to be able to speak authoritatively. If that be so their evidence was inadmissible. Their evidence, apparently, has influenced the learned Judge's mind. He himself took a view, but since evidence was admitted which appears to have been inadmissible and which undoubtedly affected his mind, then the only thing we can do is either to set aside judgment and dismiss the action, or hold, as I think we ought to hold, that there has been a mistrial and send it back.

It is simply a matter of having a surveyor run a line and give evidence as to whether this fence was or was not on the plaintiff's land.

Instead of this, a very clumsy and ineffective way was adopted to prove what could have been made certain by a survey.

B. C.

S. C.
1914

ANTICKNAP v. SCOTT.

Macdonald, C.J.A.

IRVING, J.A.:—I concur.

GALLIHER, J.A.:—I concur.

MACDONALD, C.J.A.:—The appeal will be allowed and a new trial ordered. The costs will, of course, follow the event, and I think the rule we generally adopt is that the costs of the first trial shall abide the result of the second.

Mr. Bray:—As well as the costs of this appeal, my Lord?

MACDONALD, C.J.A.:—You will get the costs of the appeal.

Irving, J.A.

IRVING, J.A.:—I should think, if you got a good surveyor, there would not be necessity for a new trial at all.

Appeal allowed.

ALTA.

S. C.
1914

HAUG v. BLAIR.

Alberta Supreme Court. Trial before Stuart, J. February 6, 1914.

1. SALE (§ II C—35)—WARRANTY IMPLIED AS TO QUALITY—MANUFACTURER'S OBLIGATION TO SUPPLY NEW COMMODITY.

Primâ facie a person sending an order for an engine to the manufacturer thereof is entitled to receive a new engine, and where the seller varies the implied warranty in this respect by representing that the engine delivered in response to the order had not been used except for "a little use on the fair ground," the alleged variance will be strictly construed.

[See also *Haug* v. *Baade*, 15 D.L.R. 520.]

Statement

ACTION for the price of an engine secured by promissory notes, involving (*a*) the seller's alleged obligation to deliver a new engine (with a stipulated variance) in response to the defendant's order, and (*b*) the defendant's counterclaim for damages for breach.

Judgment was given for the defendant in the sum of $800 as the result of his off-sets.

Palmer, for plaintiffs.

R. A. Smith, for defendant.

Stuart, J.

STUART, J.:—This is an action for the price of an engine and some attachments which had been secured by promissory notes.

The defendant in 1911 lived near Carmangay, in this province. At that point, one Husted was the sales agent for the plaintiffs. According to the evidence, both of the defendant and of Husted, what occurred prior to the sale was this: The defendant sent word to Husted that he wanted to buy an engine. Husted enquired by telephone of Williamson, who represented

the plaintiffs at Calgary, whether an engine such as defendant wanted was on hand. He was informed, so he said, that they had a new engine which had not been used except for a little use on the fair ground. He then went to defendant and told him that there was an engine in Calgary which had been used only on exhibition and that that was all the work the engine had done. The defendant then signed an order for the engine at the price of $4,000. The order was sent in to Calgary by Husted and then one Burr, another representative of the company at Calgary, telephoned to Husted, according to Husted's story, that the order had been accepted, but gave Husted to understand that the engine was practically a second-hand engine. Burr did not ask Husted to communicate this to the defendant, but, according to Burr's evidence, he told Husted that the order was not in proper form, that a new order would have to be drawn, and that the engine was one which one Truen had used for some time.

Nothing was said in this conversation about the use of the engine at the fair grounds. There is practically no material conflict between the evidence of Husted and that of Burr as to this conversation. What is material is this that Husted never communicated to the defendant the substance of this conversation. Without waiting, however, for the receipt of another order the plaintiffs shipped the engine to Carmangay to their own order and Williamson went down on the same mixed train. He then met the defendant. The two looked at the engine on the car and the defendant expressed some doubt about the engine being new and being the one he was supposed to get. Williamson again stated that it had been used on the fair grounds, but not otherwise. They then went to the station and the defendant paid the freight on the engine. Williamson then said he was in a hurry to get back on the same train which then only went as far as Carmangay and asked the defendant to sign the notes in question which he did. Williamson then produced another contract for the defendant to sign. The defendant asked him what was the matter with the prior contract whereupon Williamson said that there were some articles which went with the engine which were not mentioned in the prior contract. The defendant says that he then read the contract handed to him in order to see if it referred to a second-hand engine, and having satisfied himself that it did not, he signed it. The second contract, in fact, contained, written in ink near the beginning, the words "this being a second-hand engine." The defendant swore that these words were not there when he signed it.

I am bound to say that I am not prepared to disbelieve the defendant when he makes this positive statement. He is not

ALTA.

S. C.
1914

HAUG
v.
BLAIR.

Stuart, J.

contradicted; and Williamson, the only man who could have contradicted him was not called by the plaintiffs, nor was his absence very satisfactorily accounted for. It is true he was no longer in their employ, but they must have known that he could give very important evidence on some of the most essential points in the case, particularly on the point now in question which had been sworn to on the defendant's examination for discovery, and they gave no evidence of having made any effort to secure his attendance. In the next place it is proven quite conclusively, both by the evidence of Blair and that of Husted, the sales agent, that Williamson lied directly to both of them in stating that the engine had never been used except at the Calgary Exhibition because Burr stated that it never had been exhibited at the fair at all but had been used by Truen. For these reasons I think I ought to accept Blair's statement. If Williamson is the kind of man he appears to be I do not think I should consider an alteration of the contract by him after signature as so entirely out of the question that Blair, who swears positively to the alteration, who did not appear to be an untruthful man and who was not contradicted, must be directly disbelieved. The defendant took the engine home and used it during the fall. On January 3, 1912, he wrote the company, making some complaints about some defects in the engine, which the company by letter of January 9, promised to repair. Nothing more occurred for over a month when defendant wrote again, stating this time that he had not got the right engine, and, in answer to this Burr went down to see him and had an interview with him on February 22. Then Blair told Burr, that he had heard that the engine was second-hand and had been used by Truen. To this, of course, Burr assented, saying that it had plowed one hundred and fifty acres. But Blair, in his own evidence, said that Burr had promised to fix the engine up as good as new, to fix up anything that was wrong with it and to send an expert down to put it in first-class condition, and that it was only upon the condition of their doing this that he had agreed to keep it. Burr drew up a letter which Blair then signed, as follows:—

Dated at Carmangay, Feb. 22, 1912.

Haug Bros. & Nellermoe Co., Ltd.,
Winnipeg, Man.

In regard to the engine I bought from you last fall I require the following allowances to make the engine satisfactory and acceptable to me:—

8 No. 1450 rocker grates.

1 No. 1574 gear on int. shaft, slow speed.

1 No. 1576 clutch pinion, slow speed.

1 3 inch main globe valve and express on same which was sent C.O.D. and which I paid for.

1 injector.

Express and all charges for straw burning parts shipped by express from Winnipeg at time engine was shipped from Calgary; $20.15 paid C. H. Bright for fittings that were frozen on engine when it arrived.

The governor has never worked well on the engine, and the throttle valve has always leaked, but I think these may be fixed so that they will work. However, if they cannot be made to work right, I will also require them to be replaced with new ones that will work right.

If you will make the above allowances and adjustments, the engine will be satisfactory to me and I will pay my note on May 1, 1912.—F. H. BLAIR.

In view of my acceptance of Blair's statement that the contract sued upon (the second one) had been altered, it makes little difference which contract is taken as the basis of the plaintiff's claim, whether the first, or the second, with the reference to the engine being second-hand expunged. In either case it is clear that the contract was made with reference to a new engine which had only been used at the fair grounds and that upon discovering the real facts the defendant had a right to repudiate the contract entirely. He did not choose to do so, but affirmed the contract upon the conditions mentioned in the letter quoted and upon the verbal condition which the letter itself practically confirms that the company would make the engine work satisfactorily, or put it in first-class condition. Before referring to subsequent events, I may observe that, at that time Blair had not learned completely of the untruthfulness of Williamson's representations, for one of those representations was clearly that the engine had been used for demonstration purposes at the Calgary Exhibition. If it were possible to treat this as a distinct misrepresentation (because Burr admitted that it had never been shewn there at all) it would not even now be too late to give the defendant the right of repudiation. But nothing was made of this at the trial, and it seems to me that this statement was only another way of representing the engine to be a new one which the defendant knew, when he signed the letter of February 22, not to be the fact. What happened subsequently was this: On March 14, the defendant wrote the plaintiffs saying that he was "waiting for the return of our settlement" and that he could not wait much longer. On March 18, Burr replied on behalf of the company that he had written the company on Feb. 26, making a full report of what happened on the 22nd, and that the company had decided to supply him with all the parts at a very early date. He also promised that he would have an expert call on the defendant later in the season who would see that the governor and throttle were put in shape so that they would work all right. The defendant got a couple of pinions, as he said, from the company,

ALTA.

S. C.
1914

HAUG
v.
BLAIR.

Stuart, J.

secured an expert himself who did some repairing on the engine. Then he did about a day and a half of ploughing and found the engine not working satisfactorily. He used then an old 25 h.p. Case engine that he had for seven years and continued to use it, waiting for the company's expert. This man, Bailey, arrived on July 9, and spent a good part of the day fixing the engine. Then he induced the defendant to sign the following document:—

> July 9, 1912. Dated at Carmangay, Alberta. Haug Bros. & Nellermoe Co., Ltd., Winnipeg, Man., and Regina.—This is to certify that your Mr. Bailey of Regina, Sask., has this day been at our engine and fixed governor and throttle and has agreed to send me governor, stem, and mart, free, that will fix my engine, also governor spring, in a satisfactory manner and that the machine purchased now fully satisfied the warranty.
>
> F. H. BLAIR.

The defendant refused at first to sign this document until Bailey had steamed up the engine, hitched to twelve ploughs and proved that it would work, but Bailey said he could not do that until he had the parts and that if Blair did not sign it, the company would not recognize his work or that he had ever been there, and so for that reason Blair signed it. This is Blair's account. Bailey was not called as a witness. One Mr. May, a livery man, who drove Bailey out, testified that he heard the conversation, heard Blair refuse and finally agree to sign when Bailey said the document was merely a recommendation to the company to put the engine in repair. The defendant also testified that the document did not mention everything that Bailey had agreed to send. He waited for some time for the repairs to come. Bailey sent after a while eccentric straps, but the governor stem and mart did not come till later in the fall; the exact date of their receipt was not given. Then the defendant began to use the engine again. He had by this time received all the repairs asked for. He attempted to use the engine in running a threshing separator and also in doing plowing for a day and a half. He said that it would not work properly. The company were pressing for payment and finally took possession of the engine in the fall of 1912 and then brought this action of April 18, 1913.

My view of the case is that the plaintiff company never did fulfil the conditions upon which alone the defendant agreed to waive his right of rejection for misrepresentation. With regard to the memorandum of July 9, its opening sentence tends to confirm the account given by the defendant of the manner in which it was obtained. It starts off by certifying that Bailey had been there, which shews that that was the important thing in Bailey's mind when he proceeded to draw it up. As a certificate of satisfaction it is self-contradictory because it shews

ALTA.
S. C.
1914
HAUG
v.
BLAIR.
Stuart, J.

on its face that something more was needed before the engine would be satisfactory. It is true that the defendant admitted that all "the repairs" required were to be sent, but it is clear that a new governor and throttle, which I think were not considered as "repairs" when the defendant made the statement, were never sent. The letter of February 22 clearly contemplates the possibility of a new one being required. It may be and I am inclined to think it is the fact that the repairs to the governor which were eventually sent, that is, the governor stem and mart and the governor spring mentioned in the memorandum of July 9, were found sufficient to obviate the necessity of a new governor and throttle. But, notwithstanding the receipt of all the repairs, there still remained the general condition that the engine should work satisfactorily and be put in first-class condition before the defendant was to be taken as having waived his right of rejection. There is no contradictory evidence as to the manner in which the engine worked in the fall of 1912 after the repairs came. The evidence is all one way and I can come to no other conclusion than that, notwithstanding the receipt of the repairs mentioned, the engine never did work satisfactorily and never was put in first-class condition as the plaintiffs had agreed to do. Assuming, however, that it was for this reason open to the defendant still to reject the machine when he found that it was not in a satisfactory condition, I think he was bound to notify the plaintiffs of his rejection of them. So far as the evidence shews, he does not seem to have done this. It was stated that the plaintiff had resumed possession of the goods some time in the fall of 1912, but the exact date was not given. I think, however, that it is fairly clear that this resumption of possession did not take effect until after the lapse of a reasonable time within which the defendant should have notified the plaintiffs that he rejected it. For this reason, I think the result is that the property in the machine must be held to have finally passed to the defendant and that he is liable for the agreed price.

It remains to be considered whether the plaintiffs are liable for damages.

The contract, whichever one is taken as the basis of the legal relations between the parties, contains the usual long and involved warranty, the fourth clause of which reads as follows:—

> This warranty does not cover second-hand machinery and the purchaser hereby agrees to accept such machinery just as it stands without any warranty whatever.

Inasmuch as the machinery was in fact second-hand, I think that it is clear that the printed warranty does not apply and inasmuch as I have found that the defendant was induced

ALTA.
S. C.
1914
HAUG
v.
BLAIR.
Stuart, J.

to enter into the contract by a false representation that it was in fact a new machine which it was intended to send him, it seems to me that he is not bound by the stipulation that there was to be no warranty at all. It may be said that he can only take advantage of this in respect of damages accruing up to February 22, because he then chose to affirm the contract. But, in my opinion, this makes no practical difference because by the bargain he made then to accept the machine upon terms he obtained the same advantage, that is, he in effect stipulated that the plaintiffs must put the machine in first-class condition. This they never did, and although he lost his right of rejection for the reasons I have given, I think he is still entitled to damages for their failure to perform the promise by which they secured his affirmance of the bargain. Up to February 22, I think the machine was held under the implied warranty set forth in sec. 16, sub-sec. 1, of the Sales of Goods Ordinance, viz., that it was reasonably fit for the purpose. And I think that the substantial effect of the bargain of February 22 was to continue that warranty. The consequence is that the defendant is entitled to damages to the extent of the difference between the purchase price and the actual value of the engine. As the plaintiffs have retaken possession of the machine, I think they should be permitted to sell it to the best advantage they can and thus ascertain the real value of the machine. It has been in the plaintiff's possession since seizure and I assume it has been well cared for. The proceeds of this sale should be credited on the plaintiff's judgment against the defendant. The difference between this sum and the balance of the plaintiffs' judgment should be treated as the amount of the defendant's damages for breach of warranty so far as the value of the machine is concerned. These sums will therefore off-set entirely the plaintiffs' judgment.

I think the defendant is entitled to some additional damages in respect of the work of the fall of 1911. I think there was a clear breach of the implied warranty of fitness for the purpose for which the engine was sold. It is difficult, however, to arrive at any very definite amount at which these should be assessed upon the evidence. As usual in such cases, the evidence is indefinite and wavering. One thing is plain, however, viz., that the defendant had to spend about $400 for repairs which he should not have had to do. Then I think something should be allowed for the time lost that fall. But I cannot with any certainty allow more than $400.

I therefore give the defendant judgment against the plaintiffs for $800 and costs. The plaintiffs are to be at liberty to keep the machine and make the most out of it that they can.

Judgment for defendant.

RUTLEDGE v. ANDERSON.

MAN.

K. B.

1914

Manitoba King's Bench, Curran, J. February 9, 1914.

1. MORTGAGE (§V—63)—FRAUDULENT DISCHARGE—FRAUD BROUGHT HOME TO MORTGAGOR'S AGENT—ONUS ON BENEFITED PARTY.

A person cannot avail himself of what has been obtained by the fraud of another, unless he himself not only is innocent of the fraud but has given some valuable consideration, and where a mortgagee executes a release of his mortgage at the request of the mortgagor and his agent and such request is tainted with fraud which is brought home personally to the mortgagor's agent only, the onus is on the mortgagor not only to establish his own innocence of fraud in the transaction but to prove that he has given valuable consideration to the mortgagee for the release.

[*Scholefield* v. *Templer*, 4 DeG. & J. 429 at 434, 45 Eng. R. 166 at 168; *Eyre* v. *Burmester* (1862), 10 H.L.C. 90, 11 Eng. R. 959, specially referred to.]

Statement

ACTION to have a discharge of mortgage obtained by the alleged fraud of defendants rescinded.

Judgment was given for the plaintiff.

F. L. Davis, for plaintiff.

F. G. Taylor, K.C., for defendant.

Curran, J.

CURRAN, J.:—The plaintiff sues for rescission of a discharge of mortgage executed by him, exhibit 7, and placed by him in the hands of a solicitor for registration, and for a declaration that the mortgage in question is still a subsisting mortgage security notwithstanding the agreement to discharge same and the execution of such discharge on the ground that there has been a failure of the consideration for the agreement for such discharge and in pursuance of which it was executed by the plaintiff and delivered to the solicitor, and that the plaintiff was induced to execute the said discharge by the false and fraudulent statements of the defendants.

The plaintiff is the mortgagee named in ex. 1, made by Albert W. Peterson on certain property in the town of Gladstone known as the Travellers' Hotel, for securing the sum of $7,982.45. This mortgage is a third mortgage upon this property, there being prior mortgages securing between $9,000 and $10,000 upon the same property.

The defendant Anderson defends the action, but the defendant Laurie does not, and interlocutory judgment has been signed against the latter defendant.

The defendant Anderson purchased the property in question at a price less than the aggregate amount of the encumbrances. The sale was agreed to by the mortgagees, including the plaintiff, and an abatement in the respective amounts of the mortgages was agreed to by the respective mortgagees to enable the sale to go through, which otherwise would have been impossible.

Mr. Hull, a solicitor of Winnipeg, acted for the mortgagees

MAN.
K. B.
1914
RUTLEDGE
v.
ANDERSON.
Curran, J.

in completing the sale and adjusting the abatements necessary to be made on the various mortgages. New mortgages for the reduced amounts were to be given to the several mortgagees by the purchaser, Anderson, and discharges of the old mortgages obtained and registered. It was for this reason that the discharge of mortgage in question was handed to Mr. Hull instead of being given to the defendant Anderson.

Now, matters were in this position when the defendant Anderson, who was in possession of the hotel at Gladstone, telephoned to the plaintiff, who lives at Neepawa, that he was going down to Winnipeg on January 30, 1913, to adjust the plaintiff's mortgage, and requested the plaintiff to go down to Winnipeg at the same time. To this the plaintiff agreed, and the parties met on the train to Winnipeg, where some conversation took place about a settlement of the plaintiff's mortgage by his taking lands in British Columbia or Winnipeg in payment.

After reaching Winnipeg the defendant Anderson suggested to the plaintiff a visit to the Queen's Hotel, to which place they resorted, and there met a man who was introduced by Anderson to the plaintiff as J. A. Laurie, one of the defendants in this suit. The plaintiff had never met Laurie prior to this.

The defendant Anderson asked Laurie if he could shew the plaintiff "that fruit land," and the three went upstairs to a room where Laurie produced some maps and plans of British Columbia land. Some discussion as to price and location took place, and the plaintiff says Anderson then suggested his taking some Winnipeg property on his mortgage. Nothing further then transpired.

Up to this time the plaintiff says the amount coming to him from the defendant Anderson in respect of his mortgage had not yet been ascertained or adjusted. For this purpose the plaintiff and the defendant Anderson went to Mr. Hull's office, and while there such amount was ascertained and communicated to both Laurie and Anderson.

The same day Laurie and the plaintiff viewed two houses on Lansdowne avenue which Laurie offered to sell the plaintiff for $12,000. The price of one of these, No. 158, was quoted by Laurie to the plaintiff at $6,500.

The same day the plaintiff and Anderson went to see a house near the C.P.R. shops, referred to as the Tully House, which Anderson wanted the plaintiff to take on the mortgage, but which the plaintiff refused to do.

The plaintiff says that the same evening after supper, about half past seven, he met Laurie again at the Strathcona Hotel, and had some further conversation with him about the house on Lansdowne street, and the British Columbia fruit lands, that Anderson suggested going upstairs to transact their business, whereupon all three, plaintiff, Laurie and Anderson, went upstairs

to the hotel parlor, when an agreement was reached whereby the plaintiff was to take twenty-five acres of British Columbia land, the house, No. 158 Lansdowne avenue, subject to a mortgage, and Anderson's notes, endorsed by Laurie, for $1,000 in payment of his mortgage, which was then agreed to be discharged. Exhibit 2 was prepared and executed, also ex. 3, and the two notes, exs. 4 and 5. The plaintiff swears positively that these documents were all signed at the same time and in the presence of all three parties as the culmination of their agreement.

Anderson says that Tully House was viewed in the forenoon by himself and plaintiff and that after this, and shortly before noon, he and the plaintiff went to the Queen's Hotel to have a drink, and there, apparently quite by accident, met Laurie for the first time. He says he did not go to the Queen's Hotel to meet Laurie. It is evident Anderson wishes to give the impression that the meeting with Laurie was accidental and unpremeditated. I do not believe it was accidental, and am satisfied that Anderson all along had it in his mind to bring Laurie and the plaintiff together from the time the visit to Winnipeg was suggested by him. I think the defendant Anderson purposely took the plaintiff to the Queen's Hotel to introduce him to Laurie in the hope and expectation that some deal for British Columbia lands might be made which he would turn to his advantage on account of the mortgage.

Nothing was done at the Queen's Hotel in the way of transacting business, but apparently it was arranged that Laurie should come to the Strathcona Hotel in the afternoon to go further into the land matter with the plaintiff, which he did, meeting the plaintiff and Anderson there in the afternoon as before stated. He offered to give the plaintiff the house in Winnipeg on Lansdowne street, which was mortgaged, and some British Columbia fruit land, which was to be clear of encumbrances, for his mortgage.

It does not appear, nor does Anderson explain how Laurie came to know anything about plaintiff's mortgage. I am satisfied that he learned of this from Anderson himself, and may have got further particulars from the plaintiff when they met in Winnipeg.

According to Anderson's evidence the plaintiff and Laurie that afternoon went away to look at the house on Lansdowne avenue, returning to the Strathcona Hotel about half-past three in the afternoon, when they, Laurie and the plaintiff, went upstairs alone and remained there for the space of about an hour; he, Anderson, remaining downstairs and taking no part in whatever business they were discussing. Continuing, Anderson says the plaintiff and Laurie came down to the rotunda of the hotel where he, Anderson, was sitting, and that the plaintiff came up to him and said, "Laurie and I have made a deal if you are satisfied;" upon which Anderson asked him what the deal was, to which the plaintiff replied, "You (meaning the defendant Anderson) are

MAN.
K. B.
1914
RUTLEDGE
v.
ANDERSON.
Curran, J.

to give me $1,000 cash and Laurie and I can close our deal." The defendant replied that he could not do that as he had not the money. He goes on to say that Laurie sat down and went on to shew him that he, Laurie, was getting square with the defendant for the $800 debt, and that he would give Anderson any time he wanted to pay the balance, upon which the defendant Anderson says he told Laurie that he would not pay any more than $3,000 for the mortgage.

It may be mentioned here that the defendant Anderson claimed to hold notes against the defendant Laurie to the amount of $800, which is the debt above referred to.

It is further to be noticed that the defendant Anderson claims that up to this moment when the parties came downstairs as above related nothing had been agreed upon or arranged between him and Laurie relative to the plaintiff's mortgage.

I may say here that I very much question the truthfulness of this statement.

The upshot of the matter was, according to Anderson's testimony, that he finally agreed to give the plaintiff his notes for $1,000 to be endorsed by Laurie to help through the bargain, whatever it was, that Laurie and the plaintiff had tentatively reached upstairs. He positively asserts that anything else that was to be given (I presume for the mortgage) was wholly between the plaintiff and Laurie. This seems somewhat extraordinary if there had been no pre-arrangement between Laurie and Anderson as to how Laurie was to negotiate for the plaintiff's mortgage.

However, Anderson says that the plaintiff agreed to ths proposition, and the parties then and there adjourned to a table on the south side of the hotel rotunda, when the agreement, ex. 2, receipt, ex. 3, and the notes, exs. 4 and 5, were all drawn up and signed, and that the whole matter was completed by half-past five o'clock.

He denies most positively that he was upstairs with Laurie and the plaintiff at any time that day.

Now, Anderson is corroborated in some respects by two very respectable witnesses, Tully and Wallace. Tully says he was at the hotel on that afternoon waiting to know what might be done about the purchase of his house, and that he saw Laurie and the plaintiff come *apparently* from upstairs, heard the plaintiff say to Anderson: "Laurie and I have made a deal, and it can go through provided you give me $1,000 cash," to which Anderson replied he wouldn't do anything of the kind; that he heard Laurie trying to persuade Anderson to accept the plaintiff's offer and pay the $1,000. He remembers hearing Anderson saying something about notes he was to give the plaintiff, and that all this took place in the hotel rotunda downstairs. He further says that after this Anderson and Laurie approached him and one of them asked him to go *upstairs* and draw an agreement for them, which he refused to do.

His reference to being asked to go upstairs to draw papers is not without significance in view of what the plaintiff says upon this point.

Wallace, also called by the defendant, says that he was at the Strathcona Hotel on the afternoon in question and saw Laurie and the plaintiff go upstairs, while Anderson remained with him talking until these parties came down again about four o'clock. He says he heard one of them say to Anderson they had made a deal if it was satisfactory to Anderson. He got up at once and walked away, not wishing to overhear their private business.

Now, from all this it is clear that Laurie and the plaintiff were alone together for a considerable time upstairs in the hotel that afternoon, and that plaintiff certainly did announce to Anderson that he and Laurie had made a bargain about something which required the approval of Anderson, and the payment by him to the plaintiff of $1,000; but neither of these independent witnesses says a word about papers being drawn or seeing any such drawn or signed. From the request made to Tully to go upstairs and draw up an agreement, it would seem that the parties wanted greater privacy than the hotel lobby afforded. So Anderson's evidence stands uncorroborated as to the documents being signed downstairs in the afternoon and not upstairs in the evening, as the plaintiff says was the case.

It is here that Johnson's testimony becomes important. He says the plaintiff and he had supper at Bowes' Dairy Lunch and returned to the Strathcona Hotel about half-past seven in the evening. Anderson and Laurie were there, and he heard Anderson say to the plaintiff, "Come on, boys, and let's do something," upon which Anderson, plaintiff and Laurie went upstairs and remained about an hour. This agrees with what the plaintiff says happened after supper that evening.

I accept the plaintiff's evidence on this point in view of the corroboration by Johnson and what was said to Tully.

All this, however, is only important in considering how far the defendant Anderson is to be held to have been a party to the agreement with Laurie, a fact which he disputes.

I think unquestionably he was a party to the agreement, and so hold upon the evidence.

The paper, ex. 2, is of itself meaningless. No legal effect could be given to its provisions either for or against the plaintiff or Laurie. It is merely an item in the dealing that took place between the parties when it was signed. The receipt, ex. 3, is not conclusive against the plaintiff as between him and Anderson. It is competent to the plaintiff to shew that notwithstanding the terms of the receipt he did not in fact receive payment for his mortgage as therein stated. In fact, I think that these documents only in part evidence the agreement that was then made, and that parol evidence is clearly admissible to shew what the

MAN.

K. B.
1914

RUTLEDGE
v.
ANDERSON.

Curran, J.

whole agreement was in virtue of which these documents were signed.

It is evident that ex. 2 does not contain within itself a complete agreement. It can be shewn what consideration Laurie was to receive from the plaintiff for the property therein described. The same applies to the receipt, ex. 3, and the notes, exs. 4 and 5. These various documents may be connected and the whole transaction, which was partly verbal and partly written, proved by parol evidence.

I think it is clear that Anderson wanted to get a release of the mortgage, ex. 1, without paying even the $6,500 which he would have been liable for in virtue of the terms of his purchase of the hotel. Whether or not there was any privity of contract in writing between Anderson and the plaintiff creating an obligation on Anderson to pay this mortgage, such obligation in fact existed by virtue of his purchase of the hotel property and would be implied in law as part of the purchase price. Had no such arrangement been made as is here disclosed, the defendant Anderson undoubtedly as a term of his purchase must have executed a new mortgage to the plaintiff for $6,500. Mr. Hull's evidence makes this clear, and serves to explain that the transaction in question was one for the benefit of Anderson alone. Laurie had no interest in the mortgage; he was not buying it for himself. If he had been it would have been assigned to him to be kept on foot and not discharged as was done.

I find that the transaction as agreed to on the night of January 30, 1913, amounted to this: Anderson wanted to get rid of his liability in respect of the plaintiff's mortgage. Laurie, unknown to the plaintiff, was indebted to Anderson to the extent of $800, and was willing to make a turn of business whereby he could discharge his debt without paying money. He was introduced by Anderson to the plaintiff and induced the plaintiff to accept the house and lot in Winnipeg and 25 acres of British Columbia fruit lands in part payment of this mortgage, intending to adjust matters with Anderson later. The plaintiff was willing to accept these properties in part payment on getting a further sum of $1,000 from Anderson.

Matters had so far been agreed to when it became necessary to bring Anderson into the transaction, which was accordingly done in the manner indicated by Tully and Wallace. It then became necessary to apprise Anderson of what had been done, and the parties went upstairs when the whole and real agreement was reached. I find that this agreement was that the plaintiff accepted the terms offered, namely, the house and lot in Winnipeg, with not more than $3,925 against it, 25 acres of British Columbia lands, to be clear of encumbrances, and Anderson's notes for $1,000, to be endorsed by Laurie, in consideration of which he was to execute a discharge in full of his mortgage. This, I gather

from the evidence, was the actual bargain made, and which was tentatively and in part expressed by exs. 2, 3, 4 and 5.

I think Anderson, by his actions and conduct, became bound by it, at all events to the extent that he is precluded from enjoying the benefits that would accrue to him under it until the whole consideration had been paid. I think the only reasonable and proper conclusion to draw is that the plaintiff gave the receipt, ex. 3, on the faith and expectation that he would get the land and not merely Laurie's promise of the land. It was doubtless a most foolish and unbusinesslike thing for the plaintiff to do; but I incline to think he was overborne at the time by Anderson and induced to sign the receipt without realizing the position in which his so doing might ultimately place him. I do not believe he ever contemplated for a moment that Laurie was deceiving him and had no title to the land he was to get. Throughout the whole matter Laurie was acting solely in the interests of Anderson and was putting up for Anderson the major part of the consideration for the discharge of the mortgage, and to this extent I think he must be taken to have been representing Anderson, if not actually his agent. At all events, Anderson cannot, under the circumstances, be permitted to take advantage of Laurie's fraud. It appears that Laurie never in fact owned or had any title to the lands he agreed to sell the plaintiff, and the plaintiff got literally nothing under the agreement except Anderson's notes. These were returned to him before action was commenced.

The next day, January 31, plaintiff and Anderson went to Mr. Hull's office and the discharge of mortgage, ex. 7, was prepared and signed. A mistake in drawing this document prevented its present use, but this was ultimately rectified, as appears by the alterations in the discharge. Next, Anderson and the plaintiff went to the office of the locators, where Laurie was waiting for them, and ex. 6, which Laurie had with him, was produced, and after some discussion and certain alterations was executed by the plaintiff and Laurie.

It is to be noted that the relative position of Laurie and the plaintiff are changed by this document from what they were under ex. 2. Plaintiff is now made a purchaser of the Winnipeg property at $6,000, to be paid by the plaintiff assuming encumbrances to the amount of $3,925, and the balance of $2,075 is to be applied towards discharging plaintiff's mortgage, and 25 acres of British Columbia land is to be taken to close up and discharge the balance of this mortgage. The title to this land was to be clear and turned over to the plaintiff within ninety days. It is to be noticed that the consideration for this purchase over and above encumbrances was all to be applied in payment of the plaintiff's mortgage.

The whole matter was executory and conditional upon title being made. If Laurie failed to make title the contract ceased to be binding on the plaintiff and his mortgage remained unpaid.

MAN.

K. B.
1914

RUTLEDGE
v.
ANDERSON.

Curran, J.

Now the plaintiff says when he saw ex. 6 he said it was not the kind of a paper he expected to receive; that he expected to get the house and lot immediately, to which Anderson replied that this was the best they could do, as they required some time to get title to the British Columbia lands. I believe this statement of the plaintiff's. It is one which might well be expected under the circumstances, and it shews that Anderson was not ignorant of the position of matters, and that he acquiesced in what was being done. He knew that by the terms of this agreement the greater part of the consideration which the plaintiff was to receive for the discharge of his mortgage, which had then actually been signed, was represented by the lands mentioned in this agreement, ex. 6. He knew that if the plaintiff did not ultimately get the land the whole agreement must fall through. He knew that ninety days was allowed by the agreement to perfect title to the British Columbia lands, during which period the whole matter must be held in suspense.

A difficulty, however, is alleged to exist in relieving the plaintiff, because it is said Anderson cannot now be restored to his former position inasmuch as he has parted with his money and notes to Laurie, relying on the receipt, ex. 3, and discharge, ex. 7.

The evidence is that Anderson paid Laurie $150 cash and gave him back his notes, representing $800 and interest, that same night, January 30, after the bargain with the plaintiff had been made. This was not done in the plaintiff's presence, nor was the plaintiff informed of the fact. The next day he paid Laurie $450 in cash and got from him the receipt, ex. 13. On the 8th day of February following he paid a further sum to Laurie of $500 and got from him the receipt, ex. 14. These payments were made on account of the very properties Laurie was to give the plaintiff, and these moneys were all paid before the period allotted by the agreement for making title to the British Columbia lands had arrived. Surely in paying this money Anderson deliberately took his chance of title being made.

The plaintiff knew nothing of these payments; they were kept secret by Anderson, and yet, on the strength of these secret and, I think, premature, payments, an equity is sought to be raised against the plaintiff's right to succeed. In other words, if the plaintiff has been deceived to his loss so also has the defendant Anderson by the folly of the plaintiff in giving him the receipt, ex. 3, upon the strength of which he says he was induced to part with his money and property.

If the facts were really thus there might be some ground for the contention. But they are not. The defendant Anderson got the receipt, ex. 3, solely for his own protection and to shew that the mortgage was paid through the medium of the tentative agreement then made and for no other purpose. The giving of this receipt did not place him in any different position from that

in which he was before, because he must have known that he could not safely rely on it, or even on the discharge of mortgage until Laurie had done his part by giving the plaintiff a title to the land. I think he gratuitously and prematurely made these payments, and was not induced to do so through reliance on the plaintiff's receipt. He had no right, under the circumstances, to rely on it, or to pay the money when he did, and these payments, in my judgment, do not aid him in resisting the plaintiff's claim.

There has been an entire failure of that part of the consideration under the agreement to be contributed by Laurie. He had in fact no title to the lands mentioned in ex. 2 or ex. 6, and fraudulently entered into these agreements to deceive the plaintiff and benefit his co-defendant Anderson.

I hold there was but one agreement by which the plaintiff's mortgage was to be discharged, partly oral and partly written, entered into by the parties, all being present and assenting to its terms, which were that in consideration of the defendant Laurie conveying or causing to be conveyed to the plaintiff the house and lot on Lansdowne street, No. 158, subject only to the encumbrances to the amount of $3,925, and 25 acres of lands in British Columbia, Cranbrook district, East Kootenay, clear of encumbrances, and the giving to the plaintiff of two promissory notes for $500 each, made by the defendant Anderson and endorsed by the defendant Laurie, the plaintiff would release and discharge his mortgage to the defendant Anderson; that the plaintiff, relying on this agreement, and in good faith believing it would be carried out in its integrity by the defendants, signed the receipt, ex. 3, and afterwards the discharge of mortgage, ex. 7, and the agreement, ex. 6, and accepted the defendant's notes. That he was induced so to do by the gross fraud and misrepresentation of the defendant Laurie is unquestionable; but I cannot find that the defendant Anderson is chargeable with any direct knowledge of this fraud or of participation therein, but he was to be benefited thereby at the expense of the plaintiff. Can he retain such benefit or any benefit obtained by the fraud of another though innocent himself?

In *Scholefield* v. *Templer*, 4 DeG. & J. 429 at 434, 45 Eng. R. 166 at 168, the Lord Chancellor, Lord Campbell, said:—

> I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable consideration. In the present case a gross fraud was practised by Bell. He represented that he had a mortgage which could be assigned as a security, and he executed a deed purporting to transfer a mortgage which in fact did not exist. It is quite clear that the plaintiff must be taken to have given the letter of July, 1851, and erased Templer's name from the notes and bill, in the belief that he had a mortgage security for the money in respect of which Templer was a surety. The bill is filed against Templer as a surety, and the de-

MAN.

K. B.

1914

RUTLEDGE v. ANDERSON.

Curran, J.

fence which he sets up is a release obtained through the fraud of Bell, a defence which, in my judgment, cannot be sustained.

Now, I think this case is much in point, and if the defendant Anderson cannot be shewn, in addition to his innocence of the fraud practised by his co-defendant, to have given some valuable consideration for the release of mortgage, he cannot be permitted to retain any benefit from the agreement so fraudulently induced.

The only consideration he gave was, I think, his notes for the $1,000, and to this extent, perhaps, he would be entitled to protection if he had in fact paid the notes, but he has not paid the notes, and these were returned to him by the plaintiff. Can it be held that the moneys and securities handed over by him to his co-defendant were in any sense consideration moving from him to the plaintiff? I think not. These payments were not connected with the agreement to release the mortgage, and do not directly arise out of it. They simply go to shew more clearly the correctness of the plaintiff's contention that the defendant Anderson procured his co-defendant Laurie to agree to convey the lands referred to in ex. 2 to the plaintiff in part satisfaction of the mortgage, and to indemnify him for so doing.

If Anderson undertook to make such indemnity before Laurie had performed his part of the agreement, he did so absolutely at his own peril. There was no obligation resting on him at the time these payments were made to make them. Laurie had done nothing to entitle him to the money and surrender of the notes. The defendant knew that if Laurie did not or could not make title to the lands to the plaintiff, to that extent there was default under the agreement and a failure of the consideration that plaintiff was to receive. If he was bound to indemnify Laurie, he ought to have waited until Laurie had, by conveying the lands to the plaintiff, acquired a right to such indemnity.

The case of *Eyre* v. *Burmester* (1862), 10 H.L.C. 90, 11 Eng. R. 959, may also be referred to as holding that a mortgagee's rights to the land mortgaged were not lost by executing a release which had been obtained from him by fraud.

Upon the whole I think the plaintiff is entitled to succeed, and there will be judgment declaring that the plaintiff's mortgage is still a valid and subsisting charge or security on the lands therein mentioned; setting aside the agreement between the parties for the discharge of such mortgage, and also setting aside the discharge of such mortgage, ex. 7, in the hands of the solicitor, Hull, and ordering same to be delivered up to be cancelled. The plaintiff will have his costs of suit to include any examinations for discovery had in the action.

Judgment for plaintiff.

CUNNINGHAM v. ST. PAUL FIRE AND MARINE INS. CO.

B. C.

S. C.

1914

British Columbia Supreme Court, Macdonald, J. January 14, 1914.

1. INSURANCE (§VI H 1—415)—ACTION— MARINE POLICY—CONSTRUCTIVE TOTAL LOSS—ABANDONMENT.

An action under a marine policy of insurance for a constructive total loss cannot be sustained where the underwriters have consistently refused to accept the abandonment, and have instead repaired the vessel within a reasonable time at a cost less than the value of the boat.

[*Hudson* v. *Harrison*, 3 B. & B. 97, 129 Eng. R. 1219; *Provincial Insurance Co. of Canada* v. *Leduc*, L.R. 6 P.C. 224; *Corg* v. *Burr* (1882), L.R. 9 Q.B.D. 463 at 469; *Shepherd* v. *Henderson*, 7 A.C. 49 at 62; *Marsuand* v. *Melledge* (1877), 123 Mass. 173, specially referred to.]

Statement

ACTION under a marine policy to recover as for a total constructive loss of the boat insured.

The action was dismissed.

E. A. Lucas, and *H. W. Bucke*, for plaintiff.

John Pugh, for defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff, on April 29th, 1912, insured his motor boat "Sterling C" for one year with the defendant company in the sum of $3,500. The boat was of an admitted value of $4,500. It received slight damage through a collision and was, apparently with approval of plaintiff, being repaired by defendant company under terms of its policy when, on December 9, 1912, it received further substantial damage by fire. C. P. Sargent, on behalf of the insurance company, came from Portland, Oregon, to adjust the loss. He appears to have had full power to represent his company and his statements and actions throughout are, in my opinion, binding upon the defendant. After viewing the extent of the loss, Sargent interviewed parties as to cost of repairs and a meeting was arranged with the plaintiff at the local office of the insurance company. There is considerable contradiction as to what actually took place at this interview. Plaintiff contends that no conclusion was arrived at and that he was anxious first to see the extent of the loss. I do not think this knowledge was material from his standpoint if Mr. Sargent agreed to put the boat in as good condition as it was prior to the fire. However, from the events which immediately followed, it is not necessary to come to any definite conclusion as to the result of this conversation. If it be judged upon the basis of probabilities, it is likely that Sargent's account is, as to its main features, correct. On December 17, plaintiff telegraphed Sargent at Portland that it was impossible to replace the boat in her former condition and, as an alternative, was willing to take the engine in part settlement. Sargent was asked for his suggestions to this proposition. On December 18 he replied, reciting his recollection of the recent conver-

B. C.

S. C.
1914

CUNNINGHAM
v.
ST. PAUL FIRE AND MARINE INS. CO.

Macdonald, J.

sation and taking the ground that, as he had let a contract for repairs to Taylor & Young, Limited, it would have to be proceeded with. This contract could have been rescinded at this time without damages ensuing, as no work had been performed, and, according to Young, was eventually completed at a loss. Solicitors for plaintiff, on the same date, wrote the local agents of the defendant company that their client understood that the company was proceeding with the repairs on their own account and that the company proposed to pay plaintiff the amount of the insurance and, as far as possible, recoup itself by sale after the boat was refitted. They desired to know if this understanding were correct. The local agent replied that they were unaware of the arrangement referred to, but were forwarding the letter to Sargent for his consideration. Before receiving any reply from Sargent, solicitors for plaintiff wrote him on December 26, more clearly setting forth their position. They abandoned the boat and requested payment of the full amount of insurance. A further letter was written to the same effect on December 30, to M. C. Harrison, general agent of defendant company at San Francisco, but before this letter could have been received by such agent they wrote directly to the plaintiff repudiating any liability for total loss. They referred to the conversation with Sargent and that, on the strength of this, the boat was being repaired, and, when finished, the company would pay in proportion as covered by its policy and invited litigation if this were not satisfactory to the plaintiff.

Suit was commenced by the plaintiff on January 14, 1913, for full amount of insurance. By amended statement of claim, delivered September 12, 1913, plaintiff seeks to recover under the policy for a constructive total loss.

Applying the test, referred to by Lord Shand in *Re Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A.C. 593, as to whether in fact a constructive total loss has or has not occurred, I find under the circumstances such query should be answered in the negative. Plaintiff would not, as a prudent owner, if uninsured, have abandoned this boat, but would have sought to have it repaired, as it is quite evident the cost of such repairs would have been less than the value of the property. Plaintiff, as an alternative, contends that, by the events which followed his notice of abandonment, a constructive total loss resulted through the acts and conduct of the defendant company.

Assuming that this policy of insurance is similar to the one considered in *Peele* v. *Suffolk Insurance Co.*, 7 Pickering (Mass.) Reports 254, it would appear that the defendant company had a right to keep possession of the boat in order to repair it, if such work were accomplished within reasonable time. I consider there was not an unreasonable time occupied in repairing the boat, so that the act of repairing does not support an acceptance of the abandonment.

Plaintiff has cited *Harrison* v. *Harrison*, 3 B. & B. 97, 129 Eng. R. 1219, and *Provincial Insurance Co. of Canada* v. *Leduc*, L.R. 6 P.C. 224, as authorities in support of his position, but the facts in those two cases distinguish them from the case at at bar. The first mentioned case is referred to by Lord Penzance in *Shepherd* v. *Henderson*, 7 A.C. 49 at 62, where he points out that the question in *Hudson* v. *Harrison*, *supra*, was whether the underwriters, by lying by . . . induced the assured to believe that the abandonment was acquiesced in. He then draws a distinction which is applicable to the present case. Referring to the fact that it was admitted in the argument more than once that the underwriters distinctly repudiated the abandonment and said they would not accept it, and adds:—

> There the very matter upon which the Lord Chief Justice relied (in *Hudson* v. *Harrison*) is absent from the present case. It is obvious enough that if the underwriters act in such a way as to induce the owner to believe that they have accepted an abandonment and the owner's position is thereby altered for the worse, it may very well be, as a matter of law, afterwards that the underwriters shall not be allowed to say (for it comes rather by way of estoppel) that they did not accept it.

Lord Blackburn, in the same case, also refers to the difference between acceptance of abandonment in fact and acceptance by operation of law, and that an insurance company may not really intend to accept an abandonment, but may be precluded from denying such acceptance, and the effect would probably be the same as if they had really accepted. Even in this view of the law, in my opinion, the facts do not support such a contention raised on the part of the plaintiff. The correspondence between the solicitors clearly outlines the position taken by each party as to the possession of the boat for purposes of repair.

There is another aspect of the case, however, which might, under certain circumstances, assist the plaintiff, and that is as to the sufficiency of the repairs. According to the cross-examination of Sargent, it was sought to prove by him that the plaintiff was not compelled to take the boat unless "he was satisfied with the repairs." This contention is not borne out by the evidence, but the correspondence and evidence on the part of the defendant company shewed that the repairs were to be satisfactory, and I conclude from this that the insurance company was, instead of paying the loss, purporting to carry out its contract by placing the boat in as good condition as it was in before the fire. It then remains to consider whether the defendant, having undertaken such repairs, completed them in a satisfactory manner and, if there be any deficiency, whether this simply gives a right of action for the cost of any additional work or enables the plaintiff to contend that by such failure, however slight, the defendant has rendered itself liable for the full amount of the insurance on the basis of a total constructive loss. I find that the tenders

B. C.

S. C.
1914

CUNNINGHAM v. ST. PAUL FIRE AND MARINE INS. CO.

Macdonald, J.

for the necessary repair work on the boat ranged from $300 to $1,300, and that the boatbuilders, under a contract at $300, stated they lost money. There was a substantial performance by the defendant of its undertaking to repair the boat, but still an appreciable deficiency has occurred. In coming to this conclusion, I am not satisfied that the subsequent sinking of the boat and consequent total loss resulted from insufficient caulking or defective work of repair. It is worthy of notice that the boat, after its repairs, floated for some time. The parties did not apparently consider it advisable or necessary to definitely account for the final destruction of this valuable piece of property.

In coming to a conclusion as to the result which follows from my finding that the defendant did not fulfil its bond of indemnity as to repairs, I have followed American decisions, and am led to take such course in this insurance action by the remarks of Lord Justice Brett in *Cory* v. *Burr* (1882), L.R. 9 Q.B.D. 463 at 469:—

> If I thought that there were American authorities clear on this point I do not say I would follow them but I would try to do so, for I agree with Chancellor Kent, that, with regard to Marine Insurance law, it is most advisable that the law should, if possible, be in conformity with what it is in all countries. I must further add that, although American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with an earnest desire to endeavour to agree with them.

In connection with the liability that follows from unreasonable delay in making repairs by the insurance company, the matter is fully considered in *Copelin* v. *Insurance Co.*, 19 U.S.S.C.R. 739, 9 Wallace 461. While delay cannot be set up in this case as a ground for preventing the insurance company from returning the boat, still the sufficiency of the repairs was considered in the case referred to. It would appear that the deficiency in repairs was substantial and amounted to $5,000. Counsel for the plaintiff, in referring to *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. (Mass.) 191, contended that by such authority the insured was bound to point out the deficiencies in the repairs, but the law of the case was not so declared.

> The Court simply declared the consequences that should follow if the defects were pointed out by the assured and not supplied by the underwriters.

According to a portion of the headnote in the *Reynolds* case, it was decided that if, at the time the insurance company offers to restore the vessel as fully repaired, the assured points out deficiencies which actually existed and the insurance company refuses or unreasonably neglects to supply such deficiencies, then the assured is not bound by the tender. Suppose, however, the assured, as in the present case, refrains from pointing out

any deficiencies or from objecting to the work in such a manner as to enable the insurance company to perform any further work or complete its indemnity, what result follows? This matter was considered by Mr. Justice Miller in *Copeland* v. *Security Ins. Co.*, Woolworth 278 at 289; Beech on Insurance, vol. 2, sec. 948. The learned Judge refers to the necessity for the insurance company to fully carry out the necessary repairs to a boat which it has injured, and in one portion of his judgment inclines to the opinion that the insured is not bound to point out the deficiencies that may exist in the repairs and that a clear obligation exists as to fully indemnifying the owner for his loss. He then adds:—

> The conditions of these policies supported by the law require that the vessel when tendered should have been in such a condition that the assured when receiving her should have full indemnity. . . . Had the stranding been accidental and the repairs a particular average (and this was evidently the assumption of the company) the assured might have been bound to take the vessel back, but, under the circumstances, the tender could not be made without at least an offer to pay the costs of such repairs as were rendered necessary by her stranding.

On the facts in this case, I am satisfied that if the plaintiff had pointed out to the representative of the insurance company any deficiency in the repairs that it would have been made good. If they had not done so they would have rendered themselves liable. I do not think it would have been an idle ceremony on the part of the plaintiff to ask for such further work of repair. Notwithstanding any support that the plaintiff might receive from the judgment in *Copeland* v. *Security Ins. Co.*, I prefer to follow the decision in *Marmaud* v. *Melledge* (1877), 123 Mass. 173. It was in that case decided that where the insurance company had refused to accept abandonment of a stranded vessel, it was entitled to take possession for the purpose of repairing and restoring it to the owner. If the company, with reasonable diligence, proceeded to make such repairs, at a cost less than her value when repaired and then tendered her in this condition to the owner, who refused to receive her but made no objection to the sufficiency of the repairs, and did not point out any deficiencies; that there was no acceptance of the abandonment, also that there was no constructive total loss of the vessel, although it afterwards appeared that the repairs were not fully made. The judgment cites with approval a portion of the opinion of Chief Justice Shaw in *Reynolds* v. *Ocean Ins. Co.*, dealing with the liability of the insurance company and the duty cast upon the assured as to pointing out deficiency, and then decides as follows:—

> If the underwriters had conducted themselves in the manner pointed out and within a reasonable time tendered the vessel to the assured, who makes no objection to the sufficiency of the repairs and points out no de-

B. C.
S. C.
1914
CUNNINGHAM v. ST. PAUL FIRE AND MARINE INS. CO.
Macdonald, J.

ficiency, he is bound to accept her and the underwriters cannot be treated as having accepted abandonment. Whether the assured accepts or not the question is settled that there is no constructive total loss of the ship.

If it should afterwards appear that there are deficiencies in the repairs, the acceptance of the vessel does not preclude the assured from claiming further damage, and according to the principles of the contract securing to the assured an indemnity, an action might be brought, after such acceptance, to recover for any such deficiency or unrepaired damage, as a partial loss.

I find that the defendant company was entitled to take possession of the boat for repairing the same and, having carried out repairs substantially within a reasonable time, that the plaintiff was not justified in refusing to accept the boat or, at any rate, was not justified without having objected to the sufficiency of the repairs and pointed out the deficiencies so that the same might be made good. The subsequent destruction of the boat thus has to be borne by the plaintiff unless the defendant company, while the boat remained in its possession, was guilty of such negligence as would create a liability. In this connection I find that the defendant company took, under the circumstances, all reasonable care of the boat and was not answerable for its loss. The action is dismissed with costs.

Action dismissed.

ALTA.
S. C.
1914

Re CROW'S NEST PASS HARDWARE CO. Ltd.

Alberta Supreme Court, Walsh, J. February 5, 1914.

1. CORPORATIONS AND COMPANIES (§ V B 2—181)—SUBSCRIPTIONS—CONSIDERATION OTHER THAN CASH.

The discretion of the Court as to giving leave to file, after a winding-up order has been made, a contract whereby shares were allotted other than for cash under sec. 110*b* of the Companies Ordinance (Alta.), so as to relieve the shareholder from liability as contributories is properly exercised by refusing the leave where the same parties have filed large claims as creditors of the company for rent and salaries.

2. CORPORATIONS AND COMPANIES (§ V E 4—233)—TAKING STOCK FOR CASH DIVIDEND.

Where shareholders entitled to be paid their dividends in cash take shares instead to the amount of the dividend, such shares are to be considered as having been allotted for cash.

Statement

CONTESTATION on settling the list of contributories in a winding-up proceeding and an application by alleged contributories holding shares allotted to them for "consideration other than cash" for leave under sec. 110 of the Companies Ordinance to file a memorandum in lieu of a contract to specify the consideration under which the shares were allotted.

W. H. McLaws, for liquidator.

C. F. Adams, for contributories.

WALSH, J.:—The only evidence before me upon which I can hold any of the persons mentioned in the list of contributories liable as such is contained in the affidavits of W. J. McGowan and L. W. Kribs. It appears from these that the following persons became holders of the number of shares set after his or her name, namely: Charles Patmore, 3; Minnie A. McGowan, 2; W. J. McGowan, 1; Ella F. Kribs, 30; and Louis W. Kribs, 20. These shares were allotted to them for a consideration other than cash, and no contract in writing as provided for by sec. 110 (*b*) of the Companies Ordinance was either made or filed. They now ask for leave to file it under the proviso to that section.

I do not think that this is a case in which that leave should be granted. It was stated on the argument without contradiction that some or all of these people have filed claims with the liquidator for large sums owing by the company to them, and it was urged that it would be unfair to the creditors of the company that these contributories should not only be relieved from their liability as such, but allowed to rank upon the estate for these claims. I quite agree with this. I notice from the company's records that Charles Patmore and W. J. McGowan started in 1908 with salaries of $140 per month voted to each of them, and that in July, 1909, the salaries of Kribs and McGowan were raised to $200 per month effective from the first of January, 1910, and that McGowan was to be paid $70 a month for rent and Mrs. Kribs was to be paid $50 per month for rent. These facts seem to indicate a loyalty to their own interests which is not entirely praiseworthy. I assume from Mr. Adams' silence upon the point that Mr. McLaws' statement of the facts in this connection was quite within the mark, and I am therefore dealing with the matter from that point of view in the absence of any material save the records above referred to. If there is any dispute over the fact that claims of the character mentioned by Mr. McLaws have been filed and are being pressed the matter may be re-opened for proof in the regular way, as I am exercising my discretion in refusing the application entirely upon this ground.

I do not think there is any liability upon any of these parties beyond the amounts of their original subscriptions as above set out. The further shares that were allotted to them in payment of dividends were, I think, allotted for cash. They were entitled to be paid their dividends in cash, and instead of taking it and paying it back for their new shares they took the shares. Each of them will go on the list for the value of the shares set opposite his or her name as above.

There is nothing before me to indicate any liability upon either J. C. Patmore or Julia S. Patmore, the only other persons named in the list of contributories. The liquidator may apply again with respect to these names if he sees fit.

Application refused.

N. S.

S. C.

1914

DICKIE v. ATLANTIC LUMBER CO.

Nova Scotia Supreme Court, Ritchie, J. January 19, 1914.

1. DAMAGES (§ III K—216)—CUTTING TIMBER—STUMPAGE.

As against the unsuccessful claimant of woodlands who had entered and cut down growing trees after notice of plaintiff's superior title, the damages for trespass need not be restricted to a recovery upon a stumpage basis.

Statement

ACTION claiming damages for trespass to woodland. The facts are fully stated in the judgment of Ritchie, J.

Judgment was given for plaintiff.

H. Mellish, K.C., for plaintiff.

S. D. McLellan, K.C., for defendant.

Ritchie, J.

RITCHIE, J.:—This is an action of trespass to woodlands for breaking and entering and cutting down and carrying away trees. The lands in question were granted by the Crown to Campbell W. Johnson and conveyed by him to the plaintiff.

It is admitted that when this deed was made the lands were in a state of nature and unimproved by clearing, fencing or otherwise for the purpose of occupation. The wife of Johnson therefore had the right of dower in these lands, but, apart from this, she joined in the deed to the plaintiff. This deed from Johnson to the plaintiff was dated December 19, 1901, but was not recorded till November 11, 1911. The reason for this delay was that there were judgments against Johnson, and the plaintiff, acting under the advice of a solicitor, refrained from recording this deed so that the judgments might become barred by the Statute of Limitations without the attention of the judgment creditors being drawn to the lands.

In 1909 the defendant company got a deed of the lands from the widow of Johnson (she had no title) and recorded it a short time before the deed to the plaintiff was recorded. Before taking the deed from Johnson's widow the defendant company had been notified by the plaintiff that he owned the lands. Before the deed to the plaintiff, Johnson made a conveyance to James W. Johnson in trust for creditors of certain lands described in the conveyance. The lands in question in this suit were not conveyed. This conveyance is dated October 22, 1890. By indenture of the same date Johnson conveyed to James W. Johnson in trust for creditors certain personal property. This last named conveyance contains a recital that Johnson had by the conveyance of even date to which I have referred conveyed all his real estate in trust to James W. Johnson, and then goes on to convey "all of the said real estate conveyed to the said James W. Johnson as aforesaid," and certain personal property.

It was contended for the defendant that Johnson had by this second conveyance parted with the title to the lands in question before the deed to the plaintiff. I am of opinion that this is not so. The recital in the conveyance is untrue in fact. Johnson had not conveyed all his real estate, there being no words under which the lands in question in this suit would pass. The operative words in the conveyance to James W. Johnson which contain the recital are: "all of the said real estate conveyed to the said James W. Johnson as aforesaid." I look at the first mentioned conveyance and find that the lands claimed by the plaintiff were not conveyed to the said James W. Johnson, and that I think disposes of the objection.

It was also contended for the defendant company that Johnson was fraudulently withholding the lands in question from his creditors and that the plaintiff can be in no better position. I do not think there is any ground for this contention. When the plaintiff bought, the title was in Johnson. I think the plaintiff had a right to buy and that he also had the right to record his deed when he liked, taking of course, by delay in recording, such risks as were incident to not having his deed on record.

I do not know what Johnson did with the money which he got from the plaintiff for these lands. He may have paid a debt with it. Even if Johnson had a fraudulent intent, the plaintiff who gave value for the lands is not proved to have been a party to such fraudulent intent. I do not think there is a case of fraud made out against the plaintiff preventing his recovery in this action. The plaintiff, in my opinion, has clearly established his title and he must have judgment with costs.

The remaining question, and I am inclined to think the only real question in the case, is as to damages.

As to the quantity of timber cut there is no exact evidence. It is a case where the trespass having been committed, a Judge, in getting at the quantity of trees taken, has to do the best he can. I have noticed that in a case like this the counsel for the plaintiff always calls the evidence an estimate, and the counsel for the defendant always calls it guess work. Vaughan Williams, L.J., in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786 at 792, does not shrink from the position that in some cases, as against a wrongdoer, guess work is good enough.

I find that the logs taken by the defendant company represent 40,000 feet of lumber. But the plaintiff is entitled to considerably higher damages than could be recovered merely on a stumpage basis. The plaintiff is entitled to damages for the trespass to his lands apart from the trees taken away. He was entitled to have his trees continue to grow and increase in value. The trespasses were committed after notice both verbal and

N. S.

S. C.
1914

DICKIE
v.
ATLANTIC
LUMBER
CO.

written of the plaintiff's title. This was, putting it at the lowest, sufficient to put the defendant company on enquiry and cause it to seek inspection of the plaintiff's deed.

Taking everything into consideration, I think $250 will be a fair allowance to the plaintiff and I assess the damages at that sum.

Judgment for plaintiff.

MAN.

K. B.
1914

STOTT v. NORTH NORFOLK.

Manitoba King's Bench, Prendergast, J. February 2, 1914.

1. WATERS (§ II G—128)—SURFACE WATERS—DEFLECTING AND DIVERTING—MUNICIPAL DEFENCE, HOW LIMITED.

Where a municipality in constructing highways, digs ditches and thereby diverts the surface waters from their natural channel so as to overflow and damage the lands of adjacent owners, the municipality must respond in damages although the road building itself may have been necessary.

[*Wallis* v. *Assiniboia*, 4 Man. L.R. 89, referred to.]

2. WATERS (§ II G—128)—DIVERTING SURFACE WATERS—MUNICIPAL NEGLECT TO EMPLOY ENGINEER.

Where statutory protection is prescribed in favour of municipalities constructing their highways under the supervision of duly appointed engineers, a municipality dispensing with such supervision loses the prescribed protection in regard to actions for resulting damages.

[*Geddis* v. *Bann Reservoir*, 3 A.C. 430, distinguished.]

3. MUNICIPAL CORPORATIONS (§ II G—195)—LIABILITY FOR DAMAGES—CONDITIONS PRECEDENT—PLAINTIFF'S TITLE—MISFEASANCE.

Although an action may not lie against a municipal corporation by the owner of lands for damages in respect thereto, through the misfeasance of the corporation if the damages occurred before the plaintiff acquired his title, the action will not be defeated, as to damages resulting after he acquired title, by the circumstance that the act of misfeasance itself occurred before that time.

[*City of Montreal* v. *Mulcair*, 28 Can. S.C.R. 458, distinguished.]

Statement

ACTION against a municipality for alleged deflecting and diverting of surface waters to the damage of the plaintiff's lands.

Judgment was given for the plaintiff.

Cooper, K.C., and *Meighen*, K.C., for plaintiff.

A. B. Hudson, for defendant.

Prendergast, J.

PRENDERGAST, J.:—The plaintiff, who is the owner, and in occupation of the north half of section 31, in township 10, and range 9, west, alleges that the defendant municipality, by the construction of defective ditches, has caused large quantities of water to gather on his land and injure his crop of grain growing thereon during the years 1911 and 1912, for which he claims $10,000.

The evidence shews that to the south of and almost adjoin-

ing the southwest quarter of the plaintiff's land, there is a large marsh, referred to also as a depression or hollow, which naturally collects water from the west and southwest, and more particularly from the Rosedale hills to the south.

In 1900, it appears that the waters from the south reached the marsh by somewhat undefined and scattered runways, and that the marsh had a natural outlet at its southeastern end in a creek which, running in an easterly direction, finally discharged, many miles further, into Rat creek.

I should say that at that time, the plaintiff's land which is situate in a very wet district, could only be considered as fairly dry. There were depressions in many places, more particularly along the north line, and a comparatively large one near the northeast corner where the house is now situate, in which water appears to have gathered in greater or lesser quantities in the spring and rainy season every year. I judge also that, owing partly to beaver-dams or other obstructions, and partly to natural insufficiency, there were times when the said creek was not equal to carrying easterly all the water from the marsh, and that overflowing at places, particularly where it passes from section 31 on to section 32, some of the surplus spread northerly along the road which is between the two sections, and thence onto the easterly part of the plaintiff's land.

In 1900, certain residents of the locality, among whom were Gange and Setherington, then owners of the said half section, petitioned the council to establish roads, more particularly with the object of opening better communication with the town of Gladstone to the north, and the following year the council proceeded to build two roads; one west of the said section 31 on what was called the town line, up to the northwest corner of the plaintiff's land, and the other from the said northwest corner along the correction line immediately north of the plaintiff's half section, extending for a considerable distance easterly.

On the town line, a ditch was dug on the west side of the road; and on the correction line, on the south side of the road. Officers of the municipality having had to do with this work at the time, stated with emphasis at the trial that no ditches were dug as such, that only the building of the two roads was contemplated, and that whatever digging or trenching was done, was done only from the necessity of procuring soil to do the grading. But whatever the intention may have been, the result of this digging was the establishing all along the two roads of two well defined ditches some eighteen inches in depth or more in places, and which could not be differentiated in any one particular from ordinary country ditches.

The road on the town line was carried down south a con-

MAN.
K. B.
1914
STOTT
v.
NORTH NORFOLK.
Prendergast, J.

siderable distance for the relief of the people in the direction of the hills, and where it ran through the marsh it was corduroyed and covered with soil.

In 1901, however, the ditch on the town line west of the plaintiff's half section was not yet built so far down as to connect with the marsh. But, in 1902, William Ashe, acting under due authority, made the connection. He says that the section of it that he dug was two feet deep, that it extended from the marsh up to the old ditch, a distance of 15 or 20 rods, and that if there had been water in the marsh at that time it certainly would have flowed northerly into the ditch.

As to conditions south of the marsh, the evidence does not seem to establish that whatever ditching was done there was carried up to and immediately connected with the marsh; nor do I take it to be shewn that the effect of the work done in that locality, was to collect more water and cause more to flow into the marsh, than would flow before, merely by the natural runways.

What was the effect of connecting the marsh with the town line ditch to the north, is, of course, the main question in dispute. But, whatever it may have been, it is sure that it was followed by complaints from C. P. Wright, who claimed that his land (the west half of 6-11-9) was flooded on account of a defective culvert at the northwest corner of the plaintiff's half section which did not allow the water to flow from the town line ditch into the correction line ditch; as also by protests from Gange and Setherington, then owners of the said half section, and from D. Harvey, whose land adjoins the plaintiff's to the north—these last claiming that the levels were not properly taken on the correction line, which caused the water to back from the east.

The council seems, at all events, to have also considered that the waters from the marsh had a detrimental effect on the land to the north, for they ordered the town line ditch to be dammed, which was done about 15 rods north of the plaintiff's southwest corner. The effect of this dam, which was meant to relieve the land to the north, was, however, to flood the town line to the south and make it useless; so it was cut down the same year by John Acheson, who lived to the south. The following year, it was filled in again by James Ballard, owner of the northeast quarter of 36-10-10, who says that the water from the ditch flowed over his farm. After that, it was cut down again. The last time the dam was reinstated was, as I understand, by resolution of the council of November 27, 1908; and there was also a resolution of March 21, 1909, concerning the matter, although it does not appear whether anything was done pursuant to it.

During that time and thereafter, there was other work done and several sums of money expended by the municipality here and there to relieve the situation; for instance, an attempt was made at two places to raise the road and correct the defective levels on the correction line, and a temporary drain was commenced on the northwest quarter of 33-10-9, but, apparently not carried far enough to be of substantial advantage.

It appears that, in the summer of 1909, the dam was still in existence; but it was taken away in the fall by John Dickson, acting on his own responsibility as far as the evidence shews.

The year 1910 was a dry year.

The plaintiff's claim is that in 1911, and more particularly in 1912, which was one of the wettest seasons for a long time, two-thirds or three-quarters of his half section was flooded by water overflowing all along from the sides of the ditch on the correction line, and that that water was first gathered in the marsh and carried to the correction line ditch by the one on the town line. He says that in 1912, some water also overflowed on the west side of his farm directly from the town line ditch.

At the trial, the plaintiff estimated the damages so caused to his crops as follows: in 1911, $1,226; in 1912, $1,849; in all $3,075.

I will say at once on the main question of fact, that the plaintiff has proven to my satisfaction that part at least of the damages which he has suffered was caused by water overflowing from the two ditches referred to; that much of that water came from the marsh and would mainly have flowed easterly through the marsh's natural outlet into Rat creek had it not been for the ditches, and that the latter were, moreover, defective, both in width and depth, considering the volume of water diverted into them, as well as with respect to levels.

But, before dealing with the evidence with respect to the cause, or rather causes, of the damage suffered, I will dispose of the special objections raised by the defence.

I would first say that the damages complained of here, do not fall within sec. 16 of ch. 35 of our statutes of 1909, which provides for notice to be given within a year after the injury and for arbitration, as the municipality did not have the work done "under the supervision of an engineer" as required by the section. Mr. McGregor, who was reeve at the time, says that there was no engineer and nobody to take the place of an engineer, although it was felt by those in charge of the work that one was required.

Neither has sec. 516 of the Municipal Act, R.S.M. 1902, ch. 116, any application here, as the same clearly refers only to drainage between different municipalities.

MAN.

K. B.
1914

STOTT
v.
NORTH NORFOLK.

Prendergast, J.

As to sec. 667 of the same Act, the defendants cannot claim the benefit of the proviso thereof under the pretence that their object was merely to build roads, when in effect and to all purposes, as above stated, they dug well defined ditches.

Then, the immunity of municipalities at common law in cases of non-feasance and non-repair with regard to highways and bridges, as affirmed in *Municipality of Pictou* v. *Gildert*, [1893] A.C. 524; and *Wallis* v. *Assiniboia*, 4 Man. L.R. 89, does not extend to such a case as the present one where waters were deliberately diverted from their natural channel.

I would say, in a general way, on this branch of the defence, that the municipality, through not having appointed an engineer and thus availed itself of said sec. 16 (ch. 35 of 1909) does not come within the protection of the rule laid down in *Geddis* v. *Bann Reservoir* (1878), 3 A.C. 430, and is, in my opinion, answerable for all damages caused by the existence of the ditches which they dug, irrespective of their negligent construction or otherwise.

It is also contended that the plaintiff cannot succeed "because the work was done before he acquired title," and *City of Montreal* v. *Mulcair*, 28 Can. S.C.R. 458, was cited in this respect. The second paragraph of the headnotes in the report of that case is somewhat ambiguous and to that extent misleading; but the judgment itself shews that the reason of the decision was, not that the work alone, but that the injury also, was done before the plaintiff had become owner of the property.

As to the defendant's other objection that the plaintiff cannot succeed because the work had been petitioned for by (amongst others) his predecessors in title who also took part in the same as paid employees of the municipality, I would say that the present case is altogether different from *Dillon* v. *Township of Raleigh*, 13 A.R. (Ont.) 53, which was relied upon. In the latter case, the action was not in damages, but to compel the municipality to complete according to plans, a drain for the construction of which a special sum had been raised by assessment, and which the council had accepted from the contractors as completed. The grounds of judgment, in dismissing the action, were that there was no available fund left, and that the plaintiff was partly responsible for that state of things, because: first, he had been allotted a section of the work and had only executed part, although being paid in full, and second, that he had been one of the signers to a petition in compliance with which the municipality had refunded ratably to the ratepayers, a balance of $2,000 of the special fund remaining unexpended at the time of acceptance of the work. There is not one particular in which the two cases seem analogous.

I now come to the consideration of the damages as to which I have already found in favour of the plaintiff in a general way—that is to say, that some of the damage was caused as he alleges.

I take this to be overwhelmingly established by seven witnesses besides the plaintiff himself.

On the other hand, it seems equally clear that there were other causes for which the defendants were not accountable.

I have no doubt that the conditions prevailing in 1911, and especially in 1912, on section 32 and on section 33 where they were most serious, were due to a large extent to water coming from the creek connected with the marsh, owing both to obstructions and general incapacity to carry out the rain excess which overflowed north and northeasterly. There was, I believe, as I have already indicated, such an overflow in the vicinity of the line between sections 31 and 32, and on the general evidence as to the lay of the land and on the testimony of Turner and Gray, I am convinced that some of that water, spreading northerly and along what Turner calls "almost a chain of depressions or holes," reached in considerable quantities the plaintiff's half section well on to the north.

It would appear that the ridge on the south of the plaintiff's land protects very effectually the southern part of the latter from the waters of the marsh proper and its immediate vicinity; but it also appears that that protection in a wet season would extend only to part of the easterly half as against water from the creek, and also, perhaps, waters from the marsh itself overflowing at its north-easterly extremity and spreading east and thence northerly.

There were heavy rains in 1911, and 1912 was one of the worst years in a long time in that respect. It may be said that the rains affected most severely all the farms in that district without exception—especially towards the fall, when otherwise very good crops could not be reached in many places, or when partly reached, had very much deteriorated and fallen in grade. These conditions were general, and in the plaintiff's case they must have been aggravated by quite an appreciable quantity of rain from Charlton's land to the south, following the general declivity, and against which the ridge did not prove, as above stated, a sufficient barrier at the east end of the half section.

As I further stated in the beginning, the land has also pot holes and many local depressions not affected by the general north-easterly decline of the country, and the filling up of which must be accounted for by the rainfall.

This leads me to consider the levels taken, apparently with very great care, by Mr. Varcoe, civil engineer, and to his cal-

MAN.
K. B.
1914
STOTT
v.
NORTH
NORFOLK.
Prendergast, J.

culations made, as he says, on the basis of the evidence of David Harvey whom he understood to state that the water was four inches over the grade on the north line, although I understood Harvey to say six inches. On the basis, however, of four inches of water flowing over the grade, and with the sketches of detailed levels of the land which he took, Mr. Varcoe calculated that there could not be more than eleven acres of the plaintiff's land flooded by the waters from the two municipal ditches. I feel satisfied that the sketches, as representing general levels, are correct, and that the calculations based on them are also mathematically correct. I believe, however, that in the nature of things, and however carefully prepared, such sketches consisting of a graded series of curved or undulating lines, each following a particular level from one end of the half section to the other, cannot take into account a great many comparatively small depressions bordering the one-mile supposed water-line, on land shewn to be like all the land in the district, somewhat broken and uneven.

Inasmuch as these calculations are after all mainly based on observation, I cannot, on their strength alone, brush aside altogether what was also observed by many reliable witnesses, that would shew that the conditions were very much worse. There is also to be allowed the appreciable margin resulting from the difference between four and six inches above referred to.

At the same time, I would say that the engineer's evidence clearly shews that the plaintiff's claim as to the area flooded by water coming from the two ditches, is beyond all probability and reason. It seems to me that at the periods on which the complaint bears more particularly, even in comparatively high places, the land was generally wet and even saturated with the rainfall; so that it was easy for the plaintiff's witnesses, in the many places where such rain-water was lying all along somewhat close to the line of the body of water conveyed from the ditches, to consider it all as one and produced by the same cause.

The plaintiff has also made altogether too much of the probable yield and of market prices, as shewn by the evidence of three witnesses, amongst whom was Mr. Muir, the bailiff of the Court; nor has he sufficiently taken into account the lowering of grades and the effect of the generally adverse conditions of hail, rain and wind, especially in the fall of 1912, from which he surely cannot have been altogether immune when everybody else in the district was affected thereby.

I should add, as to the damages of 1911, that, while the adverse conditions of nature were not so great that year, the plaintiff, on the other hand, is far from having the corrobora-

tion that he produced for 1912; and the evidence of two members of the council who went to inspect the land in the spring of 1911, and say that the plaintiff did not then direct their attention to any particular damage and that they saw no water at all on the land, would tend to shew that at that time, at all events, the plaintiff did not consider that the injury would be at all as great as he contended at the trial.

On the area damaged through causes imputable to the municipality, I will allow half of what is claimed for 1911, and less than half for 1912; for the two years together, I would say five-twelfths. For excessive estimate in yield, excess in prices, deterioration and all that resulted from the generally adverse conditions referred to, I judge that the plaintiff's figures for the two years should be further reduced by 45 per cent. On this basis, I would allow the plaintiff $720.

There will be judgment for the plaintiff for $720 and costs.

Judgment for plaintiff.

BRIZARD v. BRIZARD.

Manitoba King's Bench, Galt, J. January 29, 1914.

1. DIVORCE AND SEPARATION (§ II—5)—MARRIED WOMEN'S PROTECTION ACT (MAN.).

The provisions of secs. 2 and 6 of the Married Women's Protection Act, R.S.M. 1902, ch. 107, limiting the jurisdiction in a separation proceeding by a wife against her husband to the judicial district (*a*) in which the husband was in a collateral proceeding convicted of an assault upon her, or (*b*) in which the cause of the wife's separation complaint wholly or partially arose, import that such jurisdiction lies in respect of offences originating within the prescribed territory, although those offences may have been condoned, where subsequent offences in another district have had the effect of reviving the first offences as acts of cruelty and of nullifying the condonation thereof.

2. DIVORCE AND SEPARATION (§ IV—41)—MATRIMONIAL OFFENCES—CONDONING BY RESUMING RELATIONSHIP—SUBSEQUENT CRUELTY.

Unless it appears that there is a specific arrangement to the contrary, the resumption of cohabitation between husband and wife will operate as a condonation of prior matrimonial offences subject to the forgiveness being cancelled and the old cause of complaint being revived should a subsequent offence arise.

Statement

APPEAL from the decision of Judge Ryan of the County Court granting the application in a separation proceeding by a married woman under the Manitoba Married Women's Protection Act.

The appeal was dismissed.

A preliminary motion in the case is reported, *Brizard* v. *Brizard*, 15 D.L.R. 578.

W. Holland, for defendant, appellant.

H. P. Blackwood, for plaintiff, respondent.

MAN.

K. B.
1914

BRIZARD
v.
BRIZARD.

Galt, J.

GALT, J.:—This is an appeal from an order made by His Honour Judge Ryan in the County Court of Holland on July 16, 1913, in the matter of the Married Women's Protection Act, and Marie Brizard and her infant child.

The Married Women's Protection Act, R.S.M. 1902, ch. 107, provides, amongst other things, that

2. Any married woman whose husband shall have been convicted of an assault upon her within the meaning of the Criminal Code, 1892, or any Act or Acts amending the same, or which may be substituted therefor, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her or habitual drunkenness or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty, habitual drunkenness or neglect have caused her to leave and live separately and apart from him, may from time to time apply to any County Court Judge within the judicial district in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act.

It appears that the respondent Albany Brizard had been convicted of an assault and had otherwise been guilty of persistent cruelty to his wife, the applicant. The order made by Judge Ryan provides,

(*a*) in accordance with the provisions of sec. 3 of the Married Women's Protection Act, R.S.M. 1902, ch. 107, that the applicant be no longer bound to cohabit with her said husband Albany Brizard; (*b*) that the legal custody of the infant child born of the marriage of the said parties be committed to Marie Brizard; (*c*) that the said Albany Brizard be forbidden to enter upon any premises where the said Marie Brizard may be living apart from her said husband and it shall not be lawful for the said Albany Brizard to enter upon any such premises.

Section 6 of the Act provides that

(*a*) The proceedings upon all such applications shall, as nearly as may be, be the same as those prescribed by Part 58 of the Criminal Code, 1892, and any amendments thereof already made or that may be hereafter made, or any enactment that may be substituted therefor; and there shall be an appeal from any order made upon such an application to a single Judge of the Court of King's Bench, whose decision shall be final.

The section also provides that

(*b*) The practice and procedure in such an appeal shall, as nearly as may be, be the same as in the case of an appeal under the County Courts Act to a single Judge of said Court, who shall have full discretion to vary, reverse, or affirm any such order and over the costs of all the proceedings.

On the application to Judge Ryan both parties appeared and adduced a large amount of evidence and I have before me a copy of the evidence so taken and of the learned Judge's notes.

It appears that the respondent, Marie Brizard, was a young

girl between the ages of 16 and 17 when the appellant first met her at the house of her parents, Mr. and Mrs. Simoens. Shortly afterwards the appellant seduced the respondent and a little later on they were married. In due course a child was born to the respondent and within a few days thereafter the appellant commenced a course of action towards his wife which cannot otherwise be described than as persistent cruelty, accompanied by at least one actual assault, which the appellant does not attempt to deny or justify.

The evidence shews that the respondent and her parents were members of the Roman Catholic Church and they endeavoured by frequent attendance at mass and for worship in their church to maintain their religious faith.

The details of the treatment which the appellant is said to have imposed upon his wife are too disgusting to repeat. The respondent states that on many occasions the appellant, being desirous of having no more children, inserted his hand into her private parts with a view to preventing her from having any more children. She also states that the appellant practised sodomy upon her, which she felt compelled to undergo because he was her husband. A crime of this character is so heinous that our law provides against any conviction therefor unless the evidence of the complainant be corroborated. It is difficult to imagine how such corroboration could be obtained unless the victim either by her cries or complaint immediately thereafter could secure some such evidence.

On the argument before me, Mr. Holland, acting for the appellant, admitted that the County Court Judge believed this evidence of the respondent, although with some hesitation. If he had not believed it, I cannot imagine how he could have made the order in question at all, because the evidence of one who could untruly make such a charge against her husband could not be relied upon in other respects. For the purposes of this appeal, however, finding that there is no corroboration to this charge of sodomy, I omit it altogether from consideration.

As regards the general acts of cruelty alleged against the appellant I think they are amply corroborated and confirmed by the evidence of the father and mother of the respondent and by other witnesses.

A good deal of evidence was given by both parties in respect of the conduct of the appellant in preventing his wife from going to church regularly and in using blasphemous language against the founder of our Christian religion and the Virgin Mary. It was argued by Mr. Holland that matters affecting religion could not possibly be brought within the scope of cruelty. I cannot agree with this argument. I think

MAN.
K. B.
1914
BRIZARD
v.
BRIZARD.
Galt, J.

that such conduct as has been alleged against the appellant, and apparently accepted by the learned County Court Judge, would operate as the keenest kind of cruelty against any woman who had her religion at heart.

But it is said that after the assault for which the appellant was convicted had taken place and after a large amount of the cruelty complained of had been committed, the respondent voluntarily condoned all previous occurrences by consenting to go with her husband to Swan Lake and to resume cohabitation with him there.

In *Haddon* v. *Haddon*, L.R. 18 Q.B.D. 778, a husband had been convicted for an aggravated assault on his wife and an order was made under the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband and that he should pay to her a weekly sum for her maintenance. The wife subsequently resumed cohabitation with her husband for a time and then again left him. It was held by the Divisional Court that the order was annulled by reason of the subsequent resumption of cohabitation and therefore that the wife could not enforce payment of weekly sums alleged to have become due under it after she again left her husband.

In *Williams* v. *Williams*, [1904] P.D. 145, the wife complained of desertion within the meaning of the Summary Jurisdiction, Married Women's Act, 1895, and, during an adjournment of the hearing of the summons, resumed cohabitation with her husband, and subsequently, but before the date appointed for the adjourned hearing, separated from him again, and obtained an order for separation and an allowance for maintenance. It was held by the Divisional Court that the order must be discharged as the condonation by a voluntary resumption of cohabitation had blotted out the cause of complaint, and there was nothing for the justices to adjudicate upon at the date of the order.

I do not think that this doctrine of condonation can be fairly applied to the attitude assumed by the respondent in accompanying her husband to Swan Lake. She was, as I have said, a very young woman, living out in the country, entirely inexperienced and with a strong sense of religious duty. I think she felt under a moral obligation to go with her husband as he required and try whether it would be possible to live with him again. In this respect the situation falls well within the facts reported in *D'Aguilar* v. *D'Aguilar*, 1 Haggard's Eccl. Rep. 773.

The respondent's evidence in regard to her husband's treatment of her at Swan Lake, if believed, as it certainly was believed by the County Court Judge, shews a resumption of almost all the cruelty and detestable practices (leaving out sod-

omy) which the appellant had been guilty of towards his wife previously. Letters from her to her mother were produced by the latter shewing that the respondent found it impossible to live with the appellant. She was in a delicate state of health, yet she shews that the appellant frequently compelled her to chop and saw wood and carry water upstairs to where they resided.

Mrs. Simoens shews that the respondent went to the maternity hospital to have her baby for fear that the appellant would come and ill-use her.

In dealing with the question of condonation, I find the following statement in 16 Halsbury's Laws of England, p. 489:—

1003. Condonation of matrimonial offences means the complete forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore as between the spouses the *status quo ante*; subject, unless it appears that there is a specific arrangement to the contrary, to the express or implied condition that no further matrimonial offence shall occur. If, however, such a subsequent offence should arise, the forgiveness is cancelled, and the old cause of complaint is revived, even if the offence is not *ejusdem generis* with the original offence.

Mr. Holland next argues that the cruelty relied upon by the respondent when at Swan Lake must also be corroborated and he refers to the case of *Judd* v. *Judd*, [1907] P. 241. The decision in that case is thus expressed in the headnote:—

It is the practice of the Court to require corroboration of the petitioner's evidence as to cruelty, and the mere production of a certified copy of a separation order previously made between the husband and wife by a Court of summary jurisdiction on the ground of his persistent cruelty is not, as a general rule, to be considered a sufficient corroboration. The Court may, however, in an exceptional case, relax this rule of practice where the evidence of the petitioner accounting for the absence of the witnesses who corroborated her when before the magistrate, and the general circumstances of the particular case, coupled with the production of a certified copy of the conviction, commend themselves to the Court as satisfactory and sufficient.

In Phipson on Evidence, 3rd ed., p. 50, I find the following statement of the law, that declarations, although admissible to explain, identify or corroborate, are not generally receivable as evidence of the truth of the facts stated.

Facts may be corroborated by evidence which would be wholly insufficient by itself to prove the main charge.

The respondent states that while she was living with her husband at Swan Lake he recommenced his attempt above alluded to with a view to preventing her from having any more children. She was at that time pregnant and she states that the appellant endeavoured to bring about a miscarriage of this second child. I think the respondent's letters to her mother,

MAN.

S. C.
1914

BRIZARD
v.
BRIZARD.

Galt, J.

and her action in going to the maternity hospital, and her mother's evidence in reference to this, are a sufficient corroboration of her evidence.

Of course, the appellant denies nearly all of the charges against him; but the evidence of the respondent is confirmed as to the general charges of cruelty and the assault by the evidence of her parents. The learned County Court Judge had these parties and their witnesses before him. He could observe their demeanour and ask them such questions as he chose himself. In the result he accepted the evidence given on behalf of the respondent and made the order now in appeal.

Even assuming that the residence of the respondent with the appellant at Swan Lake originally amounted to legal condonation of previous cruelty I think his conduct there was quite sufficient to resuscitate all the previous acts of cruelty upon the principle recognized in the passage I have quoted from Halsbury.

The only remaining point to be dealt with is the question of jurisdiction raised on behalf of the appellant on the ground that the complaint, if any, arose at Swan Lake, which is in the southern judicial district. In answer to this, Mr. Blackwood, on behalf of the respondent, points out that under secs. 2 and 6 of the Married Women's Protection Act, R.S.M. 1902, ch. 107, the application may be made before any County Court Judge having jurisdiction within the judicial district wherein the conviction has taken place or in which the cause of complaint shall have wholly or partially arisen. And he relies upon the resuscitation of all the acts of cruelty committed by the appellant at Bruxelles within the jurisdiction of His Honour Judge Ryan. I agree with this contention. The conviction of the appellant appears to have taken place at the said village of Bruxelles, and this circumstance alone would bring the case within the jurisdiction of Judge Ryan.

In this case I have had the satisfaction of hearing the appeal argued by painstaking counsel on both sides. Feeling, as I do, that the learned County Court Judge had every opportunity of forming an opinion on the evidence from the demeanour of the witnesses and otherwise, and finding that he has accepted the evidence of the respondent and her witnesses in preference to that of the appellant and his witnesses, I think it would be little short of an outrage if I were to compel the respondent to return to and resume cohabitation with the appellant. For the same reason I consider that the custody of their infant child should remain with the respondent.

For these reasons I am of opinion that the appeal in this case should be dismissed with costs.

Appeal dismissed.

CANADA LAW BOOK CO. Ltd. v. BUTTERWORTH.

IMP.

P. C.
1914

Judicial Committee of the Privy Council, Lord Dunedin, Lord Atkinson, and Lord Shaw. January 27, 1914.

1. CONTRACTS (§ II A—128)—CONSTRUCTION—REFERENCE TO PRIOR OFFER.

Where the proposed agent's counter-proposition for the sales agency of a work to be published in volumes issued at intervals, stipulates for the agency a fixed period "from the date of publication" the latter term is properly construed as referring to the publication of the first volume, where the negotiations were based upon a prior offer of the principal in which he had proposed an agency for a similar period expressly stated to be from publication of the first volume.

[*Canada Law Book Co.* v. *Butterworth* (No. 2), 12 D.L.R. 143, 23 Man. L.R. 352, affirmed.]

2. CONTRACTS (§ II A—128)—CONSTRUCTION—AGENCY—COUNTER-PROPOSITION—EXCLUSION OF RENEWAL CLAUSE.

Where in reply to a proposition for a contract of agency the proposed agent purports to set out a full statement of the terms to which he will agree but does not mention the offer of a renewal term which was contained in the original proposition made to him nor does his counter-proposition purport to be a mere modification of the terms of the original proposition, the renewal clause in the latter will not form a part of the contract although the acceptance by the principal refers to the counter-proposition as the agent's "modification" of his terms, if the acceptance further re-states the terms as to the duration of the contract to the exclusion of the renewal clause.

[*Canada Law Book Co.* v. *Butterworth* (No. 2), 12 D.L.R. 143, 23 Man. L.R. 352, affirmed.]

Statement

APPEAL from a judgment of the Manitoba Court of Appeal, *Canada Law Book Co.* v. *Butterworth*, 12 D.L.R. 143, 23 Man. L.R. 352, reversing the judgment of Metcalfe, J., *Canada Law Book Co.* v. *Butterworth*, 9 D.L.R. 321, whereby the defendants were restrained for a fixed period from selling in Canada or the United States "Halsbury's Laws of England," and a reference was ordered to assess damages for past sales.

The appeal was dismissed.

Danckwerts, K.C., *A. B. Hudson* (of the Canadian Bar), and *A. M. Latter*, for the appellants.

Sir Robert Finlay, K.C., *Upjohn*, K.C., *Fullerton*, K.C. (of the Canadian Bar), and *J. M. Lightwood*, for the respondents.

The judgment of the Board was delivered by

Lord Atkinson

LORD ATKINSON:—This is an appeal from a judgment dated April 25, 1913, of the Court of Appeal for the Province of Manitoba, whereby a judgment of the Court of King's Bench dated March 27, 1913, delivered by Mr. Justice Metcalfe, was overruled.

By this latter judgment an injunction was granted restraining the defendants, the respondents in the appeal, from selling or offering for sale, or permitting the sale of, or soliciting orders for, or distributing within the Dominion of Canada and the United States of America, to persons other than the plaintiffs

IMP.
P. C.
1914
CANADA LAW BOOK CO. LTD. v. BUTTERWORTH.
Lord Atkinson

or their nominees, for a period of five years from November 14, 1912, a certain publication or work known as the "Laws of England," by the Earl of Halsbury; and, as the respondent admitted at the trial that they had sold the said work in Canada within this period, and that if they were bound by contract with the plaintiffs not to do so, the latter had thereby suffered some damage, it was referred to George Patterson, Esq., K.C., to ascertain the amount of these damages.

Butterworth & Co. is a name under which one Stanley Shaw Bond, who is the owner of the copyright of the said work, carries on the trade or business of a publisher of books, the headquarters of the business being in London. And Butterworth & Co. (Canada), Limited, is the name of a company incorporated in England to carry on the business of publishers of books in the Dominion of Canada and elsewhere, the headquarters of the company being in the city of Winnipeg in the Province of Manitoba. The said Stanley Shaw Bond holds 999 of the 1,000 shares issued by this company. The appellant company carries on the trade or business of a dealer and seller of books in Canada and elsewhere, one R. R. Cromarty being its president.

It is not disputed that by a contract in writing contained in certain written communications which passed between Butterworth & Co., otherwise Stanley Shaw Bond, and the appellant company, the latter were appointed the sole agents of the former for the sale of this work in Canada and the United States of America, on certain terms for a period of five years from the publication of the first volume of the work. This volume was published on November 14, 1907, and the stipulated period of five years would, therefore, terminate on November 14, 1912. The sole question in controversy is, whether that agency was to continue, if certain conditions were fulfilled, for an additional period of five years from the termination of the first period. So that the matter for decision is the construction of this written contract.

In the year 1907 the plaintiff company had in its employment a gentleman named Robinson, since dead. After some letters had passed between the president of the appellant company, R. R. Cromarty, and Stanley Shaw Bond, touching the publication of the "Laws of England," and the sale of the work by the appellant company in Canada and the United States of America, this gentleman, Robinson, acting on behalf of the appellant company, had an interview with S. S. Bond in reference to these matters, at which the latter gave Robinson a memorandum setting forth the terms upon which he was willing to appoint the company his agents, exclusive of all others, for the sale of the contemplated publication in Canada and the United States. It is exhibit No. 5. It runs thus:—

1. Order to be accepted by the company.
2. Sets not to be returned to England.

3. We to do our best to prevent sale to Canada.

4. Sole agency to Canada and U.S.A. for five years from publication of volume I. or for one year after publication of the last volume of the set, whichever shall be the longest period.

5. Sole agency after the above mentioned period shall be obtained by their taking fifty sets for the first year and forty sets for the next year, and so by a sliding scale to ten sets for the fifth year.

6. Four hundred sets at 7s. 6d. in quires to be taken within two years, ordinary account.

7. We to hand over the orders from above territory received before this date, and to receive a bonus of 3s. 0d. per volume for the same, also to refer future orders and enquiries while this agreement lasts to the Canada Law Book Company.

8. B. & Co. to take back up to 100 sets at same price as charged at completion of the expiry of the sole agency.

The appellant company wrote to Stanley Shaw Bond a letter bearing date May 21, 1907. The important portion of this runs as follows:—

EXHIBIT 7.

C. May 21, 1907.

S. Bond, Esq.,
C/o Messrs. Butterworth & Co.,
12, Bell Yard, Temple Bar,
London, England.

DEAR MR. BOND:—

Referring further to Halsbury's Laws of England, Mr. Robinson has just handed me the proposition you made to him. Let me say in reference to the statement that we were paying Green 7s. 6d. per volume. This is a mistake, we are paying 7s. only. As to the guarantee of fourteen volumes, the additional volumes of course will be free. We were to take 500 sets inside of five years from September last.

It seems to me your proposition is a pretty stiff one. . . .

If you wish we will meet you half way and pay 7s. 6d. per volume. We to agree to take 400 sets within two years for the sole agency for Canada and the United States for five years from the date of publication. We will waive the right to return any copies, all of which will be purchased outright. You will hand over to us any orders you have in Canada and the United States without any cost to us. We will agree to supply them at the special price. I think you will agree, if you will look on it, it is unreasonable for us to pay any extra 3s. per volume. . . .

The above offer is a most reasonable one and a fair one considering we have only seven million people in the country. . . .

On receipt of this letter you might wire me acceptance or refusal. We, of course, have the right to purchase additional sets at the price.

There is nothing in the omitted portions of the letter to affect, or in any way qualify the meaning of these paragraphs. It will be observed (1) that the expression of the desire to meet the respondents half way only refers to the price of 7s. 6d. per volume; (2) that the second of the two alternatives offered in paragraph 4 of the memorandum, namely, an agency for one year after the publication of the last volume of the set is re-

IMP.
P. C.
1914
CANADA LAW BOOK CO. LTD. v. BUTTERWORTH.
Lord Atkinson

jected, and the first alternative, an agency for five years, accepted, and as the only publication mentioned in this latter alternative is the publication of the first volume, it is, in their Lordships' view, clear that the words "from the date of publication" used in this letter must refer to the date of publication of the first volume.

Again, the terms set forth in this letter do not purport to be modifications merely of the terms of the memorandum, but a full statement of the terms upon which the agreement is to be based. The subjects dealt with in all the paragraphs of the memorandum other than paragraph 5 are in effect dealt with in the letter, and of this latter no mention whatever is made. It is difficult to suggest why this should be so if the writer intended that it should be adopted.

In compliance with the request contained in this letter, the respondents sent, on June 9, 1907, to Mr. Cromarty a telegram in the following terms:—

Halsbury's Laws agree your modified terms, writing.

And on June 14, 1907, wrote to the appellants a letter; the material portions of it run as follows:—

THE LAWS OF ENGLAND.

By the Earl of Halsbury and a Distinguished body of Lawyers.

We are in receipt of your letter of May 21st with reference to the above. Although we think that you should not have had any difficulty in falling in with our proposal, yet we will agree to accept your modification of our terms. The terms between us are now as set out overleaf.

We cabled as requested as follows:—

Cromarty, Toronto, Halsbury's Laws agree your modified terms, writing.

BUTTERWORTH & Co.

Arrangements with the Canada Law Book Company, Ltd., for Halsbury's Laws of England.

1. This arrangement to be between the company, if we decide to make one for this undertaking.

2. Sets not to be returned to England.

3. Butterworth & Co. to do their best to prevent sale to Canada.

4. Canada Law Book Company to take four hundred (400) sets within two years in return for the sole agency to Canada and the U.S.A. for five years from date of publication of Volume I. During the said sole agency they to have the right of purchasing additional sets at the same price.

5. Butterworth & Co. to hand over any orders from above territory that they have received.

Much reliance was placed by the appellants on the words "your modification of our terms" used in their letter, and they contended that they must be taken to mean that all the terms of the original memorandum, especially those contained in paragraph 5, not altered by the letter of May 21, were to form some of the terms agreed to. The sentence immediately succeeding this one points irresistibly, their Lordships think, to a

different conclusion. It runs thus: "The terms between us are now as set out overleaf." That is a re-statement of the full terms on these points. On the construction of these documents their Lordships are clearly of opinion, that the continuance of the agency for a further period of five years after the termination of the first period, did not form a term of the contract entered into between the parties. And the amendments made in the pleadings would certainly go to shew that the appellants themselves were of that opinion and that the contention now put forward was something of an afterthought.

Their Lordships are therefore of opinion that the judgment appealed from was right, and that accordingly the appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed.

MELVIN v. McNAMARA.

Alberta Supreme Court, Beck J. February 4, 1914.

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION—DAMAGES—FRAUD.

In an action by the purchaser to rescind an agreement for the sale of land brought against both the owner and his agent on the ground of misrepresentation and for damages, proof of even an honest material misrepresentation inducing the agreement may suffice for rescission, but to support damages fraud must appear.

[*Derry* v. *Peek*, 14 A.C. 337 at 359, applied.]

2 PARTIES (§ III—124)—BRINGING IN THIRD PARTIES—INDEMNITY; RELIEF OVER—PRINCIPAL AND AGENT.

In an action by the purchaser to rescind an agreement for the sale of land, brought against both the owner and his agent on the ground of misrepresentation and for damages, rescission ordinarily affects the owner alone, and a judgment for damages based on fraud operates against the owner and not the agent, unless the fraud is brought home to the latter; hence a third party notice by the agent against his co-defendant (the owner) for indemnity should be allowed to stand pending the trial of the main issues in the case.

Statement

APPLICATION to set aside a third party notice taken out by a defendant against his co-defendant for indemnity.

The application was denied.

Wm. Rea, for plaintiff.

S. W. Field, for defendant McNamara.

W. J. Hanley, for defendant Grieve.

Beck, J.

BECK, J.:—This is an application to set aside a third party notice taken out by the defendant Grieve against his co-defendant McNamara.

The action is one to rescind an agreement for the purchase of land by the plaintiff on the ground of misrepresentation and for damages—whether merely in addition or in the alternative is not clearly indicated. McNamara was the owner and Grieve

ALTA.

S. C.
1914

MELVIN
v.
MCNAMARA.

Beck, J.

his agent. It is alleged that the agreement was procured wholly through the instrumentality of Grieve. Both defendants are alleged to have had knowledge that the representations were untrue.

Both McNamara and Grieve filed defences. Then Grieve delivered a third party notice to his co-defendant McNamara, claiming to be indemnified by him against liability on the ground that he acted only as agent and that such representations as he made to the plaintiff were in accordance with information given him by McNamara upon which he relied.

It is McNamara who moves to set aside the third party notice. The plaintiff is indifferent so long as he is not delayed.

The plaintiff can succeed in obtaining rescission if he proves a material misrepresentation inducing the agreement although the misrepresentation was innocently made, whether by the principal McNamara or by his agent Grieve. The plaintiff cannot recover damages unless he proves that the misrepresentations were made fraudulently—in a wide interpretation of the word. See *Derry* v. *Peek*, 14 A.C. 337 at 359.

So that, if the plaintiff's evidence proves a misrepresentation but falls short of proving that it was made fraudulently, the only result would be rescission. That would affect McNamara, the vendor, only, not Grieve, the agent; except with regard to costs.

If the plaintiff's evidence shews a fraudulent misrepresentation and he asks rescission only, the result would be the same, but if he asks damages instead of rescission, or, as, in case of a fraudulent misrepresentation, I suppose he can, in addition to rescission; then if the fraud was that of the agent, the latter would be liable personally for the damages and would have no remedy over against his principal, whether the principal was a party to the fraud or not; if the fraud were that of the principal only, the agent would not be liable, and so, in that event also, he would have no remedy over, unless it be in respect of costs.

Evidence brought out by the defence shewing fraud on the part of either of the defendants would leave the matter in the same position.

This leaves for consideration the question of costs, *i.e.*, the liability of each of the defendants to the plaintiff for the costs of the action, and the liability of either of the defendants to indemnify the other against the plaintiff's costs and his own costs of defence. On the trial of the main issue evidence sufficient to dispose of the question of costs as between the defendants might not be brought out; and it seems to me that, if the agent innocently conveyed to the purchaser representations made to him by the principal which he shews were on the part of the principal fraudulent, then he is entitled to be indemnified by the principal to the extent of his liability for any costs he may be ordered to pay or may himself incur in this action.

On this ground I think the third party notice should be allowed

to stand. The costs of this application will be costs to the defendant Grieve against the defendant McNamara in any event; and the plaintiff's costs of attendance on the application will be costs in the cause to him in any event.

Application denied.

ALTA.
S. C.
1914
Beck, J.

FERGUSON v. BRICK AND SUPPLIES LTD.

ALTA.
S. C.
1914

Alberta Supreme Court, Walsh, J. February 9, 1914.

1. COSTS (§ II—45)—SETTING OFF COSTS—WORKMEN'S COMPENSATION ACT (ALTA.).

Where the plaintiff, having failed in his common law action against his employer, subsequently proceeds under sub-sec. 4 of sec. 3 of the Alberta Workmen's Compensation Act, Statutes of 1908, the compensation assessed under that Act against the employer may be subject to a set-off for the defendant's costs of defending the common law action so brought.

2. MASTER AND SERVANT (§ II A2—49)—COURSE OF EMPLOYMENT—"OUT OF AND IN THE COURSE OF"—SHOVELLING CLAY—REPLACING DERAILED CAR.

Where the plaintiff was employed by the defendant (a brick and supply company) for the ordinary work of a labourer a personal injury sustained while assisting a fellow-workman, at the latter's request, to put back on the track one of the cars used for carrying the clay from the pit to the plant, which had become derailed, is properly held to have arisen "out of and in the course of" his employment, where the replacing the car was such work as the plaintiff and the others of his class in the defendant's employ might reasonably have been called upon to do.

Statement.

APPLICATION by a workman to assess compensation for personal injury resulting as alleged from an accident arising "out of and in the course of" his employment, after the applicant had already sued and failed in a common law action.

Judgment was given for the plaintiff assessing his compensation under the Act, but with a set-off of costs.

I. W. McArdle, for the plaintiff.

J. W. Carson, for the defendant.

Walsh, J.

WALSH, J.:—The plaintiff having failed in his common law action through the adverse verdict of the jury, now applies, under sub-sec. 4 of sec. 3 of the Workmen's Compensation Act, to have compensation awarded to him under that Act.

He started to work for the defendant as a labourer on November 30, 1912. His work upon that day, which was assigned to him by the foreman, consisted of shovelling clay from the pit into the car which carried it to the plant. On the morning of the next working day, Monday, December 2, he was going to this same work at the same pit when he was asked by a fellow-workman to help him put back on the track one of the cars used for carrying clay from the pit to the plant which had become derailed. The plaintiff, with others of the workmen, went to the assistance of this

ALTA.

S. C.
1914

FERGUSON
v.
BRICK AND SUPPLIES LTD.

Walsh, J.

man, and while the plaintiff, with a view to giving a helping hand in the replacing of this car, was walking from one end of it to the other, he stepped into a hole and smashed his foot so badly that it had to be amputated, the amputation being performed about mid-way between the ankle and the knee. Neither the foreman nor any one in authority was present when this work was being done or directed the plaintiff to take any part in it, his services being rendered entirely at the suggestion of the fellow-workman who hailed him.

The only legal objection raised to his right to compensation was that this accident did not arise out of and in the course of his employment. The contention of the defendant in brief is that the plaintiff's employment was to shovel clay out of the pit into the car, that being the work and the only work to which he was assigned by the man whose duty it was to direct his work, and that when he voluntarily undertook work of another character and in another part of the premises at the invitation of one who had no power to order him to do it, he was not then in the course of his employment.

I find myself unable to give effect to this contention. The work in which the plaintiff was engaged when he met with this accident was such work as he and others of his class in the defendant's employ might reasonably have been called upon to do. It was practically of the same character as that which he had done for the defendant on the only other day on which he had worked there, manual labour requiring physical strength and nothing more. His employment was not specifically for work in the pit, but for the ordinary work of a labourer, although it happened that it was in the pit that his first and only work was done.

It was akin or closely allied to the work in which he had been engaged, for until this car was replaced on the rails so that it might be returned to the pit where he had been working there would be no work for him and the other shovellers to do there. The case was one of emergency, for the stoppage of the works would have been involved in the failure to get clay to the hopper which would have naturally followed the break in the line of communication between the pit and the plant, and what he did was certainly in the interest of the defendant. That the accident arose out of his employment is not open to question, and I think there is ample authority for holding that upon the facts here proved it arose in the course of his employment. I find that he is entitled to compensation.

Having regard to all the evidence, I think that $14 per week is a fair sum to fix as the amount of his average weekly earnings. He procured an artificial foot in September, 1913. Until then and for some time after that I think he was totally incapacitated for work as a result of this accident. Under the law as it stood at the time of the accident, he was only entitled to compensation

after the second week, so that it will run from December 16, 1912. I allow him $7 a week, being one-half of his average weekly earnings from that date to the present time, which is practically sixty weeks, making $420, to which he is now entitled. He is now quite able, I think, to perform work of a light character in which he should be able to earn fair wages. He has been out of employment ever since the accident and until he was fitted with his artificial foot and for some time thereafter, which I am practically fixing as of this date, his failure to work was a result of the incapacity consequent upon his accident. His present idleness is due to present labour conditions in this province, and of course the defendant cannot be made to pay him compensation for that. It is his incapacity to work, not his inability to find employment, for which he must be compensated. But even if he could find employment now, it would be different in character from that which he was formerly accustomed to perform. It would be light indoor work, involving no continued strain upon his injured limb, and to that extent there is some incapacity. I think that $4 a week would now represent the difference between his average weekly earnings before the accident and the average weekly amount which he is or should now be able to earn in some suitable employment, and under the circumstances I think it would be proper for the defendant to pay him the full amount of this difference, and I fix his compensation from this date until further order at that sum.

I see no reason why the defendant should not be entitled to deduct from the compensation payable to the plaintiff the costs which have been caused by the plaintiff bringing the action instead of proceeding under the Act, and I direct that it may do so.

Judgment for plaintiff.

PIERCE v. GRAND TRUNK R. CO.

Ontario Supreme Court, Middleton, J. February 24, 1914.

1. PLEADING (§ I—I—65) — PARTICULARS — WORKMEN'S COMPENSATION CASES.

Sec. 15 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, R.S.O. 1914, ch. 146, requiring that where the injury complained of has arisen by reason of the negligence of any person in the defendant's service, particulars shall be given by the plaintiff of the name and description of such person, applies only where the claim is based on some specific act of misconduct on the part of a fellow-servant, and is not intended to shift the onus thrown on the defendant in cases where the plaintiff can rely upon the *res ipsa loquitur* rule.

2. PLEADING (§ I—I—65)—LORD CAMPBELL'S ACT—CONTRAVENTION OF RAILWAY RULES BY COMPANY.

In an action against a railway company under Lord Campbell's Act for negligence causing death, an order should not be made that the

ONT.

S. C.

1914

PIERCE v. GRAND TRUNK R. Co.

plaintiff deliver particulars of the railway company's rules and regulations in contravention of which the plaintiff claimed a defective and improper system was maintained in leaving switches unprotected which had led to the personal injury which caused the death.

Statement

APPEAL by the defendants from an order of Master in Chambers refusing to direct particulars of the names of the employees of the defendants whose negligence, it was alleged, caused the death of the plaintiffs' father; and cross-appeal by the plaintiffs from the same order in so far as it directed particulars of the rules and regulations of the railway company imposing upon the train crew in charge of the way freight train in the pleadings mentioned the duty to close the main line switch and set the distant semaphore, and of the rule or regulation imposing upon the defendants' servants the duty to furnish to the conductor of the said train a copy of the train order in question, and of the rule or regulation imposing upon the defendants' servants in charge of the train the duty of stationing a flagman to warn approaching trains, and lastly of any rule or regulation in contravention of which the railway company authorised and sanctioned a defective and improper system in allowing the switch to remain open and unprotected for long intervals while way freight trains switched back and forth over different siding tracks.

The appeal was allowed.

Frank McCarthy, for the defendants.

T. N. Phelan, for the plaintiffs.

Middleton, J.

MIDDLETON, J.:—In so far as particulars are said to be for pleading, particulars are not required here, for the defendants have the privilege accorded to them by statute of pleading "not guilty by statute."

By sec. 15 of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, it is provided that, in an action brought under that Act, where the injury of which the plaintiff complains shall have arisen by reason of the negligence of any person in the service of the defendant, the particulars shall give the name and description of such person. The defendants contend that this gives them the statutory right to have the name of every employee against whom negligence is to be charged, and that the Court has no discretion in the matter.

The statement of claim here sets forth circumstantially what took place. At St. Catharines the station-house is so situated as to prevent any extended view along the tracks. There are, in addition to the main track a passing track and two other sidings. A train had been given through orders, not calling for any stop at St. Catharines. For some time before it reached the station, a way freight train had been shunting upon the sid-

ings. The switch had been left open from the main track, and the distant semaphore had not been set to warn any train running on the main track, nor had there been any man stationed to flag an approaching train. By reason of this, the oncoming train ran into the siding, and the engine-driver of that train was killed. His infant children now sue, alleging negligence in the matters above set out, and, in the alternative, that, if this condition of affairs was in conformity with the system by which the railway was operated, the system was itself negligent.

The defendants now seek to impose upon these infant plaintiffs the obligation of fixing the blame on some particular individual and of pointing out the specific rules of the railway company which had been disobeyed by the servants of the company in bringing about this dangerous and disastrous result, as a condition of being allowed to prosecute the action. The contention needs only to be stated to shew its fallacy. Our law places no such obligation upon a plaintiff.

Section 15, if it has any application, applies only where the claim of the plaintiff is based upon some specific act of misconduct on the part of a fellow-servant; and I do not think that it ought to be extended to the class of cases in which the plaintiff will have proved his case as soon as the facts in relation to the accident are shewn. Where the rule *res ipsa loquitur* applies, the statute does not intend to shift the onus and call upon the plaintiff to locate the fault.

Nor do I think the Master should have ordered particulars of the rules. The defendants, it may be presumed, know their own rules and regulations. They have the means of knowing exactly what happened, for they are called upon to investigate every accident, and nothing could seem more oppressive than the order sought in this case, nor could anything be devised more likely to occasion a miscarriage at the trial.

In the result, the plaintiffs appeal succeeds and the defendants' appeal fails. The plaintiffs should have the costs throughout in any event.

Appeal allowed.

ALTA.

S. C.

1914

McKINNON v. COHEN.

Alberta Supreme Court, Beck, J. February 4, 1914.

1. ASSIGNMENTS FOR CREDITORS (§ VII A—55)—CHATTEL MORTGAGE—FORFEITURE OF TERM—BONUS OF ADVANCE RENT UNDER LEASE.

A clause in a lease at a monthly rental in advance, stipulating for immediate termination of the lease and a further payment of three months' rent in advance on the lessee transferring his interest in the goods and chattels upon the demised premises, is not effective as against an assignee for the benefit of creditors under the Alberta Assignments Act, ch. 6 of 1907, as to the forfeiture of three months' advance rent because such clause contravenes the general policy of the Act for the distribution of the assets *pari passu* among all the creditors; and this although the transfer of the goods relied upon as terminating the lease was a chattel mortgage and the seizure was made thereunder prior to the assignment.

Statement

STATED case by the assignee for the benefit of creditors under the Alberta Assignments Act, ch. 6, of 1907, to set aside, as against the assignee, a clause in the debtor's lease stipulating for the payment of three months' additional rent in case of assignment.

The application was granted.

T. B. Malone, for plaintiffs.

G. E. Winkler, for defendant.

Beck, J.

BECK, J.:—The plaintiff McKinnon is the assignee for the benefit of the creditors of one Myles under the Assignments Act, ch. 6, of 1907. Myles is a co-plaintiff. The assignment was made on December 23, 1913. The defendant Cohen was the lessor and Myles the lessee of business premises in Edmonton.

The lease bears date April 18, 1912. The rent was $150 per month, payable monthly in advance on the 15th day of each month.

The lease contained the following provision:—

Should the lessee at any time become bankrupt or insolvent or assign or transfer his interest or any portion of his interest in the goods and chattels upon the said premises to any other person or cease in any way to control them, three months' rent shall immediately become due and payable forthwith and distress may be made to collect such rent and the term hereby demised shall immediately become forfeited and void.

Some time—how long is not stated—prior to December 12, 1913, Myles gave a chattel mortgage on his goods situate on the leased premises; and on December 12, the mortgagee seized them by reason of default in payment of the mortgage moneys. Thereupon on the same day Cohen demanded of Myles $450, being three months' rent for the next succeeding three months, namely, from December 15, 1913, to March 15, 1914. The defendant's bailiff sold the goods on the day following the assignment to the plaintiff McKinnon, realizing $564.60, which his bailiff holds in his hands pending the decision of the question raised by the stated case which is now before me, namely, the validity or effect of the clause in the lease which I have quoted.

The clause contemplates three contingencies:—

1. The lessee becoming bankrupt or insolvent.
2. His assigning his interest, or any part of it, in the goods on the premises.
3. His ceasing in any way to control them.

Although the contingency which first happened, and on account of which the lessor distrained the lessee's goods on the premises, was not the lessee's becoming bankrupt or insolvent, yet I think that the clause—no matter which is the contingency relied on—is invalid as against an intervening assignee under the Assignments Act, on the ground that it is a "fraud" upon that Act, although, except as against such an assignee or other person representing the general body of creditors, or—in view of the Creditors' Relief Act—any creditor, it may be valid, *i.e.*, as between the parties, subject to the jurisdiction of the Court to relieve from it as being a penalty.

I come to this conclusion after having examined such cases as *Higinbotham* v. *Holme*, 19 Ves. 88; *Whitmore* v. *Mason*, 2 J. & H. 204, at p. 212; *Ex parte Williams, Re Thompson*, 7 Ch.D. 138; *Ex parte Jay, Re Harrison*, 14 Ch.D. 19; *Re Hoskins* v. *Hawkey*, 1 A.R. (Ont.) 379.

The general policy of Bankruptcy and Insolvency Acts and of our Assignments Act and Creditors Relief Act, and I may add the Dominion and Provincial Winding-up Acts, is to bring about a distribution of the assets of a debtor *pari passu* among all his creditors.

Such a clause as the one in question, if effective, would, to the extent to which it would give an advantage to a lessor, prejudice the other creditors, and is directly opposed to the general policy of these statutory provisions. It is upon this broad ground—that it was a "fraud" upon the Bankruptcy Act or the Insolvent Act, not a contravention of any precise clause upon which one could lay his finger—that the view I have expressed was applied in the cases I have cited to somewhat similar clauses. A lessor can, I think, sufficiently protect himself against any probable real loss by providing for payment of the actual rent in advance either monthly, quarterly or otherwise, according to the circumstances. I think I may take it that the original seizure was authorized by the clause in question—there is express authorization to distrain.

The distress was on December 12. The lessor would have been entitled to $150, one month's rent in advance, on December 15. How long after the 15th—if at all—the lessee occupied the premises does not appear. The lessor's act of the 12th was, it seems to me, a determination of the lease. I am inclined to allow the lessor a sum for use and occupation by the lessee at the rate of $150 a month for any period of time the lessee may have been

ALTA.
S. C.
1914
McKINNON v. COHEN.
Beck, J.

in occupation after December 15, and to permit him to deduct that sum from the money realized by the sale. Subject to this, I order the moneys in the hands of the defendant's bailiff to be paid to the plaintiff McKinnon less the proper charges and expenses of the bailiff in relation to the seizure and sale, which I will tax if there is any dispute about the amount. As there seems to be no direct authority on the question, I have been called upon to decide—at all events in this Court—I make no order as to costs.

Judgment for plaintiff McKinnon.

ALTA.
S. C.
1914

ELGIN CITY BANKING CO. v. MAWHINNEY.

Alberta Supreme Court, Walsh, J. February 6, 1914.

1. JUDGMENT (§ I F—46)—SPEEDY JUDGMENT—PROMISSORY NOTE—HOLDER IN DUE COURSE.

Summary judgment should not be awarded the endorsee of promissory notes where the maker discloses on affidavit a *primâ facie* case of fraud which would be available against the original payee, and the evidence that the plaintiff is a holder in due course is dependent upon depositions and discloses room for doubt; the court will in such a case permit the defendant to go to trial although he has cross-examined upon the plaintiff's affidavit.

[*Park* v. *Schneider*, 6 D.L.R. 451; *Fidelity Trust Co.* v. *Schneider*, 14 D.L.R. 224; *Vaughan* v. *Schneider*, 11 D.L.R. 290, referred to.]

Statement

APPEAL by the maker of certain promissory notes against summary judgment in favour of an alleged endorsee in due course, where fraud was the defence.

The appeal was allowed.

Walsh, J.

F. E. Eaton, for the appeal.

L. H. Fenerty, for plaintiffs, contra.

WALSH, J.:—I must allow these appeals. The defence of fraud is, I think, sufficiently established for the purposes of these motions by the affidavits filed by the defendant, and the onus of proving that it is the holder in due course is on the plaintiff. I think it very doubtful if in such cases as these that issue should be allowed to be disposed of on a motion for judgment under rule 103. These actions are on promissory notes given on the purchase of a stallion, and the defence is the usual one of fraud. In view of the many decisions of this Court on the question of holder in due course, I am justified in saying that the onus of proving it is one that is not allowed to be lightly discharged.

In *Park* v. *Schneider*, 6 D.L.R. 451, the Court *en banc* sustained the refusal of Stuart, J., to allow the commission evidence of the plaintiff who lived out of the jurisdiction to be used at the trial, although he was physically unable to come to this country, and his evidence was absolutely indispensable to his success. This was upon the broad ground that a witness upon whose evidence

the judgment upon this determining issue in the case rested should give that evidence in the presence of the Judge trying the case. *A fortiori* it seems to me that this issue should not be summarily disposed of in such a motion as this even when the plaintiff's affidavit has been implemented as here by the cross-examination of the defendant upon it. See also *Fidelity Trust Co.* v. *Schneider*, 14 D.L.R. 224.

Be that as it may, the examination of the plaintiff's cashier raises a good many doubts in my mind as to whether the plaintiff's claim to be the holder in due course can be given effect to. There are in it many of the elements which in other cases in this Court have led to the opposite conclusion. See *Vaughan* v. *Schneider*, 11 D.L.R. 290; *Olstad* v. *Lincham*, 1 A.L.R. 416. I think that enough appears from it to make it highly desirable that this claim of being the holder in due course which the plaintiff makes should not be settled in its favour upon the present material.

The motion for judgment in No. 4641 is dismissed, the costs of it to be in the cause, including the costs of the examination of the plaintiff's cashier. The motion to set aside the default judgment in No. 4839 and to allow the defendants to defend is granted. The defendant will pay the plaintiff's costs of entering that judgment and of the motion to open it up. The plaintiff will pay the defendant's costs of these appeals. The costs payable by each of the parties under this judgment shall be set off against each other, and payment of the difference between them shall be made by the party against whom the balance is. If the balance is against the defendant the judgment in No. 4839 will not be opened up unless payment of it is made within five days after such balance is ascertained by taxation, and the defence in such action must be delivered within eight days after such taxation.

Appeal allowed.

HOPKINS v. BROWN.

Alberta Supreme Court, Scott, J. February 10, 1914.

1. PARTIES (§ II B—119)—BRINGING IN PARTIES—JOINT AND SEVERAL NEGLIGENCE—ADDING PARTIES.

An owner who employs an architect to superintend a builder to erect a building on his land adjoining a public highway, and who through the agency of the architect employs land surveyors to survey and designate the site for the building, is entitled, in defending the architect's suit for his fees, to counterclaim for damages on the ground that the building was erected so as to encroach upon the public highway owing to the negligence of the architect, the builder and the surveyor, or in the alternative from the negligence of some of them, and may bring them all in as parties defendant to the counterclaim although some of the causes may have arisen from tort and others from contract.

[As to architect's duty to employer, see Annotation, 14 D.L.R. 402.]

Statement

APPEAL from an order of the Master in Chambers bringing in added parties to an issue between an owner and his architect

ALTA.

S. C.
1914

HOPKINS
v.
BROWN.

touching the location and erection of the owner's building on a site encroaching a public highway, and involving the owner's right to add the builder and the surveyor under a plea of joint and several negligence in the same transaction against all three and in the alternative of negligence by one or more of them.

The appeal was dismissed.

J. E. Wallbridge, and *S. W. Field*, for appellants.

S. S. Cormack, for respondent.

W. G. Harrison, for plaintiff.

Scott, J.

SCOTT, J.:—These are appeals by defendant Prentice and by the defendants Driscoll and Knight respectively from the order of the Master in Chambers adding them as defendants to the counterclaim, and amending same.

Hopkins' claim in the action is for fees alleged to be due to him as an architect in respect of the plans for and superintending the erection of a building for the defendant.

The counterclaim, as amended by the order now appealed from, alleges that Prentice was the contractor for the erection of the building, that Driscoll and Knight are Dominion land surveyors employed by Hopkins as agent of Brown and who, for reward, surveyed and designated the site for the building; that, by reason of the negligence of Prentice in erecting the building and of Hopkins in superintending its erection or of Driscoll and Knight in surveying and designating its site, it was erected so as to encroach upon the public highway, that by reason of the negligence of the defendants or one of them he will be compelled to remove the building from the highway and that he is in doubt as to which of the defendants is liable to him. He therefore claims: (1) damages from the defendant Prentice; (2) damages from defendant Hopkins, and (3) damages from defendants Driscoll and Knight.

Upon the hearing of the appeals the plaintiff applied for leave to further amend his counterclaim by substituting for the charges of negligence referred to, charges that it was by reason of the negligence of the defendants, or that of Hopkins and Prentice, or that of Hopkins and Driscoll and Knight, or that of Hopkins, or that of Prentice, or that of Driscoll and Knight, that the plaintiff would be compelled to remove the building from the highway and reconstruct same, and by claiming damages (1) from all the defendants, and, as alternative claims, (2) from Prentice and Hopkins, (3) from Driscoll and Knight and Hopkins, (4) from Hopkins, (5) from Driscoll and Knight, and (6) from Prentice.

In *Edinger* v. *MacDougall and York*, 12 W.L.R. 82, the plaintiffs charged that each of the defendants was operating an automobile, that they and each of them so negligently drove them as to cause injuries to the plaintiffs and that the latter were in

doubt as to whether they were entitled to damages against both defendants, or only against one of them and, if so, which of them. Upon an application by one of the defendants for an order to compel the plaintiffs to elect against which of the defendants they would continue the action, Harvey, C.J., made the order applied for, holding that rule 6 of order 16, which provides that all persons may be joined against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, being one of a series of rules relating only to parties to an action, is applicable only to that question and does not authorize the joinder of separate causes of action. He adopted the principle laid down by the Court of Appeal in *Thompson* v. *London County Council*, [1899] 1 Q.B. 840; and in *Hinds* v. *Town of Barrie*, 6 O.L.R. 656. A later case, however, which is referred to in his judgment, viz., *Bullock* v. *London General Omnibus Co. et al.*, [1907] 1 K.B. 264, which is also a judgment of the Court of Appeal, appears to leave it open to serious doubt whether the principle laid down in *Thompson* v. *London County Council* is applicable to the present case. Collins, M.R., was a member of the Court in both these cases, and it is only necessary to read his reasons for judgment in the later case, and his comments in both cases upon the effect of the judgment of *Smurthwaite* v. *Hannay*, [1894] A.C. 494, and in the later case upon the effect of *Sadler* v. *G.W.R.*, [1895] 2 Q.B. 688, to see how that doubt can easily arise. The fact that he expresses the view that the distinction which was drawn in the earlier cases between actions arising from tort and those arising from contract was improperly drawn, is, in itself, a ground for the doubt I have expressed.

There are a number of cases referred to in the English works on practice which bear upon the question involved in these appeals, but they are inconclusive and, to a large extent, contradictory. I therefore find it impossible to deduce from them any definite principle applicable to the question.

In view of these doubts I am unable to conclude that there has been a misjoinder of either parties or causes of action. I therefore dismiss the appeals but without costs.

The plaintiff will have liberty to amend his counterclaim in the manner in accordance with his application. Costs of the amendment and of those occasioned thereby to be costs to the defendants in any event.

Appeal dismissed.

ALTA.

S. C.

1914

HEATON v. FLATER.

Alberta Supreme Court, Stuart, J. February 9, 1914.

1. BROKERS (§ II A—5)—REAL ESTATE—AGENCY CONTRACT, WHEN WRITING NECESSARY.

Ch. 27 of the Alberta Statutes of 1906, providing against action being brought for commission on realty sales unless the contract therefor or some note or memorandum thereof is in writing, does not apply to a case for apportionment of commission where three persons agree to share between themselves a commission earned by their joint efforts, the intent of the statute being not to operate in favour of any one except the person to whom the services are alleged to have been rendered.

Statement

ACTION by one real estate broker against his co-worker in a realty sale setting up an agreement between themselves to share the commission earned by their joint efforts in the transaction in question.

Judgment was given for the plaintiff.

H. H. Parlee, K.C., for the plaintiff.

Alan D. Harvie, for the defendant.

Stuart, J.

STUART, J.:—In this case, wherever there is a conflict of testimony, I accept completely the evidence of the plaintiff and his witness Harris rather than that of the defendant. The defendant's evidence, both in its substance and its manner, was unsatisfactory to me. I think his endeavour to represent himself as having been a purchaser himself and then a vendor to Dabeny was simply a subterfuge. It was in direct conflict with the only documentary evidence which was produced. I accept the account given by Harris and the plaintiff of the transactions between them, and I conclude as a fact that the defendant did agree to share his commission with them, each taking one-third. In my opinion the statute of 1906 does not apply to a case where three persons agree to share a commission between them which has been earned by their joint efforts. The statute says that

> no action shall be brought whereby to charge any person either by commission or otherwise for services rendered in connection with the sale of any land, etc., unless, etc.

I think, considering the well-known evil which this statute was intended to remedy, that it was quite obviously not the intention of the legislature that its terms should apply in favour of any one except the person *to whom the services are alleged to have been rendered*. In the present case the plaintiff did not render his services to the defendant. The fact is that the plaintiff Harris and the defendant jointly rendered services either to the vendor or to the purchaser, that is, to either Dabeny or to Maurice, from whom Dabeny purchased. Dabeny agreed to pay a certain sum for the property and agreed in the presence of Harris and Flater that he would pay an additional $2,500 for

commission. It was agreed that this should be divided between Harris, Flater and Heaton, one-third to each. I accept Harris's evidence as to this. Flater got the $2,500, but now refuses to pay the others their share. Heaton sues for money had and received and I think he is entitled to succeed. As to the question of expenses subsequent to the date mentioned above, the inference I make from the evidence is that each of them was content to bear his own expenses and that these were not intended to be shared.

There will be judgment for the plaintiff for $833.33 and costs, including costs of examination for discovery.

Judgment for plaintiff.

Re PENGELLY-AKITT Ltd.; JACQUES' CASE

Alberta Supreme Court, Walsh, J. February 19, 1914.

1. CORPORATIONS AND COMPANIES (§ IV D 1—79)—PRIVATE COMPANY—DEBT OF INDIVIDUAL SHAREHOLDERS—ASSUMPTION BY COMPANY.

That the only real shareholders in a company had paid a part of their own debt to the plaintiff with the company's money and had obtained the issue and transfer to him of certain of the company's shares by way of security, is not an assumption of the debt, and will not operate to make the plaintiff a creditor of the company for the balance; it is, moreover, to be doubted whether a trading company can voluntarily assume an obligation incurred by an individual in the purchase of the company's own shares or become guarantor or surety in respect thereof.

Statement

CONTESTATION in winding-up proceedings of a claim to rank as a creditor of a company in liquidation in respect of a claim arising out of an advance of $4,000 made by the claimant in tran actions with the three beneficial holders of the company's stock.

J. C. Brokovski, for liquidator.

G. H. Ross, K.C., for the claimant.

Walsh, J.

WALSH, J.:—The claimant seeks to rank as a creditor of this company in liquidation, and the liquidator disputes his right to do so. The claim arises out of an advance of $4,000 made by Jacques in March, 1909. $2,000 of this has been repaid to him, and he claims to be a creditor of the company for the remaining $2,000 and interest. The liquidator sets up that this $4,000 was the purchase price of 40 shares in the capital stock of the company for which the claimant subscribed. He intimates his intention of proceeding to recover from Jacques the $2,000 repaid to him which came out of the company's funds, but with that claim I have no concern, as it is not being litigated before me.

I found as a fact at the close of the hearing that this sum of $4,000 was a loan, but I reserved my consideration of the question as to whether the claimant is a creditor of the company or of

ALTA.
S. C.
1914
RE PENGELLY-AKITT LTD.
Walsh, J.

certain individuals in respect of it. My conclusion is that this is not a liability of the company.

Jacques advanced this $4,000 (and a further sum of $1,500, which was admittedly but a temporary loan to one Butler, and which was almost immediately repaid) to one Pengelly for the purposes of himself and one Akitt and one Butler. This money was needed by these three men to make up the full amount required by them to purchase from one Mittenthal all of the shares in this company which was then known as G. E. Jacques & Co., Limited, he, Mittenthal, then owning or controlling all of these shares. At the time of the advance neither Pengelly nor Akitt nor Butler had the slightest interest in the company. They were simply individuals who had practically agreed with Mittenthal to buy him out, and who, lacking $4,000 of the amount required to do it, came to Jacques and borrowed that sum from him. I am at a loss to see how the credit of the company was pledged to Jacques in this transaction. He parted with his money to the individuals with whom he dealt. They at that time had no power to make the company responsible for it even if they had assumed to do so, which they do not appear then to have done. The only writing to evidence the transaction at that time was the cheque of Jacques, which was made payable to the order of Pengelly and was by him placed to the credit of his account in the bank with the other sums required to make the purchase, and eventually a cheque for the whole amount was issued against this account to Mittenthal. What money can be said to have been advanced to the company? The company as such got none of it. The individuals who borrowed it got it directly from Jacques, and the man who owned or controlled all of the shares of the company got it from them. It was used simply in the dealings for the shares of the company between two sets of individuals, and in what took place I can see nothing to impose any liability upon the company.

But it is said that this was subsequently adopted as a liability of the company. The facts upon which this contention rests are these. About five months after the loan was made, Jacques became uneasy because nothing had been paid upon it either for principal or interest, and he placed the matter in the hands of his solicitor. As a result, an agreement in writing was reached, not between Jacques and the company, but between him and the three men to whom he had made the advance and who then were the only real shareholders in the company, under which they agreed to pay to him in lieu of dividends on his shares in the company interest on the same at ten per cent. per annum, payable monthly so long as he should hold any of such shares. It is not clear how Jacques came to hold any of these shares, but the best conclusion I have been able to reach is that 40 shares were issued and transferred to him by way of security for the repayment of his advance.

The interest was paid according to the terms of this agreement for several months, the payment being made out of the funds of the company, and later $2,000 of the principal was repaid from the same source. A stock account was opened by the claimant in the company's ledger when this agreement was made in which he was credited with the value of 40 shares, $4,000, and was debited with the various payments of interest made to him from time to time. There was no entry of any other kind in the company's books bearing on the subject, and no resolution of any sort dealing with it.

And it is upon these facts that the claimant alleges an adoption of this liability by the company sufficient to entitle him to rank as a creditor.

Whatever legal liability might be imposed upon an individual who thus conducted himself, I am satisfied that the acts here relied upon cannot avail to make this company liable for this claim. I doubt very much if it was within the power of the company to make this its debt even if it had gone deliberately to work to formally bring that about. The debt originally was undoubtedly that of the individual shareholders, and it seems to me impossible to hold that the company could voluntarily assume its payment especially when it was contracted for the purpose of buying the company's shares. If there was not a substitution of the company for the individuals as the debtors, as I think there was not and could not be, its liability could only arise *qua* guarantor or surety or in some other such capacity. There is absolutely no evidence to justify a finding that any such relationship between the claimant and the company was even constituted, and even if there was I should think it more than doubtful if such a company as this could in law make itself so liable.

The simple fact appears to be that the three debtors, who were the only real shareholders, saw fit to discharge in part a debt of their own with the company's money, and that cannot, in my view, make the company in liquidation liable for the unsatisfied balance of this debt.

The right of the claimant to rank as a creditor cannot be given effect to, and he must pay the liquidator's costs of this contestation.

Claim rejected.

QUE.

1914

L'ALLIANCE IMMOBILIÈRE v. PICARD.

Quebec Superior Court, Archer, J. March 4, 1914.

LANDLORD AND TENANT (§ III E—115)—*Re-entry—Recovery of possession—Subletting to disorderly tenant—Effect.*]—Action in ejectment against a lessee and his transferee of the lease, asking resiliation of same by reason of the conviction of a subtenant for keeping a disorderly house.

G. C. Papineau-Couture, for plaintiff.

A. W. P. Buchanan, and *T. S. Owens*, for defendants.

ARCHER, J., held that where a lease provides for a right to sublet to respectable persons, the fact that a subtenant had been convicted of keeping the place as a disorderly house in consequence of which the owner was notified by the police under Cr. Code, sec. 228 *a* (amendment of 1913) with a view to holding him liable should the offence be repeated or continued, the Court is not bound to grant the landlord a decree forfeiting the term and resiliating the lease, but has a discretion to refuse the relief if the immediate lessee had no reason to suspect that the house was not respectably kept, in the event of the convicted occupant abandoning the premises pending the action. *Brunet* v. *Goldwater*, 33 Que. S.C. 240.

But while refusing to rescind the lease as against the immediate lessee because the reason for rescission had disappeared only a few days before the trial, the Court may maintain the action as to costs and order payment of same by the lessee.

Judgment for costs only.

N.B.—No appeal was taken.

ALTA.

S. C.

1914

BARTLETT v. BULL.

Alberta Supreme Court, Walsh, J. February 6, 1914.

1. WILLS (§ I D—36)—TESTAMENTARY CAPACITY.

The fact of a testator suffering from paresis at the time of making his will is not sufficient ground for setting it aside where the court is satisfied that at the actual time of the making of the will the testator could and did fully appreciate what he was doing and was in fact "a free and capable testator."

[Compare *Badenach* v. *Inglis*, 14 D.L.R. 109, 29 O.L.R. 165.]

2. HUSBAND AND WIFE (§ II D—72)—WIFE'S SEPARATE ESTATE—INTERMIXING WITH HUSBAND'S PROPERTY.

Where a testator during his lifetime has had the handling of his wife's estate as well as his own and the two estates have to some extent been mixed, the moneys of the wife being transferred into his name or their joint names, the husband is presumed to be a trustee for

the wife, at least with respect to the corpus, though the presumption of a gift is raised with reference to the income unless a contrary intention is proved.

[*Mercier* v. *Mercier*, [1903] 2 Ch. 98; *Dixon* v. *Dixon*, 9 Ch.D. 587; *Alexander* v. *Barnhill* (1888), 21 L.R.Ir. 511; *Hale* v. *Sheldrake*, 60 L.T. 292, specially referred to; and see Annotation on property rights between husband and wife, 13 D.L.R. 824.]

ALTA.

S.C.

1914

BARTLETT v. BULL.

Statement

ACTION by the widow to set aside a will on the ground of her husband's mental unsoundness and for an account by the executors as to the transaction undertaken by him involving the plaintiff's separate estate.

Judgment was given upholding the will, but ordering a reference to take an account in respect of the separate estate.

Frank Ford, K.C., *O. M. Biggar*, K.C., and *N. R. Lindsay*, for plaintiffs.

C. C. McCaul, K.C., and *C. L. Freeman*, for executors.

E. B. Edwards, K.C., *A. G. MacKay*, K.C., *F. C. Jamieson*, *C. H. Grant*, and *John Cormack*, for the beneficiaries.

Walsh, J.

WALSH, J.:—The widow of the late George Hutton, who has remarried since his death, brings this action against the executors of and the other beneficiaries named in his will and codicil, to set the same aside upon the sole ground that he lacked capacity to make same by reason of mental unsoundness.

The will was made on November 30, 1910. By a codicil dated January 4, 1911, he substituted the defendant Parlee for the plaintiff as one of the executors and without making any other change in the will thereby declared that "in all other respects I do confirm my said will." He died on January 28, 1911, without having revoked or otherwise altered this will, which, I understand, was the first and only will that he ever made. Probate was granted on March 20, 1911. According to the proofs to lead probate which were filed, the gross value of his estate at the time of his death was $122,825. Between the date of his will and his death he transferred to his wife property worth approximately $63,000 and to others some properties of smaller value, so that, at the date of his will, the value of his holdings, assuming that everything then standing in his name was his own property, was approximately $200,000. By his will he gave the household effects to his wife and specific legacies aggregating $49,000 to various relatives. He devised and bequeathed the residue of his estate to his executors as trustees for investment upon trust to pay out of the income to his mother an annuity of $500 during her lifetime and to pay the balance of such income, and after his mother's death the whole thereof to his wife for her life and upon her death to distribute the corpus share and share alike amongst the children of his brothers and sisters. There was never any child the issue of the marriage of the testator and the plaintiff. No charge of undue influence leading to the making of this will

ALTA.
S. C.
1914
BARTLETT
v.
BULL.
Walsh, J.

is set up by the pleadings. I thought there was an inclination from time to time on the part of the counsel for the plaintiff to, at least, suggest the interference of the testator's sister, Mrs. Skinner, with the free exercise of his testamentary powers, but I think it only right to say that in my opinion there is nothing in the evidence to warrant this suggestion.

The plaintiff's contention is that the testator when he made his will was a paretic. I have not the slightest hesitation in holding as I do that this contention is well founded. The evidence upon which I principally rely in reaching this conclusion is that of Dr. Woodrow. This gentlemen who has been practising his profession in Edmonton in partnership with Dr. Braithwaite since 1907 had, in conjunction with his partner, the testator under his professional care from that time until his death. He alone of all the medical men who gave evidence, except his partner, had an opportunity to diagnose the disease or ailment from which the testator was then undoubtedly suffering, and his opportunities in this respect were I think better than those of Dr. Braithwaite. In my judgment he has the capacity and has had the experience to make his opinion of value, and that opinion is that before Hutton made this will paresis had fastened itself upon him. The history of his professional treatment of his patient is in brief that in the fall of 1907 he was in the General Hospital at Edmonton suffering from urethritis, and in the course of his physical examination of him he found on his person an old indistinct syphilitic scar. Some doubt is cast upon the correctness of this statement as to Hutton being in the hospital in that year. It may be that Doctor Woodrow is in error in giving the hospital as the place at which he then treated him, but I see no reason whatever to doubt the correctness of his story in other respects. I do not think that he could have confused him with some other patient, and it is inconceivable that he should have manufactured the story. The value of this part of his evidence simply rests in this that paresis is very often traceable to syphilis. Between 1907 and 1908 he saw him professionally off and on for minor complaints. In 1909 he attended him in the hospital, treating him for indigestion. In the summer of 1910 he treated him at home for indigestion and hemorrhoids. He says that he saw him in August every other day or every third day, in September not as often, and in October and November, particularly November, very often, eight or nine times in December, and after January 7, until his death on the 28th, very often, particularly towards the end. His opportunities for observation were therefore most excellent. During this time the testator, who was of very humble origin and had lived all of his life in a most modest and unpretentious fashion, was building for himself a splendid home in a fashionable part of Edmonton. Dr. Woodrow says that in the early summer of 1910 he was greatly interested in this

house, his idea being to make it a palace, to have it the finest house in the city, where he could entertain and give big dinner parties and balls and that he often asked for suggestions to make it more luxurious. In August he began to worry about the house and question his ability to pay for it, and he decided to cut out a great many of its expensive appointments. In October when he was worrying about the doctor's bill, which then amounted to about $200, he offered to give him the uncompleted house upon which, including the purchase of the land, some $20,000 had then been expended, in payment of this account, and in fact signed a transfer of it, which the doctor drew up on a prescription pad because as he says "he would not give me any peace until I did, he wanted to pay his bill." This, of course, the doctor afterwards destroyed and the subject was never referred to again. In October and November he suffered from eczema, at first slightly and at last very severely. He exhibited much restlessness during this time, a great part of which no doubt was attributable to the irritating nature of this disease. About the middle of November he got the idea that he was to be taken to the penitentiary, and on one occasion about this time he took a large overdose of a solution containing arsenic with the intention, as he told the doctor, of committing suicide, and about ten days later the doctor found the broken end of a bottle in his bed with which he said he intended to kill himself for fear of going to the penitentiary. On another night which, from the evidence, I find was November 29, the night before the will was made, the doctor gave him a hypnotic about nine or ten and he went over again about one in the morning in response to an urgent call and found Hutton stark naked in his bed and in a delirium. During this period he spoke on two or three occasions of having walked out to his farm the night before, and had illusions of sight, hearing, smell and taste. His physical and mental conditions improved in December, the only evidence of anything abnormal which presented itself to the doctor in that month being what he described as "this persistent penitentiary idea." In the latter part of January he got back to about the same condition as that in which he was in November. Since the summer of 1910 the doctor noticed a difficulty in enunciation, facial tremors, a growing carelessness in his personal habits, an alteration of or unsteadiness in his gait, a lack of memory of recent events. All of these things with the exception of the suicidal tendencies are in his opinion symptomatic of paresis. Dr. Braithwaite expressed the opinion, from certain conduct of Hutton in the fall of 1910, that he was then mentally unsound. He very candidly stated that he had not given the matter any consideration and it was quite evident that he did not attempt to pose as an authority upon the question of insanity. He probably would be as much surprised as any one else if very much weight was attached to his evidence as an expert in this branch of his profession, although, of course, in

ALTA.
S. C.
1914
BARTLETT
v.
BULL.
Walsh, J.

other respects it is worthy of much consideration. Dr. Landry, an Edmonton physician, who though young both in years and in the practice of his profession, has had some experience which entitles his opi ion to respect and who had carefully studied the question for the purpose of better qualifying himself to give evidence on this trial, agrees with Dr. Woodrow's diagnosis of paresis. His opinion is based entirely upon the statements of fact sworn to by Dr. Woodrow which he treated as a case report upon Hutton's condition, and certain other statements of fact sworn to by other witnesses. I will not attempt to enumerate all of these other facts, but I take it as well established that Hutton made other attempts at suicide than those spoken of by Dr. Woodrow, that he complained of and suffered badly from headache, the result of an accident with which he met some years before his death, that he developed most generous instincts, as shewn by the many large gifts of property which he made and attempted to make, in marked contrast to the miserly habits which he had exhibited throughout his life, that notwithstanding his wealth, he complained of his poverty, sometimes perhaps jokingly, but at other times as an excuse for not doing things which he manifestly should have done for his own sake, that he worried greatly over his new house, that he did many strange things, such as starting to walk out to his farm thirteen miles distant after night and taking with him two shovels in order that he might work with them on the farm and thus help to release himself from the grind of poverty, that he imagined he was in danger of being sent to the penitentiary and was being chased by people who wanted to take him there, and that he sometimes failed to recognize people who were well known to him.

Dr. Dawson, the medical superintendent of the provincial asylum for the insane at Ponoka and Doctor Wilson, of Edmonton, were called as witnesses for the defence. The former gentleman is certainly entitled to rank as an alienist and the latter exhibited a comprehensive knowledge of the subject under discussion. Neither of them had any knowledge of the facts as to Hutton's condition beyond those stated to them by counsel as having been proved at the trial, and particularly those disclosed by Doctor Woodrow, whose evidence, in its extended form, had been read over by them. While they both disagree with Dr. Woodrow's diagnosis of paresis they both admit that the facts sworn to reveal the existence of some form of mental unsoundness in Hutton. I rather formed the opinion from what Doctor Dawson said under direct examination that his evidence supported the view that Hutton was at the time of and for a short time prior to his death suffering from paresis in its incipient stage. Upon re-examination, however, he went so far as to say this, his case did not "ring true of general paresis" and he expressed the opinion that he might have been suffering from a slight degree of melancholia. Dr. Wilson's view was that he was suffering from

depression. These gentlemen were subjected to a most able cross-examination at the hands of Mr. Biggar, and largely as a result of that the correctness of Dr. Woodrow's opinion as to the disease from which Hutton was suffering in the last few months of his life remains in my judgment unshaken, even if indeed it is not strengthened.

This finding, however, by no means disposes of the issue. I am satisfied that the disease even at the time of Hutton's death was merely in its incipient stage. Dr. Woodrow first definitely detected the symptoms of it in the spring or summer of 1910. The history of the disease is that it is a gradual downward progression, with frequent remissions, particularly in its early stages, which become less frequent as the disease progresses. The medical evidence satisfies me that during the periods of remission, at any rate, the patient has the capacity to transact his ordinary business affairs, including the capacity to make his will. And I am quite satisfied that the will in question was made at a time when Hutton's mental state was such that he could and he did appreciate fully what he was doing—that it is, as one of the cases puts it, "the true last will of a free and capable testator."

Mr. Parlee drew the will. He alone was present when the instructions for it were given. There are a great many legatees named in it, something over fifteen. All of these but one are relatives of the testator. Mr. Parlee says that he never heard of any of the persons mentioned in the will except the plaintiff, the executor Bull and possibly Mrs. Skinner, until he was taking these instructions, yet the names and relationships, places of residence and occupations of all of them are correctly set out in the will, except that three uncles are termed friends and one uncle has no description of any kind given to him. Some of the terms of the will were the subject of discussion between them, and Mr. Parlee's advice was asked more than once with reference to some of the provisions and particularly with reference to those dealing with the plaintiff. Twice at least, as the instructions proceeded, he wanted to know what the specific legacies then aggregated. Mr. Parlee's firm had acted for years as his solicitors, and although until this time he personally had not transacted very much of his business, Hutton was exceedingly well known to him. Mr. Parlee describes Hutton's physical and mental condition as it appeared to him when he was taking these instructions in these words:—

> He was lying in bed. Physically, I thought he was sick, and the impression on my mind was that he had been confined to his bed for some time. Mentally he appeared to me in connection with his instructions to be perfectly clear in his head. He had apparently given considerable consideration to the specific legacies, anyway I would think he had given consideration to how he had disposed of his property generally, and the impression on my mind then was that he was a particularly good man to get instructions from compared with other people. I had drawn wills for other people, and

ALTA.

S. C.
1914

BARTLETT
v.
BULL.

Walsh, J.

a good many wills, and I do not know that I ever took a will of that length, it is not so very long, from a man that gave me as clear instructions as Mr. Hutton did.

And asked as to his nervous condition, as to his excitability or calmness he said, "he gave me not the slightest indication of any nervousness whatsoever." After taking these instructions in the morning Mr. Parlee went to his office and returned to Hutton's house with it on the same evening for execution, being accompanied by two of his partners, Mr. Abbott and Mr. Mustard. He had under the testator's instructions left a space at the end of the will, so that anything which Hutton decided in the meantime to add to it might be written in. On his return the testator instructed him to give the legacies which are now provided for by paragraph 9 of the will. With reference to his condition then Mr. Parlee says, "I would say exactly the same thing as I said about the way I found him in the morning." Even if I did not, as I do, know Mr. Parlee to be a most conscientious and thoroughly reputable member of the legal profession, I would unhesitatingly accept his evidence as exposing most accurately Hutton's condition on that day as it exhibited itself to him. I know of no one, except, of course, the skilled physician so competent to judge of a man's fitness for the transaction of such business as a keen, well-trained, honest-minded lawyer. I believe implicitly every word that Mr. Parlee said as to Mr. Hutton's condition and as to what took place between them on both these occasions.

Mr. Abbott and Mr. Mustard did not go to the testator's room until the will was ready for signature and they only stayed there long enough for that, so that their opportunities for observing his mental condition were not very good, but they both say that beyond the fact that he appeared physically ill, there was nothing about him or in his talk to attract their attention.

Now, it is quite true that Hutton had been in a very bad state on the preceding night. But it is equally true that Doctor Woodrow called to see him about 10.30 that morning, which was, I take it, before Mr. Parlee's first visit and found that he had spent a quiet night and slept well, and so he went out without treating him at all and, as he put it, he "just barely spoke to him." It is also true that on the same night and after, as I take it, the execution of the will he called again and found Hutton in a confused state of mind, mixing him up with the person who had got him to sign some papers that day and being unable to remember things. Notwithstanding this, I am satisfied that the period between the doctor's midnight visit on the 29th and his evening visit of the 30th was marked by one of those intervals of lucidity of which Dr. Woodrow himself speaks and which the other medical men emphasize. Dr. Woodrow admitted that he might have had a lucid interval on that day, but said that if so, it was a very short one. And speaking of his capacity for making a will on that

day he said, "if he had a lucid interval on that day he might make a will, but I doubt whether he had a lucid interval."

It was to the defendant Bull, one of the executors, that Hutton first spoke on that day of having his will made. He told the plaintiff of this desire of her husband. She says that she at once remonstrated on the ground that her husband was unable to make a will. It is quite plain, however, that after Mr. Parlee got his instructions for the will he came downstairs and told the plaintiff of the testator's intentions with respect to her. To put it in her own words, "when Mr. Parlee told me about Mr. Hutton wanting to leave it in a bulk Mr. Parlee says he did not want to let Mr. Hutton leave it that way. He would rather put it out at interest, I says, 'all right, if Mr. Bull will look after it for me, it will be all right.'" She undoubtedly knew what he was there for and instead of protesting against it, seems to have acquiesced in it, a fact which is not without some significance.

Between November 30, 1910, and January 4, 1911, Hutton admittedly improved greatly. He got out of bed and after a time was able to go down town and transact business. On January 4 he went to Mr. Parlee's office and told him he had come to have someone substituted for his wife as an executor as he did not want her to be bothered about it. She was named as one of the executors in the will, which Mr. Parlee took with him to his office on the date of its execution and which had been there ever since, this being the first occasion upon which Mr. Parlee had met him since then. Mr. Parlee got the will and handed it to Hutton, but is unable to say whether or not he read it. After some discussion in which other names were mentioned Mr. Parlee at Hutton's request agreed to act as executor, and the codicil making the change and confirming the will in other respects was drawn up and executed.

I have not the slightest doubt in the world but that Mr. Hutton on this occasion knew exactly what he was doing, and that fact materially strengthens my conviction that he thoroughly understood what he was doing when he made his will. He undoubtedly carried in his mind through the intervening five weeks the knowledge of the fact that he had made the will, and that his wife was named as one of the executors of it, and this, so far at least as the evidence shews, without any refreshing of his recollection by any one. The making of the codicil was a re-publication of the will and even if that document lacked validity by reason of the testator's want of capacity at its date, I think that it had effectiveness imparted to it by what I consider his unquestionably sane and responsible act of January 4. He transacted several other matters of business in Mr. Parlee's office that day, though not with him. One was giving instructions for the converting of an agreement of sale in which he was the vendor into a transfer with a mortgage back. He also signed the discharge

ALTA.
S. C.
1914
BARTLETT
v.
BULL.
Walsh, J.

of a mortgage and transferred to his wife, the plaintiff, an undivided half interest in the property in which they then lived and which interest according to her evidence, though in his name, was really her property. The evidence of Mr. Abbott and Mr. Mustard who saw him with respect to these other matters is that on that day they saw no difference in him other than the physical change resulting from his illness. Mr. Mustard, who seems to have done the principal part of this business, says, "He spoke quite freely to me and as freely as he always did. I saw no difference whatever."

The defence called as witnesses about twenty people, the majority of whom had transacted business with the deceased and the others of whom had frequent opportunities of seeing and conversing with him. The period of time covered by this class of evidence was from September, 1910, until the date of his death. Many of the transactions were of an important character. A man named Deweese paid him money on a land deal in October, the terms of which he remembered. He saw him late in the fall, and in January he completed the deal with him by taking a transfer and giving back a mortgage, this being one of the matters for which he had given his solicitors instructions on January 4. Kenneth A. McLeod bought a half-section of land from him early in January. Arthur C. Smith, early in January, settled a claim for $400 which Hutton had against him, paying a part of it in cash and giving his note for the balance. Towards the end of January, Geo. H. Cresswell had a long discussion with him about the purchase from him of an 800-acre farm in the course of which terms, price and other details were gone into. Early in December Edward White had a settlement with him for his wages covering a period of more than two years, in the course of which he gave White a cheque for $700, and on November 18, Johnston Reid put through a sale for him of a quarter-section of land for $2,560, in the course of which he had several conversations with him. Hon. A. C. Rutherford on November 15 prepared under his instructions an assignment from him to his sister, Mrs. Skinner, of his interest in certain lands worth some thousands of dollars. Fraser Tims in January sold for him the property which Mr. McLeod bought, and a few days before the sale got from Hutton information as to the number of acres, the location and price. On October 25, Philip C. Malone agreed to buy from him four hundred acres of land for $9,000. The agreement, which contains many complicated terms in addition to the usual covenants and conditions, was prepared by Hutton's solicitors under instructions given to them by him alone. On January 16, he transacted business with Fred S. Watson, consisting in the discharge of a mortgage for $40,000 and the taking of a new mortgage for $36,000. These are the more important of the transactions covered by the evidence of the witnesses of this class. In each case the witness

had come in personal contact with Hutton and had had an opportunity to observe his manner of doing business. The other witnesses of this class were people who had either engaged in deals of a minor character with him or who had met him and conversed with him frequently during the latter months of his life. They were for the most part people who had enjoyed some degree of familiarity with him for some time. And the unanimous testimony of these people was that there was nothing in his manner or appearance or his mode of doing business that caused them to suspect in the slightest degree his capacity to transact business or to take care of himself. It is pointed out by counsel for the plaintiff that nearly every business transaction sworn to by these witnesses bears some evidence of some peculiarity in the testator's handling of it, and this I think is quite true. Each such peculiarity, however, is of a minor character. The transaction itself seems in every instance to have been carried out in the main with precision and correctness and to have been in no manner affected in its absence by the peculiarity referred to, which I regard as nothing more than the out-cropping of the disease, in a mind which still retained a large measure of its soundness. It is impossible for me to think that a man who could handle business matters of the importance of those dealt with by him in the last few months of his life with such accuracy and who could mingle with those who had known him for years without betraying to them the fact that his mind was in the slightest degree affected, lacked the capacity to make a valid will at a time when no manifestations of his mental unsoundness were apparent. I can see nothing unreasonable in the will itself. With the exception of a legacy of $2,000 given to the daughter of his friend and executor, Bull, who was named after his wife, he kept his money within his family. He remembered his mother and his sisters and his nephews and nieces and one cousin. After paying these legacies and providing for the annuity to his mother and the costs of administration, there was approximately $140,000 left, the income of which the plaintiff was to get for the rest of her life, that is, of course, assuming that all of the property then standing in the testator's name was really his and that no disposition of any part of it had been subsequently made by him. She had property of her own to his knowledge in addition. Another man might have been more generous to her and less solicitous for the welfare of his relatives, whilst still another man might have been exactly the reverse. I am unable to say that because this man after making what strikes me as being a not ungenerous and certainly quite ample allowance for her who had the first claim upon him, saw fit to remember those for many of whom he undoubtedly felt a great affection, was by reason of that fact mentally unsound to such an extent as the plaintiff alleges. It is urged that the will is unfair to the plaintiff because the evidence discloses the fact

ALTA.
S. C.
1914
BARTLETT
v.
BULL.
Walsh, J.

that her money was the foundation of his fortune. So long as human nature is what it is, men will be forgetful of what they owe to others and men will differ in their views as to what is really due to others. I would hesitate to attribute to mental irresponsibility a failure upon any man's part to measure up to the standard in this respect that others might set for him; unless such failure was marked by so extreme a degree of unreasonableness as to lead irresistibly to that conclusion. It may perhaps be that some explanation of the fact that between the date of his will and the date of his death he made over to her property valued at $63,000 may be found in his conclusion that the will did not adequately provide for her. I think, but am not sure, that Mr. Biggar put this view forward in argument. Whether or not he did, the adoption of it, of course, can only mean that he both knew and appreciated what testamentary provision he had made for her. She seems to have accepted and adopted these transfers as being the acts of a sane man, a position hardly consistent with her contention as to his testamentary capacity except upon the theory that in her view a part at least of this property was really her own.

Much was said in argument of the circumstances under which Mr. Parlee undertook the preparation of this will, He was engaged as counsel on the trial of an action in this Court which was then in progress, other counsel being associated with him in it, and he absented himself from it the greater part of the day when the call came to him from the testator. It was urged that this betrayed the urgency of the matter from his point of view. That is probably so, but how does that help in any way to establish the fact of the testator's incapacity. Mr. Parlee doubtless understood that Hutton's condition was such that it was necessary that no delay should ensue in the making of his will, but I am satisfied that in his mind at any rate it was the physical and not the mental state of the testator that made this prompt action necessary.

A few days before the death of the testator, Mr. Parlee and Mr. Abbott decided that no further transfers of his property should be prepared in their office until they saw him for themselves. It does not appear that this necessity for acting upon this decision ever arose. This determination was reached because of reports which came to them that he was giving away his property and in recognition of a duty which they thought they owed to one, who had for years been a client of their office, to protect him if he needed their protection. This fact, of course, can have no bearing upon the question of Hutton's sanity but only upon the question of these solicitors' conception of his condition, for it would be an undue straining of the argument to say that because nearly two months after this will was made they heard something which, if true, made them doubt his sanity at the time they heard it, his

mind must, therefore, have been so unsound when he made his will that the will cannot stand. I see nothing in this act of theirs to cause me to think that they ever before this questioned his entire responsibility. It was, I think, the act of prudent and conscientious men, who having had no reason from their own personal observation of their client to cast their uninvited protection around him, felt impelled to do so when rumors, whether well founded or not, reached them that he needed some looking after.

Some time after Hutton's death Mr. Parlee considered seriously the advisability of having the will proved in solemn form and this is put forward, as I understand it, as an argument in support of the contention that Mr. Parlee entertained doubts as to the validity of the will. It does not appear very clearly from his evidence why or when he thought of taking this step. An executor may of his own motion have his testator's will proved in solemn form, not only when he entertains serious doubts as to its validity, but also when there is a risk or apprehension of its validity being at a future time contested. I think not only from what he says himself but from the attitude taken by the plaintiff on her own shewing that he must have realized very soon after the testator's death that the chances were that the validity of the will would be questioned, and this in itself would quite have justified him in having it proved in solemn form. Be that as it may, he never acted upon this idea and I attach no importance whatever to it. A great deal of time was taken up with evidence as to the cause of the testator's death. Every witness who by any possibility could shed any light upon it was examined and cross-examined at length as to it. Mr. Ford started it with his examination-in-chief of the plaintiff who was the first witness. His examination was suggestive of the theory that Hutton committed suicide. I assumed that this was for the purpose of establishing suicide as a bit of evidence in support of the allegation of insanity. Mr. McCaul followed in cross-examination along a line which plainly hinted at, even if it did not broadly charge murder, the plaintiff being the criminal. I considered this at the time legitimate cross-examination to meet the suicide theory, assuming, of course, that there was some evidence upon which such an allegation could be rested. In view, however, of the unanimous opinion of the medical witnesses upon the point, the finding of suicide would be of little or no importance in determining the question of sanity or insanity. Dr. Woodrow, the plaintiff's principal medical witness, says that threats or even the desire to commit suicide are not typical of paresis and that many persons who are perfectly sane do commit suicide. The other doctors practically agree with this. When opposing medical experts in such a contest as this agree upon any one point, I think that any Court might very properly assume that it is absolutely established. That being so, I am not bothering myself

ALTA.

S. C.

1914

BARTLETT v. BULL.

Walsh, J.

to make any finding even if I could as to the cause of death. I feel bound to say, however, that there is not even the suggestion of anything in the evidence to warrant the insinuation that the plaintiff killed her husband, and I regret very much that it should have been considered necessary to put the suggestion forward. I have not attempted to deal with more than the outstanding features of the case. Many details of minor importance I have not touched upon at all. It is quite likely that I may have overlooked even some of the important facts in my consideration of the mass of testimony given by some fifty witnesses in the course of the trial which lasted for more than ten days. I have contented myself with dealing only with those facts and those arguments which appear to me to be of importance.

For the reasons which I have attempted to give I must dismiss that part of the plaintiff's action which seeks to set aside the will and codicil in question.

The plaintiff makes an alternative claim which, in view of the manner in which I have disposed of the main issue, I must now deal with. She alleges that for many years prior to his death he and she had been interested jointly in the purchase and sale of various parcels of land, some of which were held in his name alone. She also alleges that at the time of his death certain other lands also stood in his name in which he had no interest and in respect to which he was a bare trustee for her. She claims that he sold some of both classes of these properties and invested the purchase money resulting therefrom, or her share of the same, in the purchase of other lands which at the date of his death were in his name. She asks for an account of her moneys applied towards the purchase of the lands held in his name during the years preceding his death and of the application by him of the proceeds of the sales thereof and particularly of the application of the same in or towards the purchase of other lands, for the purpose of ascertaining which of the lands standing in his name at the time of his death were in fact her property and the extent of her interest in the same.

Counsel for the plaintiff contented themselves at the trial with producing such evidence and such evidence only as was necessary in their opinion to establish these allegations in a general way. I did not see how upon this trial it was possible to deal with the matter in any other way, my view being that if a case for the same was made out a reference would be necessary to complete the enquiries. Counsel for the defence combatted this view and contended that all of the issues arising out of this branch of the case should be fought out before and disposed of by me, but I did not change my view of the matter.

The plaintiff has demonstrated to my satisfaction in a general way the truth of the allegations. I think that it is clearly established that for many years after they were married the de-

ceased was in a very bad way financially. More than once he became insolvent. During these years the plaintiff was in fairly good circumstances, a fact due in large degree to the benefactions of her father, who upon at least two occasions bought land for her. This property was looked after almost entirely by the testator. One of her farms appears to have been very productive. He kept a bank account under the name "Trust George Hutton" which was carried in that form because the money which went to the credit of it came from his wife's property and from speculations made with it and he felt that he could not take any chances of having it attached by his creditors. In 1909 he gave the manager of the bank a statement shewing the financial standing of his wife and himself which shewed a surplus of $243,700. Of this, property worth $47,500 was said by him to belong to his wife and property worth $54,800 to belong to them jointly. I am not able to trace many of these properties by the evidence before me, but the property on the corner of Victoria and 4th streets, Edmonton, which according to this statement was owned by him and his wife jointly, was then in his name, as also was the Rice street half lot which was then her property. On his examination for discovery in 1904 in an action brought by one Round against him and his wife he gave a great deal of information as to his wife's property and as to his dealings with it which is strongly corroborative of the contention of the plaintiff. I think it quite clear that money which was undoubtedly hers is traced to the bank account kept by him, notably the sum of $8,300 represented by exhibit 36, which was for the purchase money of a mortgage owned by her. I do not intend to go into the facts in connection with this branch of the case in any detail. I will content myself with saying that I find that the testator dealt with and handled the property and money of the plaintiff as he saw fit without accounting to her for it and sometimes taking title in his own name to property which she either owned or was interested in.

Mr. Edwards made a strong argument that even if I found the facts in this connection as the plaintiff alleged them to be there was no legal liability upon the part of the husband or his estate to account and for this reason this part of the plaintiff's claim must also be dismissed. After reading all of the cases to which he referred me and several others, I am unable to agree with his view of the law. There is no doubt but that such cases as *Eaton* v. *Rideout*, 1 Mac. & G. 599, 41 E.R. 1397, and *Edward* v. *Cheyne*, 13 A.C. 385, and some other cases cited by Mr. Edwards, are authorities for the proposition that such a course of dealing by the husband with the wife's property may be established as to lead to the presumption that a gift of it must have been intended by her. But on the other hand such cases as *Carnegie* v. *Carnegie* (1874), 31 L.T. 7; *Re Curtis*, *Hawes* v. *Curtis* (1885), 52 L.T. 244; *Durkin* v. *Durkin* (1853), 17 Beav. 578; *Mercier* v. *Mercier*, [1903] 2 Ch. 98, hold that no presumption of a gift arises

ALTA.
S. C.
1914
BARTLETT
v.
BULL.
Walsh, J.

from the fact of property of the wife being transferred into his name or into their joint names or from a purchase of property with her moneys or an investment of her money in his name or in their joint names, but the husband is presumed to be a trustee for her unless a contrary intention is evidenced. The question in each case is whether or not the facts prove a gift from her to him. In some of the cases a distinction seems to be drawn between corpus and income, but in *Mercier* v. *Mercier*, supra, it is made quite clear that this is not a distinction in principle but in degree of proof. I think, however, that under the authorities such a course of dealing as is here established with respect to the income raises a presumption of a gift of it unless a contrary intention is proved. In addition to the cases above cited see *Dixon* v. *Dixon*, 9 Ch. D. 587; *Alexander* v. *Barnhill* (1888), 21 L.R. Ir. 511; *Hale* v. *Sheldrake*, 60 L.T. 292. No contrary intention is here established, and in my view there is a clear gift of the income to the husband.

The plaintiff is entitled to a reference of the scope and for the purpose suggested by her statement of claim, limited however to the corpus. The exact form of the judgment in this respect I will have to settle if the parties cannot agree as to it. I think that the reference should be, not to the clerk, but to some special referee. Unless the parties can agree upon one, I will name him. Further directions and the question of costs on this branch of the case will be reserved until after the referee shall have made his report.

I may perhaps be pardoned if I suggest to the parties that some effort be made to reach an understanding which will render this reference unnecessary, unless, of course, as I can easily understand to be likely, an appeal is taken from this judgment. This reference will be a costly, uncertain and unsatisfactory proceeding which will intensify the bitterness at present existing between the plaintiff and her husband's relatives, although if the questions at issue must be disposed of by some method other than a compromise, it is to my mind the least objectionable of all methods of disposing of them. If the plaintiff will but remember the fact that her husband in the last month of his life made substantial amends to her for any property rights which he may have deprived her of, and if the defendants will but bear in mind the fact that the testator's benefactions to them were to some extent at least made possible by the confidence which his wife reposed in him in the handling of her property, they may be able to find some common ground upon which they may meet for the settlement of the claim to which I am now giving effect.

The defendants, the executors by their counterclaim, allege that the testator at the time of his death was the beneficial owner of certain lands of which the plaintiff is the registered owner and that she was a trustee of the same or of some interest therein for him. They have failed to convince me by their evidence that this

claim is well founded in fact and I dismiss the counterclaim with costs.

I think that this is a proper case in which the costs of all parties on the main issue should be paid out of the estate. The executors will have their costs as between solicitor and client, whilst the other defendants amongst them will be entitled to tax but one bill.

Judgment accordingly.

WOOD v. SMART.

Manitoba King's Bench, Galt, J. February 5, 1914.

1. PLEADING (§ II H—219)—ACTION AGAINST ENDORSER OF PROMISSORY NOTE—NOTICE OF DISHONOUR.

Having regard to the statutory form of protest contained in the Bills of Exchange Act (Can.) which includes a statement of the notices of protest, a demurrer to a statement of claim which alleges protest without specifying notice of dishonour in respect of a promissory note payable in Canada, will not be allowed.

2. ESTOPPEL (§ III A—41)—BY CONDUCT—CHANGE OF POSITION.

To establish an estoppel by conduct the party setting it up must shew that he relied upon it and altered his position in consequence.

3. ESTOPPEL (§ III N—156)—BAR TO CLAIM OF—MISREPRESENTATION INDUCING STATEMENT RELIED ON AS ESTOPPEL.

A person cannot rely by way of estoppel on a statement induced by his own misrepresentation.

[*Porter* v. *Moore*, [1904] 2 Ch. 367, referred to.]

4. ESTOPPEL (§ III D—68)—FORGERY INCAPABLE OF RATIFICATION—PROMISSORY NOTE—MATERIAL CHANGE.

The unauthorized addition of an interest clause to a promissory note is forgery which is incapable of ratification but under some circumstances the maker may be estopped even from setting up a forgery.

[*Hébert* v. *Banque Nationale*, 40 Can. S.C.R. 458; and *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, [1904] A.C. 806, referred to; and see *Connell* v. *Shaw*, 39 N.B.R. 267.]

Statement

ACTION to recover on a promissory note against two defendants.

Judgment was given for the defendant who appeared and against the other by default.

J. F. Kilgour, for plaintiff.

J. H. Chalmers, for defendant Smart.

H. E. Henderson, for defendant Hughes.

Galt, J.

GALT, J.:—In this action, tried before me recently at Brandon, the plaintiff claims $733.70, as being due under a certain promissory note for $700, dated November 1, 1912, payable seven months after date, together with interest at 8% per annum and protest charges. The defendant Smart alleges that if he signed the note in question it was not expressed to bear interest at 8% per annum, nor at any rate, and that the said note has

MAN.

K. B.
1914

WOOD
v.
SMART.

Galt, J.

been materially altered without the assent or authority of this defendant.

The defendant Hughes makes a general denial in respect to the making and endorsement of said note and denies that the same was presented for payment and protested for non-payment; but he makes no specific denial in regard to the alteration respecting interest, which is referred to in the defence of Smart.

The defendant Hughes further demurs to the statement of claim upon the ground that it does not allege that defendant Hughes had due notice of dishonour of the note. At the trial before me, Mr. Henderson, K.C., on behalf of the defendant Hughes, relied merely upon the above demurrer.

The statement of claim shews that the note became due on June 4, 1913, and was presented for payment and protested for non-payment, and nothing has been paid in respect thereof. For the purposes of the demurrer, this allegation must be accepted as true. Under the forms of protest used throughout Canada there is always subjoined to the protest (in accordance with Form (*i*) in the schedule to the Bills of Exchange Act) a statement by the notary shewing service of due notice on the parties to the bill or note and giving the addresses to which such notices have been sent. I think that in the absence of any allegation by the defendant that due notice of dishonour had not been given to him it must be taken, *primâ facie* at least, that such notice was given. I therefore overruled the demurrer.

It was satisfactory, later on in the trial, to see by the protest which was put in evidence that due notice was alleged to have been given to the defendant Hughes at his residence in England in accordance with the statement in paragraph 1 of the statement of claim, which was admitted by paragraph 1 of Hughes' statement of defence.

The plaintiff states in his evidence that he was manager of the Home Bank of Canada at Wellwyn, Saskatchewan, in 1912 and for several months of the year 1913; that on December 31, 1912, the defendant Hughes came to him and desired to discount a bundle of notes, some of them being lien notes and one of them being the note in question. The amount represented by the notes was larger than the plaintiff was authorized to accept for the bank, but he arranged with two or three friends to join with him in personally discounting the notes for Hughes.

On the same day, December 31, the plaintiff wrote to the defendant Smart, on a sheet of paper containing the letterhead of the Home Bank of Canada:—

> Dear Sir: We have to-day cashed a note signed by you in favour of A. E. Hughes, dated November 1, 1912, for $700 drawn for seven months at 8% interest, and another for one drill for $82 due November 1 1913. Please advise me by return mail if these are O.K. Yours truly, A. E. WOOD, Manager.

On January 2, 1913, the defendant Smart wrote a letter addressed:—

A. E. Wood, Esq., Manager, Home Bank, Wellwyn. Dear Sir, I guess those notes you discounted of mine to Hughes will be all right: but he did not do the right thing about it with me. I remain, Yours truly, A. T. SMART. P.S. Can you advance me say $200 until the 15th Feb. It would save me drawing out grain to that amount just now. It will be all right if you can't. A. T. SMART.

The plaintiff states in his evidence that upon receiving the above answer from Smart he closed out the transaction with Hughes and paid the full amount by draft. The plaintiff says that when he took the note in question it was in the same condition as it is now—that is to say, it contained the words "with interest at 8% per annum," which are objected to by the defendant Smart. He also admits that Smart was the only party to whom he wrote for confirmation, on December 31.

On the other hand, Smart says that the note in question was given by him in carrying out the purchase of some implements for his son; that it was agreed between himself and Hughes that no interest should be paid on the note; that he never saw the note again after signing it for Hughes until March 19, 1913; and that when he received the letter of inquiry from the plaintiff dated December 31, he supposed that the bank had discounted the notes and that the 8% interest mentioned in the letter referred to the note for $82. Smart also says that a considerable portion of the implements, covered by the note, were never delivered.

Evidence was given by Gerald Claude Smart, son of the defendant, to the effect that he was present when the note was signed, that Hughes proposed to put interest on the note, but the defendant Smart refused or objected and finally it was agreed that no interest should go on. He saw the note signed but cannot say whether the note contained the words about interest or not.

On March 12, 1913, the plaintiff, again using the letter-head of the bank and signing himself as manager, writes as follows, to the defendant Smart:—

Dear Mr. Smart:—I am sending you a new note to take the place of the one we cashed for A. E. Hughes, $700. As Mr. Hughes is away from this district, head office ask that we have a new note made out to the bank and signed by you alone. They have asked me that the interest be paid up to date and the new note dated to-day and made out for the same time, June 1. Please sign the note and cheque and return to me by next mail when I will send you the old note signed in favour of Hughes, etc.

Now, in cross-examination the plaintiff admitted that when he wrote his letter of December 31, commencing with the word "We," he meant Smart to understand that he was dealing with the bank. In this letter of March 12 the plaintiff continues this

MAN.

K. B.
1914

WOOD
v.
SMART.

Galt, J.

fiction when he refers to the "one we cashed for A. E. Hughes, $700." The plaintiff is furthermore forced to admit that the following statements in his letter were false:—

(a) Head office ask that we have a new note made out to the bank and signed by you alone.

(b) They have asked that the interest be paid up to date.

(c) And the new note dated to-day.

(d) And made out for the same time, June 1.

The plaintiff explains that he resorted to the above tissue of falsehoods for the purpose of impressing the defendant Smart, and prevailing upon him to carry out the new suggestion. It goes without saying that any man who could resort to such tactics as these cannot be relied upon as a trustworthy witness in other respects, and one is bound to scan more closely the other evidence which he gives in his own favour.

Looking at the interest clause in the promissory note in question I incline to the belief that it is an apparent alteration written possibly with the same kind of ink as that used by the defendant Smart, but being in a different handwriting. Smart's signature slopes to the right: the clause as to interest is straight up and down.

It looks to me as though by March 12, the plaintiff was in some doubt as to whether he would be able to make good his claim on the note in question and for this reason resorted to the attempt to obtain a new note as set forth in his letter of March 12.

At all events the defendant Smart did not comply with it, but on March 19 he called upon the plaintiff and after some discussion the plaintiff dictated the following letter to Messrs. Goulter & Chalmers, Barristers, Virden, which was signed by the defendant Smart:—

Re A. E. Hughes.

Dear Sirs:—With further reference to my note which I signed in favour of Mr. A. E. Hughes for $700, and interest at 8% dated November 1, for seven months, the manager of the Home Bank of Canada at Wellwyn, Sask., cashed this note on December 31. Mr. A. E. Wood, manager of the Home Bank at Wellwyn, wrote me that he had cashed the note in question as stated above with a request to reply if the note was O.K. I replied to him on January 2 that this note was all right. To-day Mr. Wood has asked me to give him my own note for like sum to take the place of this one as he would have to turn the new note into the bank and realize the proceeds himself in order that he might go home on April 1. Would you please advise me if under the existing circumstances I could give Mr. Wood this note, receiving the original note in return. Thanking you for your attention in this matter.

A. T. SMART.

Underneath this was written:—

This note was given for some stock not belonging to Hughes. If I get the original note would it be better as a case for settlement. A.T.S. Reply to Manager, Home Bank, Wellwyn, Sask.

The plaintiff relies upon this letter also as an acknowledgment in regard to the interest which should operate as an estoppel on the defendant Smart.

Defendant Smart says that he had no intimation on March 19 that Wood had any personal interest in the note. Apparently Smart kept no copy of the letter he wrote to the plaintiff on January 2, and had forgotten the purport of it: but on or about March 19 Smart inspected the note, and consulted his solicitors and then on March 22 wrote to the plaintiff as follows:—

> Dear Sir:—Please send me a copy of the letter you sent me notifying me of your cashing the notes I gave to Hughes.

The plaintiff duly complied with this request.

On March 29, the defendant, at the earnest solicitation of the plaintiff, gave him a note for $300 at three months, payable to the Home Bank of Canada, but the receipt signed by the plaintiff at the time, not as manager, shews the note to have been a personal accommodation. Similarly on May 27, 1913, the defendant gave another note for $200 to the plaintiff payable to the Home Bank of Canada.

When the note in question fell due on June 4, 1913, it was protested for non-payment as above mentioned and shortly afterwards, on June 27, the plaintiff writes to the defendant Smart stating, amongst other things:—

> I have mailed your note to Messrs. Wylie, Mundell & Procter for payment, there being the payments of $300 and $200 endorsed on the back of your note to Hughes. These payments were made from advances received from the bank. You will kindly retire the advances from the bank from the balance of wheat as promised. There is still a balance on the Hughes note of $200 which may be settled by Hughes or yourself to Messrs. Wylie, Mundell & Procter.

The note now sued upon contains a credit indorsed upon it of the above two items of $300 and $200 but these credits have been struck out by somebody and neither party now claims the benefit of them.

Upon the evidence given by the defendant Smart and his son, I find that Smart never agreed to pay interest at 8 per cent. per annum on the note, and that the addition of this clause to the note was made subsequently to the defendant's signature, without his knowledge or consent.

The added words amounted to a forgery, as has been held in *Hébert* v. *La Banque Nationale*, 40 Can. S.C.R. 458, which could not be ratified even by Smart himself.

But this does not conclude the case. See *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, [1904] A.C. 806, shewing that under some circumstances a man may be estopped from setting up a forgery.

In the argument before me at the conclusion of the case Mr.

MAN.
K. B.
1914
WOOD
v.
SMART.
Galt, J.

Kilgour, on behalf of the plaintiff, urged that whether the clause as to interest in the note was or was not originally there, the defendant Smart is estopped by his letter to the plaintiff dated January 2, 1912, confirmed by the letter dated March 19, signed by Smart, and addressed to Messrs. Goulter & Chalmers.

Mr. Chalmers, on behalf of the defendant Smart, relies upon his client's evidence that the note did not contain the interest clause; and he further urges that the estoppel, if any, against Smart would only be in favour of the Home Bank with whom the plaintiff led Smart to believe that the latter was dealing.

The applicability of estoppel to this case appears to run very close to the line.

The general principle is stated by Lord Denman, C.J., in *Pickard* v. *Sears*, 6 A. & E. 469 at 474, 112 Eng. R. 179 at 181, as follows:—

> Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.

According to the verbal testimony given by the plaintiff at the trial he received the promissory note in its present form in good faith from the defendant Hughes; that he thereupon wrote to Smart for a confirmation of the validity of the note including the rate of interest at 8%, and having received Smart's acknowledgment on January 3, he, the plaintiff, closed out the arrangement he had made with Hughes and paid over the proceeds of the discount.

Undoubtedly Smart was led to believe that he was dealing with the bank. On the other hand, the letter was directed to and received by the individual upon whose mind it was intended to operate. But, when it is sought to fix upon a man a liability by way of estoppel there are certain well-recognized rules applicable.

The first rule laid down by Lord Coke is that every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that regularly a stranger is neither to take advantage of nor be bound by the estoppel.

I have not been able to find any case deciding that the representation made to the agent of a disclosed principal can be taken advantage of by the agent personally. It would seem on principle that the agent in his personal capacity should be regarded as a stranger to the transaction.

When the defendant Smart acknowledged the promissory note by his letter on January 2, he certainly supposed that he was dealing with the bank. This supposition was intended by the plaintiff. In *Porter* v. *Moore*, [1904] 2 Ch. 367, it was held that:—

A person cannot rely by way of estoppel on a statement induced by his own misrepresentation or by his concealment of a material fact the disclosure of which would have been calculated to make his informant hesitate or seek for further information before making the statement, or where the circumstances would have deterred a reasonable man from acting on it.

There is nothing in the evidence or in the circumstances of this case to warrant me in holding that such a disclosure would have made any difference to the defendant. Still it might have done so.

Then, again, the representation must be of an existing fact, and not of a mere intention: *Jorden* v. *Money*, 5 H.L. Cas. 185. The defendant's words were, "I guess those notes you discounted of mine will be all right." Is this within or without the scope of the rule?

I find, however, in the present case, a firmer basis for holding that the plaintiff is not entitled to the benefit of any estoppel against the defendant Smart arising out of the letters above mentioned.

In his letter to the defendant of December 31, the plaintiff says:—

> We have, to-day, cashed a note signed by you in favour of A. E. Hughes, etc.

This is confirmed by the letter which the plaintiff dictated for the defendant Smart to sign on March 19:—

> With further reference to my note which I signed in favour of Mr. A. E. Hughes, for $700 and interest at 8%, dated November 1, for seven months, the manager of the Home Bank of Canada at Wellwyn, Sask., cashed this note on December 31, etc.

It is manifest that the plaintiff did not rely upon, nor alter his position by reason of, the defendant's representation. It is quite true that the plaintiff now pretends that he relied upon the defendant's letter of January 2, but I accept his previous statements in writing to the contrary and hold him bound thereby.

For the above reasons this action must be dismissed with costs as against the defendant Smart.

No defence having been established by the defendant Hughes, the plaintiff is entitled to judgment against him for the amount claimed with costs.

Judgment for defendant Smart and against defendant Hughes.

ALTA.

S.C.

1914

MERCHANTS BANK v. PRICE.

Alberta Supreme Court, Walsh, J. February 5, 1914.

1. EXECUTION (§ I—8)—LIEN BY REGISTRATION—PRIOR TRANSFER—INCOMPLETENESS OF TRANSACTION.

An execution registered against lands under the Land Titles Act (Alta.) before the registration of a transfer which had in fact been previously made by the debtor, may be ordered to be removed from the certificate of title as not binding the lands, notwithstanding that it was a term of the agreement under which such transfer was made that certain encumbrances should be discharged from certain other lands taken by the debtor in exchange and that such was not done until after the execution had been recorded.

[*Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, followed.]

Statement

ACTION for the removal of the defendant's execution from the plaintiff's certificate of title to certain lands.

Judgment was given for the plaintiff.

H. P. O. Savary, for the plaintiff.

F. W. Varley, for the defendant.

Walsh, J.

WALSH, J.:—The plaintiff is entitled under *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, to have the defendant's execution removed from its certificate of title to the lands in question and to hold the same freed therefrom. Long before this execution was recorded the execution debtor had bound himself by agreement in writing to transfer these lands to one Shaw and this agreement was in full force and effect when the execution was recorded. A transfer of these lands was executed under the agreement to the plaintiff as the nominee of Shaw contemporaneously with the making of the same which was almost immediately afterwards left at the land titles office, but for some reason which is not explained to me it was not actually recorded until about eight months thereafter. In the meantime the defendant's execution came in and was recorded against these lands.

The defendant's contention is that at the time of the registration of their execution, Shaw was not entitled to specific performance of his agreement and the plaintiff was not entitled to record its transfer and their execution therefore bound these lands. This contention is founded upon the fact that a part of the consideration for the agreement and transfer was the agreement of Shaw to transfer to the execution debtor certain other lands free from encumbrances, and that whilst those other lands had then been transferred to the execution debtor they were still subject to a mortgage from which they were not discharged until about a month after the registration of the execution. They say, in short, that if Shaw had at the date of the registration of the execution brought an action against the execution debtor for specific performance of the agreement that action could not have succeeded because the plaintiff in it could not then have shewn such a performance of it on his part as would have been necessary

ALTA.

S. C.
1914

MERCHANTS BANK v. PRICE.

Walsh, J.

to entitle him to a judgment. I cannot give effect to this contention. The mere fact that when the execution was recorded the plaintiff's undoubted interest in these lands under the agreement and transfer had not ripened into a registered or registrable interest cannot avail to deprive it of its rights. The agreement was still on foot and the plaintiff's undoubted right was to have full effect given to it by the registration of the transfer if and when the proper time arrived, as it did. If the agreement had been for the sale of the land with payment of the purchase money spread over a term of years, it surely cannot be that an execution which afterwards came in against the lands of the vendor during the life of the agreement but before all of the purchase money was paid and therefore before the purchaser could have compelled the vendor to deliver a transfer of it to him could prevail as against the agreement, and that is this case in another form.

The order will go as asked with costs.

Judgment for plaintiff.

GALT Ltd. v. CRONSBERRY.

ALTA.

S. C.
1914

Alberta Supreme Court, Scott, J. February 9, 1914.

1. PARTNERSHIP (§ III—10a)—NEW FIRM TAKING OVER BUSINESS—MIXING NEW INDEBTEDNESS WITH OLD.

A novation by substituting the members of a new partnership as debtors instead of the former partnership the business of which the new firm took over, may be established from the conduct of the parties, in which regard the mixing of the indebtedness of the old and new firms and the making by the new firm of payments which must necessarily have included a portion of the old firm's debt is evidence tending to shew an assumption of the debt by the new firm.

[*Rolfe* v. *Flower*, L.R. 1 P.C. 27, referred to.]

Statement

ACTION to recover the price of goods sold and delivered. Judgment was given for the plaintiffs.

Aitken, for plaintiffs.

Albright, for defendant.

Scott, J.

SCOTT, J.:—The plaintiff company's claim is for $2,063.73 for goods sold and delivered by it to the defendants. It is admitted that, after the action commenced, a payment of $600 was made on account of this claim to plaintiff company's solicitors, but it is not shewn by whom the payment was made to them. It was stated by counsel at the trial that judgment by default of appearance had been entered against defendant Cronsberry. The defendant Proctor denies liability.

The partnership between the defendants was formed on January 19, 1911, and was dissolved on May 1, following. The business carried on by them was first established by defendant Cronsberry and his brother H. N. Cronsberry under the name of

ALTA.

S. C.

1914

GALT LTD. v. CRONSBERRY

Scott, J.

"Cronsberry Brothers" until about November 1, 1909, when the name was changed to the "City Bakery," under which name it was continued until the defendants dissolved partnership.

The account was carried in plaintiff company's books under the name of Cronsberry Brothers up to November 1, 1909. It was then changed to The City Bakery and has ever since been carried in that name.

The plaintiff company's books shew the following to be the state of the account:—

Balance due January 19, 1911			$ 2,168.56
Goods sold since that date			861.75
Unpaid draft and expenses (Mar. 8, 1911)			501.25
Interest			118.70
			$ 3,650.26
1911	CREDITS.		
March 8	Sight draft	500.00	
	Cheque	500.00	
22	Cheque	300.00	
April 27	Cheque	200.00	
July 12	Credit note	64.22	
31	Cash, Proctor	17.17	
31	Cash, Proctor	5.19	1,886.58
			$ 2,063.68
	Deduct payment after action brought		600.00
			$1,463.68

Defendant Proctor states that he bought out the interest of H. N. Cronsberry in the business and in certain other property for $1,000; that there never was any arrangement on his (Proctor's) part that he was to become responsible for H. N. Cronsberry's shares of the debts of the old firm; that he never agreed with plaintiff company to be substituted as debtor for the latter's share of the old debts, nor, to his knowledge, did the new firm pay any of them. He admits, however, that it was arranged between him and his co-defendant that the debts due to the old firm should be applied in payment of its liabilities.

It is not shewn by whom the debts of the old firm were to be or were collected, but I think it may reasonably be inferred from the evidence that they were to be collected by the new firm. The fact that such an arrangement was thought necessary to be made in itself strongly supports that view.

The books of the partnership were not produced at the trial nor is there any evidence as to how the account was carried in them. It is shewn, however, that plaintiff company rendered the firm monthly statements of account, some of which shewed only the purchases for the preceding month but in those rendered on January 31, February 28, March 31, and May 1, 1911, the balance due by the old firm was carried forward as part of the

indebtedness of the new one. Proctor states that he does not remember seeing any of these statements but he declined to swear that he did not see any of them. He states that his co-defendant managed the business and it is clear that he (Proctor) knew little or nothing of the details of it, or of the state of its accounts. It is apparently by reason of this that there never was any communication, verbal or otherwise, between him and the plaintiff company respecting the latter's account until about the time of the dissolution of the partnership. On May 3, 1911, plaintiff company wrote him as follows:—

> With regard to the present indebtedness which we are carrying on our books against the City Bakery, would say that we cannot see our way clear to release you from your liability to us even though you should make a deal with Mr. Cronsberry.

This letter appears to indicate that Proctor had previously applied to them to release him from this liability. Proctor denies having received it. I do not, however, attach much importance to it as the extent of the liability it refers to is uncertain.

On March 8, 1911, the new firm paid plaintiff company $500, and accepted a sight draft drawn by it for a further sum of $500. At that time the total amount of the company's charges against the new firm exclusive of the balance due by the old firm amounted to only $550.67, being $504.70 for goods sold and $45.93 for interest charged as of January 31, 1911, and a statement thereof was rendered on that day. At that date the new firm was in existence only eleven days and the charges for goods supplied to it up to that time amounted to only $90.65, so that it is clear that the charge for interest must have been in respect of the balance due by the old firm.

The sight draft for $500 referred to was drawn by the company on Cronsberry Brothers and was accepted as follows: "The City Bakery, H. J. Proctor." By way of explanation of this acceptance Proctor states that his partner was away at the time, that the firm's bookkeeper told him the draft was there, that he asked the latter if it was all right and that, upon being told that it was, he accepted it without examining the books to see how the account stood. I think, however, that the fact that the draft was drawn on Cronsberry Brothers must have shewn him that it was drawn at least partly for a debt due by the old firm. The statement of the bookkeeper that the draft was all right affords some indication that the debt due by the old firm was carried in the new firm's books as part of its liability.

Plaintiff company had notice of the fact that Proctor had become a partner in the business and had taken over H. N. Cronsberry's interest therein. This is shewn by defendant Cronsberry's letter to the company of January 23, 1911, marked "X1" for identification. This letter was tendered by plaintiff company's counsel as evidence against Proctor but I refused to

ALTA.

S. C.

1914

GALT LTD. v. CRONSBERRY

Scott, J.

receive it for that purpose. I now see no reason why it should not be received merely for the purpose of shewing that the company had that notice but for that purpose alone. Having had that notice the conduct of the company was such that they must be taken to have treated the liability of the old firm as one that had been assumed by the new firm, and Proctor, by his conduct, must also be taken to have recognized it as a liability of the latter. He, notwithstanding his ignorance of the affairs of his firm, must be taken to have had ample notice that the company was so treating the liability, and, as he never repudiated it during the continuance of the new firm, I think it is now too late for him to do so.

In Lindley on Partnership, 8th ed., 252, the following is stated:

> An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement and are ready to infer it from slight circumstances.

Notwithstanding the denial of Proctor that there was any such agreement in this case, the facts disclosed by the evidence lead to the conclusion I have reached that such was the agreement. It was contended on behalf of Proctor that in order to render the new firm liable for the debts of the old one there must be a novation, that there is nothing in the evidence to shew that the company released H. N. Cronsberry from his liability, and that the company cannot hold the members of both the old and new firms for its debts. In *Rolfe* v. *Flower*, L.R. 1 P.C. 27, in which the circumstances are not unlike those of the present case, it was held that conduct on the part of a creditor similar to the conduct of the company in this case was sufficient to shew a discharge of the old firm and the acceptance of the new firm as its debtor.

I hold the plaintiff company is entitled to judgment against the defendants, the amount being made up as follows:—

Balance due as shewn by the foregoing statement	$ 1,463 68
Interest on $1,344.98 (being amount of claim less interest charges) from November 13, 1911, to date	150 54

Plaintiff company to have the costs of the action.

Judgment for plaintiffs.

BAZIN v. BONNEFOY.

MAN.

K. B.

1914

Manitoba King's Bench, Curran, J. February 10, 1914.

1. VENDOR AND PURCHASER (§ I E—27)—FRAUD—SALE BY VENDOR KNOWING HE CANNOT MAKE TITLE.

Where a vendor fraudulently makes an agreement of sale knowing that he has no valid title to the land nor any right to sell it and is unable to give title, he is liable for damages for breach of his contract to sell and convey.

Statement

TRIAL of an action for specific performance or damages in respect of an agreement of sale made by the defendant Duseign to the plaintiffs. The rights of the defendant Duseign, if any, were derivable from the defendant Bonnefoy, who had not contracted directly with the plaintiffs and who moreover disputed the validity of the contract alleged to have been made between her and the defendant Duseign.

The action was dismissed as against the defendants Bonnefoy and Weicker and judgment entered for damages to the plaintiff against the defendant Duseign.

H. P. Blackwood, for plaintiff.

F. G. Taylor, K.C., for Bonnefoy and Weicker.

W. H. Curle, for Duseign.

Curran, J.

CURRAN, J. (after reviewing the testimony):—The Statute of Frauds is pleaded to the alleged agreement, exhibits 11 and 17; but, in view of my findings on the facts, that this agreement was obtained by fraud or misrepresentation and is not therefore binding on the defendant Bonnefoy, I abstain from expressing any opinion on this ground of defence.

I hold as a matter of fact that the defendant Bonnefoy never in fact sold or intended to sell the lots in question to the defendant Duseign; that she never in fact consciously executed the agreements of sale, exhibits 11 and 17, and, though she did append her signatures to these documents, she did so under a complete misapprehension, induced by the defendant Duseign as to their contents.

A document so obtained could not be binding upon any one, and I think the allegations of fraud set up in the defence of the defendant Bonnefoy are substantially proven and that the agreements for sale in question must be avoided.

This being so, the plaintiffs cannot succeed in obtaining specific performance against the defendant Bonnefoy or her co-defendant Weicker. They have no better title to the land than had Duseign, and my finding is that Duseign had no title at all. The plaintiffs' action will be dismissed as against the defendants Bonnefoy and Weicker with costs.

The alleged sale agreement between the defendant Bonnefoy and the defendant Duseign will be set aside and cancelled. The

MAN.

K. B.
1914

BAZIN
v.
BONNEFOY.

Curran, J.

agreement of sale between the defendant Duseign and the plaintiffs in so far as it affects the land in question, will also be rescinded and cancelled, saving any contract rights thereunder of the plaintiffs for damages or return of purchase money or otherwise, and not affecting the title to the land. The registration of this agreement will be vacated and set aside as a cloud upon the title of the defendant Bonnefoy or Weicker. The *lis pendens* registered by the plaintiffs, exhibit 10, will also be discharged and the registration thereof vacated and the caveat, exhibit 9, filed by the plaintiffs in the land titles office at Carman, will also be set aside and the registration thereof vacated.

I must now consider the plaintiffs' rights, if any, against the defendant Duseign. In view of my findings as to the agreement under which Duseign claims title from the defendant Bonnefoy, exhibits 11 and 17, it is manifest that specific performance by him (Duseign) of the agreement with the plaintiffs, exhibit 23, is impossible. This defendant covenanted with the plaintiffs on payment by them of the purchase money according to the stipulations for payment contained in such agreement, exhibit 23, to convey and assure or cause to be conveyed or assured to the plaintiffs the said land by deed with the usual statutory covenants. The terms of payment stipulated were

> To Mrs. Bonnefoy, $101.40, as per agreement between George Duseign and Mrs. Bonnefoy; balance to George Duseign, $198.60, on December 1, 1912.

The printed part of the agreement relating to interest has not been filled in, so there is no liability for interest, I take it, on the money payable to Duseign,—at any rate until its due date. The money due to Duseign has been fully paid by the plaintiffs, and at their request the defendant Duseign executed and delivered to them the quit claim deed, exhibit 16, dated February 1, 1913.

The defendant Duseign contends that he has done all that he obligated himself to do and that the plaintiffs agreed to perform their obligations to the defendant Bonnefoy and to procure to themselves a conveyance of the land. I do not agree with this. I think the defendant Duseign's covenants extended to the procuring of a deed from the defendant Bonnefoy, effectual for the purpose of vesting in the plaintiffs a good title to the land, and not merely a vesting of Duseign's interest in the land whatever it might be, in virtue of exhibits 11 and 17; subject, of course, to the condition of the plaintiffs having paid all purchase money in accordance with the stipulations for payment before referred to. This the plaintiffs have not done. They have not paid or tendered to the defendant Bonnefoy the full balance of purchase money due her on the assumption that she had agreed to sell to Duseign and that exhibits 11 and 17 were valid agreements of sale. The final payment to the defendant Bonnefoy was not due until December 1, 1913. The plaintiffs' action was commenced on June 13, 1913, nearly six months before this last payment fell due.

The agreement, exhibits 11 and 17, contained a proviso for prepayment of the whole or part of the purchase money to the vendor but no evidence was offered by the plaintiffs that advantage had been taken of this privilege by tendering the balance due.

Under these circumstances I do not think the plaintiffs had any right to specific performance against either Bonnefoy or Duseign when they began their action.

The defendant Duseign also urged a further ground of defence that the 9th paragraph of the plaintiffs' statement of claim shews a novation whereby he, the defendant Duseign, was released from all liability under the alleged agreement. I suppose this means the agreement, exhibit 23. I do not agree with this contention. In the first place, no such agreement on the part of the defendant Bonnefoy as is alleged in said paragraph 9 has been proved, but the reverse. In the next place, a novation which would release the defendant Duseign from the obligations of his written contract, exhibit 23, a contract required by the Statute of Frauds to be evidenced by writing and signatures, is also within the statute and must satisfy the statutory requirements: Leake on Contracts, 6th ed., p. 582. There is no pretence that such new agreement was so evidenced. In fact, there is no evidence at all of any written agreement to which the defendant Bonnefoy was a party other than the written agreements, exhibits 11 and 17. I think paragraph 9 of the statement of claim is merely a formal allegation that the defendant Bonnefoy agreed to receive the balance of her purchase money from the plaintiffs instead of from Duseign, to conform to the stipulations for payment in exhibit 23, and does not set up a novation at all.

> The assent of all parties to the creation of new rights whereby the party sought to be charged became liable to pay and the original debtor was discharged must be distinctly shewn . . . and there must be something to shew that the creditor consented or agreed to take the defendant as his new debtor and sole security and to relinquish his claims against the party originally liable. Leake on Contracts, 6th ed., p. 588a.

Applying the law as here laid down, it must be shewn that the defendant Bonnefoy agreed to accept the plaintiffs in lieu of Duseign and to look solely to them for payment and to release her claim upon Duseign. No such state of things exists here or has even been attempted to be proven.

However, none of these grounds of defence of the defendant Duseign need in fact be considered because of my previous finding that Duseign had no title to the land to sell to the plaintiffs and the chain of title upon which the plaintiffs rely has been destroyed. Now, to avoid the necessity for another action by the plaintiff against Duseign for breach of their agreement, I ought, if possible, in this action to give the plaintiffs whatever relief they would be entitled to in a separate action.

Their statement of claim asks generally for damages. All

MAN.

K. B.
1914

BAZIN
v.
BONNEFOY.

Curran, J.

parties interested are before the Court. All necessary defences have been raised and all evidence bearing upon the case has, I think, been fully adduced. It does seem to me that Duseign is liable to the plaintiffs for damages for breach of his contract to sell and convey to them these lands. He fraudulently entered into such a contract knowing that he had no valid title to the land nor any right to sell it, and he knowingly took the plaintiffs' money for something that he could not deliver.

The plaintiffs are entitled to repayment of the money paid by them to Duseign on account of this land, namely $198.60. I think they are also entitled to damages for the value of the improvements made, for, although they had knowledge that the defendant Bonnefoy claimed the land and repudiated Duseign's title, still I think, as between them and their vendor Duseign, they had a right to rely upon the agreement obtained from him and to act as if he was legally entitled to sell them the land. The evidence as to value of the improvements is not very satisfactory or very definite, but I will allow $200 on this account.

There will be judgment for the plaintiff against the defendant Duseign for the sum of $398.60, damages, with costs of suit as if the action had been originally brought against Duseign alone for breach of contract; and there will also be judgment for the defendants Bonnefoy and Weicker as before specified, with full costs of their defence as against the plaintiffs.

Judgment accordingly.

ALTA.

S. C.
1914

Re GENERAL ADMINISTRATION SOCIETY.

Alberta Supreme Court, Beck, J. February 21, 1914.

1. TAXES (§ I E 2—69)—CORPORATION TAX—TRUST COMPANIES IN ALBERTA.

In ascertaining the tax payable by a trust company under the Corporations Taxation Act, Alta. 1907, ch. 19, where the company employs only a part of its funds in Alberta, the word "tax" in paragraph (*i*) of sec. 3 (*f*) has reference to the tax as it would be ascertained under the primary and dominating provisions of the statute, with the result that the amount which, apart from paragraph (*i*) would *primâ facie* be chargeable, is to be moderated and reduced in the proportion that the company's investments in Alberta bear to its total investments.

Statement

APPLICATION for the interpretation by the Court of certain clauses of the Corporations Taxation Act, Alberta Statutes, 1907, ch. 19.

Frank Ford, K.C., for the Society.
L. F. Clarry, for the Crown.

Beck, J.

BECK, J.:—A dispute arising between this company and the Government as to the amount of tax payable by the company

under the Corporations Taxation Act (ch. 19 of 1907, Alta.), the question has been referred to me for decision.

The company is a "Trust Company." The provisions of the Act which I have to interpret are as follows:—

3. For the purpose of adding to or supplementing the revenues of the Crown in the province of Alberta every company shall annually pay to the Crown in this province each and every year the several taxes by this Act imposed thereon at the times and in the manner hereinafter provided:

. . . . . .

(*f*) Every trust company which transacts business in the province of Alberta shall pay a tax of $100 where the paid-up capital is one hundred thousand dollars or less, and the sum of $50 on every additional one hundred thousand dollars or fraction thereof of paid-up capital, and where the gross earnings of any trust company are twenty-five thousand dollars or over, such company shall pay the further sum of $500 per annum. The interest received by a trust company from the paid-up capital of the company which may be invested, shall not, for the purposes of this Act, be reckoned as gross earnings;

(*i*) Where a trust company employs only a part of its funds in Alberta the tax shall be calculated upon the same proportion of the total capital of the company up to one million five hundred thousand dollars as the total investments of the company in Alberta bear to the total investments of the company in all its fields of operation;

(*ii*) Where a trust company holds any real estate in this province which is not used or occupied by the company for its own purposes, or under agreement of sale by the company to a purchaser or under a mortgage to the company, and on which it pays municipal or school taxes, the then assessed value of such real estate shall be deducted from the amount of the capital, or the proportion of its capital, on which the tax provided for by this Act is to be calculated; provided, however, that when any company claims exemption from taxation on all capital over one million five hundred thousand dollars no deduction shall be made from such sum of one million five hundred thousand dollars under this sub-section in respect to taxable real estate held by it;

(*iii*) The minimum tax payable by any trust company in any one year, where the capital stock of the said company does not exceed one hundred thousand dollars, shall be $50, and where the capital stock does exceed one hundred thousand dollars the minimum tax shall be $100 per year.

The primary and dominating provision—the provision which must first take effect before any of the other provisions of subsec. (*f*) can take effect—is that contained in its opening words:—

Every trust company shall pay a tax of $100 where the *paid-up* capital is $100,000 or less and the sum of $50 on every additional $100,000 or fraction of *paid-up* capital.

There is no question here of gross earnings. The paid-up capital of the company is $125,000. Under the clause just quoted the tax would therefore be $100 for $100,000 and $50 for $25,000, making $150.

But the clause (*i*) contains an exceptive provision.

ALTA.

S. C.

1914

RE GENERAL ADMINISTRATION SOCIETY.

Beck, J.

Where a trust company employs only a part of its funds in Alberta the tax shall be calculated upon the same proportion of the total capital of the company up to $1,500,000 as the total investments of the company in Alberta bear to the total investment of the company in all its fields of operation.

It is quite clear, I think, that the word "total" is used solely to compare the whole with a part, that is the *whole* of the company's investments with the part of its funds employed in Alberta and the whole of its paid-up capital with the *part* of its paid-up capital ascertained by applying the "rule of three" and this involves the conclusion, which I think is clear enough, that "capital" in this subsidiary clause (*i*) means capital in the same sense in which it is used in what I have called the primary and dominating provision—namely, *paid-up* capital.

"The total investment of the company in all its fields of operation," amounts to $149,661.49. Of this the sum of $74,829.20 is the part of its funds employed in Alberta, *i.e.*, approximately one-half.

Then my first line of thought—adopting in this the line of argument of counsel for the company—was as follows:—

Applying the provisions of clause (*i*), as I have interpreted it, the tax is to be calculated "upon the same proportion" (that is one-half) of the *paid-up* capital, $125,000, that is $62,500. This reduces the tax to $100, the portion of the paid-up capital taxable being "$100,000 or less."

Then the company claims that clause (*iii*) has the effect of reducing the tax to $50.

(*iii*) The *minimum* tax . . . where the capital stock . . . does not exceed $100,000 shall be $50, and where the capital stock does exceed $100,000 the minimum tax shall be $100 per year.

I think it quite clear that just as "capital" in clause (*i*) means *paid-up* capital, so in this clause "capital stock" means paid-up capital stock.

But clause (*iii*) can have no application until by some previous calculation a figure by way of tax is reached which is less than $50; then the clause would apply in the sense that no matter how small on any previous calculation the tax would be it must be raised to $50 as the minimum tax, that is the lowest sum which would discharge the tax.

But if this argument were sound then in the particular case of a trust company, this provision (*iii*) would be senseless because under no possible circumstances could it ever have any application for the reason that the tax is fixed at $100 where the capital is $100,000 *or less;* it is larger where the capital is over that amount. The clauses which reduce the tax reduce it on this method by reason of deductions made from the amount of the

capital, but when the capital by reason of any of these reductions becomes *less than* $100,000, the tax is still $100.

This view, therefore, is evidently unsound and the fallacy seems to be that in thus interpreting clause (*i*) it has been overlooked that it is the *tax* that is to be calculated; although, as a basis for that calculation, there must be a preliminary calculation to ascertain the proportion of the investments in Alberta to the total of all investments and a calculation of the result of applying that proportion to the paid-up capital.

In order to calculate the *tax* in any other way than by the method which appears to be unsound for the reason already given there remains, it seems to me, only one method and that is to take *tax* in clause (*i*) as meaning the tax fixed *primâ facie* under what I have called the primary and dominating provision, and to take clauses (*i*), (*ii*), (*iii*), as providing that under certain circumstances and conditions that tax so *primâ facie* fixed is to be "moderated."

In the present case the tax is *primâ facie* $150. Then making the calculation upon the same proportion as obtains in the case of investments this tax would be reduced to one-half, or $75.

In this way clause (*iii*) has its application; and the capital stock of the company—the paid-up capital stock—being in excess of $100,000, the minimum tax is $100.

This interpretation permits of a reasonable meaning being given to each of the several provisions of sub-sec. (*f*).

I therefore declare that the tax payable for the past year by the company is $100.

Order accordingly.

CANCILLA v. ORR.

MAN.
K. B.
1914

Manitoba King's Bench, Galt, J. February 13, 1914.

1. CONTRACTS (§ IV D—390)—RESCISSION—MISTAKE—NEGLIGENCE.

Rescission of a contract entered into by reason of mistake as to the subject matter will be granted where the plaintiff can prove that the parties were never *ad idem* and that the mistake was not caused by his negligence, but on the contrary was contributed to by the other party's language and conduct.

[*Slouski* v. *Hopp*, 15 Man. L.R. 548; and *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266, discussed.]

Statement

ACTION for rescission of a contract for the purchase of land on the ground of mistake.

Judgment was given for the plaintiff.

W. W. Kennedy, and *F. C. Kennedy*, for plaintiff.

A. C. Campbell, for defendant.

MAN.

K. B.
1914

CANCILLA
v.
ORR.

Galt, J.

GALT, J.:—This is an action brought by the plaintiff for rescission of a certain contract for the sale of land and repayment to the plaintiff of $500 with interest paid on account.

The plaintiff alleges that on July 29, 1913, the defendant agreed verbally to sell to the plaintiff a certain lot of land situate at the southeast corner of the intersection of Talbot avenue and Eaton street, in ward 7, in the city of Winnipeg (which lot for brevity may be termed lot 4), for the price of $1,100, payable $500 in cash, $300 on July 29, 1914, and $300 on July 29, 1915, with interest at 6 per cent.

The plaintiff further alleges that prior to the making of the said agreement the defendant accompanied the plaintiff to the property and the defendant represented that he owned the said lot; that the defendant thereupon drew up an agreement of sale, the description in which mentioned lot 2, but did not shew the situation of the lot as regards the intersection of Talbot avenue and Eaton street.

As a matter of fact, the defendant owned lot 2, which was situate at the southwest corner of Talbot avenue and Eaton street, but he did not own lot 4. The plaintiff at the date of the transaction was not aware of the numbers of the lots or their descriptions.

The plaintiff alleges, amongst other things, that the defendant fraudulently and wilfully misled the plaintiff as to the correct description of the lands. In the alternative the plaintiff claims that the agreement was entered into by the plaintiff and the defendant under a mutual mistake.

The evidence given at the trial satisfies me that the plaintiff had determined, if possible, to purchase the lot at the southeast corner of Talbot avenue and Eaton street for the purposes of a fruit and confectionery store, and he never had any intention of even negotiating for the purchase of the lot at the southwest corner.

The witnesses Donald McLennan, John Homer, Joseph Seabino, and the plaintiff, all unite in establishing the plaintiff's intention as above-mentioned.

The defendant himself is sole witness as regards his understanding of the bargain. It is quite true that on the evening of July 29, when the plaintiff made his verbal bargain on or near the very ground he supposed he was purchasing, and when he paid to the defendant the sum of $20 on account, the defendant drew up a receipt mentioning lot 2. The plaintiff then suggested that a formal agreement of sale should be prepared by some lawyer, but the defendant stated that he had drawn many of these agreements, and was quite competent to have them accurate, and he would himself prepare the agreement for signa-

ture on the following day. Accordingly, on the following day, the parties again met; the defendant produced the agreement in writing and the plaintiff executed it in the belief that the description contained therein was the description of the lot at the southeast corner of the said two streets. In reality the description was of the lot at the southwest corner. The plaintiff at the same time handed his cheque for $480 to the defendant, which was duly cashed, thereby completing the first cash payment under the agreement.

A few weeks afterwards the plaintiff proposed to build on his property, and then, for the first time, ascertained that he had no right to the southeast corner. He promptly applied to the defendant to cancel the agreement and return the $500 which had been paid on account, but the defendant insisted on holding the plaintiff to his supposed bargain.

It is contended on behalf of the defendant that the mistake, if any, was wholly unilateral on the part of the plaintiff and that he has no right to relief.

The law applicable to the above state of facts appears to me to be very clearly set forth in Halsbury's Laws of England, vol. 7, sec. 732, as follows:—

> If there is no evidence as to the intention of the parties there can be no contract, and similarly, if it appears that they were negotiating or contracting with regard to different things or in contemplation of diverse terms, there is an absence of the essential mutuality and consequently no contract.
>
> Sec. 733: The mere signing of a contract does not necessarily imply consent, etc.

The reasons given by the learned editor appear to me to cover a case like the present one. Cancilla had every reason to believe that the defendant knew the land which he, Cancilla, was purchasing. The legal description in the receipt and in the agreement would convey no information whatever to Cancilla any more than if such description had been written in an unknown tongue.

Defendant's counsel referred to *Slouski* v. *Hopp*, 15 Man. L.R. 548, in support of his contention that the mistake in this case could not be remedied. There the plaintiff entered into an agreement under a mistaken belief as to the quantity of land he was to get. Mathers, J., at 549 says:—

> In my view the mistake was entirely self-imposed. . . . The mistake of one party to an agreement where the mistake was not known to the other party and where there was nothing in the language or conduct of the other party which led to or contributed to the mistake does not give a right of rescission, unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to do so.

MAN.
K. B.
1914
CANCILLA
v.
ORR.
Galt, J.

In the present case, I think that the language and conduct of the defendant, as shewn by the various witnesses on behalf of the plaintiff, led and contributed to the mistake which was made. It was also held in *Slouski* v. *Hopp*, 15 Man. L.R. 548, that on the evening of April 11, the plaintiff had notice of his mistake and subsequently paid two of the monthly instalments of his purchase money, and that on April 25, he went into occupation of the cottage and has continued to occupy it ever since. The learned Judge held that these were unequivocal acts consistent only with an intention to carry out the contract. No such acts appear in the present case.

Reference was also made to *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266. In that case the defendant bid at an auction sale for one lot, believing that he was bidding for another, but the Court at the trial held that his mistake did not relieve him. The case was afterwards reversed by the Court of Appeal in 1903, 1 Ch. 434, upon the ground that there was no memorandum of the bargain sufficient to satisfy the Statute of Frauds. But Collins, M.R., in delivering judgment, says at 436:—

> Upon the supplemental point as to whether the parties were *ad idem* it is not clear to my mind that the parties ever were *ad idem;* I do not think they were, but it is unnecessary to say anything further about that as the plaintiff's case fails on the other point.

I am of opinion in the present case that the plaintiff and the defendant never were *ad idem* as regards the subject matter of the contract, and that no negligence can fairly be imputed to the plaintiff for the mistake.

Under such circumstances the plaintiff is entitled to the relief which he has asked, that is to say, rescission of the contract and the return of the moneys he has paid with interest.

It is contended on behalf of the defendant that even if the plaintiff be entitled to succeed, he should be deprived of costs by reason of the fact that in his statement of claim, paragraph 5, he has charged fraud, and has not attempted to prove it. The allegation made by the plaintiff was:—

> 5. At the time of the making of the said agreement, dated July 29, 1913, the defendant was well aware that the lands which he caused to be described in the said agreement in writing were not the lands which he had agreed to sell to the plaintiff and fraudulently and wilfully misled the plaintiff as to the correct description thereof, etc.

There is no fixed rule that I can discover in favour of the defendant's contention. In the Annual Practice, 1914, p. 325, it is laid down that:—

> Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. General allegations, however strong may be the words in which they are

stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.

It cannot be said that the defendant in this case went down to trial for the purpose of establishing his character. He must have been thoroughly aware that the plaintiff had made a *bonâ fide* mistake and he ought to have been aware that his own conduct and words when the verbal agreement was made and the parties were standing on or near the land which the plaintiff desired to buy, led or contributed largely to the mistake. He ought, therefore, to have conceded the plaintiff's claim without litigation.

For this reason, I think the plaintiff is entitled to his costs of action.

Judgment for plaintiff.

BROOKS v. MUNDY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Lennox, J. January 26, 1914.

1. MECHANICS' LIENS (§ VI—47)—SUB-CONTRACTOR—CLAIM ON STATUTORY PERCENTAGE—TIME.

The obligation of the owner to retain a statutory percentage of the value of the work and materials is limited to the period of thirty days after the completion or abandonment of the contract by the contractor with whom the owner had contracted, and where such contractor had abandoned the work uncompleted and the owner had to pay more than the balance of the contract price to finish it, a sub-contractor filing his claim more than thirty days after the principal contractor's abandonment although within thirty days of his own last work on the building has no lien, if nothing then remained due the principal contractor.

2. MECHANICS' LIENS (§ VI—47)—SUB-CONTRACTOR — OWNER ADVANCING STATUTORY PERCENTAGE TO CONTRACTOR.

The fact that the owner did not retain from his contract any of the percentage of the value of the work as required by the Mechanics' Lien Act (Ont.) for the protection of sub-contractors and wage-earners, does not make him liable for sub-contractors' claims as to which no lien was filed or notice of claim given the owner until after the expiry of thirty days following the abandonment of the work by the principal contractor, the statutory obligation to retain the percentage being limited to thirty days after completion or abandonment of the contract with the owner.

[See Annotation on percentage funds under mechanics' lien law, at end of this case.]

Statement

APPEAL by the defendant Mundy from the judgment of the Local Master at Ottawa, dated the 11th November, 1913, in a mechanics' lien action.

The appeal was allowed.

J. G. O'Donoghue, for the appellant.

J. R. Code, for the plaintiff, the respondent.

ONT.
S. C.
1914
BROOKS
v.
MUNDY.
Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant employed his co-defendant Gagnon to build four tenement houses for $5,650, and Gagnon sublet the plastering work to the respondent. Gagnon abandoned the work on the 16th February, 1913, leaving the work he had contracted to do uncompleted, and it was afterwards completed by the appellant, whose outlay in doing so exceeded the amount of the contract price, which had not been paid to Gagnon.

The respondent had by the 1st February, 1913, completed the work he had undertaken to do, except such patching as it was his duty to do after the carpenters had completed their work, and on the 19th April following he sent men to do this patching. The men did some little work, when they were stopped from continuing what they had been sent to do, by the appellant. The lien was registered on the 15th May, 1913.

The Master gave judgment for the respondent, upon the ground that sec. 6 of the Mechanics' and Wage Earners' Lien Act (10 Edw. VII. ch. 69) gave to the respondent a lien for the price of his work on the land of the appellant; that this lien continued to exist until the expiry of thirty days from the completion of the respondent's work; that the work was not completed until the 18th April, 1913; and that the lien, having been registered on the 15th May, 1913, was registered in due time.

The Master appears to have overlooked the fact that, by sec. 10, the lien of the respondent did not attach so as to make the appellant liable for a greater sum than the sum payable by him to Gagnon, and that, as there is nothing owing by the appellant to Gagnon, unless the respondent is entitled to look to the twenty per cent. which, by sec. 12, it was the duty of the appellant to retain, there is nothing upon which the lien can attach.

All that the appellant was required by sec. 12 to do was to retain for the period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service, and materials actually done, placed, or furnished, as mentioned in sec. 6, such value to be calculated on the basis of the contract price; and at the expiration of thirty days from the abandonment by Gagnon of his contract the duty of the appellant to retain the percentage was at an end unless in the meantime proceedings had been commenced "to enforce any lien or charge against" it (sub-sec. 5).

The fact, if it be a fact, that the appellant did not retain any percentage of the value of Gagnon's work for thirty days cannot put him in any worse position than if he had done so. The percentage which the appellant was required to retain was a fund to answer the liens of such of the sub-contractors and wage-earners as should take within the prescribed time proceedings

to enforce their liens, but not to answer any other liens; and, not having taken proceedings to enforce his lien within thirty days after the abandonment of the contract by Gagnon, the appellant has no right to resort to the fund.

The appeal should be allowed with costs, and the judgment against the appellant should be reversed, and judgment be entered dismissing the action as against him with costs.

Appeal allowed.

Annotation—Mechanics' Liens (§ VI—47)—Percentage fund to protect sub-contractors.

Annotation

Mechanics' Liens—Percentage fund

It is provided by the Ontario Mechanics' Lien Act, 10 Edw. VII. ch. 69, R.S.O. 1914, ch. 140, that in all cases the person primarily liable upon any contract 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 thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work or 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: sec. 12 (1).

Where the contract price or actual value exceeds $15,000, the amount to be retained shall be fifteen per cent. instead of twenty per cent.: Sec. 12 (2).

The lien shall be a charge upon the amount directed to be retained by this section in favour of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable: Sec. 12 (3).

All payments up to eighty per cent., or eighty-five per cent. where the contract price or actual value exceeds $15,000, of such price or value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor before notice in writing of such lien given by the person claiming the lien to him, shall operate as a discharge *pro tanto* of the lien: sec. 12 (4).

(5) Payment of the percentage required to be retained under sub-sections 1 and 2 of sec. 12 may be validly made so as to discharge all liens or charges in respect thereof after the expiration of the period of thirty days mentioned in sub-section 1 unless in the meantime proceedings have been commenced to enforce any lien or charge against such percentage as provided by sections 23 and 24.

Section 12 is for the protection of sub-contractors. It creates a fund out of which persons claiming a lien under a contract not made directly with the owner may have their lien satisfied.

Before the year 1882 the percentage to be retained under the Ontario Mechanics' Lien Act was upon "the price to be paid to the contractor." Under the former section it was held that the owner was not required to retain a percentage upon all payments made to the contractor. It was sufficient if such payments did not in the aggregate exceed the specified

ONT.

Annotation

Annotation (*continued*)—**Mechanics' Liens** (§ VI—47)—**Percentage fund to protect sub-contractors.**

Mechanics' Liens—Percentage fund

percentage of the whole contract price, and if the contractor failed to complete the contract, or if for any other reason the contract price never became due, there was no fund available to satisfy the liens of sub-contractors: *Goddard* v. *Coulson* (1884), 10 A.R. 1; *Harrington* v. *Saunders* (1887), 23 C.L.J. 48, 7 C.L.T. 88; *Truax* v. *Dixon* (1889), 17 O.R. 366; *Reggin* v. *Manes* (1892), 22 O.R. 443; *Re Scar and Woods* (1892), 23 O.R. 474; Wallace on Mechanics' Liens, 2nd ed., 361.

In *Re Cornish* (1884), 6 O.R. 259, it was held that where a contractor failed to complete his contract and his surety undertook to finish the work there were two contracts, and that the percentage was to be paid on the amount earned under each. It was also held that a mechanics' lien was postponed to the owner's claim for damages for non-completion; the priority of a wage-earner's lien was not decided: See *Harrington* v. *Saunders*, *supra*; *McBean* v. *Kinnear* (1892), 23 O.R. 313.

It was afterwards held in *Russell* v. *French* (1896), 28 O.R. 215, that if any owner, contractor or sub-contractor under whom a lien may arise pays more than the specified percentage of the value of the work and materials done or finished, he does so at his peril, and a lien may be successfully asserted against him, to the extent of the percentage which he should have retained, by any lien-holder who is prejudiced by the excessive payment.

Section 22 of the Ontario Mechanics' Lien Act, limits the time within which a lien may be registered to within thirty days after the completion of the work or the supplying of the materials for which the lien is claimed. By retaining the percentage for the same period the owner, contractor or sub-contractor is in a position to know whether any lien will be asserted, the same limit of time being adopted in both instances.

An interlocutory application to stay proceedings in an action under the Mechanics' Lien Act (Ont.), brought by workmen against both their employer and the property owner, should not be granted to enable the owner to complete the work on the contractor's default and so ascertain the balance, if any, owing by the owner under the contract; such a question should not be determined in Chambers but should be determined at the trial, or, if the pleadings properly raise the question of law, it can be determined upon a motion in Court: *Saltsman* v. *Berlin Robe and Clothing Co.*, 6 D.L.R. 350, 4 O.W.N. 88, 23 O.W.R. 61.

Payments to the extent of the percentage mentioned will not be protected if before payment is made, notice in writing has been given by a person claiming a lien. The necessity for this provision is obvious as otherwise the owner before making any payment would always be obliged to make a search to ascertain if any lien had been registered: Wallace on Mechanics' Liens, 2nd ed., 363.

Lien claimants for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar street buildings" to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day:" *Held*, Meredith, J., dissenting, a sufficient "notice in writing" of their lien: *Craig* v. *Cromwell* (1900), 32 O.R. 27, affirmed, 27 A.R. 585. On the appeal in

Annotation (*continued*)—Mechanics' Liens (§ VI—47)—Percentage fund to protect sub-contractors.

ONT.

Annotation

Mechanics' Liens—Percentage fund

this case, at page 587, Osler, J.A., thus refers to the notice required by sub-sec. 2, of the former section: "The object of the notice is to warn the owner that he cannot safely make payments on account of the contract price even within the 80 per cent. margin, because of the existence of liens of which he was not otherwise bound to inform himself or to look for. The notice does not compel him to pay the lien. It does not prove the existence of the lien. Its sole purpose is to stay the hand of the paymaster until he shall be satisfied—either by the direction of the debtor or of the Court in case proceedings are taken to realize the lien—that there is a lien, and that some amount is really due and owing to the lien-holder. . . . The notice under sec. 11, sub-sec. 2, is purely informal, and was manifestly intended to be so, no form or special particulars of detail being prescribed in regard that it might have to be given promptly or by illiterate persons who might, as it were, read and understand the sections as they ran."

The payment of the percentage retained cannot validly be made to any person within the thirty days mentioned in sub-sec. 1. After the expiration of the thirty days payments may be validly made to lien-holders unless proceedings have been taken under secs. 23 and 24 to enforce a lien or charge against the percentage retained. Proceedings by one lien-holder would be sufficient as such proceedings would be available for other lien-holders claiming against the amount retained: Wallace on Mechanics' Liens, 2nd ed., 364.

In *Torrance* v. *Cratchley* (1900), 31 O.R. 546, Street, J., in referring to the 11th and following sections, says (at p. 549): "The only object of the provision requiring the owner to retain the twenty per cent. for thirty days appears to be that indicated by sub-sec. 3 of sec. 11, viz., to give persons entitled to liens an opportunity of enforcing them against the fund directed to be retained."

In a later case it was said that this section recognizes that the charge is a charge upon money to become payable to the contractor; and when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had and their lien fails: *Farrell* v. *Gallagher* (1911), 23 O.L.R. 130.

It was also held in 1911 that there is no sum "justly owing" or "payable" by the owner to the contractor where the building was never completed by the contractor and where the building contract provided that time was of the essence of the contract and stated a specific time for completion and fixed a specific sum for every day beyond a stated period that the owner is denied the full possession of the premises, and that a materialman therefore could not enforce liens against the land and had no relief under the Act, where the unpaid balance of the contract price would be absorbed by the "per diem" penalty clause, held under the circumstances to be really liquidated damages: *McManus* v. *Rothschild* (1911), 25 O.L.R. 138.

In *Farrell* v. *Gallagher*, 23 O.L.R. 130, 2 O.W.N. 635, the Divisional Court considered *Russell* v. *French*, 28 O.R. 215, to be in point, but was

ONT.

Annotation

Mechanics' Liens—Percentage fund

Annotation (*continued*)—Mechanics' Liens (§ VI—47)—Percentage fund to protect sub-contractors.

constrained, under the authority of *Mercier* v. *Campbell*, 14 O.L.R. 639, to give its own opinion independently of the decision in *Russell* v. *French*, which latter, in the opinion delivered by Middleton, J., was said not to be of "conclusive authority." The Divisional Court proceeded to a consideration of other sections of the Act (secs. 4, 10 and 11), and declined to interpret sec. 12 as constituting one of the exceptions to the general effect of sec. 11, which enacts that "same as herein otherwise provided" where the lien is claimed by any person other than the contractor, the amount which may be claimed in respect thereof, shall be limited to "the amount *owing* to the contractor or sub-contractor or other person for whom the work or service has been done or the materials placed or furnished." The Divisional Court expressed its disagreement with the decision in *Russell* v. *French* as regards the assumption in the latter case that the change made in the basis upon which the 20 per cent. is to be computed shews an intention on the part of the legislature that an owner is to be liable for the 20 per cent. where, on the contractor's default upon an unremunerative contract, the owner may have to pay more than the 20 per cent. in addition to the unearned portion of the contract price to get the work completed. In its opinion, sec. 12 as amended still recognizes that the charge is a charge upon money to become "payable" to the contractor (see sec. 10); and "when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having their statutory charge upon the fund if and when payable, have no greater rights than he himself had and their lien fails." This is the doctrine which for a time displaced the authority of *Russell* v. *French*, 28 O.R. 215, which doctrine has been declared fallacious by the case of *Rice Lewis* v. *Harvey*, 9 D.L.R. 114, 27 O.L.R. 630, re-affirming the *Russell* case as having been properly decided.

In *Rice Lewis* v. *Harvey*, 9 D.L.R. 114, it was held that the twenty per cent. which the Act requires an owner to retain constitutes a fund of which the owner is a trustee, and that where a contractor abandons his work the materialmen and other lien-holders can resort to this fund. Where, therefore, under a contract it was provided that eighty per cent. of the value of the work done was to be paid, on progress certificates, by the owner to the contractor, the owner was held liable to other lienholders to the extent of twenty per cent. on such payments, and, if any additional sum became payable by the owner to the contractor, twenty per cent. of such sum would be available to lienholders. *Russell* v. *French*, 28 O.R. 215, is in accord with this decision, and *Farrell* v. *Gallagher*, 23 O.L.R. 130, and *McManus* v. *Rothschild*, 25 O.L.R. 138, are to be considered as overruled in so far as they are inconsistent with the decisions in *Russell* v. *French*, 28 O.R. 215, and *Rice Lewis* v. *Harvey*, 9 D.L.R. 114, also reported *sub nom.* *Rice Lewis* v. *Rathbone*, 4 O.W.N. 602, 27 O.L.R. 630.

A writer in the *Canada Law Journal*, 49 C.L.J. 260, in discussing the case of *Rice Lewis* v. *Harvey* (or *Rice Lewis* v. *Rathbone*, as it has been incorrectly called in some reports because of the inclusion of another lienholder of the latter name in the proceedings), says that the view of the Court of Appeal is somewhat similar to the case of a first mortgagee making further advances, after he has notice of a subsequent mortgage.

Annotation (*continued*)—Mechanics' Liens (§ VI—47)—Percentage fund to protect sub-contractors.

ONT.

Annotation

Mechanics' Liens—Percentage fund

Such advances cannot be tacked to his first mortgage to the prejudice of the subsequent mortgagor; and it is not unreasonable, nor unjust, that subsequently accruing equities of an owner shall not prejudice or affect the rights of lienholders whose liens have attached before such equities have arisen.

The argument founded on sec. 15 (4), which expressly provides that as against liens for *wages*, the owner is to be precluded from applying the percentage to the completion of the contract or for any other purpose, or to the payment of damages for non-completion of the contract by the contractor or sub-contractor, or in payment or satisfaction of any claim against the contractor as sub-contractor, was duly considered by the Court of Appeal, and, notwithstanding the contention that, there being this express provision in favour of wage-earners and no such provision in favour of other sub-contractors, such other sub-contractors are not entitled to the same protection in regard to the percentage as wage-earners, the Court held that they were.

The Court of Appeal regarded this provision as not affecting the other provisions of the Act which they held were sufficient to protect the liens of other sub-contractors from being intercepted by counterclaims of the owner against the contractor, though not expressly provided for in the Act.

The provision in favour of wage-earners, the Court of Appeal regarded as directed to cases where there are no progress certificates in which there may be nothing payable to the contractor, except the ultimate balance, says the *Canada Law Journal*. The article concludes as follows:—

"This last suggestion as to the supposed meaning of sec. 15 (4) does not appear to us to have any good foundation. The percentage fund in no way depends on the existence or non-existence of progress certificates; it arises automatically as the work and materials are actually done and furnished altogether irrespective of progress certificates or payments to the contractor thereunder, and for every dollar's worth of work and materials done and furnished the owner has to lay aside twenty cents of the price for the benefit of sub-contractors, if any. The true reason for the Court's decision therefore, would seem to be not that sec. 15 (4) is intended to apply to some special state of facts in which wage-earners are intended to be specially benefited, but that such provision is in fact redundant and that the Act without it would have to be construed as if it contained it."

On the general question as to what persons have the right of lien under the various mechanics' lien laws of the provinces, reference should be made to the Annotation in 9 D.L.R. 105, and to *Farr* v. *Groat*, 12 D.L.R. 575, 24 W.L.R. 860; *Fitzgerald* v. *Williamson*, 12 D.L.R. 691, 18 B.C.R. 322; *Brown* v. *Allen*, 13 D.L.R. 350; *Peters* v. *Maclean*, 13 D.L.R. 519, 25 W.L.R. 358.

B. C.

S. C.
1914

REX v. ANGELO.

British Columbia Supreme Court, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 12, 1914.

1. EVIDENCE (§ IV G—421)—CRIMINAL TRIAL—FORMER TESTIMONY—ABSENT WITNESS FOR PROSECUTION—DEPOSITION AT PRELIMINARY ENQUIRY.

A court of criminal appeal will not interfere with a preliminary finding by the trial judge under Cr. Code, sec. 999 (amendment of 1913), on admitting in evidence the prior deposition of an absent witness for the Crown taken on the preliminary enquiry, that such witness was absent from Canada, where such finding was based on proof that the absent witness was a police officer who had obtained a short leave of absence and having thereafter failed to report for duty had been heard from in the United States under circumstances tending to shew that he had gone there to avoid giving evidence at the trial in question; it is not a prerequisite to the admission of the prior deposition that there should be absolute proof of absence from Canada, but only that such facts should be proved from which such absence "can be reasonably inferred" (Cr. Code 999, as amended 1913).

2. APPEAL (§ XI—721)—LEAVE TO APPEAL—CRIMINAL CASE—STATED CASE NOT TO BE DISPENSED WITH.

On giving leave to appeal under Cr. Code (1906), sec. 1015, following the refusal of the trial judge to reserve a case, the court of criminal appeal should not, even by consent, hear and deal with the matter as though a case had been stated on the question on which the leave is given; sec. 1016 of the Criminal Code is mandatory in directing that a case "shall be stated."

[*R.* v. *Armstrong*, 12 Can. Cr. Cas. 544, 15 O.L.R. 47, dissented from.]

3. APPEAL (§ IV C—120)—CONTRADICTIONS IN RECORD OR APPEAL CASE—JUDGE'S CERTIFICATE OF EVIDENCE NOT SHEWN ON STENOGRAPHER'S NOTES.

In a conflict between what the trial judge certifies in a case stated under Cr. Code 1906 sec. 1016, to have been specifically sworn to by a witness in answer to his own question, and what is shewn on the stenographer's notes of evidence sent up with the stated case under Cr. Code, sec. 1017, a court of criminal appeal is bound to accept the statement of the trial judge, particularly where he certifies that the stenographer's notes are defective by reason of the omission of such question and answer.

4. APPEAL (§ IV D—125)—AMENDING OR PERFECTING—CRIMINAL APPEAL—STATED CASE—PROOF OF PROCEEDINGS AT TRIAL.

The power of a court of criminal appeal on hearing a case stated by the trial judge under Cr. Code (1906), sec. 1015, to refer to such other evidence of what took place at the trial as it thinks fit is limited by Cr. Code sec. 1017 to cases in which "only the judge's notes are sent and it considered such notes defective"; there is no such power where, in addition to the judge's notes, the notes of the official stenographer accompany the stated case. (*Per* Martin, J.A.)

Statement

CRIMINAL appeal from Morrison, J.

J. W. deB. Farris (*Leighton* with him), for prisoner.

A. D. Taylor, K.C., for Crown.

Macdonald, C.J.A.

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

IRVING, J.A.:—This is a case stated by Morrison, J., under sec. 1014, for our opinion as to the admission in evidence at the trial, under sec. 999 of a deposition made by Constable Hannay at the preliminary hearing.

The learned Judge refused to state a case, and an appeal was taken from his refusal. On reading the stenographer's notes we thought that a case ought to be stated, and later, the learned Judge has put before us the following:—

Submitted by the Honourable Mr. Justice Morrison for the opinion of the Court of Appeal for the Province of British Columbia, pursuant to the request of the accused, Joe Angelo, arising out of the trial of the said Joe Angelo on charges of riotous damage to property, riot and unlawful assembly, against him at the sittings of the Special Assizes held at New Westminster, British Columbia, on the 7th day of January, 1914.

Did I err in allowing the depositions of George Hannay, as taken at the preliminary hearing and set out at pp. 120 and 142 inclusive, of the appeal book, to be admitted as evidence at the trial, on the evidence of David Stephenson, which was substantially as follows:—

That the said George Hannay, one of the constables on his staff at Nanaimo, had failed to report for duty. He left on leave about the 4th of December, since which time he had not seen him. He heard from him later at Vancouver and again from Seattle, U.S.A. He had failed to report, and he said he had absconded.

In my opinion, the last paragraph contains the evidence by which we should be guided in determining the question submitted.

What follows in the stated case I think is more in the nature of an explanation. The learned Judge, in my opinion, acted rightly in putting before us what the stenographer has taken down, and also in setting forth his own hasty notes, because, had he not put before us the stenographer's notes there might have been an application for further evidence under sub-sec 2 [Cr. Code sec. 1017].

But, whether he did what was unnecessary or not, in a conflict between what the Judge certifies to and what the stenographer produces, we are bound to accept the statement of the Judge.

For myself, I see no difficulty in reaching the conclusion that the evidence noted in the following words: "Hannay, 4 Dec., Van., Seattle, absconded" was given immediately before the learned Judge asked prisoner's counsel to admit that the man had absconded.

It was suggested that the learned Judge had introduced the word "absconded." I should think not, because he says lower down, "the chief of police has sworn to it," and Mr. Bird, in effect, said, "that may be, but the chief of police does

B. C.
S. C.
1914
REX
v.
ANGELO.
Irving, J.A.

not know and therefore cannot swear that he is absent from Canada."

The word may not have been used by the witness, but the idea was conveyed to the Judge by whatever word was used—whether it was fled, bolted, skipped or disappeared.

Now, with the evidence certified to by the Judge before us, let us consider whether it was rightly admitted under sec. 999 of the Code. In weighing evidence of this kind—or any kind—the Judge (or jury) is permitted to bring to bear his experience and knowledge of the words and to take judicial notice of many matters.

In the present case he was at liberty, in my opinion, to take judicial notice that at the time of the commission of the offence charged there had been at Extension and in its vicinity a great many riots, and that the foundation of the rioting was the feeling between strikers and non-strikers, and he was also entitled to take notice that the case against Angelo was one of the many cases arising out of that strike which would be dealt with at the special assize over which he was presiding. He knew from the evidence of the chief of police that Hannay had been a constable at Extension and it would therefore be likely that he would be called as a witness in more than one of these cases. A Judge may also be sensible to the fact that feeling for and against persons charged with rioting in these circumstances would run high, and that persons appearing as witnesses in these cases might be made to suffer for having so done, and a Judge may take notice of the fact that some people are lacking in moral courage and are averse to committing themselves one way or the other. With these matters present to his mind can it be said that he was wrong in reaching the conclusion that a constable who was required as a witness at the assizes, and who from his having been examined as a witness at the preliminary examination, must have known that he would be required, had some four weeks before the opening of the assizes, left his position without explanation, nay, even pretending when he left that he would return, for it must be remembered that the constable had not left the service, he had merely obtained leave of absence, and then having got away from his post, he had failed to report for duty; in short, had absconded. The word means to remove oneself for the sake of not being discovered by those with whom we are acquainted. But it is argued though Hannay may have absconded, it does not necessarily follow that it is any evidence that he was absent from Canada. Perhaps not, but the United States, or somewhere where the King's writ does not run, would be the most likely place to which he would go, and when the Judge hears that the chief of police had heard from him in Vancouver, British Columbia, and then later from

Seattle, Washington, all within three or four weeks from the trial, the conclusion that he had gone to the United States seems to me fully justifiable.

The language of the statute shews that it cannot be expected that absence from Canada will be proved as a positive fact. In most cases—in almost every case—it must be a matter of inference, determined by the probabilities of the case, and in every case common sense and shrewdness must be brought to bear upon the facts elicited.

In *Richard Evans & Co.* v. *Astley*, [1911] A.C. 674, at 678, the Lord Chancellor pointed out that Courts, like individuals, habitually act upon a balance of probabilities.

It is not possible for a Court of Appeal to say what degree of proof will support an application of the kind that the learned trial Judge had to consider. It is undesirable that any attempt by the Court of Appeal should be made; each case must be decided upon its own facts, and if the more probable conclusion is, in the opinion of the trial Judge, that the man is absent from Canada, and there is anything pointing to it, then this Court ought not to reverse the finding of fact.

In the present day too much importance cannot be attached to the principles referred to by Abbott, C.J., in 1820, that, in the administration of justice, nice and subtle distinctions are avoided in our Courts as much as possible on account of the delay, confusion and uncertainty to which such distinctions naturally lead.

I would answer the question in the negative.

MARTIN, J.A.:—When this case first came before us on the 2nd instant on the motion for leave to appeal under sec. 1015, because the Court below had refused to reserve certain questions, we gave leave to appeal on the first question submitted. But, following the rule we have laid down, we refused to accede to the request of both counsel to thereupon hear and deal with the matter upon the agreement of counsel and the evidence before us just as though that case which sec. 1016 specially declares "shall be stated" had been stated by the only tribunal which could state it, viz., the Court before which the question arose. In the stating of a case this Court cannot substitute itself, and should not allow counsel to substitute themselves, for the tribunal nominated by the statute to discharge that duty. In this respect we have again thought it not expedient to follow the course adopted in Ontario in *R.* v. *Armstrong* (1907), 15 O.L.R. 47, 12 Can. Cr. Cas. 544, and if I may be permitted to say so, the desirability, indeed necessity, of always requiring these questions to be formally stated, thereby avoiding the likelihood of error, has once more been shewn, because as the matter

Martin, J.A.

B. C.
S. C.
1914
REX
v.
ANGELO.
Martin, J.A.

now comes before us on the stated case it is clear that if we had dealt with it as requested on the motion a grave miscarriage of justice would have resulted.

It is beyond question that we are bound by the facts as they are certified to us by the Court below, and cannot go beyond them (save as provided by sub-secs. 2 and 3 of sec. 1017, as hereinafter noted) even though the result is that they may "state you out of Court," as it is put in *Evans* v. *Hemingway* (1888), 52 J.P. 134, which is an example of a case re-stated. It cannot, indeed, be otherwise, because we are prohibited from weighing evidence since only questions of law are appealable under sec. 1014, consequently we must have sent up to us, as was said in *Re the County Council of Cardigan* (1890), 54 J.P. 792, not "abstract questions," but "specific facts which have actually arisen and the decision come to on those facts," before we can entertain the matter.

In stating the present question, the learned Judge has stated the facts, and has sent us, as authorized by sec. 1017, a copy of the material evidence as taken down by the official stenographer and also a copy of his own notes, and in so doing he informs us that certain specified portions of the stenographer's notes are incorrect and omit material, indeed vital parts of the evidence on the application before him, which he supplements from his own recollection and notes, including one crucial question put by the Judge himself to the witness and the answer thereto (respecting the presence of the absconding police constable in Seattle, U.S.A.), which the stenographer entirely omitted.

In such circumstances our duty is clear, and it is that we must accept the facts so certified to us. We have no power to refer, in these circumstances, to any "other evidence of what took place at the trial" under sub-sec. 2 of sec. 1017, because that power is given to this Court, "if only the Judge's notes are sent, and it considers such notes defective"; here the stenographer's notes are also sent. There is no ground for sending the case back to be amended or re-stated under sub-sec. 3. The obligation and responsibility for stating the facts correctly to this Court are upon the learned Judge below. We cannot, save under sub-sec. 2, review his finding of fact on what occurred before him.

Turning then to sec. 999. On its unusual wording it is obvious that it does not require positive proof of the existence of all the conditions precedent to the admission of the evidence. There are two classes of such conditions mentioned in the section. The first relates to (*a*) the death, (*b*) illness, or (*c*) absence from Canada, of the person specified, and to satisfy the existence of any of these three conditions all that is required is the proof of such facts that said existence "can be reasonably

inferred." But the section goes on to require positive proof of the existence of the second class, viz., "if it is proved (*a*) that such evidence was given or such deposition was taken in the presence of the accused;" and (*b*) that he had full opportunity to cross-examine; "then, if the evidence or deposition purports to be signed by the Judge or justice . . . it shall be read as evidence in the prosecution, etc." This clearly shews the distinction between the two classes of proof. All that is necessary to be shewn to us is that on the facts before us it "can be reasonably inferred" that condition (*c*) existed, and the tribunal to draw that inference is not this Court but the Court below. In this case, all that we can do is to see if there are such facts as would reasonably entitle the Judge below to draw the inference he has drawn, to the same extent and in the same manner as would entitle a jury to reach a reasonable finding on facts of more or less cogency before them. We cannot weigh the evidence, but only consider the matter so as to be able to say whether or not there were facts before him from which the inference he has drawn may be said to be reasonable. That is what I understand the Supreme Court of the North-West Territories to hold in *The Queen* v. *Forsythe* (1900), 5 Can. Cr. Cas. 475, at 483, when it says that the Court appealed to

> ought to answer whether the evidence was sufficient to justify the Judge in finding as he did, and not merely to say that it was a matter in his discretion and that having exercised that discretion as he did the Court would not interfere.

The word "justify" is used, I take it, in the strict legal sense that a verdict of a jury is "justified" when a Court of Appeal refuses to set it aside because it could not be said that reasonable men could not reasonably reach the same conclusion on the evidence, though it might appear unsatisfactory to other minds.

Proceeding then to apply this principle to the facts before us, I have no hesitation in saying that the action of the learned Judge in drawing the inference he did is fully justified in law, and I shall only add that the word "abscond" has different legal meanings, and, according to the context, may imply that the absconder has fled the country to foreign parts, or, *e.g.*, in the case of certain sections of the English Bankruptcy Acts, that he has

> departed from his dwelling-house for the purpose of delaying his creditors and escaping payment of his debts

without leaving England, in which country he was in fact rightly held to have been arrested as an absconder, in *Reg.* v. *The Judge of the Northallerton County Court* (1898), 47 W.R.

B. C.
S. C.
1914
REX
v.
ANGELO.
Gallihier, J.A.

68. In the case at bar, the expression is clearly used in the former sense.

It follows that I answer the question reserved in the negative.

GALLIHER, J.A.:—The questions for us to decide here are:—

1. Was there evidence adduced at the trial from which the Judge could reasonably infer that a certain witness—Hannay—who had given testimony at the preliminary hearing, was absent from Canada so as to permit of his depositions being read as evidence in the prosecution under the provisions of sec. 999 of the Criminal Code?

2. If such depositions were wrongly admitted, was some substantial wrong or miscarriage thereby occasioned under sec. 1019 of the Criminal Code?

Dealing with the first question, I am of opinion that the receiving or rejecting of the depositions is not a matter merely in the discretion of the trial Judge.

It is, therefore, open to this Court on review to consider and decide whether the evidence adduced was in law sufficient to permit of the depositions being read as provided by sec. 999 above referred to; or, to put it in another way, was there legal evidence from which the Judge might reasonably infer that the witness Hannay was absent from Canada.

The evidence is that of Mr. Stephenson, chief of police, as it is before us transcribed by the stenographer with the addition thereto of the trial Judge's notes containing matter which does not appear in the stenographer's transcript of the evidence.

This, I think, is provided for by sec. 1017 of the Code, and that we are to look at both the evidence as transcribed and the Judge's notes.

Taken together, then, the evidence is in substance this: Hannay, who was a constable under Stephenson, was last seen by him on December 4, 1913, when he went away on leave. Stephenson heard from him later at Vancouver and also at Seattle, which latter city is in the State of Washington, without Canada, that he has failed to report, and that he has absconded.

As to the use of the word "absconded" by the witness, there is a conflict between the Judge's notes and the transcript, or at least there appears to me to be such, but assuming the word to have been used by the witness I do not think from reading the evidence as a whole we can take it that it means more than that he had left the country, so that the implication that he was out of the country for the country's good and therefore not likely to have returned should not attach.

Then, taking the statement that he (Stephenson) heard from

Hannay at Seattle, that may be open to two constructions, either that he heard direct, as by letter, or from some third party. If the latter, that would not be evidence as it is hearsay; if the former, no evidence is given that there was a letter at all, or that it was dated from or postmarked at Seattle, even if such evidence would be sufficient upon which to found a reasonable inference that he was still absent from Canada, considering the lapse of time and the proximity of Seattle to British Columbia.

Further, there is not a tittle of evidence to shew that any efforts whatsoever have been put forth to discover his whereabouts.

The Crown's case then rests upon the fact that he left Canada, was heard from in Seattle some time prior to the trial, that he was a constable on leave and should have reported for duty, and that he had not done so.

I have dealt with the first two, and it seems to me they are not sufficient.

Does the fact that he was a constable on leave, and has not reported for duty, so strengthen the case as to justify the learned trial Judge in admitting the depositions?

I must confess that, in the absence of authority I should have entertained some doubt, but we have been referred to a decision of the Supreme Court of the North-West Territories *en banc*, reported in 5 Can. Cr. Cas. 475 (*The Queen* v. *Forsythe*) where, under circumstances very similar, the Court unanimously held that the trial Judge was justified in admitting the depositions.

This authority is, of course, not binding on us, but besides entertaining a high regard for the opinion of the members of that Court, I think it is desirable (compatible with the interests of justice) that decisions in criminal matters should be as uniform as possible throughout Canada.

I would therefore answer the first question in the negative.

It becomes unnecessary to deal with the other phase of the case.

McPHILLIPS, J.A.:—The accused was tried and found guilty at the special assize at New Westminster in January, 1914, of riotous destruction and riotous damage to property, riot and unlawful assembly. McPhillips, J.A.

The Crown introduced the evidence of one George Hannay, a provincial constable, at the trial, as given at the preliminary inquiry before the committing magistrate.

The question as submitted by the learned trial Judge, following the order of this Court after appeal had, to state a case, reads as follows:—

B. C.
S. C.
1914
REX
v.
ANGELO.
McPhillips, J.A.

Did I err in allowing the depositions of George Hannay, as taken at the preliminary hearing, and set out at pp. 120 to 142 of the appeal book, to be admitted as evidence at the trial, on the evidence of David Stephenson, which was substantially as follows:—

That the said George Hannay, one of the constables on his staff at Nanaimo, had failed to report for duty. He left on leave about the 4th of December, since which time he had not seen him. He heard from him later at Vancouver and again from Seattle, U.S.A. He had failed to report, and he said he had absconded.

The transcript from ques. 6 on page 2 down to line 16 is unintelligible to me. There was cross-firing by counsel and remonstrance by me. It would be quite impossible for even the most expert stenographer to have caught the significance of the dialogue.

As to the observations of Mr. Bird in line 21, my clear recollection is that what he urged upon me was that there was no evidence that Hannay is *now* out of Canada. I, however, held that that evidence was sufficient upon which to base a reasonable inference that he was still out of Canada. The rest of the subjoined transcript strikes me as not containing all that took place; for example the last page, beginning at line 11 where there is a clear omission.

My own recollection of the fact that Chief Constable Stephenson stated that he had heard of Hannay in Seattle is borne out by my notes made at the time, which read:—

"Hannay, 4th December, Vancouver, Seattle, absconded," and the word "Seattle" in margin underlined. He mentioned Seattle in reply to a question put by me after counsel had subsided.

In my opinion, where the accuracy of the evidence adduced at the trial, or its completeness is questioned, this Court must place the greatest reliance upon the case as stated by the trial Judge, and his notes of the evidence.

Here we have the evidence as transcribed by the stenographer questioned by the learned trial Judge, but we have in precise terms from the learned trial Judge the evidence which is material to warrant the introduction of the evidence of Hannay.

That evidence is, that Hannay had failed to report for duty, having left in December, 1913, and had not been seen since, that he had been heard from in Vancouver, later in Seattle in the State of Washington, one of the United States of America, and that he had absconded.

Section 999 of the Criminal Code sets forth what is to be proved to admit of the depositions being read as evidence in the prosecution, that is, such facts are proved that it can be reasonably inferred therefrom that the person whose evidence was taken before the trial in the investigation of the charge is absent from Canada.

The Criminal Code unquestionably commits the determination of the matter to the trial Judge, and we have here the

learned trial Judge in the stated case submitted to this Court using this language:—

I, however, held that that evidence was sufficient upon which to base a reasonable inference that he was still out of Canada.

It is to be noticed that the learned trial Judge in his charge to the jury made this reference to the evidence of Hannay:—

Now where is Hannay? His evidence was read here because he was out of the jurisdiction of the Court. He cannot be got, otherwise that evidence could not have been read.

Now, what was the course taken by the counsel for the accused?

The learned trial Judge states this:—

As to the observations of Mr. Bird in line 21, my clear recollection is that what he urged upon me was that there was no evidence that Hannay is *now* out of Canada.

At line 21, p. 262, of the stated case, we have the following statement as being made by Mr. Bird (counsel for the accused), when David Stephenson, the chief constable, is being examined as to Hannay's whereabouts: "*Mr. Bird*:—The chief of police does not know that he is out of Canada."

In a previous statement from Mr. Bird, at p. 262, we find him saying, "Of course I do not admit that Mr. Hannay has absconded."

This is followed by this observation from the learned trial Judge:—

You are not admitting anything. The chief of police has sworn to it.

The evidence of Hannay was then read, until the Court and the foreman of the jury intervened with the statement that the evidence as to the houses having been burned had been heard over and over again.

Then we have Mr. Bird interposing and saying, at p. 263:—

My learned friend must put in all the evidence with relation to this man—evidence for the accused as well as evidence against the accused.

The Crown counsel in answer said: "I was trying to."

Then, apparently, further discussion between the Court and counsel takes place, and finally we have this:—

Mr. Bird:—I ask my learned friend to put in questions 119 to 138.

THE COURT:—We want to hear the prisoner's connection with these things.

Mr. Taylor:—All right (reads questions 119 to 138).

It is fair to assume that in the opinion of counsel, the questions and answers asked to be read were not prejudicial, but favourable to the accused.

However, no doubt, the question we have to decide is, whe-

B. C.

S. C.
1914

REX
v.
ANGELO.

McPhillips, J.A.

ther the depositions were properly admitted; as counsel for the Crown frankly admitted that Hannay's testimony may have influenced the verdict of the jury, and if wrongly admitted would offend against the principle well defined in *The King* v. *Allen, sub nom. Allen* v. *The King* (1911), 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331.

The learned trial Judge having heard the evidence as given at the trial as to the whereabouts of Hannay, decided that the evidence adduced entitled him to reasonably infer that Hannay was absent from Canada.

In Halsbury's Laws of England, vol. 9, at p. 366, footnote (*a*), we have this stated:—

> The question whether the evidence is sufficient to prove the conditions precedent to the admission of the depositions is one for the determination of the presiding Judge: *R.* v. *Stephenson* (1862), Le. & Ca. 165.

I am not of the opinion that anything unfair was done at the trial, and I must say that even with the objection made to Hannay's evidence, nothing was suggested that would indicate that any prejudice was apprehended from the introduction of the evidence; in fact, as I have pointed out, certain portions of the evidence, counsel for the accused desired should be read in evidence, and this is not a case of new evidence being introduced unknown to the accused.

With regard to the evidence as to Hannay being absent from Canada, my opinion is that the learned trial Judge had ample evidence upon which to draw the inference that he was absent from Canada.

The chief constable, under whom Hannay was, swore in positive terms that Hannay had absconded. This coming from Hannay's superior officer, and one who must know the seriousness of such a statement, in itself is most convincing proof along with the other testimony given, that Hannay was out of the jurisdiction, and absent from Canada.

The word "abscond" is dealt with in Wharton's Law Lexicon (1902), 10th ed., and we find this language:—

> Abscond—to fly the country in order to escape (1) arrest for crime.

This sufficiently indicates the gravity and meaning attachable to the use of the word, and whilst reference is made to the evidence as given, indicating Hannay's absence from Canada, I, of course, do so with all reservation, and not intending, as it would be wrong to do so, to suggest that Hannay has in any way contravened the criminal law; still it was a matter of evidence before the learned trial Judge, potent in its meaning, and from which a strong inference could be drawn that Hannay, a provincial constable, not having reported for duty, and when

B. C.

S. C.
1914

REX
v.
ANGELO.

McPhillips, J.A.

last heard from—in the United States—was at the time of the trial absent from Canada.

The Queen v. *Forsythe*, 5 Can. Cr. Cas. 475, would seem to be an authority strongly in support of the decision arrived at by the learned trial Judge.

The learned trial Judge having proceeded upon the evidence adduced before him, and having drawn the inference that it could be reasonably inferred that Hannay was absent from Canada, what right of review resides in this Court?

No doubt, if there was a total absence of evidence—or manifestly not sufficient evidence—then this Court could and would interfere, where of opinion that there had been a miscarriage of justice. But is the case before us one of such a character? In my opinion it is not, and, in my opinion, the learned trial Judge drew the necessary and obvious inference deducible from the evidence adduced before him at the trial, that being, that Hannay was absent from Canada.

It therefore follows that, in my opinion, the question as submitted should be answered in the negative.

Conviction affirmed.

EATON v. CREIGHTON.

B. C.

S. C.
1914

British Columbia Supreme Court, Murphy, J. January 16, 1914.

1. TAXES (§ III B—119)—NOTICE OF ASSESSMENT—OMISSION—EFFECT ON SALE.

Under the Assessment Act, R.S.B.C. 1897, ch. 179, as amended by the B.C. Taxation Act, 1911, ch. 222, notice either actual or constructive as therein provided is an essential element of a valid assessment, and where the letters "N.R." were omitted on the assessment roll in respect of a person whom the assessor must have known to be non-resident, there is not the equivalent of service by reason of sec. 61 and no valid assessment if notice were not in fact given.

2. TAXES (§ III F—149)—STATUTORY CONFIRMATION—VALIDATING IRREGULAR ASSESSMENT.

A tax deed issued on a sale under an assessment void by reason of the omission of the essential element of notice thereof, is not validated by the curative provisions of Statutes B.C. 1903-4, ch. 53, sec. 153, R.S.B.C. 1911, ch. 222, sec. 255.

[*Riesbech* v. *Creighton*, 12 D.L.R. 363, followed.]

ACTION to set aside a tax deed. Statement

Judgment was given for the plaintiff.

C. M. Woodworth, for plaintiff.

C. J. White, for defendant.

MURPHY, J.:—In this action I find under sec. 39 of the Assessment Act, R.S.B.C. 1897, ch. 179, which, with a few Murphy, J.

B. C.
S. C.
1914
EATON
v.
CREIGHTON.
Murphy, J.

amendments was in force at the time the tax sale took place, that various matters are to be done by the assessor, and, amongst other things, after diligent inquiry, he has to insert the letters "N.R." in a column of the tax roll if the party is a non-resident. Almost any inquiry would have brought to the notice of the tax assessor the fact that the plaintiff in this action was a non-resident. In fact, the tax assessor must have known it, because the notices that he sent out were being continuously returned to his office.

Then, by sec. 60 of that Act, it is the duty of the assessor before completing his roll to send out notices to residents and to non-residents, if he knows their addresses. By sec. 61 of the same Act insertion in the roll of the letters "N.R." amounts to service of the party who is a non-resident. As that was not done in this case there was no service, either actual or constructive, on Eaton, of the assessment.

In my opinion notice is an essential element of the assessment and there is no valid assessment if such notice, either actual or constructive, as these statutes provide for, is not given. That being so, I am bound to follow *Riesbech* v. *Creighton*, 12 D.L.R. 363, as to the contention that another section of the Act cures any defect. It was there held by my brother Clement that that section did not cure a defect in the assessment. I think the giving of notice, either actual or constructive, is essential and therefore I give judgment for the plaintiff.

Judgment for plaintiff.

ALTA.
S. C.
1914

JACKSON v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Scott, J. February 16, 1914.

1. MASTER AND SERVANT (§ II B 3—141)—SERVANT'S ASSUMPTION OF RISKS—ELEVATORS.

The risks of employment assumed by an operator of an elevator in a large office building cannot be construed to comprise risks caused by the employer's failure (*a*) to provide for the use of such operator an elevator in proper working order, and (*b*) to enclose the elevator shaft at the different floors of the building.

[*Smith* v. *Baker*, [1891] A.C. 325 at 355; and *Williams* v. *Birmingham Metal Co.*, [1899] 2 Q.B. 338 at 345, referred to.]

2. NEGLIGENCE (§ II A—78)—CONTRIBUTORY NEGLIGENCE—SUDDEN EMERGENCY FROM SUPERVENING NEGLIGENCE OF EMPLOYER.

Where the operator of an elevator in an office building is ascending with passengers and suddenly finds himself unable with the motor mechanism at hand to control or stop the elevator, the emergency will relieve him from being charged with contributory negligence in respect of the course taken by him to meet the emergency by calling down to the person in charge of the electric switches awaiting his signal and for overlooking the immediate danger to himself in projecting his head over the side of the elevator in so doing, where a person of or-

dinary prudence might be expected to take a similar risk in an effort to avert the contemplated danger to the passengers and himself.

[For other elevator accident cases, see *Hitchin* v. *B.C. Sugar Refining Co.*, 12 D.L.R. 552; and *Charles* v. *Norton-Griffiths Co.*, 15 D.L.R. 177.]

ALTA.

S. C.

1914

JACKSON v. CANADIAN PACIFIC R. Co.

Statement

ACTION in negligence by the widow of a deceased elevator operator for damages for his death by accident while in the employment of the defendant company operating its elevator.

Judgment was given for the plaintiff.

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

Frank Ford, K.C., for defendant company.

Scott, J.

SCOTT, J.:—The plaintiff is the widow of Joseph Jackson, deceased, who, while in the employment of defendant company and operating an elevator in its office building in Edmonton, received injuries which caused his death.

The plaintiff charges that the elevator was defectively constructed, improperly adjusted, insufficiently protected, and otherwise out of order, that defendant company was thereby guilty of negligence and that the death of deceased resulted from such negligence. She claims $5,000 damages.

The defendant company, besides denying negligence on its part, and that, if there was such negligence, it was the cause of the injury, charges that it was caused by the negligence of the deceased, that there was contributory negligence on his part and that the injuries were due to one of the ordinary risks of his employment voluntarily undertaken by him.

The plaintiff in her evidence admitted that she was not the personal representative of deceased, and counsel for defendant company thereupon contended that she was not entitled to recover, and I so held. He, however, stated that he would be satisfied if plaintiff's counsel would undertake that she would obtain letters of administration to the estate of the deceased. That undertaking having been given, the trial was proceeded with. The plaintiff has since obtained such letters of administration.

The deceased was employed by defendant company to work the elevator and had been in charge of it and working it for eight days up to the time of the accident. The company which installed it placed one of its men with the deceased for the first two days in order to instruct him in its working and management.

The building contained six storeys, and the elevator was designed to serve all of them. The four lower storeys were completed and occupied. The other two were incomplete, but the elevator was used occasionally for the carriage of materials therefor and the workmen therein. At the time of the accident

ALTA.
S. C.
1914
JACKSON
v.
CANADIAN
PACIFIC
R. CO.
Scott, J.

the elevator shaft at the lower four storeys was completely enclosed by iron grille work which would prevent any person in the elevator cage from projecting any portion of his body more than a slight distance beyond the cage. At the two upper storeys it was not so enclosed or protected in any way, and there a person in the cage might project himself beyond it to such extent that when the cage was ascending he would come in contact with the floors above.

At the time of the accident the deceased, having a number of passengers with him in the cage, started it upwards from the ground floor. It moved upwards about a foot and then stopped. He tried to start it again by moving certain levers in the cage, but, having failed to do so, he left it and went down to the basement, where a means for starting it had apparently been provided. That was by pressing in certain switches and keeping them pressed in until such time as a person in the cage should move certain levers therein and thereby start the elevator. The effect of the mechanism, however, was such that, while the switches in the basement continued to be pressed in, the person operating the elevator from the cage could start it but he could not stop it. While in the basement deceased saw a painter working there, whom he instructed to keep the switches pressed in until he (deceased) returned to the cage, put it in motion, and shouted to him to remove the switches. Upon returning to the cage deceased started it moving upwards and then shouted down the shaft to the painter, but the latter failed to hear him. As the cage moved upwards he continued shouting, and after it passed the fourth floor he put out his head beyond the cage, with his face downwards, and still continued to shout. While in this position his head came in contact with the fifth floor, thus causing his death. The cage continued rising until it reached the top of the building, where it stopped, a mechanism having been there provided for automatically cutting off the power at that point. It is shewn that this mechanism did not always work, but it is not shewn what the consequences would be in case it failed to work.

The evidence is conclusive that, so long as the electric current was supplied for working the machinery, the elevator, if in proper working order, could be worked without danger by a person within the cage. There is no evidence that there was any failure that day to supply the current. The fact that only a few minutes elapsed from the time it stopped working until it started again leads to the conclusion that the supply of current had not failed and that the stoppage was due to some other cause.

I find that there was negligence on the part of defendant

company, 1st, in not providing for the use of deceased an elevator in proper working order, and 2nd, in not enclosing the elevator shaft at the fifth and sixth storeys.

The deceased knew, or ought to have known, the danger he would incur by putting his head beyond the cage at the fifth and sixth floors, and, had the elevator been in proper working order, it is probable that he would not have incurred that risk, but the fact that the elevator continued to ascend and that he could not stop it, created an emergency which, it is only reasonable to presume, he had never contemplated. It was one which necessitated prompt and decisive action on his part and it could hardly be expected that, under those circumstances, he would exercise that care and discretion which, under ordinary circumstances, he might be bound to exercise. It might reasonably have occurred to him that, unless the cage were stopped before he reached the top of the building, he or his passengers or the property of defendant company in his charge would be in serious danger, and in the hurry and confusion he probably overlooked the immediate danger to himself in taking the course he did. A person of ordinary intelligence might easily make a mistake under the circumstances. I therefore hold that the deceased was not guilty of contributory negligence.

In *Smith* v. *Baker*, [1891] A.C. 325, Lord Watson, referring to the effect of the maxim *volenti non fit injuria* says, at p. 355:—

> In its application to questions between the employer and the employed the maxim, as now used, generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, his acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But, assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation will, in every case, necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

Similar views are expressed by Romer, L.J., in his judgment in *Williams* v. *Birmingham etc. Metal Co.*, [1899] 2 Q.B. 338 at 345, in which will be found a concise statement of the law respecting the liability of employers for injuries sustained by their workmen.

ALTA.

S. C.
1914

JACKSON
v.
CANADIAN
PACIFIC
R. CO.

Scott, J.

It appears from the evidence that at the time deceased was engaged by the agent of defendant company to work the elevator the latter asked him (deceased), what he knew about elevators, to which he replied that he had some experience in the old country. It appears that the only experience he had was the daily use of one installed in the factory there in which he was employed and that he never worked one himself. I do not attach any importance to this statement of the deceased as it did not convey the meaning that he had any experience in working an elevator.

I hold, upon the evidence, that the deceased did not accept the risks of his employment which were caused by the negligence of which I have found the defendant company guilty.

The deceased was about 53 years of age at the time of his death, and was in reasonably good health. He was then receiving $60 per month from the defendant company. It is also shewn that the expectation of life for a healthy male of 54 years would be 17.82 years, and that the present value of an annuity yielding $60 per month for that period would be $8,301.60. Damages to that amount would be excessive. There should, at least, be deducted the living expenses of deceased during the period referred to, and it should not be assumed that he would have been in receipt of the wages at the same rate during the whole of that period.

I give judgment for the plaintiff for $4,000, and I apportion the amount between the plaintiff and the children of the deceased as follows: $2,200 to the plaintiff and $600 to each of the three children.

The plaintiff will have her costs of the action.

Judgment for plaintiff.

POMERLEAU v. THOMPSON.

ALTA.

S. C.
1914

Alberta Supreme Court, Beck, J. February 25, 1914.

1. MECHANICS' LIENS (§ V—30)—TO WHAT PROPERTY ATTACHES—MONEY OWING TO CONTRACTOR.

The effect of secs. 37 to 40 of the Mechanics' Lien Act, Alta. Statutes 1906, ch. 21, is to constitute the moneys owing to a contractor for getting out timber and logs, a specific fund, on which the workmen and labourers have a lien for wages, with an equitable as well as statutory legal remedy in regard thereto.

[*Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, applied; *Wilson* v. *Church* (1879), 48 L.J. Ch. 690; *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 A.C. 176, specially referred to; and see Annotation on Mechanics' Liens, 16 D.L.R. 121, *ante*.]

2. MECHANICS' LIENS (§ VIII—69)—PERSONAL JUDGMENT AGAINST CONTRACTOR—LABOURERS' LIEN—LOGGING OPERATIONS.

An employee of the contractor for getting out logs who has obtained personal judgment against the contractor does not thereby

forfeit his equitable right to be paid out of the fund which by the Mechanics' Lien Act (Alta.) 1906, ch. 21, secs. 37 and 38, is created for the protection of the workmen and labourers engaged in the work, and such right may be enforced in garnishment proceedings against the money due by the owner of the logs to the contractor by declaring the lien of the workmen to have priority over the claim of other execution creditors.

3. GARNISHMENT (§ II F—55)—ATTACHING CREDITOR CLAIMING LIEN ON FUND—PRIORITIES.

The fact that the party claiming a lien on a fund paid into court by the garnishees in garnishee process was the execution creditor at whose instance and suit the garnishment process was served will not deprive him from claiming priority over other creditors in respect of his statutory lien on the fund when the rights of all claimants and creditors come to be adjudicated upon.

Statement

APPLICATION to settle the rights to a sum of money paid into Court by the garnishees.

H. P. Paul, for plaintiff.

H. R. Milner, for other execution creditors.

S. E. Bolton, for Bank of Montreal.

Beck, J.

BECK, J.:—This is an application to settle the rights to a sum of money paid into Court by the garnishees, as between the plaintiff, other execution creditors of the defendant, and an assignee of the garnishees. The questions involved in the application before me depend upon the interpretation to be given to secs. 37 (of which schedule "C" is a part), 38, 39, and 40 of the Mechanics' Lien Act (ch. 21 of 1906).

A firm of Bell & McPhee were persons

making or entering into a contract, engagement or agreement with another person (the defendant Thompson) for the purpose of furnishing, supplying or obtaining timber or logs, by which it was requisite or necessary to engage or employ workmen or labourers in the obtaining, supplying and furnishing such logs or timber as aforesaid.

The plaintiff and a number of others who assigned their claims to him were

workmen or labourers employed or engaged on or under such contract, engagement or agreement.

The plaintiff obtained judgment on behalf of himself and his assignors against Thompson for some $2,300 odd, as being the amount of wages or pay due and owing to them as workmen or labourers employed or engaged on or under such contract, engagement or agreement.

A garnishee summons was issued in this action against Bell & McPhee, who ultimately paid into Court approximately that amount.

It is indicated and undisputed that the only moneys owing by Bell & McPhee to Thompson were moneys earned by Thompson under his contract with them for getting out timber and

ALTA.

S. C.
1914

POMERLEAU
v.
THOMPSON.

Beck, J.

logs. The moneys then paid into Court by Bell & McPhee must be deemed to be the moneys which, had Bell & McPhee conformed to the provisions of sec. 37, they ought to have paid to the plaintiff and his assignors in payment of the wages owing to them by Thompson, resulting, necessarily, in the discharge *pro tanto* of their direct liability to Thompson.

That sec. (37) placed upon them an obligation

> before making any payment for or on behalf of or under such contract, engagement or agreement, of any sum of money or by kind (to) require such person to whom payment is to be made (Thompson) to produce and furnish a pay-roll or sheet of the wages and amount due and owing and of the payment thereof (which pay-roll or sheet may be in the form of schedule C annexed to this Act) or, if not paid, the amount of wages or pay due and owing to all the workmen or labourers employed or engaged on or under such contract, engagement or agreement at the time when the said logs or timber is delivered or taken in charge for or by or on behalf of the person so making such payment and receiving the timber or logs;

and the next sec. (38) proceeds to say that "any person" (in this case, Bell & McPhee)

> making any payment under such contract, engagement or agreement without requiring the production of the pay-roll or sheet as mentioned in sec. 37 of this Act shall be liable at the suit of any workman or labourer so engaged under said contract, engagement or agreement for the amount of pay so due and owing to said workman or labourer under said contract, engagement or agreement.

Then sec. 39 says: "the person" (Bell & McPhee)

> to whom such pay-roll or sheet is given shall retain for the use of the labourers or workmen whose names are set out in such pay-roll or sheet the sums set opposite their respective names which have not been paid and the receipts of such labourers or workmen shall be sufficient discharge therefor.

Besides the remedy expressly given by the statute, namely, a right of action against the head contractor, I am of opinion that there exists an equitable remedy. I think the effect of these statutory provisions was to constitute the moneys owing by Bell & McPhee to Thompson in respect of the contract for the getting out of timber and logs, a *fund*—a specific fund to which the workmen and labourers have a right to look for payment of their wages earned by work in furtherance of the contract. I use the word "fund" in the sense of the following definitions: "Fund," "a stock or sum of money, especially one set apart for a particular purpose," Murray's New English Dictionary IV. Fund, sb. 4a; and "a collection or an appropriation of money," Bouvier's Law Dict. V. Fund. It is used in the sense in which I use it, when a "fund in Court" is spoken of.

If I am correct in this view, that these moneys were or be-

came at any time a *fund* in this sense, then they are, I feel quite sure, a fund upon which the workmen and labourers have a lien for their wages. There are instructive observations on "Equitable Liens" in Pomeroy's Equit. Juris., 3rd ed., pars. 165 *et seq.*, and 1233 *et seq.*

For the enforcement of such a lien the appropriate equitable remedies by way of injunction, receiver, accounts, and enquiries and distribution are, according to the circumstances, applicable.

The broad principle, upon which I am placing my decision in this matter is expressed and exemplified in the recent case of *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, 82 L.J.P.C. 33, and by the cases therein referred to.

It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for consideration which has failed. It applies, as was pointed out by Lord Justice Brett in *Wilson* v. *Church* (1879), 48 L.J. Ch. 690, 13 Ch.D. 1, when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use. *Wilson* v. *Church*, which was affirmed in the House of Lords under the name of *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176, is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain customs duties. The foreign Government, finding that the railway had not been made, revoked the concession. The trustees, to whom the money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not with certain variations substantially carry out the scheme. It was held that, while the Government had a right to revoke the concession which could not be questioned, the effect of its so doing was to vary materially the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed must be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money.

I find the moneys paid in by Bell & McPhee as garnishees to be a fund upon which the plaintiff had a lien for the amount of his judgment. As it is less in amount than the judgment, I will order the whole sum to be paid to the plaintiff.

It was contended against the plaintiff that he had waived his claim to a lien by reason of his suing Thompson only, in an action of debt or by recovering judgment therein or by the

ALTA.

S. C.
1914

POMERLEAU
v.
THOMPSON.

Beck, J.

garnishee proceedings. I see no principle on which I ought so to hold.

In the case of an ordinary mechanics' lien the lien-claimant may undoubtedly bring his action claiming both a personal judgment as against his employer and a lien as against the owner of the property. Why may he not do so in separate actions? The amount realizable by way of lien might be insufficient to pay his claim. A judgment against his employer might be nugatory unless very speedily obtained. The employer is liable to have judgment against him for the whole indebtedness. His ultimate liability may eventually be reduced or extinguished by realization of the amount by force of the lien. The same principle should operate in the present case.

The Bank of Montreal claim the fund in question under an assignment from Bell & McPhee made on February, 1913. Their solicitor appeared upon the return of the summons, although the bank had not been served, the plaintiff having no notice of the bank's claim. I understand that inasmuch as it has other security for the indebtedness owing them, the bank is not disposed to press its claim on this application. If it decides to do so, some further enquiries and directions will be necessary, as, in my opinion, the plaintiff would have a right to a marshalling of securities.

The order which I have stated I will make will not issue for ten days, nor without leave from me pending the ascertainment of the position the bank propose to take.

Order accordingly.

YUKON.

T. C.
1914

REX v. KOLEMBER.

Yukon Territorial Court, Black, J., pro tem. February 7, 1914.

1. COURTS (§ II A 6—177)—CRIMINAL JURISDICTION—YUKON TERRITORY—R.N.W. MOUNTED POLICE.

The extended jurisdiction given by sec. 777 of the Cr. Code (amendment of 1909), to city and town magistrates does not apply to give jurisdiction in the Yukon Territory to an officer of the R.N.W. Mounted Police, although possessing all the powers of two justices by virtue of the Yukon Act, R.S.C. 1906, ch. 63.

[*R.* v. *Alexander*, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, followed.]

2. HABEAS CORPUS (§ I C—11*a*)—ORDER FOR FURTHER DETENTION—JURISDICTION.

While an order for further detention may be justified under Cr. Code sec. 1120 on a *habeas corpus* application allowed because of a technical error which rendered the conviction bad, it should not be made where the official who purported to make the commitment was not of the class of magistrates to whom extended jurisdiction had been given in respect of such offences as that on which the conviction was improperly made.

[*R.* v. *Blucher*, 7 Can. Cr. Cas. 278; *R.* v. *Breckenridge*, 7 Can. Cr. Cas. 116; *R.* v. *Benner*, 8 Can. Cr. Cas. 398, followed.]

Statement

HABEAS corpus motion in respect of a conviction on summary trial for theft of $50.

The prisoner was discharged.

J. P. Smith, for Crown.

C. W. C. Tabor, for defendant.

BLACK (JUDGE *pro tempore*):—On January 26, 1914, at Dawson, in the Yukon Territory, Sam Kolember, the defendant, was charged before Major J. D. Moodie,

> a commissioned officer of the Royal North West Mounted Police, having, possessing and exercising all the powers of two justices of the peace within the Yukon Territory,

for that he did on or about January 25, 1914, at Klondike city, in the Yukon Territory, steal from the person of one Ella White, the sum of $50 in money, thereby committing theft, contrary to the provisions of the Criminal Code.

The accused consented to be tried summarily before Major Moodie and pleaded not guilty. The trial was proceeded with under sec. 777, Part 16 of the Code which provides for summary trial of indictable offences, and the accused was convicted and sentenced to three months' imprisonment.

The warrant of commitment under which the defendant is detained in custody sets forth that the conviction was had before Major Moodie as a commissioned officer of the Royal North West Mounted Police having the jurisdiction above stated.

Application is made on behalf of said Kolember for a writ of *habeas corpus* to have the body of said Kolember before a Judge in Chambers with a view to quashing the conviction on the ground that Major Moodie had not the jurisdiction to try the case.

By sec. 105 of the Yukon Act, ch. 63, R.S.C. 1906, it is provided that certain persons including

> every commissioned officer of the Royal North West Mounted Police shall, *ex officio*, have, possess and exercise all the powers of a justice of the peace or of two justices of the peace under any laws or ordinances, civil or criminal, in force in the Territory.

By sec. 89 of the said Act authority is given to the Governor-in-council to appoint police magistrates for Dawson and Whitehorse in the Territory, who shall reside at those places respectively and shall ordinarily exercise their functions there, but who shall have jurisdiction respectively in such portions of the Territory as are defined in their commissions.

Section 777 of the Criminal Code provides that if any person is charged in the Province of Ontario before a police magistrate or before a stipendiary magistrate in any county or district in that province with having committed an offence such as is charged in this case, such person may, with his own consent, be tried before such magistrate and power is given to such magistrate to sentence, and by sub-sec. (2) the provisions of the section are made to apply to certain magistrates in the

YUKON.

T. C.
1914

REX
v.
KOLEMBER.

Judge Black

Province of Quebec and to police and stipendiary magistrates in cities and towns having a population of not less than 2,500, and in the Yukon Territory to Judges of the Territorial Court and police magistrates in said Territory.

It is argued on behalf of the Crown that sec. 771, sub-sec. (6) of the Cr. Code, which for the purposes of said Part 16 gives the definition of "magistrate" in the Yukon Territory as

> any Judge of the Territorial Court, any two justices sitting together, and any functionary or tribunal having the powers of two justices,

gives jurisdiction to a commissioned officer of the Royal North West Mounted Police in this case. Counsel for Kolember, takes the ground that, by sec. 777, under which the trial was had, jurisdiction is given in the Yukon Territory only to Judges of the Territorial Court and police magistrates. In *Rex* v. *Alexander*, 21 Can. Cr. Cas. 473, 13 D.L.R. 385, a charge of theft of an amount in excess of $10 which was tried before the police magistrate of Calgary on May 5, 1913—it was held by Mr. Justice Beck, of the Supreme Court of Alberta, that the extended jurisdiction given by Criminal Code, sec. 777, sub-sec. (2), to "police and stipendiary magistrates of cities and incorporated towns" to try with the consent of the accused, is intended to apply only to a special kind of police or stipendiary magistrate whose official capacity is designated in terms conforming to the statute, and not to magistrates for a whole province or judicial district with merely consequent jurisdiction for a city or incorporated town within the territorial limits.

Major Moodie not being a police magistrate in the Yukon Territory had not, in my view, the power, authority and jurisdiction vested in him by law to try Kolember, and the consent of the accused could not confer such jurisdiction: *The King* v. *Breckenridge*, 7 Can. Cr. Cas. 116. I hold, therefore, that the conviction and warrant are bad for want of jurisdiction.

I am asked, under sec. 1120 of the Code to make an order for the further detention of the prisoner. In the case of *The King* v. *Fuerst*, 15 D.L.R. 214, 22 Can. Cr. Cas. 183, on a similar application, an order for the detention of the prisoner was made. There the magistrate was proceeding under the section of the Code giving him jurisdiction but made a technical error which rendered bad the conviction. In this case the magistrate acted without jurisdiction, and, following the decisions in *The King* v. *Breckenridge*, 7 Can. Cr. Cas. 116; *The King* v. *Benner*, 8 Can. Cr. Cas. 398; and *Rex* v. *Blucher*, 7 Can. Cr. Cas. 278, I feel that I must decline to apply the provisions of the section, and I leave the private prosecutor and the Crown prosecutor to take such course as they may see fit to take.

The prisoner will, therefore, be discharged. There will be the usual order for protection and no costs.

Prisoner discharged.

REX v. DAVIS.

B. C.

C. A.

1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. January 21, 1914.

1. APPEAL (§ VII M 4—614)—JOINT TRIAL FOR MURDER—CAUTIONING JURY THAT ADMISSION OF ONE DEFENDANT INADMISSIBLE AGAINST THE OTHER—SUBSTANTIAL WRONG—CR. CODE (1906), SEC. 1019.

The failure of the trial judge to caution the jury on the trial together of two persons charged with murder, that any admission or confession made by one of the accused not in the presence of the other is only evidence against the one making such confession or admission, will not be a ground for a new trial where the statement was brought out on the Crown's cross-examination of the latter as a witness on his own behalf and the co-defendant, now objecting had, by his counsel, dealt with it in cross-examination of such witness, if it be manifest to the appellate court from the evidence (including the objecting defendant's own testimony) that there had been no substantial wrong or miscarriage on the trial by reason of such warning not being given.

[See as to admissions of one defendant on trial of joint indictment, *R.* v. *Martin*, 9 Can. Cr. Cas. 371; *R.* v. *Connors*, 5 Can. Cr. Cas. 70, 3 Que. Q.B. 100; *R.* v. *Blais*, 10 Can. Cr. Cas. 354, 358.]

Statement

CRIMINAL appeal on a case stated by Morrison, J., on the following questions on the trial of two persons jointly accused of a murder:—

1. Did I properly exercise my discretion in refusing a separate trial to Davis?

2. Should I have charged the jury as follows:—

You can readily see the incentive that Clark would have to escape from the clutches of the policeman if he could do so and it is for you to say whether or not he had not a good chance for getting away while Archibald was searching Davis, and if he had that chance and didn't take it, then what conclusion may you reasonably and rationally draw?

3. I charged the jury as follows:—

The conflict as to which one did fire the fatal shot arises from the ghastly struggle between these two men for their own lives, for their self-preservation; and that is what we have been witnessing here the last two days, the struggle to the death between these two persons. Therefore, you must scrutinize their evidence very, very carefully, as well as the circumstances in relation to their evidence, and if you conclude that only one of them used the revolver, as each one alleges, then I tell you, as a matter of law, that in order to make the other a principal in the deed it is not necessary that he should have inflicted the mortal wound; it is sufficient if he be present, aiding and abetting or assisting in the act. The one who does the act is the principal, and this is what the Code says as to principal, as to who are principals in an act just such as we are told this is: Everyone is a party to and guilty of an offence (say, the offence here) who actually commits it (the one who had the revolver and actually shot him, actually pulled the trigger, he is a principal) or does or omits an act for the purpose of aiding any person to commit the offence, or abets any person in commission of the offence, or counsels or

B. C.
C. A.
1914
REX
v.
DAVIS.
Statement

procures any person to commit the offence. If several persons form a common intention to prosecute any unlawful purpose and to assist each other therein, each of them is a party to every offence committed by any of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose.

They went out to burglarize and to hold up, fully armed. What was the probable consequence of the prosecution of that design? The probable consequence of that? 'Everyone who counsels or procures another person to be a party to an offence of which that person is afterwards guilty, is a party to that offence (although it may be committed in a way different from that in which counsel suggested); everyone who counsels or procures another to be a party to an offence is a party to that offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew or ought to have known to be likely to be committed in consequence of such counselling or procuring.

A principal, therefore, may be the actual perpetrator of the act, that is the one, as I have told you, who with his own hands or through his own agent does that act himself, he may be the one who, if the act is done, does or omits something for the purpose of aiding someone to do it; he may be the one who is present aiding and abetting another in the doing of it; or he may be the one who counsels or procures the doing of it; or who does it through the medium of a guilty agent. Now, the actual perpetrator with his own hands means this also: To be the actual perpetrator with his own hands the offender may or may not be present when it is committed. A person may be considered as the principal aiding and abetting in the commission of an offence without his presence being such a strict, actual, immediate presence as would make him an eye or ear witness of what was passing. If a number of persons set out together or in small parties upon one common design, be it murder or any other offence, or for any other purpose of an unlawful nature in itself, and each takes the part assigned to him, some to commit the act, others to watch at proper distances to prevent a surprise or to favour, if need be, the escape of those more immediately engaged, they are all, provided the act be committed, present at it, in the eye of the law; for the part taken by each man in his particular station tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise.

Was this a sufficient and proper charge on law of common purpose and should I have instructed the jury that they must, in order to find both prisoners guilty, be satisfied that the prisoners were engaged in an unlawful purpose at the time the murder was committed, and that in the carrying out of such unlawful purpose the prisoners must have known that murder might be committed by one of them?

4. Was there any evidence on which the jury could find that the persons were engaged in carrying out an unlawful purpose so as to make one of them guilty as a principal in respect of a murder actually committed by the other of them?

5. Should I have told the jury that any admissions or confes-

sions made by one of the accused not in the presence of the other is only evidence against the one making such confession or admission.

6. The following is part of the evidence of Inspector McRae on pages 201 and 202 of the evidence:—

Statement

Q. Could you come over and demonstrate how that would happen.

THE COURT:—You might do it there.

Mr. Maitland:—I thought yesterday, my Lord, maybe the jury could not see so well. Do you prefer it over there (addressing the jury)?

Juror:—Yes.

Mr. Maitland:—Over there, that gun is not loaded, if you could demonstrate that.

Juror:—We can see from here.

Mr. Jones:—The inspector might tell what different ways it could be done.

Witness:—Yes. Well, if it was on a level, the gun would certainly have to be held in that form.

Mr Maitland:—Up above the officer? A. Yes.

Q. That would be a tall man would have to do that? A. There, that I would have to hold this hand up that way.

Q. And this underneath here. A. It is underneath, yes, if he was up above, of course, it would be quite natural.

Q. Yes. A. For instance the way I am now.

Q. Now, as to the searching, now, how about that? A. Well, in searching he would——I have searched a good many (proceeding to search counsel).

THE COURT:—Oh well, witness, don't do that.

Mr. Maitland:—This is a demonstration I want to get.

THE COURT:—It is only guessing, because he didn't see. He might do something that would implicate the accused, you know.

Mr. Maitland:—All right, my Lord.

THE COURT:—It is only guessing, you see, and it is really trying to shew the jury how it was done. Well, you could not do that.

Mr. Maitland:—I see.

Was my ruling proper on this evidence?

R. L. Maitland, for prisoner.

A. D. Taylor, K.C., for Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would answer the first and second questions in the affirmative.

After setting out a portion of the learned Judge's charge, the third question submitted is as follows:—

Was this a sufficient and proper charge on the law of common purpose, and should I have instructed the jury that they must in order to find both prisoners guilty be satisfied that the prisoners were engaged in an unlawful purpose at the time the murder was committed, and that in the carrying out of such unlawful purpose the prisoners must have known that murder might be committed by one of them?

With regard to the first part of the question: "Was this a

B. C.

C. A.

1914

REX v. DAVIS.

Macdonald, C.J.A.

sufficient and proper charge on the law of common purpose?" my answer is in the affirmative.

I also answer the balance of the question, or what is really a subordinate question, in the affirmative.

I answer question 4 in the affirmative.

Question 5 is as follows:—

Should I have told the jury that any admissions or confessions made by one of the accused not in the presence of the other, is only evidence against the one making such confession or admission?

The facts upon which it is based are not stated, but all the evidence is before us, and the argument proceeded on the assumption by both counsel that the question was to be answered with reference to the evidence, to which they referred. No objection was taken by counsel for the Crown to the form or substance of the question. In these circumstances I think it unnecessary to send the case back to be re-stated by the learned Judge, though it is regrettable that more care was not taken in framing the questions of law.

The prisoner and one Clark were tried jointly, and both were found guilty as principals. It appears from the evidence that Clark had made a statement with respect to the crime at some time before the trial. The Crown did not offer it in evidence, but in cross-examining Clark, who gave evidence, counsel for the Crown asked him if he had made a statement. This he admitted, but the contents of that statement, in so far as they had any relation to the prisoner Davis, were not brought out by Crown counsel. On cross-examination of Clark, Mr. Maitland, counsel for the prisoner Davis, referred to this statement and cross-examined to some extent upon it. In re-examination, Clark's counsel put the statement in after objection from the Crown, but without objection by Mr. Maitland. There was nothing in the statement which had not already been brought out in the examination and cross-examination of Clark in the witness-box.

In these circumstances, it would, in my opinion, not be useful to send the case back to have this question re-stated. All that can be said upon it has already been said by counsel, and all the evidence bearing upon it has already been brought to the attention of the Court, and from that it appears to me manifest that in the circumstances of this case, assuming that the Judge should have cautioned the jury, it was not serious error on his part not to have cautioned them that any admission or confession made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission. In any case it is manifest that there has been no wrong or miscarriage by reason of such warning not being given.

Mr. Maitland made a motion to the Court to direct the learned trial Judge to submit a further question, but after some argument that motion was abandoned.

IRVING, J.A.:—I would answer the questions submitted in the same way as the learned Chief Justice has done, and I would sustain the conviction on the grounds stated by him.

MARTIN, J.A.:—I answer the questions submitted to this Court as follows:—

Q. 1. In the affirmative. It is admitted that on the first application for a separate trial (under secs. 857-8) the learned Judge properly exercised his discretion on the material before him (so it is unnecessary to consider our right to review that discretion, and, moreover, the point is not raised), and at the same time he remarked to appellant's counsel, "You are not prejudiced at this stage, and if anything develops you may renew your application." But counsel did not avail himself of this leave, though he now suggests, something did later occur which made it desirable that his client should have had a separate trial, and he tells us quite frankly that though he had the matter in his mind, yet, he did not make the application again because, to use his exact words, "I didn't wish to prejudice my client's case with the jury." We have then this extraordinary situation that, after the right to make an application was deliberately abandoned in the Court below because it would have been prejudicial to the prisoner's case to claim it, this Court of Appeal is now asked to grant a new trial because the prisoner has obtained benefit from the action of his counsel in electing to forego a privilege granted him by the learned trial Judge. Simply to state the matter shews, when it is clearly understood, that it should not be countenanced or favourably entertained by this Court; there is no case in the books in any way resembling it. How can it be said to be "conducive to the ends of justice" (to use the language of sec. 857) that the prisoner should have had a separate trial when he refrained from asking for it because he would have been prejudiced had he done so?

Q. 2. I answer in the affirmative; on the facts the direction to the jury is unobjectionable.

Q. 3. The same answer.

Q. 4. I answer in the affirmative.

Q. 5. Taken as it stands, and giving that answer to it as propounded literally, which it is our duty to do, there can be only one, on a charge of this kind, viz.: in the affirmative, because as it stated in Roscoe's Criminal Evidence, 1908, 46, "it is quite settled, generally, that a confession is only evidence against the person making it and cannot be used against others," and

B. C.
C. A.
1914
REX
v.
DAVIS.
Martin, J.A.

there can be no doubt that substantial wrong was occasioned (under sec. 1019) to the prisoner by the failure of the learned Judge to direct the jury on so grave a point of evidence. The course to be adopted is so well known that I shall content myself by referring to the cases of *R.* v. *Hearne* (1830), 4 C. & P. 215; *R.* v. *Clewes*, *ib.* 221; and *R.* v. *Fletcher*, *ib.* 250, in the last of which Mr. Justice Littledale said, after deciding that the whole of a certain letter written by one of the prisoners implicating and naming other prisoners should be read to the jury:—

> But I shall take care to make such observations to the jury as will prevent its having any injurious effect against the other prisoners; and I shall tell the jury that they ought not to pay the slightest attention to this letter except so far as it goes to affect the person who wrote it.

It is difficult to imagine how such an elementary and abstract question came to be stated at all, in the face of the established rule that a Judge should not reserve a point unless he has some doubt about it, and surely there could be no doubt about this question. It was indeed admitted by both counsel before us that there was none, and the learned Judge below himself recognized and stated the rule, at pp. 162-3 of the appeal book. With all due respect, I think he should have followed the usual course, which was, *e.g.*, adopted in *The Queen* v. *Letang* (1899), 2 Can. Cr. Cas. 505, at 510, and refused to state such a question, and he also should have refused to state it on the ground that it is really an irrelevant question: *R.* v. *Walkem* (1908), 14 Can. Cr. Cas. 122, 14 B.C.R. 1 at 8. But we were invited to consider the matter on the ground that, in view of certain evidence that had been given, the learned Judge was justified in refraining from giving the said usual and most necessary caution, and which, in answer to counsel's request, he said he would give "at the proper juncture" to the jury (A.B. 162).

It is apparent that the question, as submitted to us, is not a real, but a fictitious, irrelevant, and futile one, the answering of which can lead to nothing except to obscure the true and, to the condemned man, vital question which should have been reserved. I am strongly of the opinion, which I expressed at the hearing (indeed, on further consideration, still more so), that in such circumstances we should follow the course which has been before adopted by this Court of Criminal Appeal (when constituted as the old full Court) in cases of much less gravity, and take advantage of the remedy provided by sec. 1017, subsec. 3, and send the case back to the learned Judge below to have this question re-stated so as to raise the real point involved. As it is before us now the learned Judge has not pointed out the evidence or facts on which he relies to justify his action (though he has done so with the evidence connected with the other questions), and it is clearly not a proper course to adopt simply to

send up to us an abstract question accompanied by an appeal book of 353 pages through which we must grope our way in an endeavour to find something to justify that, which, on the face of it, is unjustifiable. And it is not sufficient, in my opinion, with all due respect for other views, to say that if counsel agree that the evidence or facts is or are so and so, then we can determine the matter upon their consent, because that substitutes the voluntary act of counsel for the duty of the Judge, and probably the Judge would not be prepared to accept counsel's statement as to what influenced him. My former experience of many years as a trial Judge has taught me that it would be most unsafe to do so. It is, in short, due to the convicted man, to the Judge below, and to this Court, in the discharge of its grave duty, to see that there is no element of uncertainty in these cases affecting the life and liberty of the subject, and to safeguard this, the Court below should now as heretofore certify to this Court the evidence and facts upon which it gave the ruling or took the course complained of. This very case is an example of the danger of pursuing any other course, because I understood from counsel, and I remained under that erroneous impression till yesterday, that the statement in question (which is one exculpating Clark and incriminating Davis) was given in full on p. 276 of the appeal book, whereas I find the fact to be (from pp. 261-2, 275-6 of the appeal book), the said statement is only something which "was at the end of (Clark's) confession." But this document, *i.e.*, the confession, is not before us, not being either in the appeal book nor sent up as an exhibit, though it was given to the jury by the Judge at the trial (p. 349), saying to them, "You will take the exhibits, you have full access to them, and endeavour to come to a determined conclusion." We have no means of knowing what that confession contained; we have only the general observation of Clark that in it he was trying to tell his story of the killing of the constable, but we can see from p. 261, that it must have contained something, apparently, of the first importance to the appellant, because Clark refers to the statement in it "where he says that he held the guns in front of him." In short we have just sufficient indication of its contents to shew how necessary it is that it should be before us. Again, we were informed by counsel, that Clark, in the witness-box, on cross-examination by the appellant's counsel covered all he said in the statement or confession, but the most superficial examination of Clark's evidence shews he did nothing of the kind even as regards the final portion that is before us, which I call the statement, his evidence on that point being a short general remark on p. 262, that he

was trying to state clearly how the thing was, and that Davis did the shooting,

B. C.
C. A.
1914
REX
v.
DAVIS.
Martin, J.A.

and on p. 263, a brief reference to the allegation that

Davis got the best of me after the first day of the trial by lying.

So far as the preceding confession is concerned, no attempt was made to cross-examine on it excepting the said unintelligible reference to the "guns," and the equally unintelligible reference to something apparently written on the back of it (p. 261) which only emphasizes the uncertainty of the matter.

I refer to these two points only to shew the necessity for caution herein, and of requiring a re-statement of the question, and the ascertainment and certification by the Judge below of the evidence and facts connected with and explanatory of the course he adopted, and until that is done pursuant to the long-established practice, I feel that the only course open to me in the best interests of justice is to decline to answer this question. How can we tell whether or not it was proper for the trial Judge to refrain from giving a caution respecting a written confession when that confession is not even before us? How can we form any estimate of the weight any document placed unreservedly in the hands of the jury may have upon them when we do not even know one half of what it contains? The mere fact that the author of the confession was cross-examined on a small portion of that one half is not of itself, in my opinion, sufficient to enable us to express a sound opinion as to the propriety of the course adopted by the learned Judge. Before doing so, we must have all the facts before us, not only those upon which he acted, but also those upon which the jury may have done so.

The course which this Court has taken on prior occasions of sending a case back to be re-stated is that which has been adopted by other Courts. I refer to *The Queen* v. *Giles* (1894), 31 C.L.J. 33, where the Court of Criminal Appeal in Ontario, of its own motion, unanimously refused to hear a case which had been insufficiently stated by a County Court Judge, saying:—

We cannot agree to proceed on this case. It must be remitted to the Judge to be re-stated. The Judge must find the facts and specify the question of law as to which he is in doubt and reserves for our judgment.

And in *R.* v. *Cohen* (1903), 6 Can. Cr. Cas. 386 at 393, Mr. Justice Townshend, with whom Chief Justice Macdonald concurred, said:—

I may add in conclusion that it is not competent for the Judge below to submit such a question as the last, whether there is any legal evidence to sustain the conviction—and send up the whole evidence for us to review. He may state the effect of evidence given to sustain a certain charge or give the material part of it, and reserve a question as to its sufficiency in point of law to convict, but it certainly was never contemplated that he could send up the whole body of the evidence, and ask if that evidence is sufficient to convict.

See also to the same effect the unanimous judgment of the Court of King's Bench of Quebec in *The King* v. *Fortier* (1903), 7 Can. Cr. Cas 417 at 425, wherein the Court refused to hear a question "asked in an abstract way without any statement of facts to which it can apply the law," and for that reason quashed the case that had been reserved.

Even in civil matters, the Supreme Court of Canada has refused to hear a case improperly stated. Thus, in the case of *The Can. Pac. Ry.* v. *City of Ottawa*, reported in the last number of the Supreme Court reports, just received, Part 3, 48 Can. S.C.R. 257, it is stated that

> The Court, of its own motion, took objection to the form of the submission of the case by the Board of Railway Commissioners of Canada saying:—
>
> The majority of the Court is of the opinion that we cannot hear the appeal, at the present time at least, as the board has not submitted any question which, in the opinion of the board, is a question of law.

Furthermore, and apart from this appeal, it is high time, in my opinion, that this Court should take steps to see that these reserved cases are properly stated; the number of them is increasing rapidly, and the neglect to do so casts a heavy and unwarrantable burden upon the time of this Court which is already fully occupied. The last example occurs in a case in which judgment was delivered in this Court a few days ago (the 16th instant), *R.* v. *Winsby* (in which I did not sit), wherein two of my learned brothers refer to the insufficiency of the case, and one of them to the additional task thereby cast upon them "of examining the Criminal Code to see if the indictment is good under any other section."

In the case at bar, as I have already said, it is impossible, in my opinion, to do justice without a re-statement.

It was, however, suggested to us that we could and should disregard the question submitted and deal with the whole matter under sec. 1019, on the theory that, in any event, no "substantial wrong or miscarriage was thereby occasioned at the trial," and this was to be accomplished either by answering the abstract question in the affirmative, and then disregarding or explaining it away as having no effect on the assumed facts, or by refusing to answer it, and, after reading and considering the whole case, reach the conclusion that what was done could be upheld by said sec. 1019. I first observe that this is, in my opinion, apart from all other matters, something we ought not to be called upon to do. If questions are submitted which are not real or material ones, they should be eliminated from the record, because it must be remembered that these capital cases have not only under sec. 1063 to be reported by the trial Judge

B. C.
C. A.
1914
REX
v.
DAVIS.
Martin, J.A.

to the Secretary of State for the information of His Excellency the Governor-General, so that the pleasure of the Crown as to execution may be signified (which would not, generally speaking, be done finally pending an appeal), but under sec. 1022 upon an application to the Crown for mercy, on behalf of any person convicted of an indictable offence, which application may be made at any time, the Minister of Justice has the unusual power of ordering a new trial, and it is highly desirable that, in the exercise of so delicate and onerous a duty, the Minister, as well as His Excellency-in-council, and likewise the Supreme Court of Canada, should an appeal be taken from us, should have the record before him freed from all uncertainties and complications, so that the matter may be facilitated as much as possible. It seems to me that it is highly undesirable to, in effect, compel a Court of appeal or the Minister, or His Excellency-in-council, to begin at the end of the matter and take up so heavy a burden when it could often be avoided by having a clear understanding of the real question from the beginning. If the Court will consent to answer one abstract and futile and irrelevant question (out of, say, four submitted) in favour of the prisoner, and then avoid the consequences by reading the whole record in the effort to apply sec. 1019, what is to prevent the whole series of said four questions being submitted in the abstract and treated in the same manner? Where is the line to be drawn? If the most important of the six questions reserved in this case is to be treated in this manner, why not all? The result of this would mean that this Court would, with the assistance of counsel, be wholly disregarding the sham questions submitted and framing its own questions for itself to answer, which actually is what we are asked to do in the present case, in defiance of the statute which directs that the questions reserved shall be stated by the Court below: secs. 1014, 1016, sub-sec. 6. This, in effect, renders nugatory the provisions of the statute.

I am strongly of the opinion that sec. 1019 is only to be invoked after all other real questions have been stated and answered, and that we are not at liberty to resort to it before that has been done—to do otherwise is to invert and upset the whole order of long established procedure on appeal founded on the best and most practical reasons. There is also final and weighty reasons for not invoking sec. 1019, unless unavoidable, and it is that there is no more difficult duty for a Judge to perform than to give due effect to it, because, as has been observed, it compels the Court to answer a question of fact and substitutes it for the jury in that respect. It directs the Court not to set aside a conviction in specified circumstances unless in its opinion

some substantial wrong or miscarriage was thereby occasioned on the trial.

Till recently, I have, erroneously no doubt, but at least in good company, understood this language to mean that unless the Court could affirmatively reach the conclusion that "some substantial wrong or miscarriage" had actually been occasioned, the conviction should stand. But a very different and far wider meaning has been attached to those words by the Supreme Court of Canada in *Allen* v. *The King* (1911), 44 Can. S.C.R. 331, 18 Can. Cr. Cas. 1, an appeal from this Court (which my brother McPhillips is considering at length in a judgment which I have had the benefit of perusing) wherein it was laid down that, if the circumstances are such that it is impossible to say that the minds of the jury may not have been prejudicially affected by the evidence complained of, then a substantial wrong has been occasioned. This result is accomplished if what has been improperly done "may influence them (the jury) adversely to the accused upon a material issue"; see the judgment of the Chief Justice, p. 341, and passim (with which Mr. Justice Duff agreed), and Mr. Justice Anglin, at pp. 361-3.

This interpretation is, of course, binding on us, and it is our duty to give effect to it. But it will be at once perceived that it is of far wider scope and consequences than the narrower one that this Court and other Courts had applied. It now will become our duty, if that stage of the matter should be reached, to hold that if what was done herein *may* have influenced the jury adversely, then there must be a new trial.

I confess that this is a duty I shrink from discharging, in a capital case particularly, unless it is unavoidable. Who can say, in many cases, with any reasonable degree of certainty what act or omission complained of may not have adversely affected the mind of the jury? Take the case at bar for example. Who can say what the effect would be upon the mind of only one man out of twelve, deliberating upon the guilt or innocence of the appellant, if a confession and statement charging him with the murder were produced, unaccompanied by any caution from the Court as to its restricted application, signed by his accomplice, and garnished by all the artful and theatrical expressions which appear in the statement before us, with the added solemnity of their being made by one who was about to commit suicide, and therefore would be likely to tell the truth as having no interest to wrongfully accuse another when upon the point of death. And would the force and sting of that dread accusation be wholly taken away if another juror were to recall the fact that the accuser had been cross-examined on a small portion thereof? I am thankful to say that at present, at least, this matter has not reached the stage where I deem it to be my duty to answer this question, and I do not think a Judge

B. C.
C. A.
1914
REX
v.
DAVIS.
Martin, J.A.

should be asked to answer one so grave and anxious, in a capital case, especially, unless no other course is open to him.

There remains question 6. This I answer in the affirmative. Whatever might be otherwise said on this point, in my opinion, counsel did not finally press his contention, and, in effect, agreed with the learned Judge that the suggested "demonstration" would not be of real assistance to his case.

The result is that, in my opinion, we should, for the reasons already stated, give effect to sec. 1017, sub-sec. 3, and send this case back to the Court by which it was stated, for the purpose of having the fourth question re-stated, before we attempt to answer it in ignorance of the full facts.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the conclusions of the learned Chief Justice. I also agree that the learned trial Judge should have warned the jury that the statement could only be evidence as against the party making it. But there is a step further—though it is true the case is not sufficiently stated to this Court—the Court perused all the evidence that could have been set out by the Judge, and the same was brought to the attention of this Court by counsel when the case was heard before us, and, notwithstanding the fact that there was an error in not giving that direction to the jury, we have to consider section 1019. That entitles us to examine the evidence. That was done, and having done so it becomes necessary for us to decide whether there was any substantial wrong or miscarriage of justice as affecting the accused under that section. In the light of the evidence at the trial—and the admission of the accused given under oath in his own defence—I can see no possible grounds for saying that what was omitted to be done constituted a miscarriage of justice, and for these reasons (although I am in accord with what my learned brother Martin has said with regard to these cases being properly and sufficiently stated by the Judges in the Court below) there would be nothing to be gained by sending the case back as the result to the accused would, in the end, be the same.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A. (dissenting):—I would answer question No. 1 in this way—that as matters were presented to the learned trial Judge, perhaps it was a right direction at the outset directing that the accused Clark and Davis should be tried jointly, and refusing a separate trial to the accused Davis; but when the Crown counsel, in his cross-examination of the accused Clark, brought out that Clark had made out a written statement which was sent to the Attorney-General about ten days before the trial, then cause existed for a separate trial for Davis; but I do not observe that counsel for the accused Davis renewed his applica-

tion, nevertheless, by reason of the reference to this statement, and its being put in evidence later by counsel for the accused Clark, and in its nature implicating the accused Davis, and in that it was inadmissible evidence against the accused Davis, this evidence may have influenced the verdict of the jury as against the accused Davis, and caused the accused Davis substantial wrong, and therefore a miscarriage of justice took place by the trial of the accused Davis jointly with the accused Clark. It therefore follows that the accused Davis should have had a separate trial, and it should have been at the later time so directed, in view especially of the omission by the learned trial Judge to direct the jury that the statement was not evidence against the accused Davis. This point is further dealt with in my answer to question 5.

I would answer question No. 2 in the affirmative, but qualified by my answer to question 5. That is, that in my opinion, the jury were or may have been misled by the omission of the learned trial Judge to impress upon them that the written statement of the accused Clark was not to be taken or considered as evidence as against the accused Davis, and that as to other omissions or misstatements, in my opinion, they do not amount to misdirection, the case being fully heard by the jury.

I would answer question 3 in the same manner that I have answered question 2.

I would answer question No. 4 in the affirmative.

I would answer question No. 5 in the affirmative, but so far only, and with respect only, to the written statement of the accused Clark. The question, of course, in the abstract, could only be answered in the affirmative. We have not been given a reference to the admissions or confessions that the learned Judge had reference to when settling the stated case. This entailed perusal of the evidence, and possibly the better course would have been to send the stated case back for amendment. I am the more impressed now that this would have been the proper course in view of the very cogent reasoning so well brought out by my learned brother Martin in his judgment just read. However, upon an examination of the evidence, in my opinion, the only error made by the learned trial Judge by way of non-direction was his omission to impress upon the jury that the written statement of the accused Clark was not to be taken or considered as evidence as against the accused Davis, and his failure to do this has resulted, in my opinion, in a miscarriage of justice, in that without this direction, the jury may probably have been misled.

Unquestionably the written statement of the accused Clark was not evidence against the accused Davis, and could not have

B. C.
C. A.
1914
REX
v.
DAVIS.
McPhillips, J.A. (dissenting)

been got in evidence if counsel for the Crown had refrained from examining upon it, and thereby making it known, and admitting of counsel for the accused Clark introducing it in evidence. The statement was clearly inadmissible against the accused Davis; it was never read over to him, nor did he make any confession following, as in *Reg.* v. *Hirst* (1896), 18 Cox C.C. 374.

The statement in itself is a most concise and clever little melodramatic story of about 200 words, calculated to impress the jury, and unquestionably to implicate the accused Davis, and when it is considered that this statement is an exhibit in the case, and that the trial Judge said in his charge, speaking to the jury:—

> You will take the exhibits, you have full access to them, and endeavour to come to a determined conclusion,

and this statement went before the jury in their deliberations, in all its artful language, and coupled with the fact that it was written with a determination upon the accused Clark's part to at once commit suicide immediately after writing it—an attempt he made and nearly accomplished, being picked up unconscious after dashing his head against the iron bars of his cell—can it be for a moment thought that this did not work substantial wrong against the accused Davis?

I feel greatly sustained in the opinion I have come to in a matter of such gravity, by the case of *Allen* v. *The King* (1911), 18 Can. Cr. Cas. 1 at 9, 44 Can. S.C.R. 331 at 339, and the judgment (which I trust I have read aright) to be found there of the Right Honourable Sir Charles Fitzpatrick, Chief Justice of Canada, wherein he said

> . . . to dismiss the appeal we must ignore the well settled rule that in a criminal case the verdict is to be founded exclusively upon such evidence as the law allows.

It cannot be gainsaid that the verdict against the accused Davis is founded, among other evidence, upon evidence which was illegal evidence as against him, in the introduction of the statement of the accused Clark, and the learned trial Judge admits that he did not charge the jury that it was evidence only against the accused Clark, who wrote the statement.

Now, in the *Allen* case, the learned Chief Justice of Canada said, *Allen* v. *The King*, 44 Can. S.C.R. 331 at 333, 18 Can. Cr. Cas. 1 at 4:—

> All the Judges below find that there was ample evidence that the prisoner killed Captain Elliston, and in that opinion we concur. The question to be determined, however, is with respect to the admissibility of the testimony quoted in the reserved case, and its effect upon the verdict.

Here two men have been found guilty of murder—unquestionably only one, I take it from the evidence, did the physical act of pulling the trigger and thereby sending the bullet on its mission of death. I, of course, do not say that, under the law, one may not be found guilty of murder upon proper evidence and a fair trial, even without any active participation in the discharge of the bullet which takes life; but we must see to it that all that has taken place is that which the law requires, and if there be a doubt as to this, and if it may be that substantial wrong has occurred, and a miscarriage of justice has intervened, then there must be a new trial.

It will be observed that it is not the province of the appellate Court to try the case.

This is well portrayed in the graphic and forceful language of the learned Chief Justice of Canada, at page 337 in the *Allen* case (44 Can. S.C.R. 331):—

> It may well be that, in our opinion, sitting here in an atmosphere very different from that in which the case was tried, the evidence was quite sufficient, taken in its entirety, to support the verdict; but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? *We must not overlook the fact that it is the free unbiassed verdict of the jury that the accused was entitled to have.*

It is to be observed that the Crown prosecutor in this case was the first to make an error—he examined the accused Clark when under cross-examination upon a statement which was not admissible in evidence against the accused Davis, and admitting of counsel for the accused Clark then introducing the statement in evidence, thereby implicating the accused Davis; and this statement went to the jury without a proper charge thereon and may have prejudiced the accused Davis upon his trial. It should never have been referred to, but if referred to, unquestionably should have been remarked upon, as the law requires, by the learned trial Judge, and the fact that counsel for the accused Davis did not call the attention of the learned trial Judge to the omission, matters not.

Let us note the cross-examination of the accused Clark upon the statement.

> *Mr. A. D. Taylor*, K.C. (counsel for the Crown):—
>
> Q. Now, Clark, about 10 days ago you wrote out a statement in reference to this matter which you sent to the Attorney-General of the province, or asked to be sent, did you not? A. I did.
>
> Q. Yes, and in that statement you intended to give a full account? A. I did, sir.
>
> Q. Of what occurred, and that statement you handed to one of the guards in New Westminster? A. To Mr. McArthur, yes, sir.

B. C.
C. A.
1914
REX
v.
DAVIS.
McPhillips, J.A. (dissenting)

Q. And then a few minutes after making that statement you tried to commit suicide? A. I did, sir.

Q. Now, I suppose you have been thinking over this matter a good deal? A. Well——

Q. And made up this statement, is that right A. Why, it was about three days before this I had been writing up this statement. My intention at the time of writing this statement was to give my side, my side of the case.

Q. Your side of the case? A. And being——

Q. Well, now, that was the first time that you had made what you call your side of the case? A. Yes.

. . . . . .

Q. Now, you remember writing this long letter. That is your signature, is it not? A. Yes, sir.

Q. Now, I see you say here——

THE COURT:—That is his writing?

Witness:—Yes, sir.

Mr. Taylor:—Q. That is your writing. Now I see you say here at the end: "Well, I think this closes my case. I have tried to make it as plain as I could because you won't be able to ask me no questions." Now, your idea of saying that no questions should be asked you that you were going to carry out your idea of committing suicide, was it not? A. Yes, sir.

Then we have counsel for the accused Clark, upon re-direct examination of the accused Clark, introducing the statement in evidence, and it was admitted against the objection of the Crown prosecutor, and rightly, as he had made it possible of being introduced—in effect, *manufactured evidence*, a specious and clever plea for the accused Clark, and implicating the accused Davis, gets before the jury by and through the action of the Crown prosecutor; it was not evidence against the accused Davis, but went in as such, and without the jury being warned or charged that it was not evidence against the accused Davis.

The statement went in in the following way:—

Mr. Jones of counsel for the accused Clark (Clark being under re-direct examination):—

Q. Now, my learned friend has questioned you regarding your confession. You changed your mind, you said, after your mother came to see you? A. I did.

Q. Now, why did you change your mind? A. I was disgusted with myself.

Q. And this was what was at the end of your confession: "The reason you will——"

Mr. Taylor:—That is most manifestly a leading question.

Mr. Jones:—My learned friend has put it in.

THE COURT:—Don't talk both at once.

Mr. Taylor:—I referred to certain parts of this written statement which I didn't put in. Now, my learned friend in re-examination of his own client is going to read from this confession, say "is this what you said?" It is most manifestly a leading question. You can't possibly put in this in re-examination.

Mr. Jones:—I submit, my Lord——

THE COURT:—You may.

Mr. Jones:—Q. (reading the written statement). "The reason you will not be able to ask me no questions is this: My father is dead, I have no brothers or sisters, only a dear old mother. I have caused her so much worry, sorrow and heartaches that I am so downhearted and disgusted with myself that I am going to put an end to it. There are two crimes I have never committed, one is murder and the other is leading an innocent girl astray, so I am not afraid to face the charge in the hereafter. I think you will agree with me in what I will do as may be possibly a whole lot better for me to be dead than doing 20 years of a lifetime in prison. I would only cause my poor mother so many more heartaches all the time I am in prison. I hope this statement will help you to clear the case and the guilty man get justice. Davis got the best of me after the first day of the trial by lying. I knew I would get life anyway so I said nothing. I close for good, remaining yours, H. F. CLARK."

Now, immediately after writing that you handed this statement to the guard? A. Yes, sir.

Q. And immediately after handing the statement to the guard, what happened? A. I tried to see if I couldn't break my skull on the bars.

I would again call attention to the judgment of the Chief Justice of Canada in the *Allen* case, 44 Can. S.C.R., at pp. 334-5-6-7. [The learned Judge here quoted *in extenso* from the opinion there reported.]

Now, in this case it may be said that the Crown did not put in the statement. I think I am right in saying that in effect the statement was put in by the Crown, and unquestionably without the action of the Crown it would never have got in, and, adopting the language of the Chief Justice of Canada, may have influenced the verdict of the jury and caused the accused Davis substantial wrong.

Here it is not the case of non-direction or omission to charge the jury upon a question of fact; it is a mistake of law, and the introduction of illegal evidence against the accused Davis. Many cases have occurred where there has been mis-direction, non-direction, and omission to direct upon questions of fact and verdicts sustained. Upon this point it is instructive to read the language of Lord Alverstone, C.J., in *Sydney Augustus Wann*, [1912] Criminal Appeal Reports (Lord Alverstone, C.J., Hamilton, and Lush, JJ.), at pp. 138, 139:—

> In a summing-up the facts may not be stated fully or may be stated incorrectly, without a misdirection on any question of law. A mere misstatement is clearly not a misdirection when the case has been fully heard by the jury, and as to omission, we must be satisfied that it is such that it is reasonable and probable that the jury were misled, in which case there might be "a miscarriage of justice." But the objection of omission seldom succeeds. As I said in delivering the judgment of this Court: "One has to be very careful in dealing with a case of alleged misdirection to appreciate the lines on which a case is conducted, as omission to direct

B. C.
C. A.
1914
REX
v.
DAVIS.
McPhillips, J.A. (dissenting)

the jury on a point which was not taken at the trial may not matter if no injustice is done": *Meyer*, 1 Cr. App. R., at 11, 1908. The effect of the cases on this subject is stated in Ross on the Court of Criminal Appeal, at p. 113, as follows: "To have any effect in itself the misstatement of the evidence, or the misdirection as to the effect of the evidence must be such as to make it reasonably possible that the jury would not have returned their verdict of guilty if there had been no misstatements." With the alteration of the one word "possible" to "probable" we think that this statement is correct.

At p. 140:—

It is more important that an innocent person should not be convicted than that a guilty person should go free. The difficulty of this case is very great, and we only give this judgment after very great doubt and hesitation. The Court is of opinion in this particular case that the conviction must be quashed.

The Lord Chief Justice in the case last above cited is in particular considering sec. 4 (1) of the Criminal Appeal Act (Imp.), and at the commencement of his judgment, at p. 138, said:—

The wording of sec. 4 (1) of the Criminal Appeal Act creates a great difficulty in such a case as the present, and it is open to question whether the Act does not require to be amended. In this case the verdict is not, in our opinion, unreasonable, and is not one that cannot be supported, having regard to the evidence. There has not been a wrong decision of any question of law. Therefore, the only clause under which we can deal with the case is the clause relating to miscarriage of justice. But we are not satisfied that there has been a miscarriage of justice here in the ordinary sense that the appellant has been wrongly convicted. There has been an insufficient direction upon a question of fact which makes a further enquiry desirable, but we have no power to grant a new trial.

It will be observed that in England, owing to the state of the statute law there, and, although the Court in the *Sydney Augustus Wann* case was not satisfied that there had been a miscarriage of justice in the ordinary sense, yet the appellant had been wrongly convicted, and in the result the accused went free owing to the Court having no power to grant a new trial. This power we have—to punctuate the situation—if I am right in my opinion—and if this case occurred in England, the accused Davis would go free. As it is, if I am right in my opinion, a new trial follows—a trial upon legal, not illegal, evidence.

I would refer also to the judgment of Darling, J., in *Charles Ellsom*, [1911] Cr. App. R. 4, at p. 7 (Lord Alverstone, C.J., Darling, and Hamilton, JJ.):—

DARLING, J.:—This case, besides being in any event of great gravity, is of exceptional importance because it is the first capital case in which the Court finds it necessary to set aside a conviction. In a capital case, nothing but a feeling that such a course must be taken would induce us to adopt it. We think it necessary to say that we do not express the

slightest opinion as to whether this appellant is guilty or not; we are only dealing with the conviction, and the question whether that can stand. That a brutal murder was committed there can be no doubt, and we think it fair to say that nothing we are doing or saying is to be taken as implying that there is any suspicion in our minds that Fletcher had anything to do with the commission of this murder. This case is an example of what we have often said, that only points of real gravity should be taken in this Court; several have been argued which were perfectly proper to be submitted to the jury, but once the verdict is given it is useless to repeat such arguments. For instance, the *alibi* which was discussed to-day, was before the jury and rejected by them. In this case we desire to repeat and emphasize what the Lord Chief Justice has said on several occasions, that it appears to us after some years' experience of the working of this Act, to be matters of great regret that we have no power to order a new trial, as can be done on appeal in a civil case where a verdict is set aside on such grounds as those on which we feel bound to act to-day. In this Court if sufficient legal reason is advanced against the conclusion of a Judge and jury, we have no alternative but to quash the conviction, and no further proceedings can be taken. This is a case, like many others which have come before us, where it is clearly desirable that all the facts should be submitted again to a jury with an adequate and proper direction. We hope that what we are now saying will be considered by those who have power to amend the law in this respect.

(At p. 12):—The question here, therefore, is whether if properly directed, the jury would have returned the same verdict. We feel it impossible to say with any certainty that they would. The only judgment, therefore, that we can give is that the appeal must be allowed, and appellant discharged. At the same time, we wish to repeat our regret that we have not power to order a new trial.

It is to be remarked that in this case it is not possible to say that that which the learned trial Judge omitted to charge the jury may be safely assumed was in the minds of the jury—the jury are not to be assumed to know the law, and must receive instructions in the law—and that failure here, in my opinion, may have caused the accused Davis substantial wrong.

It is to be noted that counsel for the accused Davis did not object to the reception of the statement in evidence, nor did he ask the learned trial Judge to direct the jury that the statement was not evidence against the accused Davis—but there is authority that a new trial will be granted although no objection was raised by the prisoner's counsel. I would refer to *The King* v. *Long* (1902), 5 Can. Cr. Cas. 493, relied on in *The King* v. *Law* (1909), 15 Can. Cr. Cas. 395, 19 Man. L.R. 274.

I would answer question 6 in the affirmative.

I therefore am of opinion, upon careful consideration of the whole case, that the appeal must be allowed, the conviction quashed, and a new trial granted to the accused Davis—the written statement admitted in evidence was illegal evidence as against the accused Davis—and became possible of being ad-

B. C.
C. A.
1914

duced in evidence by the action of the Crown counsel, and this evidence may have influenced the verdict of the jury and caused the accused Davis substantial wrong.

Conviction affirmed.

IMP.
P. C.
1914

CEDARS RAPIDS MFG. AND POWER CO. v. LACOSTE.

Judicial Committee of the Privy Council, Lord Dunedin, Lord Shaw, and Lord Atkinson. February 3, 1914.

1. DAMAGES (§ III L 2—241)—EMINENT DOMAIN—VALUE TO OWNER AT DATE OF TAKING.

The value to be paid for on the compulsory expropriation is the value to the owner as it existed at the date of the taking, not the value to the taker.

[*Lacoste* v. *Cedars Rapids Mfg. and Power Co.*, 43 Que. S.C. 410, reversed.]

2. DAMAGES (§ III L 2—252) — EMINENT DOMAIN — POSSIBILITIES OF SPECIAL USE.

The value to the owner which the taker must pay on a compulsory expropriation, consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

[*Lucas* v. *Chesterfield Gas*, [1909] 1 K.B. 16, applied.]

3. DAMAGES (§ III L 2—253)—EMINENT DOMAIN—ADAPTABILITY FOR PART OF LARGE UNDERTAKING.

On a compulsory expropriation under statutory powers, if the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in its adaptability for a certain undertaking which necessarily would include other properties, the value to be assessed by the arbitrators is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give; and that price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

[*Lacoste* v. *Cedars Rapids Mfg. and Power Co.*, 43 Que. S.C. 410, reversed.]

4. WATERS (§ I C 4—32)—NAVIGABLE RIVERS—BED OF RIVER—CROWN PROPERTY.

The bed of a navigable river, under the laws of Quebec belongs to the Crown and no riparian owner can construct works in the bed of the river without the consent of the Crown.

Statement

APPEAL by special leave from the judgment of Davidson, C.J., of the Superior Court of Quebec, *Lacoste* v. *Cedars Rapids Manufacturing and Power Co.*, 43 Que. S.C. 410, setting aside the award of arbitrators on the value of lands in expropriation proceedings.

The appeal was allowed, sustaining the award as to one tract of the land and remitting the matter to the arbitrators to

hear evidence and make an award *de novo* as to the other tracts.

Sir Robert Finlay, K.C., *Mignault*, K.C., (of the Canadian Bar), and *Geoffrey Lawrence*, for the appellants.

Sir Edward Clarke, K.C., *Sir Alexander Lacoste*, K.C., and *Donald Macmaster*, K.C., (both of the Canadian Bar), for the respondents.

The judgment of the Board was delivered by LORD DUNEDIN:—The appellants are a company incorporated by a statute of the Parliament of Canada in 1904, empowered to construct and develop water powers in or adjacent to the river St. Lawrence in the parish of St. Joseph of Soulanges in the province of Quebec, and to take by way of expropriation lands within the parish actually required for such development.

With a view to such development the appellants served notices of expropriation on the respondents, who, as executors of the estate de Beaujeu, were proprietors of the subjects to which such notices applied. These subjects were three in number, to wit (1) the Ile aux Vaches; (2) the Ile Bédard; and (3) reserved rights over the Pointe du Moulin. For these subjects the appellants by the said notices offered to pay respectively $2,800, $200, and $1,700 and named an arbitrator in the event of these sums not being accepted. The respondents did not accept these sums and named on their part an arbitrator. The third arbitrator, or umpire, was named according to law by the Judge of the Superior Court.

The three arbitrators after visiting the properties heard witnesses and received documents, and finally, by a majority, consisting of the arbitrator appointed by the appellants and the arbitrator appointed by the Judge of the Superior Court, awarded as compensation the sums offered by the appellants. The third arbitrator appointed by the respondents dissented and intimated that he would have been prepared to award the sums of $62,000, $34,000, and $80,000 respectively.

Against the findings (1) and (3), *i.e.*, for $2,800 for the Ile des Vaches and $1,700 for the reserved rights at Pointe du Moulin, there lay, under the Canadian law, an appeal on the merits to the Superior Court of Quebec; and an appeal was taken by the respondents.

Against finding (2), owing to the award being less than $600 no appeal lay. But a direct action, in the Superior Court, to set aside the award *in toto*, was brought by the respondents. The appeals and the direct action were heard together before Chief Justice Davidson of the Superior Court. He allowed the appeals and substituted for the sums awarded the sums proposed

IMP.
P. C.
1914
CEDARS RAPIDS MFG. AND POWER CO. v. LACOSTE.
Lord Dunedin

to be awarded by the dissenting arbitrator. In the case of the Ile Bédard he set aside the award and directed a new arbitration.

From these decisions the present appeal is brought by special leave to this Board.

It now becomes necessary to describe generally the subjects taken.

The Ile aux Vaches is an island situated to the north of the medium filum of the St. Lawrence river, at a point about 40 miles above Montreal, of the extent of 28¼ arpents—an arpent representing slightly more than one acre. Ile Bédard is a smaller island also to the north of the medium filum, having an area of 3½ acres, and situate 7,600 feet down the river from the Ile des Vaches. Further down again, and 700 feet from the Ile Bédard, comes the Pointe du Moulin, which is a point jutting out into the river to such an extent that approximately a straight line drawn from the southern side of the Ile aux Vaches through the Ile Bédard will cut the point in question.

The whole of the riverain land at the Pointe du Moulin originally belonged to the respondents' predecessors. They have sold all the lands at the Pointe du Moulin, subject to a reservation in the following terms:—

(TRANSLATION.)

The vendor as such reserves to himself

1. A road 24 feet wide over the whole extent of the aforesaid land from Queen's Road to the St. Lawrence river.

2. A building site on the aforesaid land sufficiently large for the erection of a mill or factory or any other buildings necessary to the work to be carried on.

These two reservations are made in perpetuity and the purchaser his heirs and assigns covenant to pay all taxes, municipal or school, which in future may be imposed on the lands hereinbefore reserved without right to any compensation or indemnity.

The vendor as such will have the right to take possession of the above mentioned reservations at his pleasure and further reserves to himself all the debris of the old mill and the right to take same away at any time without his crossing the land, hereinbefore sold for that purpose, being deemed the taking up of the right first hereinbefore reserved "of a road," etc., etc.

The purchaser his heirs and assigns will in no wise have the right to avail themselves of the water rights on the bank of the St. Lawrence appurtenant to the land conveyed which the vendor by these presents expressly reserves.

The river being a navigable river, the bed belongs, according to the law of Canada, to the Crown, and no riparian owner can construct works in the bed without the consent of the Crown.

The river at this place is in rapids. The total fall measured from the top of the Ile aux Vaches down to the lowest point of

IMP.

P. C.
1914

CEDARS RAPIDS MFG. AND POWER CO. v. LACOSTE.

Lord Dunedin

the Pointe du Moulin is about 28 feet. The scheme of the appellants' works is to construct a dyke in the bed of the river from Ile aux Vaches to Ile Bédard and then on to the lowest point of the Pointe du Moulin. That will impound the whole waters of the river to the north of the dyke. To be able to do this they obtained, by agreement with the Dominion Government, a right to erect the works and to abstract the water. They further propose to submerge by cutting away all jutting-out portions of the Pointe du Moulin till the last jutting-out piece, on which they are to erect their power-station, thus providing for an uninterrupted flow of the river towards their power-house, and availing themselves of the total fall of 28 feet.

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of *Lucas* v. *Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, where Lord Justices Vaughan Williams and Moulton deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability as pointed out by Lord Justice Moulton in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Applying these principles, it is in the opinion of their Lordships impossible to support the judgment appealed against. The greater part of the judgment of the learned Chief Justice is concerned with demonstrating that the arbitrators in the award they had given had gone on evidence which went to agricultural value alone (using that term as including the water power of the mill used as an ordinary mill). In this criticism so far their Lordships think the learned Chief Justice was right. But when he comes to fix the value to be substituted for

IMP.

P. C.
1914

CEDARS RAPIDS MFG. AND POWER CO. v. LACOSTE.

Lord Dunedin

that given by the majority of the arbitrators he accepts the figures given by the dissenting arbitrator and confessedly bases them on the evidence given by the witnesses for the respondents (appellants before him).

Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

It would be tedious to quote too much of the evidence, but the following may be taken as samples:—

Exhibit A10 is a report from Isham Randolph, engineer. He was examined as a witness, and his evidence is really only a development and amplification of his report. His qualifications as an engineer are undoubted, and his opinion on engineering matters worthy of the greatest respect. But you need go no further than the first sentence to see how completely he has misunderstood the legal position:—

> I consider that as component parts of a hydro-electric power development having head works at Ile aux Vaches and power plant on the point indicated . . . the said Ile aux Vaches and the said point of land have very great value, and should make the owners participants in the earnings of the development, or else they should receive in advance a compensation based approximately upon the net earnings of the power development in the ratio of the head controlled by these two properties, to the total head capable of being developed.

Arthur Surveyer, another engineering witness, deals separately with the different subjects. As to Ile aux Vaches, he deals with it thus:—

First, he says, if the island were not there and there were shoal water, it would cost $39,000 to build a dam, which would represent part of the island. Second, when that was done there would be a loss of 1.7 foot of head, as compared with the present works, which would mean a loss to the company of an annual rent of $1,050, which, capitalized at 5 per cent., comes to $21,000. Third, he says, the protective value of the island to the works below it is absolute. To ensure the same result, if the island were not there, by means of an insurance, you would have to pay underwriters a premium, which, capitalized, amounts to $17,000; and, fourth, he estimates that the smooth water below it, which the presence of the Ile aux Vaches ensures, amounts to a saving during the construction of the works below it of $6,000. Adding these sums together, he puts the value of the Ile aux Vaches at $83,000.

It is difficult to conceive evidence more honeycombed by

fallacy than this. Besides the general fallacy already mentioned, it appropriates to an island the proprietorship of which carries with it no rights over the bed of the river, and no connection with the property on the bank opposite it, the whole value of the "head" of water which is *ex adverso* of it. It measures the value of the island by the cost of an *opus manufactum*, which might be made if the island was not there; and, lastly, it values both temporarily and permanently the "protective" action of the island, totally forgetful that the works might be stopped one foot short of the island, no part of the island taken, and yet the protective value would be there all the same.

Dealing with the reserved rights at the Pointe, he bases his calculation on loss of profits to the taking company, and also forgets that the power to cut away the protruding parts of the other portions of the Pointe, which alone makes possible the unrestricted flow, is a power that flows from the Government contract and the taking of the riparian lands, and has nothing to do with the reserved water rights of these claimants.

Mr. Robertson, another engineer, when asked as to the Ile aux Vaches:—

> Q. You were valuing it at the value it would possess for the Cedars Rapids Manufacturing Company? A. Yes, that in my opinion would be the value to them.

Further quotation is unnecessary. All the witnesses persist in looking at the three subjects as forming parts of a completed whole—and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the undertakers. Their Lordships may quote the words of Lord Justice Vaughan Williams in the case cited as applicable to this case:—

> The element which the arbitrator may take into consideration is not the fact that the land has in fact been taken, and that the probability (*i.e.*, of purchasers requiring the land for such purposes) has been realised by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before these promoters had obtained their powers . . . it appears that the Umpire has treated the probability and the realized probability as identical for the purposes of valuation, he has gone on a wrong basis and we ought to send the award back to him.

Indeed, the mistake goes further in this case even than in that. For in that case there was only one subject. Here there are three subjects detached, and the value which the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and

IMP.

P. C.
1914

CEDARS RAPIDS MFG. AND POWER CO. v. LACOSTE.

Lord Dunedin

for the enhanced value of which result the claimants have no right to be compensated.

The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the Cedars Power Co. being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

It is on account of the latter consideration that their Lordships, while unable to accept the judgment under appeal, are also unable to restore the judgment of the arbitrators. Unfortunately, the appellants led no evidence except as to bare agricultural value. Now, with regard to the Ile aux Vaches and the reserved water rights, it seems possible that there may be some value over and above the bare value.

If the situation be naturally favourable to the establishment of power works like those of the appellants then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot, after the event, be taken into account. And also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the appellants will be derived from the reserved water rights; but it is that a water power like that of the appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents. These considerations, however, point to the possibility of something more being given for the subjects than the bare value; or in other words, that if they had been put up to auction as beforesaid, there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme.

As regards the Ile Bédard, the Board is, however, satisfied that on the materials placed before them, the arbitrators' conclusion was reasonable and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case accordingly ought to be ended now.

Their Lordships will, therefore, advise His Majesty to direct that with regard to the Ile Bédard the judgment complained of be reversed with costs in the Court below to the appellants the Cedars Rapids Co.; and (2) that with regard to the Ile aux Vaches and the reserved power and mill site, the judgment

complained of be set aside and the Court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth: no costs being allowed to either party in the arbitration already held or in the Court below; and further, that neither party ought to have costs before this Board.

IMP.
P. C.
1914

Appeal allowed.

Re FORT GEORGE LUMBER CO.
TRADERS BANK v. LOCKWOOD.

CAN.
S. C.
1913

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 3, 1913.

1. CORPORATIONS AND COMPANIES (§ V I C—330)—WINDING-UP—SALE OF MORTGAGED VESSEL BY LIQUIDATOR—PROCEEDS — RIGHTS OF MORTGAGEE AND SEAMEN ENTITLED TO LIEN ON BOAT.

Where, under an order of court, a liquidator with the consent of the mortgagees sold a mortgaged vessel free from encumbrances, the mortgagee, and the seamen entitled to a maritime lien on the vessel for wages, have the same respective rights against the fund realized from the sale as they had against the vessel, and the subsequent loss of the latter does not deprive the holders of the maritime lien of their priority over the mortgage as regards such fund.

[*Re Fort George Lumber Co.*, 12 D.L.R. 807, affirmed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Re Fort George Lumber Co.*, 12 D.L.R. 807, 25 W.L.R. 92, dismissing an appeal, by the present appellant, from certain orders by Clement, J., in the matter of the winding-up of the Fort George Lumber and Navigation Co. made, respectively, on the 15th, 22nd and 27th of January, 1913.

The appeal was dismissed.

Argument

W. B. A. Ritchie, K.C., for the appellant:—The right and title of the bank in the "Chilco" was never divested. No "assignment and delivery" of the mortgage was required or made pursuant to sec. 77 of the Winding-up Act, or at all. The vessel being valued at $5,000, and that being all that could be got for her, the liquidator had no interest in her, but for convenience she was sold with the other assets of the company, the liquidator in selling her acting on behalf of the bank. The $5,000 paid by the purchaser was the money of the bank, and no question of indemnity arose as no claim was made by the seamen under their liens before the loss of the ship, and by her loss the liens ceased to exist.

The liquidator has no power to make a sale which would divest the liens of the seamen; he represented the company, not its creditors. See *Re Clinton Thresher Co.*, 1 O.W.N. 445, *per* Boyd, C., and *Re Longdendale Cotton Spinning Co.*, 8 Ch.D.

CAN.

S. C.
1913

RE FORT GEORGE LUMBER CO.

Argument

150, *per* Jessel, M.R., speaking of the rights of a person having a charge by virtue of mortgage against property of a company in liquidation; also 2 Palmer's Company Precedents, 10th ed., 385, and *Keighley, Maxsted & Co.* v. *Durant*, [1901] A.C. 240.

At all events, the seamen could not hold, as they did, their liens upon the ship till she goes down, and then contend that, the security having gone, they would elect to treat the sale as made on their behalf and ask for payment of their liens out of the purchase price. Assuming that they might, before the loss of the ship, have elected to treat the purchase price as representing the ship and enforce their liens then, they cannot do so after the loss of the ship because at the time when they came forward to so enforce their liens they had no liens.

The seamen were entitled, to the extent of $3,152.15, to rank as preferred creditors by virtue of sec. 70 of the Winding-up Act, and the effect of taking the security held by the bank to pay the seamen is that the bank is forced, by reason of the liens, to pay off the preferred creditors, and upon no equitable principle can this enure to the benefit of the general creditors. If the order charging the seamen's wages upon the $5,000 which, but for such wages, would have been paid over to the bank, was correct then the order should have worked out the equitable rights of the bank by subrogating it to the rights of the seamen as preferred creditors.

Assuming that it is regarded that there was an assignment and delivery of the security to the liquidator within the meaning of sec. 77 of the Winding-up Act, and that the liquidator realized such security, the order charging the liens upon the proceeds of the sale and thereby diverting the money which would otherwise have gone to the bank should provide for payment of the $5,000 to the bank out of the general assets.

Travers Lewis, K.C., for the liquidator, respondent:—The liquidator has, throughout the proceedings, considered himself as custodian and trustee of the $5,000, proceeds of the sale of the "Chileo," and has been and is prepared to pay it, or any part of it, to whomsoever the Court decides to be entitled thereto. The liquidator objects to being joined as a respondent in this appeal; and he is improperly referred to as a respondent, the matter in dispute being a question between the appellant and the class represented by the respondent McInnes; no order has been made joining the liquidator as a party.

The ship was sold, with the consent of the Court, without incumbrances, the liquidator at that time having no knowledge of the existence of the maritime liens; the claims on that account were presented after the sale and before the loss of the ship. The sale was free from incumbrances as to the purchasers,

CAN.

S. C.
1913

RE
FORT GEORGE
LUMBER CO.

Argument

but the Court has held that this did not relieve the proceeds of the sale from being charged with any lien attaching to the ship.

With reference to the costs incurred by the proceedings taken by way of appeal in this Court and in the lower Courts, the liquidator submits that, as the dispute is one between the appellant and the wage-earners over a separate fund, these costs should not be borne by the general estate, but out of the separate fund affected; the moneys realized from the sale of the general assets should not be liable for these costs; it would be inequitable to permit these costs to be chargeable against the preferred creditors who are not parties to the dispute, and they have not had an opportunity of appearing in these appeal proceedings.

Chrysler, K.C., for the wage-earners, respondents:—In the Court of Appeal it was admitted that the wage-earners were entitled to a maritime lien on the ship at the time of her sale. The only question now involved is as to priority of the claims of the lien-holders or mortgagees to the $5,000 received from her sale, the price being insufficient to satisfy both claims.

If there had been no winding-up order made, and the mortgagees had proceeded under their mortgage, the seamen's lien would have attached to the moneys secured by the sale of the vessel: "*The Hope*," 28 L.T.N.S. 287. How can the position of the parties be reversed and the mortgagee secure a priority over the lien of the seamen by electing to participate in the winding-up?

When a company is being wound-up the proper procedure for the master and seamen is to place their claims in the hands of the liquidator, and participate in the winding-up, instead of proceeding *in rem*: *Re Australian Direct Steam Navigation Co.*, L.R. 20 Eq. 325, *per* Jessel, M.R., at page 327; *Re Rio Grande do Sul Steamship Company*, 5 Ch.D. 282, *per* Brett, J., at 285.

In an action for winding-up the seamen are entitled to priority over the mortgagees for the proceeds of the sale of a vessel of the company being wound-up: *Re The Great Eastern Steamship Co.*, 53 L.T. 594.

The lien for wages was not lost by any slight delay there may have been in setting forth the claims and there is no evidence before the Court that there was any such delay: *Munsen et al.* v. "*The Comrade*," 7 Ex. C.R. 330. The money realized from the sale of the "Chileo" is still in the hands of the liquidator, who is an officer of the Court: "*The Chieftain*," Bro. & Lush 212.

As to the contention that the seamen's lien followed the

CAN.

S. C.
1913

RE FORT GEORGE LUMBER CO.

Argument

vessel and became extinct when it was wrecked and became a total loss, see *Re "Dawson,"* Fonb. 229, 17 L.T. (O.S.) 100.

The relationship which the liquidator bears the creditor is that of a trustee. He, without the knowledge or consent of the wage-earners, disposed of the ship, on which they had a maritime lien, for the sum of $5,000, and he is governed by the legal principles controlling a trustee. *Re Oriental Inland Steam Company*, 9 Ch. App. 557, *per* James, L.J., at 559, and Mellish, L.J., at 560; Lewin on Trusts, 12th ed., 1150, sec. 2; *Taylor* v. *Plumer*, 3 Maule & Sel. 562, *per* Lord Ellenborough, at 574 and 575.

Since the liquidator disposed of the ship, without the knowledge or consent of the wage-earners, and the money received has been kept by him in a separate account, that money is to be considered as the ship itself, and the seamen are entitled to be paid out of that fund in priority to all other claims. Moreover, the ship was sold under an order of the Court and, therefore, was free from incumbrances so that no lien could follow the vessel into the hands of the new purchasers.

Sir Charles Fitzpatrick, C.J.
Davies, J.

THE CHIEF JUSTICE, and DAVIES, J., agreed with DUFF, J.

Idington, J.

IDINGTON, J.:—Upon the application of the respondent, assented to by the appellant, in a winding-up proceeding, a vessel was sold free from incumbrances under an order of the Court and, as a result thereof, it was taken from where, but for this sale, it should have remained and was totally wrecked.

The contention that thereby the rights of those having a lien on that so absolutely sold by order of the Court and so dealt with are not only extinguished, but that the benefit of such extinction is to enure entirely to one of the prime movers in such a proceeding involves some strange conception of what law and Courts of justice are for.

Yet to give effect to such a contention seems to be the chief if not the sole aim of this appeal.

If the appellant had sold by virtue of its mortgage, or by order of a Court enforcing it, the absolute property in the vessel, these prior liens would have come out of the purchase money; or if it had been sold subject to such liens it would only have realized so much less.

But why need I labour with such a question? The appeal should be dismissed with costs for the reasons (so far as necessary for his decision) assigned by the learned Chief Justice of the Court of Appeal, speaking for the majority of the Court.

The time has not arrived for dealing with any equities the appellant may have as against others (who are not before us) than the lien-holders classed as wage-earners now before us.

DUFF, J.:—This is an appeal brought by the Traders Bank of Canada against the judgment of the Court of Appeal for the Province of British Columbia dismissing its appeal from three orders of the Honourable Mr. Justice Clement, dated respectively, January 15, 1913, January 22, 1913, and January 27, 1913.

The Fort George Lumber and Navigation Co., Ltd. was incorporated under the laws of the Province of British Columbia and empowered, *inter alia*, to carry on a general logging, lumbering and transportation business and, in connection with its business, owned and operated a number of river steamships on the inland waters of the province.

Upon the application of certain creditors the company was, by order of the Supreme Court of British Columbia, bearing date January 4, 1911, ordered to be wound up under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144.

By a further order, dated January 23, 1911, the respondent, Herbert Lockwood, was appointed official liquidator and was directed to call for tenders for the purchase of the assets of the company in liquidation.

The assets comprised mill and camp equipment, machinery of various kinds, and certain river steamships, and these were at the time of the winding-up in various places in the neighbourhood of Fort George and Ashcroft.

Included in them was the steamship "Chilco," upon which the appellant, the Traders Bank, held a mortgage to secure the sum of $10,000. At the time of the winding-up order, the "Chilco" was imbedded in the ice in the Upper Fraser river and there was grave danger of her becoming a total loss when the ice broke up in the spring of the year. Pursuant to the order directing the sale of the assets, the liquidator advertised for tenders for the purchase of them, which advertisement included the steamship "Chilco" and equipment.

Pursuant to the said advertisement the two material tenders received were:—

1. A tender for the whole of the assets of the company, at a price of $65,100.

2. A tender, at the price of $37,500 plus $25,000 and interest (the sum alleged to be due the purchasers on certain mortgages held by them on the assets of the company), making in all $62,500 and interest.

After consultation with the committee of creditors of the company, and on behalf of the liquidator, it was arranged with the agents of the purchasers, John K. McLennan and Allan J. Adamson, that they should offer to purchase separately the steamship "Chilco" and equipment, which offer was made by the purchasers, and the liquidator accepted their offer to pur-

CAN.

S. C.
1913

RE FORT GEORGE LUMBER CO.

Duff, J.

chase the steamship for $5,000; thus bringing the total price the purchasers were to pay for the assets of the company, exclusive of book debts, to about the sum of $76,500. The appellant, the Traders Bank, was consulted and approved of the sale of the steamship for the price of $5,000, it being set out in the liquidator's acceptance of the offer of purchase that the liquidator made no guarantee as to the present existence of the steamship "Chilco."

The appellant, when asked by the respondent liquidator if it would consent to a sale of the steamer "Chilco" for the sum mentioned, gave its consent. By order of the Chief Justice, dated March 5, 1911, the liquidator was directed to sell the said assets upon the terms of the said offer and acceptance, which sale was carried out as directed, and the separate sum of $5,000 was agreed to be paid over by the purchasers to the liquidator for the steamship "Chilco," which sum of $5,000 was duly credited to the company in liquidation. As directed by the Court, and in the usual course of the winding-up proceedings, the respondent liquidator advertised for creditors of the company, and the appellant (by its manager in the city of Vancouver, Arthur Romaine Heiter) filed with the liquidator an affidavit, dated April 1, 1911, whereby the appellant claimed to be a creditor of the company (among other claims) on a demand note for $10,000 and interest, and, further, stated that the appellant held as security for payment of the said note a mortgage on the steamship "Chilco," which the said appellant, the Traders Bank, valued at $5,000.

The purchasers took possession of the steamship, and, in attempting to take the ship to Quesnel, it was wrecked, on or about April 27, 1911, and became a total loss. Maritime liens were then advanced by the respondent McInnes and the class of creditors he represents and they claimed preference on the proceeds of the sale of the steamship. The appellant, the Traders Bank, claimed to be entitled absolutely to this $5,000.

By order, dated April 26, 1911, an inquiry before the district registrar at Vancouver was directed to ascertain, *inter alia*, what persons had earned wages upon the steamship "Chilco" and were still unpaid, the amount of such wages, and how much thereof was earned three months prior to the winding-up of the company.

By order, dated January 16, 1912, the said inquiry was extended to ascertain, *inter alia*, what maritime liens there were, if any, affecting the steamship "Chilco" at the date of its sale, and whether any and, if so, which of said liens were then and are now chargeable "upon the proceeds of the sale of the steamship 'Chilco.'" Pursuant to these orders the said inquiries were held and the report of the district registrar, dated

January 9, 1913, sets out his findings. His report contained a finding that certain claimants, therein set out, were entitled to maritime liens on the steamship "Chilco" at the date of said sale in the amounts set opposite their respective names. The report further contained a finding by the district registrar that "none of" the said liens were chargeable upon the proceeds of the sale of the "Chilco."

The respondent McInnes moved to vary the said reports and, by an order, dated January 15, 1913, Mr. Justice Clement varied the said report by striking out the words "none of," and held that the said liens were chargeable upon the proceeds of the sale of the "Chilco," and further directed that the wage-earners be paid the total amount set after their respective names in the report out of the proceeds of the sale of the "Chilco" in priority to all other claims.

A further order, dated January 22, 1913, to the same effect, included the steamship "Chilco," and, by a further order, dated January 27, 1913, the reports were approved, subject to the said orders so varying the reports in part.

The appellant appealed to the Court of Appeal for British Columbia from the order of January 15, 1913, the order of January 22, 1913, and the order of January 27, 1913, and, by judgment, dated July 22, 1913, the Court of Appeal dismissed said appeal.

The present appeal is brought from this judgment of the Court of Appeal, by special leave granted in this Court, in Chambers, by order dated September 16, 1913, on the appellant's undertaking to abide by any order as to costs, including costs as between solicitor and client and all other costs which this Court may see fit to make.

I think the appeal fails. The liquidator undoubtedly intended to sell and the purchasers intended to buy the ship free from all incumbrances. The sale must be taken to have been authorized with a view to attain the object for which the winding-up proceedings were initiated, namely, to convert the assets of the company and to apply the proceeds in payment of the creditors according to the order and priority ordained by law. It is upon this hypothesis that any claim of the appellant itself against the proceeds of the sale in specie must rest; and, in consenting to the sale, the appellant must be taken to have assented to the fund being dealt with on this principle; and, on this principle, the superiority of the respondents' claim is indisputable. It is true that the respondents did not, as the bank did, consent to the sale before it took place. It may be assumed that, in the absence of circumstances giving rise to an estoppel, the sale itself would not, *ex proprio vigore*, pass to the purchaser a title to the ship free from their liens.

CAN.

S. C.
1913

RE
FORT GEORGE
LUMBER CO.

Duff, J.

On the other hand, if immediately after the sale they had attempted to enforce their rights by proceeding against the ship *in rem*, the Court would, unquestionably, on the application of the purchaser, have directed the liquidator to apply the proceeds of the sale in his hands in satisfaction of the liens; and these proceeds being sufficient for the purpose would have restrained the proceedings of the lien-holders.

The lien-holders, moreover, might have elected, *mero motû*, to affirm the sale as passing to the purchaser a title free from incumbrances and to proceed themselves against the fund in the liquidator's hands.

Such having been the rights of the parties immediately after the conclusion of the sale, there appears to be no ground for holding that the subsequent loss of the ship in any way prejudiced these rights. That circumstance does not appear to have altered the position of the parties in the least. The bank could not have withdrawn its assent to a sale free from its own mortgage on discovery, after the sale, of the existence of the liens.

There is no suggestion that if the existence of the liens had been known prior to the sale any other course would have been taken. It seems impossible, therefore, to support the view that the lien-holders have, through the destruction of the ship, lost their right to elect to proceed against the fund. The rights of the bank, if any, to subrogation, or in respect to the marshalling of securities, do not appear to have been affected by the judgment appealed from; but it is better that this should be formally stated in the order dismissing the appeal.

The appeal should be dismissed with costs, and the liquidator should have his costs, as between solicitor and client.

Anglin, J.

ANGLIN, J.:—Although counsel for the appellant argued on behalf of his client that the case at bar should be regarded as one of the taking over of a security by the liquidator at a valuation, under sec. 77 of the Winding-up Act, in answer to a question from the Bench, he frankly admitted that he did not himself consider that to be the proper view of it. He was, I think, well advised in making this statement. That being so, I cannot understand how the appellant can successfully maintain that it is entitled to the whole sum of $5,000, received as proceeds of the sale of the "Chileo" without any provision being made for the satisfaction of the claims of the wage lien-holders, which, admittedly, constituted a charge upon the vessel itself in priority to the appellant's mortgage.

The correspondence between the solicitors for the purchasers and the solicitors for the liquidator seems to make it clear that, at least to the extent of $3,500, there was an agreement that this fund should be held subject to the claims of these lien-holders.

But, apart from any effect which should be given to that correspondence, it is obvious that the liquidator and the appellant mortgagee would, as vendors, be obliged to indemnify the purchasers against these liens, if they remained unaffected by the sale. If they were extinguished by the sale as charges on the vessel, or became unenforceable by proceedings against it, they attached upon the proceeds of the sale which stood in its stead. In either case, as between the liquidator, representing the estate, and the appellant, the proceeds of the sale of the ship which were in the hands of the liquidator as an officer of the Court and subject to equitable administration in the winding-up proceedings, were available to satisfy the claims of the lien-holders as against and in priority to the rights upon them of the appellant. The rights of the parties in regard to this fund were not affected by the subsequent destruction of the "Chileo."

But, in default of obtaining the whole sum of $5,000 to the exclusion of the lien-holders, the appellant asked at bar that it should be subrogated to the rights against the general estate of such of the wage lien-holders as should be paid out of this fund, which represents the appellant's security, or that there should be a marshalling of assets and securities in such manner that, to the extent to which it has two securities—one a lien on the vessel or its proceeds, in which the appellant is interested; and the other a preferential right to payment out of the general assets of the estate, in which the appellant is not interested—the lien-holders should be required to resort to and exhaust the latter security before availing themselves of the former.

As against unsecured and unpreferred creditors, represented here by the liquidator, it may well be that this is the appellant's equitable right. But other secured and preferred creditors were not represented before us and, at all events in the apparent uncertainty which exists as to whether the assets will be sufficient to satisfy claims of this class, we could not determine anything here as against such creditors or which would affect their rights. The appellant did not raise this question in the Courts of British Columbia so far as the record shews. The notice of appeal to the Court of Appeal contains no allusion to this aspect of the case. The only matter dealt with in the judgments delivered in that Court is the claim of the appellant to entirely exclude the lien-holders from any interest in the fund of $5,000. In rejecting that claim of the appellant the Courts below were, I think, clearly right. Counsel for the respondents maintains that this is the only matter which was presented or adjudicated upon and that any right which the appellant may have to marshalling or subrogation will arise at a

CAN.

S. C. 1913

RE FORT GEORGE LUMBER CO.

later stage of the liquidation proceedings and will not be affected by the disposition of this appeal. Accepting this view of the matter and on this basis I concur in the dismissal of the appeal.

BRODEUR, J.:—I concur in the opinion of Mr. Justice Anglin.

Appeal dismissed.

B. C.

S. C. 1913

SPARROW v. CORBETT.

British Columbia Supreme Court. Trial before Murphy, J. September 8, 1913.

1. EVIDENCE (§ VI F—548)—PROMISSORY NOTE—PRESENTMENT PROVED BY SUBSEQUENT PROMISE TO PAY.

When a promise to pay a promissory note is made by the maker after the note has fallen due, it is *primâ facie* evidence of presentment.

[See Annotation on presentment of bills and notes, 15 D.L.R. 41.]

Statement

TRIAL of action upon a promissory note.

Judgment was given for the plaintiff with a set-off to the defendant.

A. H. MacNeill, K.C., and *Bird*, for plaintiff.

Woodworth, and *Creagh*, for defendant.

Murphy, J.

MURPHY, J.:—It is objected in this action that the plaintiff cannot succeed because no proof of presentation of the note was given. The case of *Deering* v. *Hayden* (1886), 3 Man. L.R. 219, and authorities there cited, shew that when a promise to pay has been made after the note has fallen due, that is *primâ facie* evidence of presentment. In this action, proof was given of such promise to pay, and, unless my memory fails me, proof was also given that some payments were made. At any rate, it was proven that the defendant, after the due date, had made repeated promises to settle, and had requested time. That being so, I hold that the plaintiff is entitled to recover.

With regard to the set-off, the evidence was very unsatisfactory, and I am forced to state that I have to view with close scrutiny what was said by the defendant. When a man, in the face of the correspondence that was filed in this action, comes forward and states that the note here sued upon was an accommodation note, I think his evidence is of a character that requires consideration. Apparently the plaintiff believes that the defendant has some sort of claim. With regard to his claim for wages, he admitted himself that it was an afterthought, and he could not even give me the date when he finally determined to make such charges. I entirely disallow these. With regard

B. C.

S. C.
1913

SPARROW
v.
CORBETT.

Murphy, J.

to the expenses, the evidence was so fragmentary that when it is remembered the onus is upon the defendant to prove this set-off, I am rather in a quandary what to do. I must state with regard to the claim of $45 for sending his son to Winnipeg, I disallow it, not giving credence to his evidence on that point. It seems, however, from the correspondence, that he did do some work, or at any rate make some attempts during the months that he charges for, to sell some of the books. Whilst I must admit that the matter is something of a guess, I believe that substantial justice will be done (especially in view of the attitude taken by the plaintiff), by allowing a set-off of $100. I give judgment for the amount of the note and costs, $100.

The defendant will have any costs occasioned by establishing the amount of the set-off as allowed, the same to be set off against the costs of the action.

Judgment accordingly.

TRUSTS AND GUARANTEE CO. v. WHITLA CO.

ALTA.

S. C.
1914

Alberta Supreme Court, Stuart, J. March 6, 1914.

1. ASSIGNMENTS FOR CREDITORS (§ VI A—55)—PREFERENCES BY INSOLVENT —INTENT AND PRESSURE.

A preference given by a debtor when in insolvent circumstances and within 60 days prior to the debtor's making an assignment for the benefit of his creditors, is void as in contravention of the Alberta Assignments Act, Statutes 1907, ch. 6, and this regardless of the questions of intent and pressure (secs. 42 and 43).

[*Beaullack* v. *Bank of B.N.A.*, 36 Can. S.C.R. 120, distinguished.]

2. CONTRACTS (§ I D 3—55)—DEFINITENESS—ASSIGNMENT OF $2,500 OUT OF $6,500 FIRE INSURANCE.

An oral promise by the debtor in consideration of an extension to assign to his creditor out of $6,500 fire insurance then in force a portion thereof "to the extent of $2,500" as security for a $2,200 debt is unenforceable for uncertainty, where there is no ascertainment of any particular policy of several aggregating the total insurance as the one to be subject to such lien or charge.

[*Godwin* v. *Murchison National Bank*, 17 L.R.A. (N.S.) 935, applied; *Tailby* v. *Official Receiver*, 13 A.C. 523, distinguished.]

3. LIENS (§ I—4a)—EQUITABLE LIENS—DEFINITENESS.

A lien is not created by a covenant to charge property not defined by the covenant and where there has been no acquisition of property with intent to perform the covenant.

[*Mornington* v. *Keane*, 2 DeG. & J. 290, 44 E.R. 1001, followed.]

Statement

ACTION by an assignee for the benefit of creditors to set aside as in violation of sec. 42 of the Alberta Assignments Act, a deed transferring certain fire insurance moneys to the defendant.

Judgment was given for the plaintiff, setting aside the transfer.

ALTA.

S. C.
1914

TRUSTS AND GUARANTEE CO. v. WHITLA CO.

Stuart, J.

Stanley Jones, K.C., and *Mackay*, for the plaintiff.
Clark, K.C., and *Winter*, for the defendant.

STUART, J.:—The plaintiff company is the assignee for the benefit of creditors of one Edward G. Brown under a deed of assignment dated April 25, 1911. Brown had been carrying on business at High River as a dry goods merchant dealing in clothing and men's furnishings and was carrying considerable insurance. About the 25th or 26th of March, 1911, a fire occurred which destroyed a portion of his goods and certain moneys became due him from certain insurance companies. He was at the time indebted to the defendants in the sum of $2,460.44.

On April 4, 1911, he executed a document under seal whereby in consideration of the said indebtedness (wrongly stated in the deed to be $2,674.05) and of the sum of one dollar he assigned to the defendants all the said insurance moneys "to the extent and amount of $762" payable to him under the said policies subject to a prior assignment in favour of one W. E. N. Holmes to the extent of $747.43 and he appointed an attorney to endorse any cheques for the insurance money on his behalf and to receive the proceeds upon trust to pay the same to the defendants. The defendants received in cash from Brown at the date of the execution of this document the sum of $100 and subsequently received the sum of $762 in the manner agreed upon from the insurance companies.

On May 30, 1912, the plaintiff company brought this action to set aside the deed of April 4, 1911, as being made in violation of the provisions of the Assignments Act and for an accounting by the defendants for all sums collected by them by virtue of that transaction.

It was contended by the defendants that the deed of April 4, was given in pursuance of a previous verbal agreement entered into on January 4 of the same year between Brown and the defendants' representative, Clark.

There are, therefore, two dates with reference to which it may be necessary to decide whether Brown was in insolvent circumstances or not, viz.: April 4 and January 4.

The evidence of Brown on cross-examination by which the defendants attempted to shew that he was not insolvent within the meaning of the Act on April 4, appeared to me to be very unsatisfactory. He seems to have given Poapst, the solicitor for the defendants who drew up the deed of April 4, the sum of $7,701.05 as the extent of his liabilities. But he was not able to say at the trial whether this was the correct amount or not and he gave me the very distinct impression that he had little accurate knowledge of the true state of his affairs at that date. He said that he thought then that he could "pull through" and

had then no thought of assigning but that very soon his creditors began to press him and he decided to assign. Howard, the manager of the plaintiff company testified that the assignee had received claims verified in the way prescribed by the Act to the amount of $10,345.32.

In the absence of any evidence to shew that Brown had, between April 4, and April 25, that is, in a period of three weeks during which he simply entertained the opinion that he could "pull through" and while his creditors were pressing him, increased his liabilities by incurring debts to the extent of $2,644 I think the Court ought to take the evidence of Howard as decisive upon the question. It is curious that the difference between $7,701.05 and $10,345.32 is just $2,644, that is within three dollars of the amount of the defendants' claim against Brown, and this suggests to my mind the explanation that in giving the amount of his liabilities to Poapst, Brown had given the amount exclusive of the claim Poapst was representing. Of course this is not very consistent with Mr. Poapst's direct testimony, but it may be that Mr. Poapst was under some misapprehension. But even if there is nothing in this suggestion, as perhaps there is not, I think I ought to consider Brown's liabilities as having reached the amount stated by Howard.

Howard gave the amount of assets which had come into his hands as $3,682.95. Brown gave them as amounting to $8,025 on April 4. This, of course, included the insurance moneys which never came into the assignee's hands. There is no necessity however to fix them definitely because even taking the largest possible sum they fall considerably short of the amount of the liabilities. I think therefore that I must conclude that Brown was insolvent when he signed the deed of assignment of April 4. This brings the case within sec. 42 of the Act because the effect of the deed was clearly to give the defendants a preference. Inasmuch as an assignment was made within sixty days it does not appear that the question of intent is material. This seems to distinguish the case from *Tudhope* v. *Northern Bank*, 10 W.L.R. 122, in which there does not appear to have been any assignment for the benefit of creditors. The case of *Benallack* v. *Bank of British North America*, 36 Can. S.C.R. 120, is also distinguishable not only for the same reason but also because the whole reasoning of the judgment of Mr. Justice Idington rested upon the presence of the word "such" in the section of the ordinance there under consideration. It was obvious in that case that the effect of the use of this word before the words "conveyance assignment, etc." was to continue into the section the element of intent as set forth in the previous section. In the present case sec. 42 stands by itself and the element of intent

ALTA.

S.C.
1914

TRUSTS AND GUARANTEE CO. v. WHITLA CO.

Stuart, J.

is not introduced into sec. 42 either directly or by implication. Moreover sec. 43 expressly negatives the necessity of intent and removes the element of pressure also from consideration.

It follows that the deed of April 4, standing by itself, would be a violation of the Act and therefore void as against the plaintiffs.

There remains to be considered the effect of the transaction of January 4. The contention of the defendants as I understand it is, that whether the deed of April 4, and the subsequent payment in pursuance of it were given and made exactly in fulfilment of a prior agreement or not, at any rate under the prior agreement they were, on April 4, and afterwards, equitably entitled to be paid what they in fact received, that the prior agreement was made at a time when Brown was not insolvent; or, if he was, there was in any case no intent to prefer on Brown's part or at the very least no intent to receive a preference on theirs.

It is clear that both insolvency and such a concurrence of intent are necessary to be shewn in order to set aside the transaction of January 4. Upon this point both *Tudhope* v. *The Northern Bank*, 10 W.L.R. 122, and *Benallack* v. *Bank of British North America*, 36 Can. S.C.R. 120, are authorities.

Inasmuch as I can find on the evidence no such concurrence of intent with respect to the alleged agreement of January 4, it is not necessary to discuss the question of insolvency at that date. Even if Brown were then insolvent it is clear that the defendants had no knowledge of it. There is no suggestion in the circumstances shewn by the evidence that the defendants had any thought of obtaining a preference over other creditors.

But it was contended by the plaintiffs that the conversation between Brown and Clark on January 4 had no legal effect at all. The plaintiffs contended that quite aside from any question of insolvency or intent to prefer that transaction had no legal effect of any kind and that the defendants were driven to rest their claim upon the deed of April 4. What happened was this. Brown had begun business in 1908 with a capital of only $500. He had got along pretty well for a time and had dealt mainly with the defendants in getting his stock. The year 1910 was a hard year and as Brown had given a good deal of credit he became towards the end of that year unable to meet his payments promptly. He went to Winnipeg to the head office of the defendants to arrange for an extension of time. He then owed the defendants about $2,200 of which $1,300 was over due. Brown in his evidence admitted that he had talked about his insurance with Clark, the defendants' representative, but said he did not recollect promising to assign any assurance to them. He

said he had no policies with him at the time. He did remember however that Clark asked him to assign to them some of his insurance. He admitted that he had arranged an extension. In these circumstances it is obvious that I must accept Clark's definite statement that an extension of time was agreed upon upon consideration of the promise of Brown to send down an assignment of insurance to the extent of $2,500. In such a situation it is only natural that Brown would agree to it.

The defendants' contention is that this agreement constituted a good equitable assignment and that, as it was given both for valuable consideration, *i.e.*, the extension of time which he in fact received, and also at a time when he was not insolvent, they are able to rely upon it quite apart from the deed of April 4.

I am of opinion however that this contention is not sound. There is no doubt that the contingent right to be indemnified for the loss by fire of insured property whenever the right shall in the future arise is capable of assignment in equity: *McPhillips* v. *London Mutual Fire Insurance Co.*, 23 A.R. (Ont.) 524. But the difficulty which, it seems to me, stands in the way of applying that rule here lies in the uncertainty as to the particular insurance policy or policies agreed to be assigned. According to Brown's statement to Clark he had insurance at the time to the amount of $6,500. I don't remember that Brown was asked in the witness box to say whether he did in fact at that time have insurance to that amount or that he said what amount he did in fact have. In the absence of any other evidence, I think the question should be treated as if the statement which he made to Clark which Clark swore to in his evidence and which Brown in his evidence admitted having made, was a true statement of the amount of insurance which he carried at that time. This being so, it is clear from the evidence of Clark that what Brown agreed to do was, not to give an assignment of *all* his insurance but to assign insurance to the extent of $2,500 as security for a $2,200 debt.

If it had been shewn in evidence that Brown at that time was carrying only $2,500 in insurance and no more, I think the defendants might have succeeded. But the case was dealt with on the trial upon the basis that Brown was then carrying $6,500 in insurance. At any rate if that was not the amount we have no knowledge at all as to what the amount was and the evidence at least pointed to there being more than $2,500 of insurance. Now the test seems to be this, could the defendants after Brown's return from Winnipeg to High River and before the fire had enforced against him his agreement to assign $2,500 worth of insurance? A similar question was raised in *Godwin*

ALTA.

S. C.

1914

TRUSTS AND GUARANTEE CO. v. WHITLA CO.

Stuart, J.

v. *Murchison National Bank*, 17 L.R.A. (N.S.) 935, and in a note to that case it is stated that one important question is

> the sufficiency of the antecedent agreement to establish a title or lien which would be considered valid in equity as between the parties.

And it is further said:—

> If the agreement is so imperfect as to be inoperative as a transfer of the property to which it relates even in equity there can be no question that the date of the actual transfer is the only one to be considered.

This states clearly enough the exact point involved here. Now it seems to me that the views expressed in the House of Lords in *Tailby* v. *The Official Receiver*, 13 A.C. 523, shew plainly that if Brown had given a charge upon or had agreed to assign all moneys which might become due to him as indemnity under all insurance policies which might cover his property wherever a fire occurred the defendants could have enforced it against him. There would then have been no uncertainty whatever as to the future property which he intended to charge or to assign. But that is not what was agreed upon according to Clark's evidence. It was stated to Clark by Brown that he, Brown, was carrying $6,500 worth of insurance and Brown agreed to assign $2,500 worth of it to the defendants as security for his $2,200 debt. Now the parties did not then know what the policies were. Brown did not have them with him. In effect, what Brown said was

> Of the $6,500 worth of insurance I *now* carry in whatever companies and under whatever policies it may be I will assign $2,500 to you if you will extend the time for the payment of my debts.

It seems to me there are two difficulties in the way of applying the principle of *Tailby* v. *The Official Receiver*, 13 A.C. 523. In the first place the evidence at the trial does not by any means establish that the policies current on January 4 were any of them identical with the policies assigned on April 4, by the deed of that date. This may have been assumed by the parties at the trial but there was no evidence at all upon which I can find such a fact. In the second place even supposing the policies current on January 4, included the policies referred to in the deed of April 4, it is difficult for me to see how a Court could have fixed upon any particular policy or policies during January as that or those upon which the defendants were entitled to a charge. Upon what policy would the Court have laid the charge? Upon what policy or policies can I now say that a charge or lien did in reality exist in equity during January? It is quite impossible for me to declare upon the evidence of Clark that there was created by virtue of the agreement to which he testifies a lien or charge upon the policies referred to in the deed of April 4. I quote the words of Lord Justice

Turner in *Mornington* v. *Keane*, 2 De G. & J. 290 at 318, 44 E.R. 1001 at 1011:—

> I believe there is no case in which a lien has been held to be created by a covenant to charge property not defined by the covenant and where there has been no acquisition of property with intent to perform the covenant.

It therefore appears to me impossible for the defendants to get any advantage from the agreement of January 4, even assuming the defendant then to have been solvent. This latter question need not for this reason be discussed.

The result is that the plaintiffs are entitled to succeed. There will therefore be judgment declaring the deed of April 4, 1911, void as against the plaintiffs and directing the defendants to account for all sums received by them by virtue of it. A direct judgment for the sum of $762 is not asked for in the claim but that would appear to be the particular relief to which the plaintiffs are entitled. The plaintiffs are entitled to their costs.

Judgment for plaintiffs.

CANADIAN PACIFIC R. CO. v. KERR.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 10, 1913.

(Supplementary to the report contained in 14 D.L.R. 840.)

RAILWAYS (§ II D—75)—*Fires—Origin from locomotive—Inference.*]—Subsequent to the handing down of the opinions of the other Judges who sat in this case and which are printed in 14 D.L.R. 840, the following opinion was handed down by the Chief Justice, concurring in the dismissal of the appeal.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs. The plaintiff had a right of action although the quantum of damages might depend on the character of his title. (See ch. 129, sec. 132, R.S.B.C.) Also *Dinan* v. *Breakey*, 7 Q.L.R. 120. Could that question be raised on this record? I am very doubtful. (See *Hamelin* v. *Bannerman*, 31 Can. S.C.R. 534.)

The origin of the fire is fixed by the witness Anderson beyond dispute. The material elements of fact from which the inference of negligence was drawn were: an unusually hot summer and a consequently parched surface in the immediate neighbourhood of the railway track. The engine went by the place at which the fire was first seen at ten minutes to two in the afternoon, when there was no fire. Ten minutes afterwards the fire was seen by Anderson, and five minutes later by the engineer of the next train. I think the fair inference was drawn by the Judge and we should not interfere. *Vide Smith* v. *London and South Western R. Co.*, L.R. 5 C.P. 98.

B. C.

1913

DOCTOR v. PEOPLE'S TRUST CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. May 20, 1913.

CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—*Powers of officers—Unauthorized contract of general manager—Scope of apparent authority.*]—Appeal by defendant from the judgment of Murphy, J., at trial in favour of the plaintiff in an action to recover for architect's services in preparing building plans.

In support of the appeal it was argued that the work which had been done on the order of Mr. Cook, a director, and the "general manager" of defendant company was in fact done for the People's Trust Building Co., a separate corporation, although Mr. Cook had purported to act for defendant company and used its letter-heads in the correspondence. It was urged that there being no real authority from defendant company to Cook, to enter into the contract with plaintiff, the latter should not have been given judgment in the Court below.

Wilson, K.C., for defendants, appellants.

A. H. MacNeill, K.C., and *Bird*, for plaintiff, respondent.

THE COURT OF APPEAL held that defendant company had the power under its articles of association to erect a building such as the plans in question called for, and that by their articles of association any one of the directors might be authorized to act as the company's agent. The articles were in general conformity with those of the Companies Act, R.S.B.C. 1897, ch. 44, under which the company was incorporated. A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their present authority, and that strangers dealing *bonâ fide* with such persons have a right to assume that they have been duly appointed: *Smith* v. *Hull Glass Co.*, 8 C.B. 668, 21 L.J.C.P. 106; *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 93, 65 L.J. Ch. 536.

In the present case the articles provided that the business of the company should be managed by the directors and any of the directors might be appointed to act as agent for the company. Cook might have been appointed, and the transaction being within the ordinary business for which the company was formed it was not necessary, as regards the plaintiff, to ascertain whether the appointment was in fact made or that the powers exercised by Cook were in conformity with the terms, if any, given to him by the directors.

Appeal dismissed.

INDEX OF SUBJECT MATTER, VOL. XVI., PART 2

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XVI., PART 2.

Re PAMBRUN and SHORT.

ALTA.

S. C.
1914

Alberta Supreme Court, Beck, J. March 11, 1914.

1. MORTGAGE (§ VII C—157) — REDEMPTION — TENDER AFTER MATURITY — NOTICE OR BONUS—LAND TITLES ACT (ALTA.).

As a mortgage of land in Alberta under the Land Titles Act (or Torrens system) constitutes merely a charge on the land and does not grant the mortgagor's estate subject to a right of redemption, a mortgagor in default after maturity of the principal money and before foreclosure may, in the absence of any stipulation therefor, redeem without giving six months' notice or six months' interest bonus in lieu thereof as it was the practice in England to require under mortgages whereby the legal estate had passed and in regard to which the defaulting mortgagor was permitted to redeem only by the application of equitable doctrines.

[*Archbold* v. *Building and Loan Assn.*, 15 O.R. 237, and in appeal, 16 A.R. (Ont.) 1, considered.]

Statement

QUESTION for decision as to the notice or bonus, if any, payable by a mortgagor desiring to pay off his mortgage after maturity.

D. W. MacKay, for the mortgagor.

Geo. F. Downes, for the mortgagee.

Beck, J.

BECK, J.:—It has been left to me to decide whether the English rule or any modification of it is in force in this province which requires a mortgagor in default to give the mortgagee six months' notice of his intention to pay the mortgage debt or in lieu of notice to pay six months' additional interest.

The rule in England was a rule of the Court of Chancery. The reason for it is stated as follows:—

So that, whenever the mortgagee calls in his money, the mortgagor must pay it; but the mortgagor is not in the same situation. He cannot compel the mortgagee to take his money at a moment's warning; he must give the mortgagor six months' notice to receive it, or, which is the same thing, pay him six months' interest in advance, *because the day of redemption at law being passed he has lost his estate at law and can be let in to redeem by a Court of equity only;* and a Court of equity will not assist unless he do equity; and the Court holds that it is equitable that the mortgagor give six months' notice of paying in the money to enable the mortgagee to provide another place for it; so that it is incumbent on a mortgagor to give notice (a passage quoted in the case mentioned below).

The question was considered in Ontario in the case of *Archbold* v. *Building and Loan Association* (1888), 15 O.R. 237; reversed on a ground not affecting this question, (1888) 16 A.R. (Ont.) 1.

Of the three Judges composing the Court, Armour, C.J., held that neither the rule nor any modification of it was in force. Street, J., held that it was in force to its full extent, chiefly on the ground that the Court of Chancery in Ontario

ALTA.

S. C.
1914

RE PAMBRUN AND SHORT.

Beck, J.

had long recognized it; Falconbridge, J., concurred with Street, J., but said that he should not be sorry to find that he was wrong.

The opinion of Armour, C.J., was as follows:—

The rule that after default in the payment of the principal money secured by a mortgage the mortgagee is not bound to receive it unless after six months' notice, or upon payment of six months' interest, is, no doubt, of great antiquity, but that is its only merit. It is an unjust rule, for it does not bind both parties alike. It permits the mortgagee to call for payment at any time without any notice, and it compels the mortgagor to give six months' notice, or be mulcted in six months' interest, before he can compel the mortgagee to receive. It puts another instrument in the hands of the extortioner with which to vex his unfortunate debtor, and, in my experience, it is never invoked except by those who do not aim to be of good repute. It will, however, like every other mode of oppression, have its defenders, and will be chiefly and most stoutly defended by those who use the maxim: "Thou shalt love thy neighbour as thyself" only for the purposes of devotion. It was formulated at a time when redemption was regarded only in the light of an indulgence to the mortgagor, and before it had come to be looked upon as a right. It was adopted and has continued to exist in England under circumstances and modes of dealing wholly different from those which prevail in this province, and it is wholly unsuited to the circumstances and modes of dealing in this province, ought never to have been introduced here, and ought not now to be followed or recognized.

The absence of such a rule can work no wrong to the mortgagee, for upon default he can insist on payment, or on a new agreement for payment from his mortgagor.

There are additional reasons for the adoption in this province of the view of Armour, C.J. Mortgages, with us, do not grant the mortgagor's estate, subject to a right of redemption; they constitute merely a charge upon his estate. The people of the province are necessarily rather borrowers than lenders. Eastern capitalists recognize it as a good field for investment. There is no difficulty and there never has been any difficulty in securing promptly good investments. So I adopt the opinion of Armour, C.J.

There was no express provision in the mortgage in this case covering the point in question. Whether and to what extent such a provision would be effective, I have not now to decide. The matter has been dealt with by statute in Ontario, R.S.O. 1897, ch. 121, sec. 17, and in Manitoba, R.S.M. 1902, ch. 115, sec. 7.

Order accordingly.

VINEBERG v. VINEBERG.

QUE.
K. B.
1914

Quebec Court of King's Bench (Appeal Side), Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. February 24, 1914.

1. TRADE NAME (§ I—9)—INFRINGEMENT—UNFAIR COMPETITION.

Where the defendant company had selected a corporate name resembling the plaintiff's corporate name, embarked in a trade the same as that of the plaintiff company previously established in the same city, and in so doing conspicuously advertised in connection therewith a trade word (*ex. gr.*, "progress"), which, although it may not constitute a valid trade-mark, was publicly known to have been used by the plaintiff company as descriptive of its goods, and where the defendant's action is found to be injurious to the plaintiff company by leading the public erroneously to suppose that the goods sold by defendant company are of the plaintiff's make, an injunction will lie to restrain the further use of such trade word, although the defendants had added thereto the word "proclaimed" in substitution for the word "brand" which followed it in the plaintiff's advertising.

[*Standard Sanitary Mfg. Co.* v. *Standard Ideal Co.*, [1911] A.C. 78, referred to.]

Statement

APPEAL by defendants Vineberg's Limited from the judgment of the Superior Court granting the plaintiffs H. Vineberg & Co., Limited, a perpetual injunction in restraint of alleged unfair competition in the publication of certain advertising matter. The publishers of a newspaper in which the advertisement objected to appeared had been made parties *mis-en-cause* under the Quebec procedure.

The appeal was dismissed.

Peter Berkovitch, K.C., and *E. G. Place*, for appellant.

S. W. Jacobs, K.C., and *G. C. Papineau-Couture*, for respondent.

The opinion of the majority of the Court was delivered by

Carroll, J.

CARROLL, J.:—Plaintiffs are manufacturers and wholesale merchants of Montreal. They erected a large eight-storey building at the corner of Duluth avenue and St. Lawrence blvd. to manufacture goods which bear as trade-mark the words "Progress Brand." In 1908 they were formed into a company by Federal letters patent under the firm name of H. Vineberg & Co., Ltd. They deal in men's, youths' and boys' clothing. Their trade-mark "Progress Brand" has been registered at Ottawa.

The defendants also obtained letters patent from Ottawa in 1912, and were constituted a corporation under the name of Vineberg's Ltd. They opened an establishment for the retail sale of clothing at the corner of St. Urbain and St. Catherine streets, not very far away from the plaintiffs' establishment.

On March 21, 1912, they published in the *Star* and in the *Herald*, an advertisement covering an entire page in each of

QUE.
K. B.
1914
VINEBERG
v.
VINEBERG.
Carroll, J.

these newspapers. At the top of this advertisement, extending across almost the whole width of the page, the words "Progress Proclaimed" appear in large type. There is, moreover, a female figure wearing a band on its head on which is printed the word "Progress." The typographical characters are about the same as those used by the plaintiffs for their trade-mark "Progress Brand."

Plaintiffs complain of this proceeding. They state that, owing to the similarity of the names of the two companies, the fact of printing in connection with it the word "Progress," was of a nature to lead the public into error, and, as a matter of fact, did lead it into error, and that the defendants' object in constituting themselves into a corporation under the firm name of Vineberg's Ltd. was to appropriate the credit and the clientèle of the firm of H. Vineberg & Co., Ltd.

An interlocutory injunction issued on the petition of the plaintiffs; this injunction was declared absolute and perpetual by the judgment of the Superior Court, but no damages were awarded to the plaintiffs although they demanded in their conclusions $50,000.

Defendants plead that, in using the word "Progress" as they did, they had no intention of injuring the plaintiffs; that the word "Progress" is an ordinary word of the English language which cannot be used as descriptive in a special manner of goods or merchandise; that everybody can use this word; that they were not attempting to copy the trade-mark of the plaintiffs' "Progress Brand," and that, as a matter of fact, the public was not deceived and did not confound the two firms.

In 1902, the predecessors in title of the plaintiffs registered their trade-mark, the words "Progress Brand." They expended large amounts of money to advertise their goods which have become very well known throughout the country.

Vineberg's Ltd., before March, 1912, were not in existence. Before that date the principal shareholder of the new firm carried on business together with one Goodman under the firm name of "Vineberg, Goodman & Co." Goodman's name was omitted from the new firm although he was still interested therein. The reason of this, however, is not disclosed by the evidence.

Vineberg's Ltd. leased the ground floor of the Kellert building, an eight-storey building on St. Catherine street. It is rather strange that in the advertisement, a pennant with the words "Vineberg's Ltd." is seen floating at the top of the building.

The advertisement, as it appeared in the *Star*, shews a female figure kneeling before the Kellert eight-storey building, a building which resembles rather closely the building which the plaintiffs had erected for the manufacture of their goods, and this

advertisement contains the word "Progress," and underneath it the word "Proclaimed."

What effect did such an advertisement have? It most certainly led into error the merchants of Montreal, and even those who bought from the plaintiffs their "Progress" goods. The impression which obtained was that the plaintiffs, who are wholesale merchants, had opened a retail store, which, in the eyes of the retail trade, is absolutely improper and unfair to them. Mr. Larue, manager of the men's clothing department of Henry Morgan & Co., said:—

Q. Mr. Larue, will you tell the Court what was your own impression and what was the impression of the department when this advertisement came out? A. My impression was that the firm advertised as Vineberg's Ltd. "Progress Proclaimed" was a retail store of H. Vineberg, Ltd., and so much so that I, who, at the time was assistant manager, had a conference with the manager at which we both stated that if this were the case no goods of the firm of H. Vineberg would ever come into our store. That was my impression and the impression of the then manager.

Later, he adds:—

The name "Progress" has been very well known for a very long time.

William Currie, retail merchant, says:—

Q. Did you remark anything particular about the advertisement, and if so, what? A. I remarked that the word "Progress" was there, and I took it for granted Mr. H. Vineberg must have made some special arrangement with this firm to handle his clothing, as I knew that the word "Progress" was Mr. Vineberg's trade-mark.

Q. Now is there any similarity between the figure of the vignette which appeared in this advertisement on the 21st of March, 1912, and the figure which forms the trade-mark? A. The word "Progress" is there.

Q. Is it not true that the word "Progress" is employed all through in the advertisement, whenever it appears with the meaning given to it in ordinary English, and not as indicating any special kind of clothing? A. The word "Progress" is so intimately connected with H. Vineberg and Co. Ltd. clothing that I could not help but think that the word "Progress" all through the advertisement had a bearing on the word "Progress" clothing.

Q. If you had been a member of the public, if you had not handled "Progress" clothing yourself for many years, would you have taken the ordinary English meaning which is given to the word "Progress" from that advertisement? A. Naturally I would.

Mr. McCaskill, who was manager of the firm of John Allan, said:—

Q. Is it not a fact that the word "Progress" is used in that advertisement in its special English sense to declare that advancement of some sort is being made? A. If this advertisement was put in by any other firm, but a firm by the name of Vineberg, using the word "Progress" would know that it caused a disadvantage to Mr. Vineberg.

QUE.

K. B. 1914

VINEBERG v. VINEBERG.

Carroll, J.

Q. But you would not have heard if another firm had put in that advertisement that they intended to advertise "Progress Brand" clothing? A. I won't say. The two names coming together certainly gave anyone in the clothing business an impression that it is "Progress Brand."

The most convincing proof that this advertisement could mislead the public is to be found in the very admission of the president of the defendant company, who, when asked:—

Q. You have in your possession about a dozen invoices and statements sent to you by the attorneys for H. Vineberg & Co. Ltd. received by them in mistake for your firm? You have these? A. I have those, yes.

The learned trial Judge has found this advertisement of a nature to mislead the public, and that, as a matter of fact, it has misled the public. We agree entirely with him on this point.

The defendants rely on the decision rendered by the Privy Council in the case of *Standard Sanitary Manufacturing Co.* v. *Standard Ideal Co.*, [1911] A.C. 78, where it was held that the word "Standard," being an ordinary word of the English language, could not validly be appropriated as a trade-mark, inasmuch as it could not be used for differentiating different kinds of goods.

Defendants say that the word "Progress" belongs to this ordinary category of words which a trader cannot appropriate unto himself to the exclusion of others. This argument, taken in the abstract, is well founded, but it cannot recover all the cases which may arise in practice.

I believe—although this Court expresses no opinion on this point—that the word "Progress" cannot be used by a merchant exclusively for the purpose of identifying his goods. Nevertheless when a joint-stock company is formed and takes the name of another merchant, with but a slight difference, and when it appropriates unto itself a well-known word which has been used for the identification of the goods of this other merchant; when the advertisement indicates an establishment of a similar kind to that already in existence; when in this advertisement at the top of the new establishment the same name appears with but a slight variation—whereas, as a matter of fact, the name does not appear on the building as it exists in reality—the conclusion flows irresistibly that an attempt has been made to deceive the public and that this attempt has succeeded.

Kerr, on Injunctions, 4th ed., at 332, cited by the respondent, says:—

The principle which applies to the case of a man selling his goods as the goods of another, applies to the case of a man using the name of another for the purpose of reaping the benefit of the reputation which that other has already acquired in the market. A man has a right to set up a shop anywhere for the sale of goods under his own name, although another may have been selling the same class of goods under the same name,

and although the goods, as associated with his name, may have acquired a reputation in the market. The mere use by a man of his own name is, of itself, no evidence of fraud, but there may be other elements in the case shewing that the name has been fraudulently used for the purpose of leading the public to believe that they are buying goods manufactured by another man, and so reaping the benefit of the reputation which another has already acquired. It is in each case a matter of evidence whether or not the user of the name has been fraudulent.

And again, at page 334:—

Where a man has established a trade and carries it under a given name, there is fraud if another trader assumes the same name, or the same name with a slight variation, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given the reputation to the name.

Aulart, in his work on Unfair Competition (Concurrence Déloyale), cites a decision of the Court of Paris of 1888, which has a certain analogy with the present case. There it was held that, although a patronymic name is the property of and belongs to the bearer thereof, yet it cannot be used for purposes of unfair competition. More especially, although a limited partnership may choose from among the names of its partners that which suits it the best as its firm name, and for its marks and labels, yet it is not lawful to make this choice so as to divert to its benefit the clientèle of an old-established firm which bears the same name and which carries on the same industry or business.

This decision supports the remarks of the learned trial Judge when he states that in the present case we are dealing with a limited partnership.

It has also been held that where a trader has adopted as his sign a sculpture representing two golden oxen drawing a plough with the motto "*Au bœufs d'or*," a competitor established in the neighbourhood cannot use for his sign a sculpture representing two golden oxen drawing a chariot laden with sheaves, with the words "*Aux Moissonneurs.*" For if the differences which exist between two signs are sufficient to distinguish the two stores, the points of similarity between these signs must lead into error those persons who do not examine the stores with very great attention (Angers, November 13, 1862; *Gaillard, Annales* 62, 75, cited in Aulart's work, p. 106).

I have spoken sufficiently to shew what we think of this case. It is a dishonest attempt to appropriate the clientèle of an old-established firm.

Again the defendants cite the *Standard Ideal* case, [1911] A.C. 78. On the facts the learned trial Judge and this Court had unanimously declared that the designs and engravings of the older company had been obtained dishonestly, and that the

QUE.
K. B.
1914
VINEBERG
v.
VINEBERG.
Carroll, J.

public had been deceived. The trial Judge—the very one who has given judgment in this case in the Court below—and the Judges in appeal were unanimous on this question of fact. Their decision was set aside by the Privy Council which declared:—

> There is no proof that any person has ever been deceived by the alleged similarity between the trade designation used by the defendant and that used by the plaintiff, nor is there any probability of deception,

and as to the accusation of "passing off" the Privy Council said:—

> It is impossible to come to the conclusion that the trade designation adopted by the defendant company is calculated to deceive or to lead customers to believe that in buying its goods they are buying the goods of the plaintiff company.

Were the question a purely legal one we should accept with respect, as we always do, a decision of a higher Court, but there can be no jurisprudence which binds us on a question of fact.

I must say, however, that the present case is clearer than the former one, and we have no hesitation in confirming the judgment of the Superior Court.

CROSS, J.

CROSS, J.:—The plaintiff, respondent, is a wholesale dealer in ready-made men's and boys' clothes, one of the kinds of clothes being known in the markets as "Progress" or "Progress Brand."

The defendant, appellant, is a newly incorporated company doing business as a retail dealer in ready-made clothes including men's and boys' suits.

An interlocutory order of injunction issued in this action restraining the appellant and certain newspaper publishers, pending the suit, from continuing to publish an advertisement under the heading "Progress Proclaimed," or any advertisement wherein the word "Progress" is used.

In the respondent's complaint, it is in substance set forth that the appellant is publishing the word "progress," in respect of its business and of its name, so as to make tradesmen and people in general take it as a business of selling the respondent's "progress" clothes, that the advertisements and even the charter-name of the appellant are contrivances to make its business appear to be the respondent's business, and that from all this the respondent suffers.

The prayer of the action (apart from a demand for damages not now in question) is that the interlocutory injunction be made perpetual, "and that as a result the Court be pleased to enjoin the defendant, its officers, representatives . . . to cease, under pain of all legal penalties, from continuing to publish the advertisements herein complained of, to wit, any advertisements wherein this word 'Progress' is used."

The injunction, as made by the judgment now appealed from, is as follows:—

Doth confirm the said interlocutory injunction; doth enjoin the defendant against the use of the word "progress" in any manner in connection with its business which may have the effect of deceiving the public, and doth also render the same perpetual against the *mis-en-cause*, and doth condemn the defendant to pay the costs of the action.

The Court would seem to have granted more than the respondent asked for. It would appear that at one point in the trial the defendant proposed to put in evidence about letter headings, but desisted upon an objection on behalf of the plaintiff, made as follows:—

Mr. Jacobs, K.C.:—I do not see that that is necessary. We are not complaining of that at all. I object to the production of the two letterheads, inasmuch as they do not affect our cause at all. We are not complaining of their letterheads and billheads. We are merely complaining of the two advertisements which appeared in the *Star* and *Herald* of the twenty-first of March, 1912.

I, however, feel relieved of having to consider this as a matter of importance because I do not find, in the appellant's printed or oral argument, any complaint that the restraint adjudged has gone *ultra petita*.

Proceeding to a consideration of the merits of the action, I take it that we are to eliminate the respondent's claim to rest upon its trade-mark—assuming that it has proved its title to the mark—for the reason that one person cannot acquire a right to the exclusive use of such a word as "progress."

Taking the action as it stands, it may be mentioned in a preliminary way that it is said in English law that

A man cannot give to his own wares a name which has been adopted by a rival manufacturer, so as to make his wares pass as being manufactured by the other. But there is nothing to prevent him giving his own house the same name as his neighbour's house, though the result may be to cause inconvenience and loss to the latter: Mayne on Damages, 8th ed., 9.

If the second proposition just quoted had been recognized as law here it would not be surprising to find decisions in trade-name cases, such as are to be found where that proposition is admitted which shock the sense of justice.

The action before us, whether the rules to be applied be those of English or of older French law, is to be decided, not by reference to the niceties of trade-mark law, but by application of elementary principles of the law of torts or quasi-offences. The question for decision may be thus stated: Is there a violation of legal obligation on the part of a defendant who, having selected a name resembling the plaintiff's name,

QUE.

K. B. 1914

VINEBERG v. VINEBERG.

Cross, J.

embarks in a trade the same as that of the plaintiff in the same city, and, in so doing, conspicuously advertises in connection with his trade a word which anybody may use but which is publicly known to have been used by the plaintiff as descriptive of his goods, the defendant's action being of a nature to injure the plaintiff?

That, in my view of what has been proved in this case, is an accurate statement of the issue presented.

It is in substance what the learned Judge of the Superior Court has found to have been proved, and the only point of appreciation of fact of which I could make mention is that, in relation to the objection of the appellant to his being criticised for use of the name "Vineberg's Limited" in view of the fact that the principal shareholder's name is Vineberg. I attach weight to the consideration that the name "Vineberg's Limited" is none the less an artificial creation which the appellant has taken the responsibility of adopting. In that aspect companies and natural persons are not on the same footing: *Ouvah Ceylon Estates (Ltd.)* v. *Uva Ceylon Rubber Estates (Ltd.)* (1910), 27 Times L.R. 24.

It is right that a natural person should be more at liberty to use his real name even to the injury of another person of the same name but the same reason does not exist when the defendant's name—as in the case of a joint-stock company—is an adopted one.

With that incidental observation, I take the facts as found by the learned trial Judge. The proof, moreover, leaves no room to doubt that the appellants suddenly launched illustrated advertisements with conspicuous display and association of the words "Vineberg's" and "Progress" or "Progress proclaimed" in inaugurating a trade in ready-made clothing, had upon the respondent's long-established business the very effect which anybody would expect such an operation to produce. In short, the appellant was doing the respondent a grievous wrong.

If case law alone had to be applied to the determination of this controversy, difficulties in the respondent's way can be seen or imagined.

But with the declaration of article 1053 C.C. before us and with the useful machinery of injunctions made available by articles 957 and following C.P. there is nothing in the way of giving the respondent the relief for which it has asked.

A decision is noted in the "Répertoire" of Fuzier Herman —title "Concurrence Déloyale" worded as follows:—

167. Une société qui exploite le commerce sous un certain nom commercial peut demander à ce qu'une personne, portant réellement le même nom, qui vient s'établir à proximité de ses magasins et se livre au même commerce, ajoute sur ses enseignes te réclames certaines indications de

nature à différencier les deux établissements: Tribunal commercial Seine 17 Juin 1887.

That is an indication of a mode of relief which can appropriately be applied in such a case as this one.

It is true that, in general, an injunction should be specific so that the restrained party may know clearly what is forbidden.

I nevertheless consider that the appellant has no grievance in that respect. Having put itself in the wrong, if it makes use of the word progress in promoting its trade it will be at its peril if it does so to the injury of the respondent. I would dismiss the appeal.

Appeal dismissed.

REX v. ANDERSON.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck, Simmons, and Walsh, JJ. January 10, 1914.

1. CRIMINAL LAW (§ I B—6)—INSANITY AS A DEFENCE—DEGREE OF PROOF.

It is misdirection to instruct the jury in a murder trial in which the defence is insanity, that such defence must be made out so as to satisfy the jury "beyond a reasonable doubt," the latter expression having, by long judicial usage, become associated with the idea that more is required than merely being "satisfied" that the fact of insanity is proved.

[*McNaghten's Case*, 10 Cl. & F. 200, considered; *R. v. Myshrall*, 8 Can. Cr. Cas. 474, referred to.]

2. EVIDENCE (§ II F 5—174)—PRESUMPTION AS TO SANITY—PREPONDERANCE OF EVIDENCE TO REBUT.

The rule as to presumption of sanity "until the contrary is proved" (Cr. Code 1906, sec. 19), as applied to a defence of insanity in a criminal case merely requires proof of insanity by a preponderance of evidence to the satisfaction of the jury.

[*R. v. Jefferson*, 72 J.P. 467, 1 Cr. App. Cas. 95, 24 Times L.R. 877, considered.]

3. EVIDENCE (§ IV O—467)—MEDICAL BOOKS—ORAL PROOF OF THEIR AUTHORITY.

If a witness called to give expert testimony is asked about a text book (*ex. gr.*, as to mental diseases) and expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence; but, if he admits its authority, he then, in a sense, confirms it by his own testimony, and then may quite properly be asked for an explanation of any apparent differences between its opinion and that stated by him.

4. TRIAL (§ I D—15)—STATEMENT OF COUNSEL—MURDER TRIAL—REFERENCE TO POSSIBLE COMMUTATION OF SENTENCE.

It is not error entitling the accused to a new trial that the Crown counsel in addressing the jury in a murder case stated, as was the law, that the Crown through the Department of Justice might reduce a sentence of death, if the accused were convicted, by substituting a term of imprisonment, where such statement was elicited by a reference made by counsel for the accused in his address to the jury to the disgrace which would fall on the family of the accused

ALTA.

S. C.

1914

REX v. ANDERSON.

were he convicted, and where the trial judge afterwards instructed the jury that they should pay no attention to what the punishment should be.

5. EVIDENCE (§ VIII—670)—CRIMINAL LAW—POLICE PHYSICIAN QUESTIONING PRISONER TO DETERMINE ON SANITY.

Answers to questions put to a prisoner in custody by a police physician who put the questions merely for the purpose of forming an opinion upon his mental condition are admissible to prove him sane where they were not in the nature of admissions or confessions as regards the charge against him, although no warning was given the accused that what he might say could be used in evidence against him.

[See Annotation at end of this case on questioning accused person in custody.]

Statement

CROWN case reserved on a conviction for murder.

L. F. Clarry, Deputy Attorney-General, and *W. A. Begg*, K.C., for the Crown.

A. A. McGillivray, K.C., and *A. Barron*, for the defendant.

Harvey, C.J.

HARVEY, C.J.:—This case came on by way of appeal from the refusal of my brother Simmons to reserve for the opinion of the Court 16 questions which counsel for accused asked him to reserve. After hearing the argument the Court consisting of my brothers Scott, Stuart, and Beck and myself were all of opinion that there was no sufficient ground to support any of the questions except question 12, upon which, though counsel had agreed that the argument might be considered as on a reserved case for the purpose of judgment, we thought it advisable instead of giving judgment in the manner agreed, to direct a reserved case in order that there might be a consideration of it by the full Bench.

The remaining questions upon which the reasons for our conclusions were not given at the time may be conveniently dealt with first.

The accused was convicted of the murder of his wife, and it is admitted by his counsel that the evidence clearly established the fact of the killing, under circumstances which, in the absence of explanation, would constitute murder. The defence was one of insanity and consequently the only question which was really in issue was whether the prisoner at the time he committed the act was insane. The questions are as follows:—

Q. 1. Is there any evidence to support the verdict of the jury?

Q. 2. Having regard to the evidence, is the said verdict perverse or such that reasonable men could not render?

In view of the fact that the law presumes every man sane and that the burden of establishing insanity is on the accused, and in view of the further fact that the evidence was, as is natural, largely expert evidence to which the jury could at-

tach such value as they saw fit, the first question must be answered in the affirmative and the second in the negative.

Q. 3. The third question relates to the refusal to allow a question which was asked the expert, Doctor Dawson, for his opinion as to whether, when the act was committed, the prisoner knew the difference between right and wrong. We intimated on the argument that no importance could be attached to this refusal, because, whether rightly or wrongly, the same question was subsequently permitted to be asked in the same terms and answered.

Q. 4. In the course of the direct examination of the said Dawson, I refused to allow counsel for the said Anderson or the said Dawson to read to the jury from any text books or any extracts dealing with mental diseases. Was such a ruling a proper one for me to make?

This question may be more conveniently dealt with in connection with questions 8 and 9.

Q. 5. A part of the direct examination of the said Dawson is as follows:—

Q. You know the work that I have quoted to you, "Stoddart on the Mind and its Disorders"? A. Yes, I think it was unnecessary for you to read it, I have given all the facts.

Q. But I am interested in knowing the opinion of others that have gone before you, whether they were of the same opinion? A. Yes.

Q. Do you know Tanze on Mental Diseases? A. Yes.

THE COURT:—In other words, you suggest that the statement of this witness is not sufficient for this jury and you yourself want to read it to them.

Was such remark, made by me to counsel for the said Anderson, improper, and, if so, could the same have effected a miscarriage of justice on the trial of the said Anderson?

The only questions which a Judge may reserve for this Court's consideration under sec. 1014 of the Code are questions of law arising at the trial. It is difficult to see how, in view of that fact, any such question as this could be reserved or what ruling, express or implied, is involved which, under sec. 1018, this Court would be required to consider.

It may be added, however, that the remark appears to be entirely justified considering counsel's preceding statement and the fact that it followed almost immediately upon the ruling dealt with in the preceding question.

Q. 6. Having regard to the evidence, was I justified in stating during the examination of the said Dawson that there was evidence that the late wife of the said Anderson had admitted that she was pregnant and that she had admitted that a man other than the said Anderson was the cause of it, or to blame for it?

Q. 7. Having regard to the evidence, was counsel for the Crown justified in asserting the fact or assuming during the course of the examination of

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Harvey, C.J.

the medical experts called as witnesses, that the late wife of the said Anderson had admitted that she was pregnant other than by the said Anderson?

It is difficult to see how any such questions as these could be reserved as relating to any ruling on a question of law, but be that as it may, it was in evidence from several witnesses and on accused counsel's own examination that accused had said that his wife had made such admission. It was clearly evidence therefore as against the accused that such admission had been made and there was no objection to the Judge or counsel stating or assuming what was the fact.

Q. 8. Did I improperly limit the cross-examination of Doctor Charles Ernest Smyth by counsel for the said Anderson in refusing to allow an examination of the said witness as to particular cases of insanity having regard to the fact that the said witnesses were called to give expert testimony?

Q. 9. Did I properly limit the cross-examination of the said Smyth by counsel for the said Anderson in refusing to allow the said counsel to read to the said Smyth from recognized text-books on mental diseases in the course of such cross-examination?

I agree with what my brother Beck has said with reference to the use of text-books. As all evidence is given under the sanction of an oath or its equivalent, it is apparent that text-books or other treatises as such cannot be evidence. The opinion of an eminent author may be, and in many cases is, as a matter of fact, entitled to more weight than that of the sworn witness, but the fact is that, if his opinion is put in in the form of a treatise, there is no opportunity of questioning and ascertaining whether any expression might be subject to any qualification respecting a particular case. A witness would not be qualified as an expert if his opinions were gained wholly from the opinions of others and the faith that is to be given to the opinion of an author of a treatise must come through the faith in the witness and the confidence to be placed in the witness's opinion, in theory, is not to be derived from the confidence in the author with whose opinion he agrees. On principle, therefore, nothing may be given from a text-book, other than as the opinion of a witness who gives it. On cross-examination the Judge should be careful to see that an improper use is not made of text-books, practically to give in evidence opinions of absent authors at variance with those of the witness. It is quite apparent that if the witness is asked about a text-book and he expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence, but if he admits its authority, he then in a sense confirms it by his own testimony, and then may be quite properly asked for explanation of any ap-

parent differences between its opinion and that stated by him.

Q. 10. Were the statements made by the said Anderson to Doctor Frederick Gershaw, a witness called by the Crown, properly admitted in evidence by me, if appearing that the said Gershaw was an officer of police and that such statements were elicited by questioning and without the customary warning to the said Anderson?

This question should be answered in the affirmative. The doctor was not a person having any control over the accused. He was not an officer of the police in the ordinary sense, but merely a police surgeon. Moreover the statements made in answer to his questions were not admissions or confessions in any sense. The questions were asked merely in order that the doctor might, from the answers and the manner of giving them and the general conduct of the prisoner, form an opinion as to his mental condition.

Question 11 was abandoned.

Q. 13. Having regard to the evidence, was that portion of my charge to the jury next hereinafter set forth a misstatement of fact? It is suggested that this man was labouring under a delusion particularly associated with the infidelity of his wife and that the effect of that on his mind for some weeks and possibly months, had been to deprive him of his reason, of his judgment and of his ability to distinguish right from wrong, or, if you like, of his ability to appreciate the nature and the quality of his act.

This also scarcely appears to raise any question of law, certainly no improper ruling. Moreover, there seems no objection to the statement on any ground. Counsel for accused stated that what he was trying to establish was that a person under a delusion might, after a period of time, become, momentarily, entirely devoid of reason and he suggests that the remark of the learned Judge indicated that he was trying to establish that he was deprived of reason "for some weeks and possibly months."

The proper reading and intention of the statement would seem to be entirely in accord with what counsel admits the evidence indicates, and not the construction he seeks to attach to it.

Q. 14. Having regard to the evidence of all the medical witnesses, was I right in charging the jury, by way of a caution to them, that it was their duty to examine the conditions incident to the occurrence much more closely where a man has been able to conduct his business as an ordinary business man and to use his reason and judgment in the usual business transactions incident to his walk in life?

Q. 15. Counsel for the Crown having said in the course of his address to the jury, something to the effect that, since counsel for the accused had spoken of the disgrace to family and relatives, he wished to point out that even though a verdict of murder was brought in that the Department of Justice or the Minister of Justice who has control of these matters might reduce the sentence of death to something less, confinement of the pris-

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Harvey, C.J.

omer or something of that nature. I recalled the jury and instructed them at length to the effect that they should pay no attention to what the punishment should be.

Was that statement by counsel for the Crown justifiable?

And if not, was my direction on the point sufficient to remove all possibility of a miscarriage of justice by reason of such statement?

These are both matters of fact and not of law. It is contended that the charge referred to in question 14 contains a suggestion of an incorrect interpretation of the evidence. Even if that would permit the Court of Appeal to review it, it does not appear that the evidence will support the contention.

As to question 16, it is not argued that the learned Judge could have protected the accused more than he did. Unless the trial Judge should have discharged the jury, the failure to do which would be an implied ruling that it was not his duty to do so, it is difficult to see what error there is on his part.

The statement made by counsel for the Crown was merely a statement in common language of the well-known fact that the right of clemency is in all cases in the Crown. That fact, should not, of course, in any way affect the jury in deciding whether the evidence establishes the guilt or innocence of the accused, but the trial Judge cautioned them fairly as to that and it is difficult to see how it could then be any more important than the common appeal to sentiment, more or less directly made in most criminal cases by prisoners' counsel, upon which the Judge also usually cautions them.

Question 12 which is now reserved is:—

Q. 12. Was my charge to the jury that the onus was upon the said Anderson to satisfy them "beyond a reasonable doubt" as to his insanity a proper statement of the law?

After the two arguments and the most careful consideration, I have come to the conclusion that although the matter was not put to the jury in the usual form, the expression "beyond a reasonable doubt" being commonly applied with reference to the proof of guilt in ordinary cases, nevertheless the expression as used by the learned Judge was in law strictly correct. The law with reference to the burden of proof when the defence of insanity is raised was declared by a conference of all the Judges in 1843 in *McNaghten's* case, 10 Cl. & F. 200, 8 Eng. R. 718. It is not necessary to deal with the definition of insanity declared by that case, but merely with the burden of proof since that is all that is raised by the question. In the note to the report in the English Reports (reprint) vol. 8, p. 718, it is stated that the rules laid down by that case have been rejected by many of the American States, but, as far as I am aware, though some of them, particularly those relating to the degree of in-

sanity necessary to free from responsibility, have been adversely criticised by text-writers, they have been uniformly accepted up to the present day as the declaration of the law in England and Canada. It is apparent then that a reference to American text-writers and cases can furnish no aid in determining the law in Canada on this subject.

In *McNaghten's* case, 10 Cl. & Fin. 200, 8 Eng. R. 718, it is laid down that

> the jurors ought to be told in all cases that every man is to be presumed to be sane and to possess sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong.

It is apparent that the only question to be determined is, whether "satisfying beyond a reasonable doubt" requires a higher degree of proof than "proving to the satisfaction" or "clearly proving." With the meaning I attach to the word "satisfy" I find myself unable to conceive how I can be satisfied that a thing is so, if I have any reasonable doubt that it is so. The new Standard Dictionary defines "satisfy" as meaning "to free from uncertainty, doubt or anxiety; to set at rest the mind of." Webster's International defines it in almost the same words: 'To free from doubt, suspense or uncertainty."

In Russell on Crimes, 7th ed., 65, there is a reference to *Bellingham's* case in 1812. The charge was murder and Chief Justice Mansfield, the presiding Judge, told the jury that in order to support the defence of insanity, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt, etc.

This case was thirty years before *McNaghten's* case, but in the latter case the Judges did nothing more than declare what the law then was on the questions raised.

In *Regina* v. *Stokes*, 3 C. & K. 185, in 1848, five years after *McNaghten's* case, Baron Rolfe, the presiding Judge, the charge being murder and the defence insanity, told the jury that:—

> If a prisoner seeks to excuse himself upon the plea of insanity it is for him to make it clear that he was insane at the time of committing the offence charged. The onus rests on him; and the jury must be satisfied that he actually was insane. If the matter be left in doubt, it will be their duty to convict him, for every man must be presumed to be responsible for his acts till the contrary is clearly shewn.

I have not been able to ascertain from any material at hand whether Baron Rolfe was one of the Judges in *McNaghten's*

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Harvey, C.J.

case, but even if he were not, his interpretation of the meaning of the rule then laid down, coming as it does so soon after the expression of the rule, seems to me to be very important.

Only five years ago the law was laid down in the same general and absolute terms by Mr. Justice Bigham who had then been a Judge of the King's Bench Division for more than ten years, prior to which for nearly fifteen years he had been a Q.C. and leader of the North Circuit.

In *R.* v. *Jefferson* (1908), 72 J.P. 467, the charge was murder and the killing was clearly proved by eye-witnesses. In his charge to the jury on the subject of the defence of insanity which was raised by the prisoner, Mr. Justice Bigham said:—

> He must make it out clearly so that the jury are able to say without any reasonable doubt that the man when he committed the act was in fact incapable of distinguishing right from wrong.

and after the jury had retired they were recalled and directed again on this point in the following words:—

> You must remember that it is for the prisoner, by his evidence, to satisfy you beyond all reasonable doubt that he did not know that he was doing wrong.
>
> A *Juror*:—If there is a doubt I suppose the prisoner will have the benefit of it?
>
> BIGHAM, J.:—No, no; that is what I want to explain to you. He has to make it out to your satisfaction without any reasonable doubt. If you have a reasonable doubt whether he knew that he was doing wrong, or not, you must find him guilty.

There seems no room for reasonable or other kind of doubt that if the law is correctly declared by Mr. Justice Bigham, no exception can be taken to the direction in the present case.

It is somewhat significant too, that though an appeal was taken from the verdict of guilty rendered in that case no exception whatever was taken to the correctness of the Judge's declaration of the law on this point.

It is contended, however, by prisoner's counsel that, even though that may be a correct interpretation of the law in England, it is not so in Canada, because there is a section of the Code which has in effect changed the law. Section 19 in the first part declares the law as laid down in *McNaghten's* case as to the degree of insanity necessary to render irresponsible. Subsec. 3 says:—

> Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

It is contended that, because the section says nothing of the degree of proof required, it changes the law as declared in *McNaghten's* case, that the proof must be clear and satisfying.

There is no doubt that a distinction has long been recog-

nized between the character of proof to establish guilt of a crime and that to establish a civil claim and if the section in question were making a new law it appears to me that there might be some force in the contention, but as far as the words of the section go they are quite within the law that had been in existence for a long time and the only question open is the character of the proof. In the absence of something to indicate an intention to change the law, I can see no reason to think that the word "proved" is used in any other sense than that in which it had been used ever since *McNaghten's* case when used in this application.

Harvey, C.J.

I can see no ground, therefore, on principle or authority for concluding that the rule as to proof in civil cases has any application to this case. It is not a civil case. The degree of proof is clearly declared by the Judges in *McNaghten's* case. It has been interpreted by the Judges to whom reference has been made and no English or Canadian authority has been cited which in any way questions that interpretation, so that the weight of both authority and reason appears to me to support the correctness of the learned Judge's declaration of the law.

SCOTT, J., concurred with BECK, J.

Scott, J.

STUART, J.:—The point of law raised by the twelfth question is one, the importance of which cannot very well be exaggerated. We are asked to declare the law for this province in regard to the proper form of instruction to be given to a jury when upon a criminal charge the defence of insanity is set up. The proper instruction is decisively laid down by the Judges and accepted by the House of Lords in the answer to the second and third questions in *McNaghten's* case, 10 Cl. & Fin. 200, 8 Eng. R. 718. In the case before us, the learned trial Judge did not adopt the exact phraseology of Lord Chief Justice Tindal. In delivering the opinion of the Judges the Lord Chief Justice said:—

Stuart, J.

> The jurors ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did not know it, that he did not know that he was doing what was wrong.

The learned trial Judge, while following in the main the ideas thus set forth, added to his instruction the phrase, "beyond a reasonable doubt." He told them that before they could

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Stuart, J.

acquit on the ground of insanity, they "must be satisfied beyond a reasonable doubt that this man's reason was dethroned, that he was incapable of exercising judgment and incapable of knowing right from wrong at the time."

The whole question, therefore, is whether, by the addition of the phrase "beyond a reasonable doubt," the learned trial Judge gave an improper direction to the jury. Did or did not the use of that expression add anything to, or vary in any way, the meaning which would have been conveyed by the use of the exact language of *McNaghten's* case?

Now, it seems to me plain that we are here upon very delicate ground for, if it is decided that nothing was added by the use of that phrase, then it logically follows that the use of the language of *McNaghten's* case must be considered as equivalent to the language used by the learned trial Judge and therefore it also follows that the use of the language of *McNaghten's* case, viz., the use of the simple expression "satisfied" and "clearly proven" without any additional expressions of earnest emphasis by the Judge would, in a case where no special defence was raised, the burden of proving which is by law upon the accused, be quite sufficient to satisfy the well-known rule in favour of an accused that the jury must be satisfied of his guilt "beyond a reasonable doubt," before they should convict him. Are we then to say that it is not necessary to use that now classic expression or at any rate any words of stronger and more impressive meaning than the words used in *McNaghten's* case in charging a jury with respect to the degree of certainty which the prosecution must create in their minds as to a prisoner's guilt before a verdict of guilty can be rendered, but that the prisoner cannot demand anything more than the use of such expression "satisfied" and "clearly proven"? That appears to me to be the logical result of sustaining the direction to the jury in the present case, and I hesitate to do anything which would lead to that result. It may, indeed, be as the Chief Justice points out, hard to express any intelligible distinction between the two phrases, but, for myself, I cannot undertake to do anything which necessarily involves the removal of the protection which it has always been understood that the necessary use of the expression "beyond a reasonable doubt" or at any rate words of similarly emphatic meaning has given to an accused person. If the expression was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case.

I think the rule is well established that an accused person is entitled to have such a direction given. Neither on the first argument nor on the second did I receive any satisfactory an-

swer to this contention, although on both occasions I put my difficulty clearly to counsel for the Crown.

I agree with what my brother Beck has said in regard to the use of text-books in the examination of witnesses and with the Chief Justice on the other points reserved, but on the one point above dealt with I think there should be a new trial.

December 20, 1913.

BECK, J.:—This is an appeal from the refusal of Simmons, J., to reserve questions for the Court, which by the consent of counsel is to be treated as if the learned Judge had in fact reserved the questions.

Beck, J.

The prisoner was charged with and found guilty and convicted of murder. The homicide was confessed. The defence was the insanity of the prisoner at the time of the homicidal act.

The learned Judge in his charge to the jury used the following expressions:—

> The law has been quite correctly stated that the onus is upon him (the accused) to satisfy you beyond a reasonable doubt that at that time he was not capable of appreciating the nature or extent of his action.

And again:—

> I have already told you that you must be satisfied beyond a reasonable doubt that this man's reason was dethroned, that he was incapable of exercising judgment and incapable of knowing right from wrong at the time, in order to excuse him on the ground of insanity; but if you have a reasonable doubt in that matter, you will be still bound to convict him; but if you are convinced beyond a reasonable doubt (of his insanity) you will not be able to convict him.

The view of the learned Judge was put clearly in the same sense after the jury had retired in these words:—

> I gave them very definite instructions on that; that the defence must establish (insanity) beyond a reasonable doubt; and that if they had any reasonable doubt they are still to hold him responsible

One question was, was there a misdirection? I am clearly of opinion that there was a misdirection.

It is commonly and generally speaking, correctly said, that in a criminal prosecution, the case for the Crown must be established "beyond a reasonable doubt." The rule is put in Cyc., vol. 12, tit. "Criminal Law," as follows:—

> (c). Reasonable doubt. (1) General rule. In criminal cases a verdict of guilty cannot be based upon a mere preponderance of proof. The jury are required, particularly where the evidence is circumstantial or contradictory, to be satisfied upon all the evidence beyond a reasonable doubt that the accused is guilty. In this respect criminal cases differ from civil, for in the latter no presumption is indulged in in favour of either

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Beck, J.

litigant, so that he who produces the preponderance of evidence wins, while in the former, the accused starts out with the presumption that he is innocent, which must be overcome, in addition to the evidence introduced in his behalf.

And:—

(c). Defences. (1) General rule. It is safe to say as a general rule that the doctrine of reasonable doubt applies only to criminative, and not to exculpatory, facts. Hence, defendant is not required to establish such fact or facts in mitigation beyond a reasonable doubt. It is sufficient if he satisfy the jury of their truth by credible or preponderating evidence, or if the exculpatory facts, taken in connection with the incriminating evidence, raise a reasonable doubt of the guilt of the prisoner.

In support of this latter proposition may be cited *Stoddart's* case, 2 Cohen's C.A.R. 217, and *King* v. *Myshrall*, 8 Can. Cr. Cas. 474.

The rule, moreover, goes further, and is well expressed and explained in Taylor on Evidence, par. 112:—

One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, "gives the benefit of a doubt to the accused," and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step except on evidence which excludes from their minds all reasonable doubt. It has sometimes been said that the presumption in question is confined to the criminal Courts, and is adopted there specially in favour of life and liberty, and as a safeguard against error in convictions which are not open to revision. But it rests on a broader basis. The right which every man has to his character, the value of that character to himself and his family, and the evil consequences that would result to society if charges of guilt were lightly entertained, or readily established in Courts of justice; these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, accordingly, is recognized by all tribunals, whether civil or criminal, and in all proceedings, whether the question of guilt be directly or incidentally raised. For example, in an action against an insurance company to recover a loss by fire, and where the defence is that the plaintiff wilfully burnt down the premises, the jury, before finding a verdict against the plaintiff, must be satisfied that the act imputed to him has been proved by clear evidence, so clear as to justify a conviction for arson; and, in general, whether the question arises in a prosecution for it, or in a civil Court, forgery or bigamy must similarly be established by the same strict evidence. In accordance with this principle, it has been held in America that in a civil action on a policy of insurance a death must be presumed to have been a natural one, and not a suicide, when there is no evidence as to its cause, since suicide is felony.

It is another question, however, when an accused person confesses the material acts constituting the charge, but seeks to avoid the inference of evil intent by setting up insanity in any of its numerous forms. There the burden of proof is admittedly thrown upon the accused and the question is whether he must establish his affirmative defence of insanity "beyond a reasonable doubt" or only by a preponderance of evidence.

The answer given by the Judges in *McNaghten's* case, 10 Cl. & Fin. 200 at 210, 8 Eng. R. 718 at 722, to the second and third questions submitted to them was as follows:—

> The jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

This must be accepted as a correct statement of the obligation of the accused in such a case; but the question remains whether there is a difference between telling the jury that, in order to give effect to the defence of insanity, they must find insanity proved "beyond a reasonable doubt," and telling them that, for that purpose, the defence must be proved "to their satisfaction" or "clearly" proved.

Whether there is in psychology an admissible distinction of meaning in these three expressions, and if so, what that distinction is, it seems to me it is not necessary to inquire. The expression "satisfaction beyond a reasonable doubt" has become consecrated by long judicial usage as pointing to a state of mental satisfaction in some sense greater than "satisfaction" *simpliciter* or that state of mind induced by proof that is merely "clear."

A history of the introduction and subsequent persistent use of the expression "beyond a reasonable doubt" is to be found in Wigmore on Evidence, par. 2497.

The distinction is fully recognized in *Doe d. Devine* v. *Wilson* (1855), 10 Moore P.C. 502 at 531, 14 E.R. 581 at 592, where it is said:—

> Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must *satisfy* the jury that it is genuine. The jury must weigh the conflicting evidence, *consider all the probabilities* of the case, not excluding the ordinary presumption of innocence, and must determine the question

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Beck, J.

according to the balance of those probabilities. In a criminal case, the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless he can *satisfy the jury* that the instrument is forged *to the exclusion of reasonable doubt*, the prisoner must be acquitted.

Now, the charge of the learned Judge appears to their Lordships to have in effect shifted the onus from the defendants who assert the deed, to the plaintiff, who denies it, for in substance he tells the jury that whatever be the *balance of the probabilities*, yet, if they have *a reasonable doubt*, the defendants are to have the benefit of that doubt, and the deed is to be established even against the probabilities in favour of the doubt. Certainly it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty or from any other reason, it may not be material to inquire, but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the onus would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities would not in their Lordships' opinion apply.

In regard to the defence of insanity the matter is put in Cyc. (1.c.) as follows:—

> There is a direct conflict in the cases as to the degree of proof necessary to establish a defence of insanity. (1) A few of the cases have held that the defendant must establish his insanity beyond a reasonable doubt. (2) Others have held that he need not do so beyond a reasonable doubt, but that he must do so by a preponderance of the evidence or to the reasonable satisfaction of the jury. (3) Others have held that, while he has burden of introducing some evidence to rebut the presumption of sanity, yet, if on all the evidence, the jury have a reasonable doubt as to his sanity, they must acquit.

The second of these propositions is supported by much the greater weight of authority.

As I have already said, the opinion of the Judges in *McNaghten's* case, 10 Cl. & Fin. 200, 8 Eng. R. 718, must be accepted as a true statement of the law. In view of the authorities and opinions I have referred to, it must also be accepted that there is a clearly recognized distinction between being satisfied beyond a reasonable doubt as contrasted with being merely satisfied or having clear proofs. Hence, I have formed the clear opinion that it was a misdirection to instruct the jury that the accused must make out his defence so as to satisfy them beyond a reasonable doubt. The only safe rule would seem to be to adopt the very words of the Judges in *McNaghten's* case; "to your satisfaction;" "clear proof;" and I should myself, I think, often be inclined to point out to the jury the heavier burden of proof lying upon the prosecution than on the accused.

On this ground, I think there should be a new trial.

Another question raised is, however, of such importance

that I think it well to give it some careful consideration, namely: the extent to which text-books may be used in the examination of a medical man as an expert both in direct examination and in cross-examination.

There are extremely few reported decisions dealing with this question and none of them, I think, are binding upon us.

The only decisions I can find are the following:—

Spencer Cowper's case (1699), 13 How St. Tr. 1163, where it appears that a medical witness was allowed to refer to a text-book.

Collier v. *Simpson* (1831), 5 C. & P. 73, 38 R.R. 796. The action was for slander, imputing that the plaintiff, a medical man, had prescribed improper medicine. Counsel for the plaintiff proposed to shew that the prescriptions were proper and the doses not too large, and wished to put in medical books of authority to shew what was the received opinion in the medical profession. Tindal, C.J., said:—

I think you may ask a witness whether, in the course of his reading he has found this laid down. . . . I do not think the books themselves can be read; but I do not see any objection to your asking the witness his judgment and the grounds of it, which may be in some degree founded on books as a part of his general knowledge.

The Queen v. *Crouch* (1844), 1 Cox C.C. 94. The charge was murder, the defence insanity. Counsel for the prisoner proposed to read to the jury from the medical text-books in opening his case to the jury. He was stopped by Alderson, B. I think he is referring to medical text-books when he says:—

Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. . . . You surely cannot contend that you may give the book in evidence, and if not what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?

Regina v. *Taylor* (1874), 13 Cox C.C. 77. The charge was murder, the defence insanity. Counsel for the prisoner apparently called no evidence. A surgeon, though examined as a witness for the Crown, seems not to have been cross-examined on the question of insanity. Counsel for the prisoner in his address to the jury proposed to read a case from Taylor's Medical Jurisprudence. Brett, J., said:—

That is no evidence in a Court of justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present. I cannot allow it to be read.

Brown v. *Sheppard* (1856), 13 U.C.R. 178. The action was for seduction. Defendant's counsel proposed to ask in cross-examination of the medical witnesses what medical works they

ALTA.

S.C.
1914

REX
v.
ANDERSON.

Beck, J.

considered best as treating upon the subject *uteri gestatio*, and proposed to adduce and read such books to the jury. This, the learned Judge (Draper, J.), rejected; allowing the counsel to ask, however, whether such books influenced the witnesses in the opinions arrived at. On a motion for a new trial, the judgment of the Court was given by Burns, J., who said:—

The question was simply whether the jury should believe the statement of the girl that the defendant was her seducer; and whether, upon the opinions of the medical witnesses, they could in this particular instance believe that the period of gestation was protracted to eleven months. Upon examination of the subject, whether the learned Judge was right in rejecting medical works, we have no doubt he was quite right. Chief Justice Tindal draws a distinction between admitting a book containing foreign law to be proved, and read to prove the law, and a book treating upon skill and science and the opinions of different persons upon the laws of nature. The distinction is obvious upon reflection; the object of the first is to prove an existing fact which is to govern certain things and actions; and the second is, for the purpose of offering opinions upon which the fact is to be deduced. The rule of law with regard to the latter is, that the opinions which are to be received upon which the jury is to deduce a certain fact, must be so given as to be subject to examination and cross-examination before the Court and jury. Now, it is obvious, if books upon skill and science are to be made evidence of themselves, the protection a person has of shewing by an examination of the person advancing an opinion, that it is improperly arrived at is quite destroyed: see *Collier* v. *Simpson*, 5 C. & B. 73.

Reference may also be made to *Doherty* v. *Williams* (1872), 32 N.B.R. 215.

Brownell v. *Black* (1890), 31 N.B.R. 594 (Court *en banc*). The headnote is:—

A physician may strengthen his memory by referring to works which he considers of authority; and counsel may read extracts therefrom to him and obtain his judgment thereon. An illustration (pictorial) is, for this purpose, as much a part of the book as the text; and it may, when thus referred to, be shewn to the jury.

The reasons for judgment of Tuck, J., and Fraser, J. (with the latter of whom Wetmore, and King, JJ., agreed), contain what, to my mind, is so satisfactory a discussion of these subjects that I quote very largely from them. [The learned Judge here quoted from the opinions of Tuck, J., and Fraser, J., in vol. 31, N.B.R.]

As I have said, none of the cases to which I have referred are decisions binding upon us, and therefore I think it is open to this Court to lay down a rule of practice for itself with regard to the questions under discussion. Nevertheless the principles and rules which I shall attempt to formulate are not, I think, more than the fair conclusion to be drawn from the decisions I have quoted and the reasoning upon which they are based. The results, in my opinion, are as follows:—

(1) There is distinction in principle between the case of an expert witness called to prove foreign law and one called to give a medical or other scientific opinion; foreign law is a fact; the fact is capable of being proved by reference to enactments or authoritative declarations, and though in a particular case there may be doubts what the fact, that is, the law, is, the doubt is to be solved by reference to enactment and authoritative declarations with a view only to their existence and proper interpretation. An opinion on a medical or other scientific question though in one sense a fact is not a fact in the same sense as is a fact that a certain proposition is a correct statement of foreign law. It is a subsidiary fact from which the tribunal is to draw a conclusion affirmative or negative as to a principal fact in issue. The opinion has in itself nothing of the force of an enactment which creates or of an authoritative declaration which, *per se*, establishes the existence of the fact. In the former case the enactments and authoritative declarations are open to discussion only in regard to their existence and interpretation and such a discussion is proper to be had with the witness put forward as an expert in relation to them. In the latter case, the opinions of medical men or other scientists are of no binding force. Their moral value depends upon the intelligence, diligence, opportunities for observation and experience of those who hold them, including their accumulation and sifting and sorting of the opinions of others, and therefore are necessarily open to critical examination from all these points of view, which can be had satisfactorily only if an opportunity is afforded of inquiry into the sources from which the opinion has been formed.

(2) When a medical man or other person professing some science is called as an expert witness, it is his opinion and his opinion only that can be properly put before the jury. Just as in the case of a witness called to prove a fact, it is proper in direct examination to ask him not merely to state the fact, but also how he came by the knowledge of the fact, so in the case of an expert witness called to give an opinion, he may in direct examination be asked how he came by his opinion. An expert medical witness may, therefore, upon giving his opinion, state in direct examination that he bases his opinion partly upon his own experience and partly upon the opinions of text-writers who are recognized by the medical profession at large as of authority. I think he may name the text-writers. I think he may add that his opinion and that of the text-writers named accords. Further, I see no good reason why such an expert witness should not be permitted, while in the box, to refer to such text-books as he chooses, in order, by the aid which they will

ALTA.
S. C.
1914
REX
v.
ANDERSON.
Beck, J.

give him, in addition to his other means of forming an opinion, to enable him to express an opinion; and again, that the witness having expressly adopted as his own the opinion of a text-writer, may himself read the text as expressing his own opinion.

(3) In cross-examination an expert medical witness having first been asked whether a certain text-book is recognized by the medical profession as a standard author and having said that it is, there may be read to him a passage from the book expressing an opinion, for the purpose of testing the value of the witness' opinion. I adopt the words of Tuck, J. (31 N.B. R. 595):—

> I think an expert may be examined as to what is in the books. Medical works are produced which are recognized by the profession as standard authorities. An expert witness is being examined, who gives evidence as to specified diseases and their remedies. It is found by reference that his statements are at variance with what is laid down by the best authors on the same subject. Surely, it must be the right of counsel to confront the witness with books written by scientific men, leaders in their profession, for the purpose of shewing either that the witness is mistaken, or that he may explain and reconcile, if he can, the real or apparent difference between what he has said and what is found in the books. If it was otherwise, men of insufficient learning, or veritable quacks, might palm off their crude opinions as scientific knowledge. There is a marked difference between reading what is in a book as evidence to a jury, and testing a witness when examining him by reading to him from the same book. In the one case, you are reading as evidence what, after all, is only the opinion of a scholar, however learned he may be, without an opportunity to cross-examine him. In the latter, you are testing the opinion of one expert by the writings of another, admitted to be of high authority. It may be that the author's views are placed before the jury as effectually in one way as in the other; but, in my opinion, one way is objectionable, and the other is not.

This, of course, is subject to control which is vested in the trial Judge for the purpose of preventing the abuse of right of cross-examination.

The instances in the present case to which I must apply these rules I now state:—

Doctor Dawson, a witness for the defence, was under direct examination by counsel for the defence. He was asked if a certain work was a standard authority. He said, "Yes." Counsel then read a passage to him. This was objected to. The objection was sustained. The learned Judge, however, went to the extent of saying that the witness himself should not be permitted to read aloud an extract from a text-book which he adopted as his own opinion. In this respect, I think he was wrong. But no harm was done because the witness himself, seriously enough, said in effect that he himself did not wish to read the passage. He said to counsel for the defence: "I think

it was unnecessary for you to read it, I have given all the facts."

Dr. Smyth, a Crown witness, was under cross-examination by counsel for the defence. He asked the witness respecting a particular case mentioned in a recognized text-book. The learned Judge ruled that the particular case cited by the author could not be inquired into. The learned Judge was, I think, quite right. The matter of cross-examination founded upon text-books is properly limited to the opinions, excluding the data upon which they are formed, of the author and the agreement or disagreement of the witness with them.

Later in the cross-examination of Dr. Smyth, the counsel for the defence having obtained his admission that Tanze on mental diseases was a standard work, asked him the question:—

"Now, I want you to tell me, doctor, as to whether or not this is a fair statement of the absurdity of the positions of persons suffering from this particular type of disease (paranoia) or state of mind?"

Counsel evidently had the text-book in his hand and was about to read to the witness from it. He was stopped by the learned Judge who said: "I have already said that you cannot read from text-books," adding that this ruling applied to cross-examination. I think the learned Judge was wrong in laying down this broad proposition. It is to be noted, however, that counsel was not proposing to read to the witness the text-writer's opinion with the view of having the witness retract or modify his formerly expressed opinion, but was using the text-book merely as a brief on which to found questions regarding the symptoms and consequences of the disease; questions which could as easily and more properly be asked of the witness from the information furnished to the counsel by the text-book as if it were a brief and questions, which, upon the ruling of the Judge, he appears to have put to the witness without hindrance. The rulings of the learned Judge upon these questions, therefore, in my opinion, give no ground for interference, but there should, in my opinion, as I have said, be a new trial on the ground I have first dealt with.

January 10, 1914.

BECK, J.:—The foregoing was written at the conclusion of the argument of the appeal from the refusal of the trial Judge to reserve a case.

As a result of a conference it was decided to allow the appeal on the one ground only, namely, the direction of the learned trial Judge to the jury, that they must be satisfied *beyond a reasonable doubt* of the prisoner's insanity at the time of the homicide before giving effect to it.

ALTA.

S. C.
1914

REX
v.
ANDERSON.

Beck, J.

This question has now been reargued before all the members of the Court. I retain the view I have already expressed. The only new light thrown upon the question is the reference by counsel for the Crown to the case of *Rex* v. *Jefferson* (1908), 72 J.P. 467; reported also without reference to the trial Judge's charge, 1 Crim. App. 95, 24 Times L.R. 877, and the reference by counsel for the prisoner to sec. 19 of the Criminal Code which says that one is presumed to be sane "until the contrary is *proved*."

I think that the words of the Code make no difference—that whatever was the character of the proof required before the Code is still required; but I think that that proof was and still is merely proof "to the satisfaction" of the jury and that such proof is proof "by a preponderance of evidence" and not proof "beyond a reasonable doubt."

Rex v. *Stokes* (1848), 3 C. & K. 185, upon which the Crown laid great stress is, unfortunately, not accessible to us. From the note of it in Russell on Crimes, 7th ed., 71, it seems that it does not help the Crown. It is there said that Rolfe, B., told the jury with regard to the defence of insanity:—

> The onus rests upon him (the prisoner); and the jury must be satisfied that he actually was insane. If the matter was left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shewn.

This doesn't touch the question of the distinction between proof beyond a reasonable doubt and proof to satisfaction. That question being settled, it is quite right, in my opinion, to direct the jury that, if they are left in doubt, the defence is not proved and therefore they should so find.

The case of *Rex* v. *Jefferson* (1908), 72 J.P. 467, is, no doubt, an instance of a trial Judge, Mr. Justice Bigham, telling the jury that the defence of insanity must be proved beyond a reasonable doubt. The case went to appeal. To my mind it is strange that exception was not taken to the charge. Mr. Justice Lawrence, in giving the judgment of the Court, whereby the sentence was quashed and the prisoner directed to be placed in a lunatic asylum, expressly says: "No question has arisen here as to the direction in the summing-up of the learned Judge." It appears to me that the Court was guarding itself against being supposed to approve of the charge.

As I have indicated, I still think there should be a new trial.

Simmons, J.

SIMMONS, J., concurred with HARVEY, C.J.

Walsh, J.

WALSH, J., concurred with BECK, J.

New trial ordered.

[See Annotation following on page 223.]

Annotation—Evidence (§ VIII—670)—Criminal law—Questioning accused person in custody.

ALTA.

Annotation

Questioning of prisoners —Criminal law.

In a Privy Council appeal from Hong Kong (March, 1914, *Ibrahim* v. *The King*, not yet reported), the question of admissibility of a prisoner's statement while in custody was reviewed. There had been a conviction for murder by shooting a native officer named Ali Shafa on the British Concession at Canton where was encamped the Baluchistan regiment to which the accused and the officer both belonged, the accused Afghan being an enrolled private who had taken the oath of allegiance to the King of Great Britain.

One ground for appeal arose from the circumstance that after Ali Shafa was shot, Major Barrett, the appellant's officer, asked him, while in custody, "Why have you done such a senseless act?" and he replied, "Some three or four days he has been abusing me; without doubt I killed him." It was argued that Ibrahim's statement was inadmissible, (*a*) as not being a voluntary statement, but obtained by pressure of authority and fear of consequences; and (*b*) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner. Lord Sumner said: "It had long been established as a positive rule of English criminal law that no statement by an accused was admissible in evidence against him unless it was shewn by the prosecution to have been a voluntary statement, in the sense that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle was as old as Lord Hale. The burden of proof in the matter had been decided by high authority in recent times in *R.* v. *Thompson*, [1893] 2 Q.B. 12, a case which was considered by the trial Judge before he admitted the evidence."

Their Lordships were clearly of opinion that the admission of the evidence was no breach of the rule.

As to the admissibility of a prisoner's statement, Lord Sumner said that the English law was still unsettled, strange as it might seem, since the point was one that constantly occurred in criminal trials. Many Judges, in their discretion, excluded such evidence, for they feared that nothing less than the exclusion of all such statements could prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration did not arise in the *Ibrahim* case. If a Judge, after anxious consideration of the authorities, decided in accordance with what was at any rate a "probable opinion" of the present law, if it was not actually the better opinion, it appeared to their Lordships that his conduct was the very reverse of that "violation of the principles of natural justice" which had been said to be the ground for advising His Majesty's interference in a criminal matter.

If the matter was one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships thought that, in the circumstances of the case, his discretion was not shewn to have been exercised improperly.

Having regard to the particular position in which their Lordships

ALTA.

Annotation

Questioning of prisoners —Criminal law.

Annotation (*continued*)—Evidence (§ VIII—670)—Criminal law — Questioning accused person in custody.

stood to criminal proceedings, they did not propose to intimate what they thought the rule of English law ought to be, much as it was to be desired that the point should be settled by authority, so far as a general rule could be laid down where circumstances must so greatly vary. That must be left to a Court which exercised (as their Lordships did not) the revising functions of a general Court of Criminal Appeal (*Clifford* v. *The King-Emperor*, 40 I.A. 241). The Privy Council practice had been repeatedly defined. Leave to appeal was not granted "except where some clear departure from the requirements of justice" existed. The Board will not give leave to appeal where the grounds suggested could not sustain the appeal itself, and, conversely, it could not allow an appeal on grounds that would not have sufficed for the grant of permission to bring it.

Misdirection, as such, even irregularly as such, would not suffice: *Ex parte Macrea*, [1893] A.C. 346. There must be something which, in the particular case, deprived the accused of the assistance of fair trial and the protection of the law, or which, in general, tended to divert the due and orderly administration of the law into a new course which might be drawn into an evil precedent in future: *R.* v. *Bertrand*, L.R. 1 P.C. 520, 16 L.J.N.S. 752.

In England, where the trial Judge had warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, sec. 4, might refuse to interfere if it thought that the jury, giving heed to that warning, would have returned the same verdict.

Their Lordships of the Judicial Committee thought that the jurisdiction which they exercised in appeals in criminal matters involved a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter.

Lord Sumner concluded: "It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave or otherwise." The conviction was affirmed.

As to confessions and admissions on interrogation of accused persons in custody, reference may also be made to *R.* v. *Day*, 20 O.R. 209; *R.* v. *Elliott*, 3 Can. Cr. Cas. 95; *R.* v. *Kay*, 9 Can. Cr. Cas. 405; *R.* v. *Cummings*, 19 Can. Cr. Cas. 358, 5 D.L.R. 86; *R.* v. *Hoo Sam*, 19 Can. Cr. Cas. 269, 1 D.L.R. 569; *R.* v. *Bruce*, 12 Can. Cr. Cas. 275; *R.* v. *Steffoff*, 15 Can. Cr. Cas. 366; *R.* v. *Daley*, 16 Can. Cr. Cas. 168; *R.* v. *Young*, 10 Can. Cr. Cas. 466; *R.* v. *Rossi*, 17 Can. Cr. Cas. 182; *R.* v. *McCraw*, 12 Can. Cr. Cas. 253; *Trepanier* v. *The King*, 19 Can. Cr. Cas. 290; *R.* v. *Graf*, 15 Can. Cr. Cas. 193; *R.* v. *Frejd*, 18 Can. Cr. Cas. 113.

Annotations dealing with the Canadian cases on the subject will be found in 1 Can. Cr. Cas. 398; 3 Can. Cr. Cas. 99; 9 Can. Cr. Cas. 356; 15 Can. Cr. Cas. 35.

WAUGH-MILBURN CONSTRUCTION CO. (defendants, appellants) v. **SLATER** (plaintiff, respondent).

CAN.
S. C.
1913

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 3, 1913.

1. MASTER AND SERVANT (§ II A 4—67)—LIABILITY FOR INJURY TO SERVANT—SAFE PLACE—INSUFFICIENT EXCAVATION FOR POLES FOR ELECTRIC WIRES.

One who contracts to string wires on poles for an electric power line to be set by him in holes dug by another contractor, and who with knowledge of the local conditions accepts such holes as being sufficiently deep and takes no precautionary measures for better supporting the poles in case the ordinary filling of light soil there available should be insufficient, is answerable for the death of a servant as the result of the fall of a pole on which the latter was working that was set in a hole not deep enough to hold it securely, since there was a failure to furnish a safe place in which to work.

[*Slater* v. *Vancouver Power Co.*, 13 D.L.R. 143, 25 W.L.R. 66, affirmed; *Johnson* v. *Lindsay*, [1891] A.C. 371, distinguished.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Slater* v. *Vancouver Power Co.*, 13 D.L.R. 143, 25 W.L.R. 66, by which, on equal division of opinion among the Judges, the judgment of Morrison, J., entered upon the verdict of the jury at the trial, stood affirmed.

The appeal was dismissed.

Argument

W. B. A. Ritchie, K.C., for the appellants:—The motion for nonsuit should have prevailed. The point is shortly stated by Irving, J., as follows: "The learned Judge should have withdrawn the case from the jury. The accident took place by reason of the negligence of the fellow workmen not filling in the hole with proper holding material and not excavating to a sufficient depth." The defendants themselves were not shewn to be guilty of any negligence. See *Gallagher* v. *Piper*, 16 C.B. N.S. 669; *Cribb* v. *Kynoch*, [1907] 2 K.B. 548; *Young* v. *Hoffman Manufacturing Co.*, [1907] 2 K.B. 646; *McFarlane* v. *Gilmour*, 5 O.R. 302.

The plaintiff's evidence shewed, as the jury subsequently found, that deceased was a servant in the employ of appellants and, as expressed in the words of Martin, J., "the defendant contracting company agreed with the defendant power company, the owner of the electric line, to set up the poles on the power company's right-of-way in the holes that the power company had dug for them." The evidence shews that some of these holes had caved in, and that the fellow-workmen of the deceased were employed on piece-work, as he was, they to clear out these holes when necessary and fill in around the poles, when in place. There was no suggestion in plaintiff's case of personal negligence by the appellants, and it was not alleged or attempted to be proved that there was any defect of system in

CAN.
S.C.
1913
WAUGH-MILBURN CONSTRUCTION CO. v. SLATER.
Argument

regard to the work, or any failure on their part to provide suitable workmen and materials. The fault, according to plaintiff's case, was in the foreman not seeing that the poles were put deeper in the ground, or as the jury put it, filled with sufficiently rigid material to ensure safety.

There was also a further point in support of the motion for nonsuit, viz., that it plainly appears that deceased not only voluntarily incurred the risk of going up a pole which he knew to be insecure, but, in the words of Lord Cairns in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*, 3 App. Cas. 1155 at 1166, "that he caused his death by his own folly and recklessness." See *Wakelin* v. *London and South Western Railway Co.*, 12 App. Cas. 41, *per* Lord Halsbury, at 45; *Dominion Iron and Steel Co.* v. *Day*, 34 Can. S.C.R. 387; *Quebec and Levis Ferry Co.* v. *Jess*, 35 Can. S.C.R. 693; *Canada Foundry Co.* v. *Mitchell*, 35 Can. S.C.R. 452, *per* Killam, J., at 459.

The learned trial Judge should have given effect to appellants' contention that they were entitled to judgment upon the finding of the jury that the proximate cause of the accident was the failure to set the pole sufficiently deep and to fill the hole with sufficiently rigid material to ensure safety. They have not made findings as to whether this arose from defective system or any personal negligence of these defendants, or whether the same arose from negligence of the workmen engaged in setting the pole and filling the hole. There is no finding upon which judgment could be entered for the plaintiff. Where a jury does not give a general verdict but answers questions, such answers to support a verdict for plaintiff, must clearly shew a cause of action. See *Mader* v. *Halifax Electric R. Co.*, 37 Can. S.C.R. 94 at 98. The answers of the jury are in the nature of a special case, and they must disclose what the negligence was. A finding which does not disclose whether the negligence found is personal negligence, or is the negligence of the foreman or workmen, will not answer when the action is brought by the representatives of a workman in common employment with those who did the work, and with the foreman, who is equally a fellow-servant with the other workmen. In the judgment of Martin, J., dealing with the matter upon the evidence, instead of upon the findings of the jury, the learned Judge's reasoning upon the facts is not sufficient to establish that the jury should have found that the appellants had put the deceased to work in a defective place, and that there was neglect of the primary duty cast upon employers in relation to the safety of their servants. The jury, being the constituted tribunal to determine the facts, a judgment cannot be entered in favour of the plaintiff until they have either found a general verdict in her favour or found facts which clearly shew liability in accordance with legal principles.

The respondent cannot recover damages for negligence against appellants in an action brought and continued down to the end against the appellants and an independent incorporated company, the statement of claim alleging that the injuries were sustained in consequence of the joint negligence of the respective defendants, one of whom plaintiff expressly releases from liability: *Cocke* v. *Jennor*, Hobart 66; *Duck* v. *Mayeu*, [1892] 2 Q.B. 511 at 513. It is submitted that respondent cannot in an action of tort against two defendants jointly recover, under a statement of claim alleging only joint liability, a verdict against only one of the defendants. The conduct of respondent's counsel at the trial amounted to a distinct refusal to ask for an amendment. The decision in *Longmore* v. *McArthur*, 19 Man. L.R. 641, 43 Can. S.C.R. 640, does not in any way make against appellant's contention. The statement of claim alleged the joint duty and responsibility and claimed damages against the Vancouver Power Co. and Waugh-Milburn Construction Co. jointly, and the judgment is against the Waugh-Milburn Construction Co. alone.

D. G. Macdonell, for the respondent:—The power company had the holes already dug. No inquiry was made as to how they had dug the holes. The appellants did not inspect the quality of the filling; the only instruction they gave their workmen was to put the poles in the holes. The appellants personally accepted the defective holes and the defective filling from the power company. One of them, three days before the accident, saw the pole that had been planted and the quality of the filling, but took no action to secure safety.

The appellants, themselves, failed to provide a fit and proper place for deceased to work in: *Ainslie Mining and Railway Co.* v. *McDougall*, 42 Can. S.C.R. 420, 424-428. The instrumentalities which the appellants personally provided were defective. The holes in which the poles were to be planted, and the filling which their workmen were to use in planting the poles were defective; the holes in not being dug deep enough, and the filling being of too light a material to hold the poles in position.

The course of counsel for plaintiff at the trial was mere discontinuance of the action against one of the defendants for want of evidence to shew liability. It was not a release of a joint tortfeasor.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Lord Watson, in *Johnson* v. *Lindsay*, [1891] A.C. 371 at 382, states the rule with respect to fellow-servants, in the following terms:—

> The immunity extended to masters in case of injuries caused to each other by his servants rests on an implied undertaking by the servants to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master.

CAN.

S. C. 1913

WAUGH-MILBURN CONSTRUCTION CO. v. SLATER.

Sir Charles Fitzpatrick, C.J.

That is not this case. Here as is pointed out by Mr. Justice Martin in his judgment, it is in substance admitted that the accident resulted from the fact that the hole in which the pole was planted was not of sufficient depth to enable it to be erected safely. The fellow servants of the deceased had no responsibility for that omission or defect. The appellants had taken a contract, as stated in the plea to the action, for the placing of the poles of the Vancouver Power Co. in holes already dug by that company, and placing cross-arms and stringing wires upon such poles. In the same statement of defence, it is said that the dangerous or unfit condition of the pole in question was occasioned by the manner in which the hole in which the pole was planted had been dug by the defendants, the Vancouver Power Co. How can the appellants now be heard to lay the blame on the fellow-servants of the deceased? The latter had no discretion to exercise with respect to the deepening of the holes nor had they authority to make the holes deeper in order that the posts might be more firmly set in them. The appellants had accepted the holes from the Vancouver Power Co. as they had been dug by the latter and, in doing so, they impliedly guaranteed that they were sufficient for the purpose. The only direction given their servants was to use such holes so accepted for the purpose of erecting the poles, and not to exercise any discretion with respect to their depth. If by reason of the insufficiency of the holes an accident happened, the responsibility is with the employer who omitted to take the proper precautions in that respect to avoid the accident.

The contention that the questions and answers of the jury do not disclose personal negligence attributable to the appellants or to those for whom they were responsible is not made out. The failure on the part of the appellants to provide a hole of sufficient depth, as found by the jury, to plant the poles firmly and safely is negligence for the consequences of which the employers are as clearly responsible as if they had supplied their servants with defective posts or defective apparatus of any kind.

The verdict of the jury negatives the defence of contributory negligence and it is not referred to in the judgment below.

I would dismiss this appeal with costs.

Davies, J.

DAVIES, J.:—The defendant company had a contract to erect electric posts in certain holes which had been dug for the purpose by another contractor and to prepare for the stringing of electric wires along those posts.

The deceased was one of the men employed in placing cross-bars on one of the posts to carry the electric wires, and, while doing so, was fatally injured by the falling of the post. The jury found that the hole for the post was either not sufficiently

deep or the packing was insufficient. It was not part of the defendants' contract to sink those holes. Their contract was to erect the posts in the holes sunk by the contractor who had the contract for that work.

The post erected would, doubtless, have been found sufficiently safe for the purposes for which it was required after it had the support of the wires strung upon it.

The question was, whether the defendants owed a duty to the workmen they employed in the setting up of these posts to see that they were sufficiently supported and strengthened either by providing suitable filling material to put around them in the holes or otherwise, so that the men should not be obliged to incur unduly dangerous risks in climbing the poles and putting the cross-bars for the wires upon them.

I think the defendants owed such a duty and neglected to fulfil it and that the doctrine of common employment was, under the circumstances, no defence.

It is no answer to say that the poles were deeply enough sunk and would be safe enough after the wires were strung and they were strengthened thereby.

The question is, were they safe when the unfortunate man was sent aloft to put on the cross-bars? The event shewed they were not, and, in my opinion, it was the employers' duty to provide suitable filling material to ensure safety, or, failing such material, to see that equivalent safe-guards were supplied. Failing in this, the employer cannot invoke the doctrine of common employment to relieve him from liability. Under the facts proved, there was no obligation on the labourers or the foreman either to deepen the hole or to provide other packing or filling than the excavated material lying to their hand.

The defendant Waugh himself was present a day or two before the accident and saw the conditions and gave his men no special instructions. Ignorance of the actual facts by the defendants is displaced. The accident was the result, as the jury found, of the neglect of duty of the employer and not of the negligence of a fellow workman.

I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—The undertaking of a dangerous work without adequate means of averting the consequences of such dangers as attendant upon its execution, and protecting therefrom those engaged therein, is negligence. That is what the appellants are found by the jury to have been guilty of, and there is, *primâ facie*, evidence to support it. They undertook to set posts in holes which ought to have been, in the view of some men giving evidence, twice as deep as they were to ensure safety.

It seems idle to talk of superintendents and foremen, en-

CAN.
S. C.
1913
WAUGH-MILBURN CONSTRUCTION CO. v. SLATER.
Idington, J.

gaged to execute such an inherently dangerous project, being negligent in not so digging new holes and incurring the extra expense of so doing something they were not retained to do as to ensure safety.

The same is true of the expense of filling in or setting of the posts though the evidence of what transpired is not so direct but rather affords ground for the mere inference that the foreman and superintendent did exactly what they were expected to do; namely, use such filling-in as nearest to hand, and not expend money on hauling better material from a distance.

Such inference, I think, was open to the jury and if, as I think, the correct one, then it is, I respectfully submit, surely absurd to talk of the foreman or superintendent having been negligent, and that negligence the cause of the accident.

On such condition of facts and circumstances, it devolved on the appellant to shew, if it could, that the superintendent or foreman was otherwise instructed and duly furnished with adequate material or means of getting same.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The first ground upon which Mr. Ritchie contends, on behalf of the defendants, who are appealing, that the judgment should be reversed and the action dismissed is that there is no evidence of any breach of duty on the part of the defendants personally. The deceased, Benjamin Slater, was an employee of the appellants who, at the time Slater received the injury that resulted in his death, were engaged in the execution of a contract they had entered into with the Vancouver Power Co. for setting and wiring a line of poles on the power company's railway line between Vedder river and New Westminster. Slater was occupied in pursuance of his duty in fastening the cross-arms on the top of one of the poles which had already been set by the employees of the appellants, when the embankment, in which the pole was set, gave way and Slater was carried to the ground by the uprooted pole and fatally injured. The embankment in which the pole was set was a deep fill which at this place consisted of light soil described by some of the witnesses as "peaty" and by others as simply "a bed of ashes." The poles had a height of 60 feet. They were set in the steep slope of the embankment. One of the witnesses says that in order to obtain a secure setting it would be necessary in such soil to excavate to a depth of at least 9 feet. The defendant Waugh himself admits that the minimum depth necessary for securing safety would be 7 feet. There is ample evidence that in this fill the poles were placed in holes that had been excavated to a depth of less than 6 feet. The evidence shews also

that Slater, being engaged in placing the cross-arms on this pole some time after it had been set, would not be able from such inspection as could be made by him in such circumstances to ascertain whether the pole had been set securely or not. In these circumstances there was, of course, enough to entitle the jury to find that there had been negligence in not excavating to a greater depth before setting up the pole. The question is whether negligence has been brought home to the appellants.

I think the evidence justifies the conclusion that the defendant, Waugh, was personally implicated in this negligence. The poles were being set, as I have already mentioned, under a contract between the appellants and the Vancouver Power Co. The contract was an oral one. Waugh says that in making the arrangement with the power company he was assured that the holes had already been excavated and that it was understood that these holes were to be accepted, and that his price was fixed upon that basis. He says that if they had found a hole only four feet deep they would doubtless have deepened it before setting the pole. But, he admits that if they found a hole excavated to what he calls a "reasonable depth," six feet, they would not have excavated it further. It was shewn that a contract had been let to a man named Hare, who was one of the witnesses at the trial, to dig a line of post holes for posts of the same character on the other side of the track through this same fill and that although the specification of the contract required holes of 7 feet in depth they were, in fact, excavated only to a depth of 6 feet, and that in that condition they were accepted and the poles were placed in them by the appellants. Waugh, moreover, admits that a few days before the accident took place he walked over this fill. There was a superintendent, Bailey, who was in charge of the execution of the contract for the appellants and there was a foreman named Haines who was in charge of the gang of men who set up the pole in question. No evidence was offered on behalf of the appellants to shew that any instructions had been given to Bailey with regard to the depth to which the poles were to be sunk or with regard to the inspection of the post-holes that had been dug by the power company, or as to any precautions to be taken to secure the stability of the poles with a view to the safety of the men engaged in placing the wires upon them.

I do not think it would be an unreasonable inference from the evidence I have mentioned, coupled with the lack of evidence as to instructions given by the appellants to Bailey, that the appellants did not consider it to be their duty in the execution of their contract to deepen a hole such as that which occasioned this accident; and that Bailey, the superintendent, was aware that this was the appellants' view. I think, moreover,

CAN.
S. C.
1913
WAUGH-MILBURN CONSTRUCTION CO. v. SLATER.
Duff. J.

that the jury might not unreasonably infer that Bailey had no express instructions to do such work for the purpose of securing the safety of workmen engaged in wiring the poles after they had been set up. Whether, moreover, it would be a part of his duty as between him and his employers, in the circumstances, in the absence of instructions would, I am inclined to think, be a question for the jury. However that may be, in all these circumstances the jury were, as it appears to me, entitled to find that a man of Waugh's knowledge and experience, knowing the character of the fill in which the posts were being set, ought to have realized, and if he had exercised any sort of forethought whatever for the safety of his employees, would have realized that exceptional measures would be required for securing the stability of the poles set up in this fill; and that his failure to observe that or his failure to act upon it in giving appropriate instructions was such a want of care as properly casts upon him responsibility for the failure to take such precautions.

Mr. Ritchie's next contention is that the verdict of the jury is insufficient. I am unable to agree with this contention. The jury found the defendants guilty of negligence in two respects: in failing to set the poles sufficiently deep and in failing to fill the post-holes with sufficiently rigid material. I think this involves a finding that there was negligence in these respects and that that negligence is imputable to the defendants personally.

There was a further point made by Mr. Ritchie which, if I understood him correctly, was this. The appellants and the Vancouver Power Co., he said, were charged in the respondent's statement of claim as joint tortfeasors; and he said, the respondents' counsel at the trial having released the Vancouver Power Co., the cause of action against the appellants must be taken to have disappeared on the principle that the release of one joint tortfeasor effects the release of all, because the cause of action is an entirety. This contention cannot be given effect to, in my opinion, because it is perfectly clear that what the respondent's counsel at the trial did was to discontinue the action as against the Vancouver Power Co. because the evidence failed to implicate them in the negligence proved and to proceed against the appellants as the persons solely responsible for the injury complained of. It was entirely a question for the trial Judge whether that course should or should not be permitted and the appellants' contention fails upon the simple grounds, in my opinion, that on the facts proved the Vancouver Power Co. could not be held to be joint tortfeasors with the appellants and, if they could, the respondents at the trial ought not to be taken as releasing the Vancouver Power Co. from liability, but simply as discontinuing the action against them.

ANGLIN, J.:—The plaintiff is the widow of a deceased employee of the defendant company, suing on behalf of herself and his children to recover damages for his death, caused, she avers, by the negligence of the defendants, an incorporated partnership.

The facts are not seriously in controversy. A pole erected by the defendants fell while the plaintiff's husband was upon it, engaged in placing cross-bars to carry electric wires, and he sustained fatal injuries. The jury found upon sufficient evidence that the fall of the pole was due to the negligence of the defendants in that "they failed to set the pole sufficiently deep and to fill the hole with sufficiently rigid material to ensure safety."

The recovery was at common law and the main defence relied upon at bar was "common employment."

I think that defence is not available under the circumstances of this case. The hole in which the pole was placed was not made by the defendants, but by a contractor who preceded them. It was no part of the work of the defendant company to deepen that hole. They accepted the holes as they had been dug. The evidence does not establish that the inadequacy of the hole in question was due to the fault of a fellow-workman of the deceased. The defendants' contract was to erect the poles in the holes as dug and this appears to have been the instruction which they gave to their men. There is nothing to shew that it was the duty of the foreman to deepen the hole in question or to see that other filling was procured and used if that adjacent to it was unsuitable. The defendants owed to the plaintiff's husband the duty of furnishing him with a reasonably safe place in which to work—of seeing that the pole which he was required to ascend was securely placed. Notwithstanding the shallowness of the hole, it is claimed that the pole would not have fallen if sufficiently rigid filling had been used. The jury has found that the defendants were at fault in regard to the filling. The circumstances disclose a case of dangerous employment imposing upon the defendants, as masters, the duty to see that proper precautions were taken to ensure their employee's safety. The defendant, Waugh, admits that no inquiry or inspection was made or directed as to the depth of the hole or the quality of the filling. The filling adjacent to the hole in question, having regard to its shallowness, was unsuitable. No instructions were given to procure or use any other filling. The defendants had erected poles on the opposite side of the railway. They knew the character of the soil. The defendant, Waugh, himself passed the place of the accident only three or four days before it occurred. He had an opportunity then of

CAN.
S. C.
1913
WAUGH-MILBURN CONSTRUCTION CO. v. SLATER.

seeing the nature of the ground in which the particular pole in question was placed and of knowing that special care was necessary there as to the depth of the hole and the character of the filling. Yet there were no inquiries; no instructions were given; no inspection was made or directed. Under such circumstances the jury were, I think, justified in finding the defendants liable at common law.

I would dismiss this appeal.

Brodeur, J.

BRODEUR, J., agreed with ANGLIN, J.

Appeal dismissed with costs.

CAN.
S. C.
1913

COMO (defendant, appellant) v. HERRON (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. November 10, 1913.

1. BROKERS (§ II B—11a)—FORMALITIES OF CONTRACT FOR COMMISSION—WRITING REQUIRED BY STATUTE (ALTA.).

The signed memorandum essential in Alberta in a contract for commission to a real estate broker (6 Edw. VII., Alta., ch. 27) must be one to which the sale relied upon is referable; and the statutory requirement is not satisfied by the production of a written authority to the real estate broker to sell as one parcel a section and a half section of land for cash for a stipulated price, and to pay thereupon five per cent. commission, when the contract made by the principal with the customer whom the broker had introduced, was an essentially different transaction not including the half section and accepting other lands in exchange for the section as part payment therefor, although the stipulated price for the section on the exchange was at a rate per acre higher than the rate per acre at which the broker had been authorized to sell the "section and a half" of land.

[*Herron* v. *Como*, 9 D.L.R. 381, 23 W.L.R. 328, reversed.]

Statement

APPEAL from the judgment of the Supreme Court of Alberta, *Herron* v. *Como*, 9 D.L.R. 381, 23 W.L.R. 328, affirming the judgment of Simmons, J., at the trial, by which the plaintiff's action was maintained with costs.

The appeal was allowed, DUFF, and BRODEUR, JJ., dissenting.

Lougheed & Co., for the appellant.
Hellmuth, K.C., and *G. H. Ross*, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The plaintiff alleges an agreement in writing whereby the defendant undertook to pay him five per cent. commission on the selling price of a piece of land described as section 3, and the west half of section 11, township 20, range 28, west of the fourth meridian, in the province of Alberta. The agreement produced gives the defendant general authority to sell the property and earn his commission; but, taken as a whole and construed with reference to the surrounding circumstances, it constitutes a limited mandate to sell a certain area of land of a defined acreage at a fixed price per acre and on terms of payment

stipulated for in advance by the owner in view of his then financial necessities. Any departure from all or any of these special terms would amount to the creation of a new contract which would require to be in writing.

The plaintiff, fully aware of the difficulties of his position, attempted to amend the statement of claim by setting up an alternative right to compensation for introducing a buyer to the appellant "in pursuance of the said agreement." It is impossible for me to understand how it can be said that the exchange on which the respondent seeks to recover his commission can be construed to have been made "in pursuance of the agreement" or can in any way be referable thereto. After Twohey, the intending purchaser, visited the ranch with the plaintiff, Herron, and decided not to buy it, he made a direct offer to Como, the defendant, to acquire in exchange for another property a portion of the farm at a valuation per acre different from that stated in the listing contract. That offer for an object and consideration different from those covered by the contract declared upon was accepted by the defendant the next day in the absence of the plaintiff. Here is the way the respondent in his evidence describes what happened.

Q. Now, after going over the ranch that day, what did you do? A. Mr. Twohey asked Mr. Como if he would sell the section without the half section and Mr. Como said, "Yes." Mr. Twohey said: "What price would you put on the section itself?" and Mr. Como replied: "$40 an acre."

Q. After you had this discussion you returned to Calgary? A. Yes, and Mr. Como said he would come to Calgary on the following Monday morning.

Q. And did he come to Calgary on the following Monday morning? A. Yes, he did.

Q. Did you see him? A. He came to my house and I hitched up my rig and shewed him Mr. Wright's property and Mr. Twohey's property.

Q. What property? A. Mr. Wright's property that I had been talking to him about before, and Mr. Twohey's property in Mount Royal.

Q. Well, then, what did you do next? A. He looked through the house and seemed quite pleased with it. Mrs. Twohey took him through every room upstairs and downstairs, and down to the basement and everywhere. Then he came back, and Mr. Twohey and myself and him talked about the deal and the deal was finally closed up on the 28th of May.

Q. How do you know that? A. It was about two or three o'clock in the afternoon I was called out to my ranch here on the telephone and had a sick mare and I got a veterinary surgeon and went out. Then, as soon as I came back, I suppose about four o'clock in the afternoon, I met Mr. Twohey and he told me.

Q. Did you see Mr. Como at all? A. Yes, that evening.

Q. Did you have any conversation with him? A. They both told me they had closed the deal.

This is entirely a new contract, as I have said before, which is not in any way referable to the one declared upon and cannot

CAN.
S. C.
1913
COMO
v.
HERRON.
Idington, J.

be enforced unless evidenced by a document in writing, and there is no such evidence forthcoming. See sec. 1, ch. 27, Statutes of Alberta, 1906.

In my opinion the appeal should be allowed with costs.

IDINGTON, J.:—The Legislature of Alberta in 1906 enacted as follows:—

1. No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

The appellant signed a contract with respondent pursuant thereto of which the material part is as follows:—

In the event of your selling the property described on the opposite side of this card, I agree to pay W. S. Herron a commission of 5%, and in consideration of your advertising and pushing same, I agree to list exclusively with you for a period of a month.

The land described consisted of a section and a half. The appellant exchanged one section thereof with a third person (who was, I assume, introduced by respondent) for some equity in land in Calgary. Half a section remained undisposed of. I cannot conceive how, in face of the statute, the respondent can found, on such facts, an action on this contract for commission only accruing to him, as the express terms of the contract specify, on a sale of the whole land.

The statute substantially adopts the language used in the Statute of Frauds, which it has been held time and again as the authorities collected in Leake on Contracts, 4th ed., pp. 565 to 567, shew, do not permit any verbal variation or waiver of terms the Act requires to be in writing, as foundation for an action at law thereupon.

The appeal should be allowed with costs.

Duff, J. (dissenting)

DUFF, J. (dissenting):—I think this appeal should be dismissed with costs. My view of the case will be best understood after a statement of the material facts. The appellant was the owner of two parcels of land (a section and an adjoining half-section) near Calgary which he desired to sell; and in May, 1912, he employed the respondent as agent to dispose of this property and signed what is called a listing agreement in the following terms:—

In the event of your selling the property described on the opposite side of this card, I agree to pay W. S. Herron a commission of 5%, and in consideration of your advertising and pushing same, I agree to list exclusively with you for a period of a month.

Signature of owner: CAPT. G. COMO.
Address: High River.

CAN.
S. C.
1913
COMO
v.
HERRON.
Duff, J.
(dissenting)

On the back of this document there appeared a description of both the section and half-section in question and certain terms of sale. Shortly after this document was signed the respondent introduced to the appellant a Mr. Twohey, who was the owner of some property in Calgary which he desired to exchange for farm property. Twohey, in company with the respondent, visited the appellant's property, where the appellant resided, and inspected it. Finding that the quality of the soil of the half-section was not to his liking, he asked the appellant if he was ready to sell the section alone, and the appellant immediately informed him that he would sell it at the price of $40 an acre.

After some further negotiations an agreement was entered into between the appellant and Twohey by which Twohey's property was to be exchanged for the appellant's, the former being valued at the price of $15,000 and appellant being allowed for his property $40 an acre. The effect of this transaction was that it became practically impossible to sell the half-section. That was admitted by the appellant at the trial; was, indeed, put forward by him as one of the grounds on which he justified his refusal to pay the respondent his commission. In his statement of claim the respondent demanded commission under the listing agreement at the rate of 5% upon a purchase price for the section exchanged calculated at $40 an acre. At the trial an application was made upon notice for leave to amend the statement of claim by adding a statement of the facts already referred to, an allegation that the appellant had accepted the plaintiff's services and a claim to be remunerated for services as upon a *quantum meruit*. The application to amend was opposed on the ground that ch. 27 of the Alberta statutes of 1906 was a bar to any claim based upon the allegation in the amendment and the appellant offered, in the alternative, an amendment of his defence, in the event of the respondent's amendment being allowed, by which, among other things, he denied that he had accepted the respondent's services. The learned trial Judge reserved his decision upon the application until, as he said, he should "see what the evidence disclosed." There was a good deal of discussion during the course of the trial touching the admissibility of evidence under the claim of *quantum meruit*, but the learned Judge appears to have admitted the evidence as if the amendment had been made. We were informed on the hearing of the appeal that eventually the learned trial Judge refused to allow the amendment, presumably on the ground taken by the appellant that the Alberta statute above referred to would be a bar to a recovery on the basis of the allegations the respondent proposed to add to his claim. The learned trial Judge held the respondent entitled to recovery on the ground that the employment under the listing agreement above mentioned was a "general employment" in the sense in which Lord Watson used that phrase in *Toulmin* v. *Millar*, 58 L.T. 96; in other words, that

CAN.
S. C.
1913
COMO
v.
HERRON.
Duff, J.
(dissenting)

the agreement on its true construction provides for the payment of commission to the respondent upon any sale or other disposition of any part of the lands referred to, to a person introduced by the respondent. On the whole I am inclined to think that this construction of the agreement cannot be maintained. It is not the most natural reading of it; and one must not leave out of consideration the fact that the agreement was drawn up by an agent whose business was that of land-selling, and who was accustomed to framing and entering into such contracts. I think that in the circumstances, the agent must be held to the *strictissimum jus* so far as concerns the construction of the words employed by him.

But there is another ground upon which I think the respondent was entitled to recover. There can be no question that when an owner has entered into a contract of this description (in which the agent has contracted expressly to use his best efforts for the sale of the property in consideration of receiving a commission upon introducing the purchaser) the owner undertakes an obligation not to interfere with and frustrate the agent's efforts. If the agent introduces a purchaser who is prepared to enter into negotiations for the purchase of the property, the owner would be acting in contravention of the obligations of his contract if he were to take advantage of the agent's services to enter into some arrangement with the person introduced, whereby it should become impossible for the agent to earn his commission under the terms of his contract of employment. In this case the owner did take advantage of the agent's services by entering into a contract with the person introduced, the result of which was that the term of the contract requiring the sale of the whole property as a condition of the respondent's right to commission became impossible of performance—impossible, that is to say, in a business sense, because impracticable: *Dahl* v. *Nelson, Donkin & Co.*, 6 App. Cas. 38. The principle applies which was laid down by Willes, J., in *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (1864), 17 C.B. (N.S.) 733, and quoted with approval by the Judicial Committee of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, at p. 626:—

> I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

In such a case the agent is clearly entitled to recover compensation for his services. The only point to be considered in this connection is whether there is anything in the Alberta statute already referred to barring such recovery. It seems to me to be clear that there is not. The foundation of the agent's right to recover in such a case is the contract of employment. The principal's conduct preventing a performance of the condition prescribed

by the contract has the effect in law of precluding him from insisting upon the performance of that condition, and entitles the agent to recover compensation for his services as services rendered at the request of the principal; the request being evidenced by the written contract of employment. See precedent, Bullen & Leake, "Precedents of Pleadings," 6th ed., p. 328. The only objection to this view that I can think of is that the arrangement with Twohey was assented to by the respondent and consequently the appellant's conduct in entering into it cannot be said to have been wrongful as against him. The answer to that is this: *Primâ facie* the principal's conduct gives the agent a right to recover against him remuneration for his services. If the principal relies upon the conduct of the agent as an assent justifying his own conduct, then since this assent is to be implied from the conduct of the parties, he must accept all the implications to which this conduct gives rise. It would be ridiculous to suggest that the agent by his conduct must be taken to have assented to the appellant entering into the arrangement with Twohey except upon the terms that he should be paid for his services in introducing Twohey. Then the appellant cannot blow hot and cold, and he cannot be permitted to take advantage of the respondent's implied assent as an answer to the respondent's action without observing the conditions also implied. The appellant cannot, therefore, set up the respondent's conduct in answer to the respondent's claim to recover for his services on a *quantum meruit*.

As to the amount the respondent is entitled to recover, I think if the appellant desires it, there should be a reference to ascertain the amount, the cost of the appeal to be paid by the appellant, the costs of the reference and further directions to be reserved.

ANGLIN, J.:—This action is brought upon a written contract by which the defendant agreed to pay a commission of 5% for a sale for a money price, of which a substantial part should be payable in cash, of a defined property. The transaction in respect of which commission is claimed was a disposal of part only of the property mentioned in the written contract, not for a money price, but in exchange for another property. It was not a performance of the terms on which, under the written contract, the commission was to be payable. In order to succeed, the plaintiff must prove a substantial variation in the terms of the written contract on which he sues. He must shew the substitution of another consideration for that upon which the defendant undertook in writing to pay the commission. That is in effect setting up a new contract. But if it should be regarded as a case of variation, that variation is in a most material element and, if made, was in parol. Under the Alberta statute, 6 Edw. VII. ch. 27, an agent, in my opinion, cannot recover upon a contract so varied.

Anglin, J.

CAN.
S. C.
1913
COMO
v.
HERRON.
Anglin, J.

The action is not framed and was not tried either as an action for damages for breach of the provision in the written contract for an exclusive listing, or as an action to recover upon a *quantum meruit* on the basis of an implied contract to remunerate the plaintiff for his services in consideration of his relinquishing his rights, if any, under the written contract, and in my opinion if any such cause of action exists it should not now be dealt with here.

The appeal should be allowed with costs in this Court and in the full Court of Alberta, and the action should be dismissed with costs.

Brodeur, J. (dissenting)

BRODEUR, J. (dissenting):—I have come to the conclusion that this appeal should be dismissed. The law in Alberta states that:—

> No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

That is a new provision in the law and a very wise one if we may judge by the great number of cases that come before us concerning commissions claimed by real estate agents. The contract of sale of lands could not give rise to any right of action, except when it is in writing. Now the provisions of the statute are extended to cover the relations between principal and agent.

In this case the memorandum proves conclusively that the respondent had authority to act as agent of the appellant. The respondent began to perform his duties as such agent and found an intending purchaser. He could not by himself conclude the contract of sale, because in the instructions which he had received from his employer some conditions of the purchase price had to be determined and agreed upon by him. But the real estate agent in this case found a purchaser whom he put in relation with his principal. The vendor and the intending purchaser carried out negotiations, and as a result a sale was made of the lot in question. Now, if the vendor has found it advisable to make a sale on conditions different from those he had mentioned to the agent, he is, all the same, responsible for the services rendered to him by his agent. The services rendered by the agent give rise to a right of action on his part. His contract of agency is established and proved, and it certainly entitles him to claim for the services rendered. Lord Watson in the case of *Toulmin* v. *Millar* (1887), 58 L.T. 96, at 97 discusses in the following terms the effect of a contract similar to the one in this case:—

> When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum

which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

Brodeur, J. (dissenting)

For these reasons I would be of opinion that the appeal should be dismissed with costs.

Appeal allowed with costs.

REX v. CHITNITA.

Alberta Supreme Court, Scott, J. March 9, 1914.

1. SUMMARY CONVICTIONS (§ VIII—85)—UNCERTAINTY—CHARGE NOT DISCLOSING LEGAL OFFENCE—PLEA OF GUILTY.

A plea of guilty to a charge intended to be framed under sec. 242A of the Criminal Code (amendment of 1913), but not specifically referring to that section, will not support a summary conviction thereunder where the information upon which the plea was taken did not sufficiently disclose an offence, the form of same being that the defendant did "neglect his wife."

[See also *R. v. Oberlander*, 16 Can. Cr. Cas. 244; *R. v. Armstrong*, 18 Can. Cr. Cas. 72; *R. v. Fitzgerald*, 19 Can. Cr. Cas. 39; *R. v. Toy Moon*, 19 Can. Cr. Cas. 33.]

Statement

HABEAS corpus application in respect of a commitment under a summary conviction in proceedings taken under sec. 242A of the Criminal Code (amendment of 1913).

The applicant was discharged from custody.

A. E. Popple, for the Attorney-General.

L. T. Barclay, for defendant.

Scott, J.

SCOTT, J.:—This is an application by the defendant for the issue of a writ of *habeas corpus*. The defendant is now confined in the provincial gaol at Lethbridge, being there detained under a warrant of commitment issued on December 23, 1913, by one Arthur L. Lucas, a justice of the peace for the province. It recites that the defendant was on that day convicted "for that he, the said Martin Chitnita, on the.....day of ..... A.D. 1913, at Waugh, in the said province, did unlawfully neglect his wife and children," and that it was adjudged that he, for his said offence, should be imprisoned in the gaol at Lethbridge for the term of one year.

The application for the writ was made to me on the 2nd March instant, but with the consent of counsel for the Attorney-General, it was adjourned until March 6 instant. When the

ALTA.
S. C.
1914
REX
v.
CHITNITA.
Scott, J.

application was made on March 2, certain documents which appeared and purported to be the original records of the proceedings before the convicting justice and which were in the custody of the clerk of the Court were produced before me and were referred to by counsel without objection. It appears from these records that on December 23, 1913, the wife of the defendant laid an information under oath before the convicting justice charging that the defendant "during the summer of 1913 at Waugh in the said province did neglect his wife." The only record of a conviction having been made is that on the face of the information immediately following the statement of the charge is a statement signed by the defendant in the following words: "to which the accused pleads guilty," and the further statement signed by the convicting justice, viz., "sentenced to one year's imprisonment without the option of a fine."

When the parties were before me on March 2, I expressed the view that neither the warrant of commitment nor the information, upon which the conviction, if any, was based, disclosed an offence for which the defendant could be convicted.

When the application came on to be heard on March 6, it appeared that the convicting justice had, in the meantime, returned to the clerk of the Court a formal conviction in which the defendant is convicted that he

on or about April 1, 1913, to December 23, inclusive, A.D. 1913, at Waugh, in the said province did without lawful excuse neglect or refuse to provide necessaries for his wife and children contrary to sec. 242A of the Criminal Code, he being a husband under a legal duty to provide necessaries for his wife or any child under sixteen years of age and such wife and children being in destitute or necessitous circumstances.

It also appeared that the justice had also, in the meantime, issued a new warrant of commitment which recited that the defendant was convicted of the charge, the particulars thereof being stated in the same terms as they appear in the formal conviction.

Section 1121 of the Criminal Code provides that no warrant or commitment shall be held void by reason of any defect therein, provided it is thereby alleged that the defendant has been convicted and there is a good and valid conviction to sustain the same.

Apart from any question as to whether the formal conviction discloses an offence punishable on summary conviction, I must hold that it is invalid by reason of the fact that the proceedings before the convicting justice did not authorize him to make it. The fact that the defendant by his plea of guilty admitted that he neglected his wife, which is not an act or omission for which he can be convicted, cannot be construed as an admission by him that he neglected to provide her with necessaries under circumstances which would render him liable to conviction.

ALTA.
S. C.
1914
REX
v.
CHITNITA.
Scott, J.

Further, the charge to which he pleaded guilty, and upon which plea the conviction is based, was one for neglecting his wife, and, even assuming that he could be convicted upon that charge, that would not authorize the justice to convict him for neglecting both his wife and his children.

I must, therefore, hold that the defendant is entitled to an order for his discharge from custody. I regret that I have to make this order on the material before me as it may be that the defendant is guilty of an offence under sec. 242A, but I am bound to uphold the objections that have been raised respecting the irregularity of the proceedings of the convicting justice. If I have authority so to do, I order that no action shall be brought against the convicting justice.

Defendant discharged.

B. C.
1913

BOGARDUS v. HILL.

British Columbia Supreme Court, Murphy, J. October 1, 1913.

COSTS (§ II—65)—*Practice—Expense of survey of lands—Cost of maps—Fiat granted prior to allocatur—B.C. Costs Tariff* (1906), *schedule* 4.]—Appeal from the taxation of costs as to the allowance of the expense of a survey of lands.

S. S. Taylor, K.C., for plaintiff.

Davis, K.C., for defendant.

MURPHY, J., held that the principle to be acted upon in dealing with allowances to witnesses for equipping themselves is that all work should be allowed for which a reasonable man preparing for trial would feel bound to undertake in order to prove his case. As to the cost of maps for which no fiat was obtained, the omission may be remedied, if a fiat is necessary, by the Judge hearing the appeal granting the fiat where the allocatur had not yet been signed.

Appeal dismissed.

B. C.

1913

BASTEDO v. BRITISH EMPIRE INSURANCE CO.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. May 20, 1913.

INSURANCE (§ III E 1—76) — *Warranty — Concealment — Insuring life of horse—Representation of price paid—Evasive and incorrect answer suggested by agent.*]—Appeal from the County Court at Vancouver in an action upon an animal insurance policy. The company's objection to paying the loss was on the ground of concealment or misrepresentation in the application which formed part of the contract along with a stipulation that the company should not be liable where material statements were untrue.

The evidence shewed that the applicant told the agent, as was the fact, that he had paid $550 for the stallion on which an insurance of $1,000 was being applied for; that the agent, writing out the application, suggested that the answer to the printed question, "What did you pay for this animal?" should be filled out, "Got in trade." In answer to another question requiring the value of the stallion to be stated, the answer was $2,000.

In the County Court, Judge Grant gave judgment for the plaintiff, holding that the horse was worth $2,000 and that there was no material misrepresentation by the assured.

R. M. Macdonald, for defendant, appellant.

W. B. Farris, for plaintiff, respondent.

IRVING, J.A., held that the answer "got in trade," followed by a valuation of $2,000, was designed to conceal the fact that the last owner was willing to accept $550 for the animal. The insurance company was not fixed with knowledge of the disclosure to the local agent of the true price when the applicant and the agent had arranged to suppress it in order to get the application accepted.

MARTIN, and GALLIHER, JJ.A., held that the company was not responsible for the inventions of its agent to which the plaintiff, knowing the untrue answer, had become a party; the deception would tend to stifle inquiry by the company upon the material point of the price paid by plaintiff for the horse, and the case of *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516, applied.

The appeal was allowed and the action dismissed.

LOACH v. B.C. ELECTRIC R. CO.

B. C.

C. A.
1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. RAILWAYS (§ IV A 2—98)—CONTRIBUTORY NEGLIGENCE—AT CROSSINGS—RIDING WITH ANOTHER.

A person being given a gratuitous ride on a wagon and sitting beside the driver is under no duty on approaching the crossing of an electric railway to use extraordinary care as to the approach of cars; and on his being killed in a collision with a car not seen by either of them, an action on behalf of his family against the electric railway for damages for his death is not defeated by a finding that the deceased was negligent in not taking "extraordinary precautions to see that the road was clear," in view of further findings of excessive speed by the railway and that the railway motorman could have stopped the car and have avoided the accident had it not been for the defective brakes which the railway negligently maintained as part of the car equipment.

[*Brenner* v. *Toronto R. Co.*, 6 Can. Ry. Cas. 261, 13 O.L.R. 423, on appeal 7 Can. Ry. Cas. 210, 15 O.L.R. 195, and 8 Can. Ry. Cas. 108, 40 Can. S.C.R. 540, considered; *Pike* v. *London General Omnibus Co.*, 8 Times L.R. 164; *Dublin, etc. R. Co.* v. *Slattery*, 3 A.C. 1155; and *Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838; *Scott* v. *Dublin, etc., R. Co.*, 11 Ir. C.L. 377; and *Herron* v. *Toronto R. Co.*, 11 D.L.R. 697, 15 Can. Ry. Cas. 373, referred to.]

Statement

APPEAL by the plaintiff from the judgment of Murphy, J., in favour of the defendant company on the answers of the jury to questions submitted, in an action under Lord Campbell's Act brought by the administrator of Benjamin Sands who was killed in an electric railway crossing accident for damages for the benefit of the widow and children.

The appeal was allowed, MACDONALD, C.J.A., and MCPHILLIPS, J.A., dissenting.

D. G. Macdonell, for appellant (plaintiff).

McPhillips, K.C., and *Duncan*, for respondent (defendant).

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A. (dissenting):—This action was brought by the administrator of Benjamin Sands, deceased, for the benefit of his widow and children under the Families Compensation Act, R.S.B.C. 1911, ch. 82. The deceased and one Milton Hall were employees of the Bitulithic Paving Co., deceased as a timekeeper and Hall as a teamster. On the evening in question Hall was driving his team with a load of paving material. Deceased asked for and was given by Hall a ride on the wagon, and sat by the driver. They proceeded eastward from the employer's office, which was west of the defendants' railway three-quarters of a mile. Approaching the railway the view was partially obstructed by an orchard. Townsend road, on which they were driving, approached the rail level on an up-grade. There was a space between the orchard and the railway the width of which

B. C.
C. A.
1914
LOACH
v.
B.C.
ELECTRIC
R. Co.
Macdonald,
C.J.A.
(dissenting)

is not very definitely fixed. The plaintiff and Hall approached the railway engrossed in conversation, and took no precautions at all to ascertain whether or not a car was approaching the crossing. The evidence is clear and uncontradicted on this point. The two men were totally oblivious of their surroundings. There is evidence that had they looked they could have seen the approaching car, but if there be any doubt upon this point, there is no question that had they listened they could have heard the approaching car, which was coming down grade to the crossing at a speed of thirty-five miles per hour, and making a noise which could be heard at a great distance. The driver and the deceased neither stopped, nor looked, nor listened, nor gave any attention at all to the presence there of the railway track. When the horses had got partially across the track, and the front wheels of the wagon had reached the rail, they were struck by defendant's tramcar coming from the north, and the deceased was killed. The jury found the defendants were negligent in running the car at an excessive rate of speed, and in not slackening this speed and bringing the car under complete control approaching the crossing, and in having insufficient space for observation of approaching cars between the orchard and the station, which was a small shelter erected within a few feet of the rails just north of the crossing. They found that the driver, Hall, was guilty of negligence in not taking ordinary precautions to see that the road was clear; that the deceased was guilty of negligence which contributed to the accident, and which consisted in not taking *extraordinary* precautions to see that the road was clear, and that the defendant's motorman could have stopped the car and have avoided the accident if the brake had been in effective condition.

Upon these findings the learned Judge entered judgment for the defendants and dismissed the action. From that judgment this appeal is taken.

The finding of contributory negligence is peculiarly worded, but having regard to the evidence, which is conclusive and uncontradicted, upon the point, it can mean nothing less than that the deceased did not take ordinary or reasonable care.

If there were any doubt about this, if the evidence were at all equivocal; if it were uncertain what the plaintiff's negligence consisted of; I should not hold the answer a sufficient finding of contributory negligence; but the jury could not, I think, have done otherwise than find the deceased guilty of want of reasonable care; his negligence was identical with that of the driver who was found guilty of want of ordinary care by the answer to another question.

It was suggested in argument that because the deceased was

not the driver he was under no obligation to take care, but this is quite a different case from the class of cases considered in *The Bernina, sub nom. Mills* v. *Armstrong* (1888), 13 A.C. 1, where the rights and duties of passengers in and drivers of public conveyances are discussed.

It was also suggested that it was not shewn in evidence that the deceased knew the railway was there, and hence was not guilty of any want of precaution in not looking to see if a car were approaching. That question seems to have been raised before us for the first time. The reason, I think, that no evidence was offered of the plaintiff's knowledge that the railway was there is that all parties took such knowledge for granted, it being apparent that he must have known, his employer's office being three-quarters of a mile to the west of the railway track, the men whose time he was keeping being at work east of the railway track, and the deceased having been in that employment for a month before the accident.

This brings me to the question of law so strongly pressed upon us by the appellant's counsel, based upon the answer of the jury, or what I must take that answer in effect to be, that the occurrence could have been prevented had the car been equipped with an efficient brake. He relied very strongly upon *Brenner* v. *Toronto Railway* (1907), 6 Can. Ry. Cas. 261, 13 O.L.R. 423. I confess I was much impressed by the reasons for judgment in that case. On an appeal to the Court of Appeal for Ontario, the judgment was reversed on other grounds [7 Can. Ry. Cas. 210, 15 O.L.R. 195], and no reference at all was made to the point so fully discussed by Mr. Justice Anglin. The judgment of the Court of Appeal was sustained by the Supreme Court of Canada on the same grounds [8 Can. Ry. Cas. 108, 40 Can. S.C.R. 540], so that I have not the advantage of the opinions of the learned Judges in either of these Courts, except casual notice of the point in the judgments of Mr. Justice Idington and Mr. Justice Duff.

It seems to me that the term "ultimate negligence" is inapt and confusing unless it be confined, in the application of it, to an act or omission subsequent in point of time to the negligence of the other party. It pre-supposes anterior negligence on the part of, at least, the party complaining. It can only be properly used, I think, with deference, to designate an act or omission but for which the consequences of his own negligence would have been avoided; something which ought to have been done or omitted when the *particular* danger was imminent.

It has been found a convenient phrase when analysing and distinguishing the several acts of negligence where several appear to exist, and fixing upon the proximate or efficient cause, eliminating the others. Hence, where one party negligently

B. C.
C. A.
1914
LOACH
v.
B.C.
ELECTRIC
R. Co.
Macdonald, C.J.A. (dissenting)

approaches a point of danger, and the other party with like obligation to take care negligently approaches the same point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate negligence in the sense of being the proximate cause of the injury.

In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence and to assign to it the whole blame for the occurrence, although by no effort of the defendants or their servants could the situation, at that stage, have been saved.

It is said that but for the act of negligence in not repairing the brake the occurrence could have been avoided, but it is equally true that but for the acts of negligence of the deceased and the driver, it could have been avoided. It is equally true to say, where the only negligence is excessive speed, that but for that it could have been avoided, or in case of failure of a car or engine driver to sound a warning when approaching a crossing, that, but for that negligence, it could have been avoided.

Both parties were actors in the occurrence, that is to say, each was present and capable of acting when the danger was imminent, or when it ought to have been apparent to them that a particular danger of that sort might be imminent. In this respect it is unlike *Davis* v. *Mann*, 10 M. & W. 546; and *Radley* v. *London and N.W. R. Co.*, 1 App. Cas. 754, where neither plaintiff *could at the time* do anything to avert the injury, but each defendant could.

The judgment of Mr. Justice Walton in *Reynolds* v. *Tilling* (1903), 19 Times L.R. 539, which was affirmed in the Court of Appeal, 20 Times L.R. 57, seems to me to point irresistibly to the conclusion at which I have arrived. I can see no distinction in principle between this case and that. There the plaintiff pushed his truck in front of the hind wheel of an omnibus. He did not do it intentionally but negligently. The driver of the omnibus could, so it was found, by the exercise of care, have avoided it. It was held that plaintiff could not recover because of his own negligent act in pushing his truck in front of the wheel. Here, in the same negligent manner the deceased, without paying any heed to an apparent danger, allowed himself to be driven in front of an approaching car.

I think, therefore, the appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—The defendant's cross-appeal I would dismiss. In my opinion, the evidence will support the jury's findings.

We must, therefore, deal with the plaintiff's appeal on the

findings of the jury, and on the facts admitted or not disputed. The defendants cannot rely on facts which were disputed in evidence, and which were not found by the jury.

On the findings I would allow this appeal and enter judgment for the plaintiff. I cannot agree that the verdict of the jury amounts to a finding that the plaintiff was guilty of contributory negligence. Taken alone, the answer to question 3 might bear that construction. The use of the word "extraordinary" in the 3rd answer, contrasted with "ordinary" in the 8th, shews that the jury used the word "negligence" in a different sense.

Nor was the plaintiff so identified with the driver as to make the driver's negligence his negligence. In *Pike* v. *London General Omnibus Co.* (1891), 8 Times L.R. 164, before Lord Coleridge, L.C.J., and Mr. Justice A. L. Smith, the plaintiff was being driven by Kettle, as a friend, not as a servant of Kettle's master. He took no part in the driving. An omnibus ran against the vehicle, and the plaintiff was hurt. It was argued that a person sitting by the driver was responsible for his careless driving so as to preclude him from recovering damages. The jury found that the company was guilty of negligence, and that Kettle was guilty of negligence in driving too rapidly, but that there was no negligence on the part of the plaintiff. The Court overruled this contention. See also *Mills* v. *Armstrong* (1888), 13 App. Cas. 1, overruling *Thorogood* v. *Bryan* (1849), 8 C.B. 115, 18 L.J.C.P. 336.

In the case before us the jury have not found that the plaintiff was talking to the driver, or doing anything to distract his attention. In fact, they have acquitted him of any negligence except that of not taking "extraordinary" precautions to see the road was clear.

The jury found that the negligence which was the proximate cause of the accident, was the excessive speed of the car as a consequence of its defective brakes; that had there been proper brakes on the car, the motorman would have been able to stop the car after he saw the position of the plaintiff on the track, and before he was struck. Now, although the emergency calling for the use of the brakes did not arise until the plaintiff was on the track, the failure to furnish a car equipped so as to stop when approaching a crossing, although such an omission on the part of the company occurred prior in point of time to the plaintiff's alleged negligence, was the negligence which caused the accident. I think that is the effect of the 1st, 5th, 6th, 9th, and 10th findings of the jury. What is the proximate cause is a question of fact for the jury.

In cases where it is suggested both parties are guilty of neglect of duty, and that if either had exercised reasonable care

B. C.
C. A.
1914
LOACH
v.
B.C. ELECTRIC R. CO.
Irving, J.A.

and skill, the collision would have been avoided, if the negligent acts ascribed to the plaintiff and defendant respectively are practically simultaneous, the received and usual direction to the jury is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover: *per* Lord Blackburn in *Dublin, Wicklow and Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155 at 1207.

Assuming that the jury meant to find the plaintiff guilty of negligence in its legal sense, then although the plaintiff's conduct—even negligent conduct—may have formed a material part of the cause of the accident, he can, nevertheless, recover if it is shewn that the defendant's servants could by the exercise of ordinary care and caution on their part, have avoided the consequences of the plaintiff's negligent conduct. This is the doctrine of *Davis* v. *Mann*, 10 M. & W. 546; re-stated in *Grand Trunk* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838.

The answer of the jury to the 4th question shews in effect that the plaintiff could only have avoided the defendant's negligence in not providing a properly equipped car, by resorting to extraordinary precautions; possibly they had in mind the difficulty that arose from the company's station shutting out a view of the track, or possibly they may have thought that the plaintiff, not being in charge of the horses, was not required to look out for trains.

So, in whatever way we construe the 3rd answer, the 10th finding to which some effect must be given, would disentitle the defendants to hold the judgment in their favour.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—After reading all the evidence, in addition to what we were referred to, I am of the opinion that the jury meant what they said in drawing the distinction between the "ordinary precautions" omitted to be taken by the driver of the wagon and the "extraordinary precautions" omitted by the deceased in each case "to see (the) road was clear." There is abundant evidence to shew that the space between the station (shelter) and the orchard was, as the jury found, insufficient to properly observe the approach of the car, and the presence of this building doubtless also tended to prevent the sound of the car, or its whistle, being heard, as did also the trees of the orchard. Taking, as must be done, the answers to questions 3 and 4 together, they absolve the deceased from contributory negligence. He can only be regarded as a passenger, being given a ride on the wagon as a matter of kindness, because the driver, Hall, had sole control over it with which the deceased very properly made no attempt to interfere. Hall had been

working on the job for about a month (p. 20) and knew the road and the railway track, having been across it six or seven times (evidence, p. 20), but there is no evidence that the deceased had ever driven over it and it is only a matter of inference, though a probable one (p. 57), that he had been across the track, which is three-quarters of a mile from his office, and he is said by one witness, Hayes (p. 5), to have been working there only four or five days, though a longer period of two weeks is mentioned, but the point is not cleared up.

With respect to the duty of a passenger the case of *Brickell* v. *New York Central R. Co.* (1890), 24 N.E.R. 449, was relied upon, but in the first place the facts are not the same as the deceased here undoubtedly had not the same knowledge of the road and environment as the driver, and the point of view of a driver and a pedestrian often is essentially different; and in the next place the rule is extended beyond that which is recognized by our Courts in the cases cited and accurately stated in 21 Hals. 415, sec. 700, thus:—

> If the vehicle is a hired vehicle, the person to whom it is hired is only liable for the negligence of the driver in so far as he is in a position to control the actions of the driver. A mere passenger, even though sitting by the side of the driver, and, therefore, physically in a position to control his actions, is not liable for the driver's negligence.

The cases cited are *McLaughlin* v. *Pryor* (1842), 4 Man. & Gr. 48; *Wheatley* v. *Patrick* (1837), 2 M. & W. 650; and *Pike* v. *London General Omnibus Co.* (1891), 8 Times L.R. 164. It follows, therefore, that as negligence has been found, the appeal should be allowed, on this ground alone, so I express no opinion on the other questions raised; that one relating to the dismissal of an action without a verdict where contributory negligence is pleaded really disappeared during the argument when the respondent's counsel applied for and obtained an amendment to cross-appeal, which appeal should also be dismissed.

GALLIHER, J.A.:—The circumstances of this case did not relieve the deceased from taking ordinary precautions in approaching the crossing. Galliher, J.A.

The jury have found the defendants guilty of negligence in that they were running at an excessive rate of speed, and have also found the deceased guilty of contributory negligence.

It is not quite clear why the jury in finding contributory negligence should have stated that the deceased should have used "extraordinary care." Such was not necessary, but I think it cannot be disputed that the deceased used no care whatever in approaching the crossing, but owing to the view I take on another ground, it becomes unnecessary to decide what,

B. C.
C. A.
1914
LOACH
v.
B.C. ELECTRIC R. CO.
Gallihier, J.A.

if any, effect their finding in this form should have on the judgment.

The point most strenuously argued before us by Mr. Macdonell, of counsel for the plaintiff, was that admitting negligence, and contributory negligence, the fact that the brake equipment of the car was defective, as found by the jury, was ultimate negligence on the part of the company which entitled the plaintiff, in law, to recover.

We were referred to *Brenner* v. *Toronto R. Co.*, 6 Can. Ry. Cas. 261, 13 O.L.R. 423, where Anglin, J., dealt very exhaustively with the question of ultimate negligence, and in whose judgment Mulock, C.J., and Clute, J., concurred.

That case went to the Court of Appeal for Ontario, 7 Can. Ry. Cas. 210, 15 O.L.R. 195, and to the Supreme Court of Canada, 8 Can. Ry. Cas. 108, 40 Can. S.C.R. 540, on the ground of misdirection, but in neither of these Courts was the question of ultimate negligence dealt with, and as I read the case in those Courts, the question is open to us here.

In the present case what is claimed to be ultimate negligence was the defective brake equipment.

If the view expressed by the Divisional Court in the *Brenner* case is good law, then this case comes within it.

The cases of *Radley* v. *North Western R. Co.*, 1 App. Cas. 754; *Davis* v. *Mann*, 10 M. & W. 546, and *Tuff* v. *Warman*, 5 C.B. (N.S.) 573, while they are all in accord with the principle that a plaintiff though negligent where he can shew that the ultimate negligence of the defendant was the proximate cause of the accident, is entitled to recover, do not assist us very much in determining in this case whether the defective brakes bring it within the class of ultimate and not original negligence.

The negligence in so far as the existence of the defective brakes is concerned was anterior to and continued right up to the time of collision.

The motorman did all he could as soon as he discovered the danger to avoid the accident, but (owing as the jury have found to the defective condition of the brakes) without avail.

Does what is in the first instance original negligence become ultimate negligence which can be said to be the proximate cause of the accident when the company have, by that very negligence, tied the hands of their employees, so to speak, and rendered useless any physical act on their part, performed subsequent to the act of negligence of the plaintiff which otherwise might have avoided the accident?

The case of *Scott* v. *Dublin and Wicklow R. Co.* (1861), 11 Ir. C.L.R. 377, referred to by Anglin, J., in *Brenner* v. *Toronto*, *supra*, would seem to bear out that view.

The matter was so thoroughly reasoned out in the Divisional Court in the *Brenner* case (supported by *Scott* v. *Dublin, etc.*) that I need not do more than refer to those cases.

There is an additional feature, however, which suggests itself to my mind in the case before us which is not present in the *Brenner* case, and which makes this case stronger, viz., that the negligence in having defective brakes became effective at the crucial moment, and at a time subsequent to the plaintiff's negligence, so as to be really the proximate cause of the accident.

I would allow the appeal.

McPHILLIPS, J.A. (dissenting):—In this case upon the answers of the jury to questions submitted to them, and upon a motion reserved to the defendant to move for judgment at the close of the plaintiff's case, Murphy, J., directed judgment to be entered for the defendant dismissing the action with costs; and from that judgment the plaintiff now appeals to this Court.

McPhillips, J.A. (dissenting)

The questions as submitted to the jury, and the answers thereto, are as follows:—

Q. 1. Was the defendant company guilty of negligence which was the proximate cause of the accident? A. Yes.

Q. 2. If so, in what did such negligence consist? A. (1) Excessive speed under the circumstances, viz., a single track was in use for both way passengers and it was proved passengers were waiting whose destination was unknown to motorman or conductor—therefore the speed should have been slackened and car brought under complete control approaching station; (2) Insufficient space between orchard and station for observing approach of cars from the north.

Q. 3. Was the deceased as distinguished from the driver of the rig, guilty of negligence which contributed to the accident? A. Yes.

Q. 4. If so, in what did such negligence consist? A. By not taking extraordinary precaution to see road was clear.

Q. 5. If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident? A. Yes.

Q. 6. If so, what? A. The motorman could have stopped the car if the brake had been in effective condition.

Q. 7. Was the driver as distinguished from deceased, guilty of negligence that contributed to the accident? A. Yes.

Q. 8. If so, in what did such negligence consist? A. By not taking ordinary precautions to see road was clear.

Q. 9. If both the driver as distinguished from deceased and the company were guilty of negligence, could the company then have done anything which would have prevented the accident? A. Yes.

Q. 10. If so, what? A. The motorman could have stopped the car if the brake had been in effective condition.

Q. 11. (*a*) Damages for widow? A. $5,000; (*b*) Damages for each child? A. $2,500 each child.

I may say that I have had the advantage of reading the

B. C.
C. A.
1914
LOACH
v.
B.C.
ELECTRIC
R. CO.
McPhillips, J.A.
(dissenting)

judgment just delivered by my learned brother the Chief Justice of this Court, and I may say that I entirely agree with it, adding some further reasons which, in my opinion, are salient reasons upon which to support the judgment of the learned trial Judge.

In my opinion, both upon the answers of the jury, and upon the whole evidence, judgment has been rightly entered for the defendant.

It has been contended that where a question of contributory negligence arises there never can be a nonsuit or dismissal of the action without a verdict.

This contention had consideration by the Appellate Division of the Supreme Court in *Cooper* v. *London Street R. Co.* (1913), 9 D.L.R. 368, 15 Can. Ry. Cas. 24. Meredith, J.A., at p. 369 (9 D.L.R.), said:—

> It is contended for the plaintiff that, although there might be a nonsuit for want of reasonable evidence of negligence on the defendants' part in a case where there is such a want of evidence there never can be a nonsuit, or dismissal of the action without a verdict, on the question of contributory negligence, because the onus of proof in such a case is upon the defendants, but that contention must, in my opinion, be held in these days to be erroneous, and that in all cases in which there is no reasonable evidence upon which the jury could find in the plaintiff's favour, the case should be withdrawn from them and the action dismissed. Why not? Why make any difference? It is just as much no legal evidence whether the onus is the one or the other way: a verdict must be supported by some legal evidence no matter upon whom the onus of proof may be, or which way the finding may be; and if there be no legal evidence on one side, no matter which, there is nothing upon which a jury can pass, and so the case should be withdrawn from them. It is not necessary, in my opinion, in these days to go through the form of directing them to find a verdict, and it has always seemed to me to be illogical from all points of view that they should be so directed; if there be any evidence, the verdict should be theirs, if there be no evidence, the judgment should be the Court's as a matter of law.

It is contended by counsel for the appellant that the answers of the jury to questions 3 and 4 do not, taken together, amount to a finding of contributory negligence, that is, that 4 is explanatory of 3, and that the resultant effect is—no finding of contributory negligence. In my opinion, such is not the effect, and the evidence would not support this, and we may look at the evidence. The jury plainly intended to indicate that a person about to pass over the railway track under the circumstances which the deceased did, did not take the precautions which one is called upon to take.

What should these precautions have been? In the case last above cited, Meredith, J.A., dealt with a somewhat analogous situation, although it is true that was a case of a double track,

and the passenger went around the rear of the car from which she had just alighted. At p. 371, he said:—

Accidents such as this are likely to happen unless, perhaps, considerably more care than the ordinary person takes is taken. Not only should the passenger be more than ordinarily careful in crossing the other track after alighting from a car and passing close behind it; but also conductors as well as motormen should be more than usually alert to prevent accidents so happening.

Can it not be well said that the jury when they used the words "by not taking extraordinary precautions to see the road was clear" meant to accentuate their view that upon all the facts of the case, and the surrounding circumstances, the deceased did not do that which he ought to have done, and if he had done that which he ought to have done, the accident would not have occurred.

It would seem to me that if it is necessary to give consideration to the answers of the jury at all, that this is the only conclusion to which one can come; if the jury do not mean this, and do not in effect find contributory negligence, my opinion is, that there is no reasonable evidence upon the whole case upon which the jury could find in the plaintiff's favour. Therefore it follows that the action has been rightly dismissed upon the whole case.

A most interesting case in the light of the facts of this case is *Long* v. *Toronto R. Co.* (1913), 10 D.L.R. 300, 15 Can. Ry. Cas. 35, which is also a case in the Appellate Division of the Ontario Supreme Court (Mulock, C.J.Ex., Sutherland, Middleton, and Leitch, JJ.A.). It is interesting to read the questions and answers that were under consideration there, and, notwithstanding which, judgment went for the railway company:—

Q. 3. Was the plaintiff's husband guilty of negligence which caused the accident, or which so contributed to it, but for his negligence the accident would not have happened? A. Yes.

Q. 4. If you answer "yes" to the last question, wherein did his negligence consist? A. In not looking for a car.

Q. 5. Notwithstanding the negligence, if any, of the deceased, could the defendants, by the exercise of reasonable care, have prevented the collision? A. Yes.

Q. 6. If so, what could they have done which they did not do or have left undone which they did do? A. By putting on the brakes and having the car under proper control.

Q. Could the motorman and the deceased, each of them, up to the moment of collision, have prevented the accident by the use of reasonable care; in other words, was the negligence of the deceased the contributing act up to the very moment of the accident? A. Ten say no, two say yes.

The judgment of the Court was delivered by Mulock, C.J., and he said, at p. 302:—

As to the answers to questions 3 and 4, their evident meaning is,

B. C.

C. A.

1914

LOACH v. B.C. ELECTRIC R. CO.

McPhillips, J.A. (dissenting)

that the deceased failed to exercise reasonable care, by not looking for an approaching car, and by negligently stepping upon the track and endeavouring to cross in front of it, thereby causing, or contributing to, the accident. If these answers stood alone, the plaintiff, notwithstanding the answer to question 6, even if supported by evidence, must fail, the rule being that where damage is the direct, immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover. It was, however, argued that the answer to question 7 relieved the plaintiff of the consequences of the deceased's negligence. But there is, I think, no evidence to support the answer to question 7. The deceased was guilty of but one act of negligence, viz., endeavouring, under the circumstances of this case, to cross the track almost immediately in front of the car; and its negligent character was continuous. From the time of his stepping upon the track until the accident, he, in fact, undertook to clear the track before the car, which was within ten feet of him, would strike him.

The evidence shews that, under the circumstances, the motorman used all reasonable means to avert the accident, but that it was not preventible. I, therefore, think there is no evidence to justify reasonable persons in finding, as the jury in their answer to question 7 have found, that the negligence of the deceased did not contribute to the accident up to the very moment of its happening. Thus eliminating the answers to questions 6 and 7, there remains the finding (which cannot be successfully attacked) that the deceased's negligence caused the accident.

It will be observed that Mulock, C.J., says, dealing with the answers to questions 3 and 4,

their evident meaning is that the deceased failed to exercise reasonable care by not looking for an approaching car, and by negligently stepping upon the track and endeavouring to cross in front of it, thereby causing or contributing to the accident.

In the case before us the jury in answering questions 3 and 4 as we have them, unquestionably meant that there was an absence of reasonable care, and that the deceased was guilty of contributory negligence in not looking for an approaching car, as the admitted facts are that the deceased did not, nor did the driver of the vehicle, look for an approaching car, but were talking to each other, looking down at the heels of the horses—looking right at the horses.

There is the further and still more recent case of *Herron* v. *Toronto R. Co.* (1913), 11 D.L.R. 697, 15 Can. Ry. Cas. 373, being a decision of the Appellate Division of the Supreme Court (Garrow, Maclaren, R. M. Meredith, Magee and Hodgins, JJ.A.). The determination of the Court upon the facts of the case, which was one for damages for personal injuries sustained in a collision between one of the defendants' electric street cars and a vehicle in which the plaintiff was driving, was as set forth at p. 697 [headnotes, *Herron* v. *Toronto R. Co.*, 11 D.L.R.], that:—

B. C.

C. A.
1914

LOACH
v.
B.C.
ELECTRIC
R. CO.

McPhillips, J.A. (dissenting)

1. In a personal injury action arising from a street car colliding with a rig where the findings of the jury were in effect that the negligence of the defendants' motorman and that of the plaintiff were concurrent and simultaneous negligence of similar character by both parties and that there was not any new negligent act by the defendant in addition to its first act of negligence, verdict was properly for the defendant and will not in that respect be disturbed.

2. In an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, the mishap, in which the injury was received, would not have occurred.

3. In a personal injury action arising from a street car colliding with a rig, where both the plaintiff and the defendants' motorman were guilty of negligence, each in not seeing the danger and avoiding the injury of a collision, if it appears that when the motorman first saw the impending danger it was too late to prevent the injury, the plaintiff's action fails.

In the case we have before us the jury find as against the defendant excessive speed, insufficient space between orchard and station, and that the motorman could have stopped the car if the brake had been in effective condition, all existent before the deceased recklessly places himself in the way of the car.

There was not here what might be said to be any new negligence, it was all existent before the deceased placed himself in front of the car. Taking these findings of the jury they become resolved finally to this—*the deceased recklessly places himself without looking in front of a rapidly approaching car, and is killed,* it being impossible through defective brakes, the jury say, for the car to be then stopped in time to prevent the accident. In my opinion, upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendant, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff.

Hodgins, J.A., in the case last cited, 11 D.L.R. 697 at 707, 15 Can. Ry. Cas. 373, said:—

> Counsel for the plaintiff suggested that the jury should have been asked whether the motorman was negligent when he saw or ought to have seen the plaintiff; and the Divisional Court speak of the possible negligence of the motorman in not applying the brake at an earlier stage, when he might have stopped the car.
>
> I think that both these points are well covered by the charge and by the answers actually given by the jury, and I cannot bring myself to hold that any question of "ultimate negligence" is raised. If it can, it must only be of the kind suggested by Mr. Justice Anglin in *Brenner* v. *Toronto R. Co.* (1907), 13 O.L.R. 423, at 428: "Assuming that the degree of momentum which the motorman found himself unable to overcome should

B. C.
C. A.
1914
LOACH
v.
B.C. ELECTRIC R. CO.
McPhillips, J.A. (dissenting)

be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of the injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result the former might, but for this continuing though anterior negligence, have avoided the mischief?"

Upon this point I prefer the views on the subject of ultimate negligence and contributory negligence expressed by Mr. Justice Duff in the *Brenner* case when before the Supreme Court of Canada (1908), 40 S.C.R. 540 at 556: "The principle is too firmly settled to admit, in this Court, any controversy upon it, that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence this mishap, in which the injury was received, would not have occurred."

This is the same view, as it appears to me, as is expressed in more concrete form in *Sim* v. *City of Port Arthur* (1911), 2 O.W.N. 864, by Mr. Justice Middleton. See also *Jones* v. *Toronto and York Radial R. Co.* (1911), 23 O.L.R. 331, 25 O.L.R. 158; *Rice* v. *Toronto R. Co.* (1910), 22 O.L.R. 446.

My conclusion is, that the negligence of the motorman as found and that of the plaintiff were "concurrent and simultaneous negligence of similar character by both parties," and that the jury have negatived any new negligent act of the defendants in addition to their first act of negligence.

I think the appeal should be allowed and the action dismissed with costs.

Now, in the case before us, the jury have negatived any new negligent act of the defendant—as in the *Herron* case—the motorman after he saw the vehicle could not have stopped the car if it was the ineffective brake which prevented him (although upon the whole evidence, my own view is, it was then an impossibility under any known mechanism); therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death, and the plaintiff, the administrator of the estate of the deceased, cannot recover, adopting the language of Mr. Justice Duff,

> however clearly it may be established that but for the defendants' earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred.

It follows, in my opinion, that the judgment of the learned trial Judge, Mr. Justice Murphy, must be affirmed, and the appeal dismissed.

Appeal allowed.

RYAN v. THE DISTRICT REGISTRAR.

B. C.

C. A.

1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. January 30, 1914.

1. LAND TITLES (§ VI—61)—PLANS—SALE OF PORTION—LAND ADAPTED FOR SUB-DIVISION.

A sale agreement in respect of a portion of a block of vacant land as to which there is no approved or registered subdivision plan within the purview of the Land Registry Act, R.S.B.C. 1911, ch. 127, sec. 90, may be registered in the "Register of charges" on a description of the portion by metes and bounds accompanied by a surveyor's sketch not designating such portion by any lot number, and this notwithstanding a prior attempt to sub-divide the property which failed for want of approval by the municipal council if the proposed plan of sub-division so rejected is not referred to either in the description or in the survey accompanying such sale agreement.

Statement

APPEAL from the order of Morrison, J., dismissing the petition of the appellants praying for an order that the registrar be directed to register certain sale agreements against land under sec. 29 of the British Columbia Land Registry Act, R.S.B.C. 1911, ch. 127, as amended by sec. 7 of ch. 15, B.C. Statutes of 1912.

The appeal was allowed, and an order made allowing registration, GALLIHER, and MCPHILLIPS, JJ.A., dissenting.

Bray, for appellants.

A. G. Smith, the district registrar, in person.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The facts of this case are that one Jemima Russell, being owner of a parcel of land, and desiring to subdivide it into a number of small lots, apparently for building purposes, made a plan of the subdivision which she sought to have approved by the municipal council of South Vancouver, the municipality in which the land lay, pursuant to sec. 92 of the Land Registry Act, R.S.B.C. 1911, ch. 127. [Amended by sec. 21 Stats. 1912, ch. 15.] The council refused its approval because proper street allowances were not provided for, and hence the plan was not accepted by the registrar, and was apparently abandoned by Jemima Russell. The petitioners are each the purchaser from her of a lot, being part of said parcel. Each lot is described by metes and bounds and attached to the agreement is a sketch of the lot. No reference is made in the description of the lots to the rejected plan, though it is alleged by respondents in the case that

a portion of the land covered by the application of the petitioners is identical with certain lots shewn upon the plan (the rejected plan) and that the sketches attached to the said applications are merely tracings from the said plan omitting the numbers of the lots.

While not very clear, I think this means that the subdivisions described in the agreements sought to be registered are each identical with a lot shewn on the rejected plan.

B. C.

C. A.
1914

RYAN
v.
THE
DISTRICT
REGISTRAR.

Macdonald,
C.J.A.

The district registrar of titles at Vancouver declined to register the said agreements as charges affecting the said original parcel, and from that refusal the petitioners appealed to a Judge of the Supreme Court, who dismissed their appeal. From that order this appeal is taken.

It is not easy to define with precision the rights of parties to registration under the Land Registry Act when subdivided lands are in question. Section 90 of the Act appears to have been intended to apply more especially to the subdividing of lands in the popular sense and meaning of the word "subdivision," namely, an addition to a town-site or a division of land into a number of village, town or city lots, including streets, lanes and other public places. When an owner has made such a subdivision of his land he is required under a penalty to deposit a plan of the same with the registrar. Should such plan not be deposited, the registrar, in my opinion, is not obliged to register any instrument which contains a description of land by reference to such undeposited plan.

Section 100 of said Act (amended by sec. 26 Stats. 1912, ch. 15), makes it appear with reasonable clearness that all subdivisions were not necessarily to be governed by said sec. 90. I use the word "subdivision" in this connection in its true sense—a dividing of something into parts even if it be divided into two parts only.

Sub-section 3 of that section (sec. 100 amended as above) was relied upon by the appellants in support of their contention that the registrar was bound to accept their applications and register their instruments. That sub-section deals with applications to register "a portion of an entire lot or section." In such case the applicant may attach to the instrument a sketch of that portion, or, if the applicant has not attached such a sketch, the registrar may require him to do so, and by sub-sec. 4, if he decline, then the registrar need not proceed with the registration.

The language of sub-sec. 3 is somewhat indefinite. What is meant by entire lot or section? Is it the original lot or section as granted by the Crown? Whatever is meant the intention of the sub-section is to provide a means of relieving persons subdividing their lands from the operation of said sec. 90. Where lots are designated by reference to an undeposited plan, the matter is simple enough, the record itself is defective, and the registrar cannot proceed; but where they are sufficiently described by reference to a recorded plan, or a registered parcel, I am unable to find anything in the Act which authorizes the registrar to go behind the record and hold an investigation into the propriety of the subdivision.

The applications in question here are to register charges,

and are governed by sec. 29 of said Act as amended by sec. 7 of the Act of 1912.

That section provides that when the fee simple has been registered, any person claiming any less estate (*i.e.*, a charge) may apply to the registrar for registration thereof,

> and the registrar shall upon being satisfied after examination of the title deeds or other evidence (if any) produced that a *primâ facie* title has been established by the applicant, register the title of such applicant in a book to be called the "Register of charges."

In this case it is not disputed that Jemima Russell had a good registered title to the original parcel, nor is it contended that the petitioners had not made out a *primâ facie* title to their charges upon it. The duty, and the only duty of the registrar, as declared by the section, was to satisfy himself that such title had been made out and then to register the charges. The language is entirely free from ambiguity and is imperative. The registrar is given no mandate to inquire beyond the question of the sufficiency of the title. In this case, in so far as the title is concerned, there was nothing on record to justify the rejection of the applications, nor is there anything in the rest of the Act to authorize the course which was pursued by the registrar in rejecting the applications.

I must, therefore, give effect to the clear language of the section and declare the petitioners' applications to register their charges were wrongly rejected.

The appeal should be allowed.

IRVING, J.A.:—I would allow this appeal for the reasons given by the learned Chief Justice. Irving, J.A.

MARTIN, J.A.:—It is a serious matter to curtail the right of any owner of land to convey any portion of it in such manner as he may see fit, and before I could feel justified in so doing I should require to have the matter placed beyond peradventure by the legislation which has been invoked by the district registrar in support of his refusal to register the petitioners' application. The case should in my opinion be considered on the application of the present petitioners, as it now stands, entirely apart from the action taken by Jemima Russell, the then registered owner, to have a plan approved by the municipality of South Vancouver. The question of what is a "subdivision" is not an easy one to answer, but on the facts of the present case I have reached the conclusion that the term does not apply to this agreement for sale, which is, I think, governed by sub-sec. (3) of sec. 26 covering the case of "a portion of an entire lot or section"; whatever construction or limit may be placed upon that language it at least reasonably as well as actually covers Martin, J.A.

B.C.

S. C. 1914

RYAN v. THE DISTRICT REGISTRAR.

Galliher, J.A. (dissenting)

the land in question, and therefore I think the appeal should be allowed.

GALLIHER, J.A.:—The owners of above property subdivided it into town lots, and caused a map or plan of same to be made out.

The municipal council refused to assent to this plan owing to the streets not being of the proper width.

The owners then proceeded to sell the property in lots described by metes and bounds corresponding exactly with the boundaries of said lots as shewn on the plan and the purchasers of these lots applied to register same.

Registration was refused and the matter came up on petition before Morrison J., who dismissed the petitions.

From this order the appeal is taken.

The applicants admit that they have not complied with sec. 19 of ch. 15 of 1912 (Land Registry Act Amendment) but claim that they have complied with sub-sec. 3 of sec. 26 of said Act, and are entitled to registration. This sub-section is as follows:—

> Notwithstanding anything hereinbefore contained whenever any person applies for registration of a portion of an entire lot or section, or for the issuance of a certificate of indefeasible title to the same, he may and shall, if so required by the registrar, append to or procure to be endorsed on the instrument conveying the said land, or deliver to the registrar, a map or sketch thereof, certified by a duly qualified land surveyor and signed by the grantor or other conveying party, or by the applicant, shewing the dimensions of the land, and giving such information as will easily identify the same, and a duplicate of such plan shall also be delivered to the registrar.

When the parties proceed under sec. 19 the assent of the municipal council to the plan is necessary. See sec. 21.

It is quite apparent that what is attempted here is a clear evasion of the Land Registry Act, and unless it comes within sub-sec. 3 of sec. 26, the applicants must fail.

If I own an acre of ground and seek to sell a certain number of feet off it to my neighbour, it may very well be I can do so describing it by metes and bounds, and otherwise identifying it under sec. 26, but it seems to me quite a different matter when, as here, the whole scheme for disposition of the holdings is in effect one of sub-division, and the reason is so apparent why it is attempted in this way.

I do not think sub-sec. 3 of sec. 26 was ever intended to cover such a case.

The appeal should be dismissed.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A.:—This appeal is one from an order made by Morrison, J., dismissing the petition of the appellants, praying for an order that the registrar be directed to register cer-

tain agreements of sale, and assignment of agreement for sale pursuant to the applications made, the registrar having refused to do so upon the ground that the land covered by the agreements of sale constitute a subdivision, and the consent of the municipality of South Vancouver had not been obtained to the plan and the subdivision was not one that, reading the Municipal Act and the Land Registry Act together, that entitled registration being made by way of charge or otherwise.

The Land Registry Act and the Municipal Act need careful attention, and the history of the various acts and amending acts, and in particular the Land Registry Act Amendment Act, 1912.

The land in question is within a municipality, namely, the municipality of South Vancouver, and it was admitted that the land can rightly be termed a "subdivision"; being a subdivision it comes within sec. 92 of ch. 127, R.S. 1911, as amended by sec. 21, of ch. 15 of the Act of 1912. That being so, it must, in my opinion, be approved by the municipal council, or by some person authorized by the municipal council to approve the same, which is not the case.

The admitted facts that seem to me to be material are admissions Nos. 4 and 5, to be found in the appeal book pp. 19 and 20, which read as follows:—

4. Prior to the lodging of the applications of the petitioners, Jemima Russell, the then registered owner of the property in question herein, and the vendor thereof to the petitioners, had block 11 surveyed and a plan of the same shewing the same divided into lots, prepared by a British Columbia land surveyor, and submitted the said plans to the council of the municipality of South Vancouver for approval. The said council refused to approve of the same.

5. A portion of the land covered by the applications of the petitioners herein is identical with certain lots shewn upon the plan prepared by a British Columbia land surveyor, and referred to in the last preceding paragraph hereof, and the sketches attached to the said applications are merely tracings from the said plan prepared by the said surveyor, omitting the numbers of the said lots.

It is contended by counsel for the appellants that there need not be compliance with sec. 92 of ch. 127 R.S. 1911, but that there is right to registration under sec. 100 of ch. 127 R.S. 1911, as amended by sec. 26 of ch. 15 of the Act of 1912, submitting that the word "notwithstanding" in sub-sec. 3 to said sec. 100 of ch. 127 as amended, indicates that the requirement of said sec. 92 is not a condition precedent to registration.

In my opinion this contention is untenable, and as it is the province and the duty of the Court to read the statutes as a whole and together, it is plain what the intention of the legislature is, and it is a plain attempt to evade the statute law, and is such an evasion as cannot be countenanced by the Court.

B. C.

C. A.
1914

RYAN
v.
THE
DISTRICT
REGISTRAR.

McPhillips, J.A. (dissenting)

The learned registrar, Mr. A. G. Smith, in a careful argument, in my opinion well demonstrated that the enactments are capable of standing together, and it is apparent that to allow what is contended for here would be the destruction of a policy well spread upon the statute book and one which is eminently in the public interest.

It is apparent that the plan as presented to the municipal council not being approved, it is now attempted to specifically describe the parcels by metes and bounds, and accomplish registration in this way.

If there is any good ground why the plan should be approved notwithstanding the decision of the municipal council, it is well known that an appeal lies to the Lieutenant-Governor-in-council, and that course, it would seem, was not adopted, the only conclusion that can be come to is that the appellants were of the opinion that any such appeal would not be successful, and this method is a method which in my opinion this Court cannot accede to; further, it is beyond the jurisdiction of the Court.

It is contended, and I think rightly, in this case, that the course adopted is an attempted evasion of the statute law.

We have, it is true, the language of Lord Cranworth, L.C., in *Edwards* v. *Hall* (1856), 25 L.J. Ch. 82 at 84:—

> I never understood what is meant by an "evasion" of an Act of Parliament; either you are within the Act of Parliament or not. If you are not within it, you have a right to avoid it, to keep out of the prohibition; if you are within it, say so, and then the course is clear.

However, in legal terminology, it is quite common usage and custom to speak of the evasion of a statute.

Maxwell on the Interpretation of Statutes, 5th ed. (1912), has this to say with regard to Lord Cranworth's proposition, at p. 184:—

> When not so exact as he, we, in law Courts and in statutes, as well as in ordinary life, use the phrase "evasion" of a statute as really connoting an attempt to evade it.

Without unduly elaborating the matter, it may be said that what is prohibited is that which the Legislature has guarded against, and what may be done is that which is beyond the enacting part; and it may possibly be that the statute falls short in some cases of accomplishing what was the real policy; and if in this case it was the latter, that is to say, that the policy, whilst apparent, the enactment fails to prevent, then there would be the right to registration.

In other words, there is no prohibition for doing that, or being entitled to relief from the Court in the doing of that against which there is no inhibition.

Lord Hobhouse in *Sims* v. *Registrar of Probates* (1900), 69 L.J.P.C. 51, a succession duty case, said at 56:—

It does not appear to their Lordships that an examination of the decisions in which the word "evade" has been the subject of comment leads to any tangible result.

It is true we have not here any words of the statute in express terms legislating against any evasion, but a statutory procedure is exacted in obtaining registration, and what right is there in the appellants to override this?

If it could be said that the appellants are outside of the statute law, and that the registrar is exacting something not called for, then admittedly the Court could direct registration; but only upon it being clear beyond all reasonable peradventure that the registrar was in error.

To arrive at this conclusion is, in my opinion, the setting aside and the ignoring of provisions of the statute law that seem to me to stand out, and prevent any such conclusion being arrived at.

Then it is said what is asked is only the registration of a charge. What a delusion it would be to make registration as a charge not capable of being perfected later! It seems to me that subdivisions must be made and approved in the manner called for by the statute, and in my opinion the appellants are attempting an evasion of that which is a condition precedent to registration.

It follows, therefore, in my opinion, that the appeal should be dismissed, and the order of Morrison, J., affirmed.

Appeal allowed.

RICHES v. ZIMMERLI.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. PRINCIPAL AND AGENT (§ II C—20)—AGENT'S FRAUD OR WRONG—SALE OF LAND—SECRET PROFIT—PRINCIPAL'S RIGHT TO RECOVER.

An innocent purchaser of property who is induced by the false representation of his agent to pay a price larger than that which the vendor is willing to accept has a good cause of action against such agent to the extent of any secret profit which he is shewn to have derived in the transaction.

[See also as to secret profit, *Peacock* v. *Crane*, 14 D.L.R. 217.]

Statement

APPEAL by the defendants from the judgment of Lampman, County Judge, in favour of plaintiff for the recovery of the equivalent of a secret profit alleged to have been realized by his agent, the defendant, in a real estate transaction the amount of which had been added to the price paid by the plaintiff.

The appeal was dismissed, McPHILLIPS, J.A., dissenting.

McPhillips, K.C., for the appellant (defendant).

W. R. Vaughan, for the respondent (plaintiff).

B. C.
C. A.
1914
RICHES
v.
ZIMMERLI.
Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the relationship of principal and agent is established. The plaintiff says that if he bought he was to pay commission; if he did not, he was to pay for the hire of the car. Defendant admits that he was to receive $50 for his time in taking the plaintiff to see the property if the plaintiff made the purchase. The defendant claimed at the trial to have been the owner of the property before he met plaintiff, though he does not deny that he represented to plaintiff at the time that it belonged to another man, Wetherell, and that the price Wetherell was asking was net $750 per acre, whereas according to his evidence at the trial, he himself had just before acquired it in Wetherell's name for $500 per acre. The documents shew that Wetherell bought from Roberts on May 24; that the plaintiff and defendant bought from Wetherell on June 6 (defendant having offered to take a half interest, the plaintiff taking the other half) at $750 per acre, whereas the true price as between defendant and Wetherell was $500 per acre. Defendant acquired it at $500 per acre, represented that he could acquire it only at $750 per acre, and made the difference by way of secret profit. As between the documentary evidence, coupled with defendant's representations that Wetherell was the owner, and defendant's evidence at the trial, I prefer to accept the former.

I think the appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—I concur with what my brother McPhillips is about to say regarding the very unsatisfactory way this case comes before us which has made it difficult to reach a conclusion. And I also agree that the plaintiff has nothing to complain of about the value of the land and that he got all in that respect that he was entitled to and acted very unwisely in sacrificing his interest as he did; and also that, if the lands were the property of the defendants, there was no fiduciary relationship between the parties as principal and agent, or otherwise.

The judgment can, I think, be supported, but supported only, on the ground that the land was, in reality, Wetherell's and the determination of that question has occasioned me much difficulty, which is enhanced by the fact that Wetherell should have been called as a witness to explain the matter. I have to deal with the case in the light of the finding of the trial Judge that he has decided to accept the testimony of the plaintiff as against that of the defendant whom he stigmatizes as a swindler, and in such case it was open to the trial Judge to determine the rights of the parties on the basis that Wetherell owned the land and to hold the defendant to his statement, which is in accord with the writings, to the plaintiff, made on the spot, that such was the case, or at least conveying that exclusive inference, which is really the same thing. Such being the circumstances, I cannot bring myself to say that the judgment below should be set aside, and so the appeal should be dismissed.

GALLIHER, J.A.:—If the plaintiff could have brought his action for rescission I should have experienced no difficulty in giving judgment in his favour.

The defendant's acts throughout impress me very unfavourably; I have, however, to consider what is the plaintiff's position with regard to the judgment he holds on his pleadings.

Mr. Vaughan has referred us to *Re Leeds & Hanley Theatres of Varieties Ltd.*, [1902] 2 Ch.D. 809, but it is only necessary in order to distinguish that case from the one at bar to refer to the judgment of Wright, J., at p. 813, where he says:—

> But it seems to me clear on the facts of this case that the respondents ought to be held to have bought the halls as agents or trustees for the intended company, with whose money the purchase money was to be paid. They never intended to buy the halls for themselves or to pay for them out of their own money—they always intended to act for the projected company.

And to the judgment of Vaughan Williams, L.J., in the Court of Appeal at p. 822:—

> The conclusion at which I arrive taking all the facts together is that from first to last the Finance Company were promoters: that from first to last their intention was to buy the music halls for the purpose of selling them to a company which they should create. They intended from the first to do that which they ultimately did.

The evidence in the case at bar is that Zimmerli purchased (as he says for himself) but at all events either for himself or Wetherell, and not for the plaintiff, as that purchase was made before he spoke to the plaintiff about the property.

The other case cited by Mr. Vaughan, *Re Darby, Ex parte Brougham*, [1911] 1 K.B. 95, is also distinguishable.

This case then really comes down to a consideration of whether Zimmerli or Wetherell was the owner at the time of the purchase by the plaintiff.

If Wetherell was the owner, then the plaintiff's judgment can be maintained, but on a different ground, but if we must regard Zimmerli as the owner it seems to me (rescission being possible) that would be the only remedy the plaintiff would have.

The evidence upon this point is to the effect (and the trial Judge accepted the plaintiff's evidence) that all through the transaction Zimmerli represented Wetherell as the owner, the property was in Wetherell's name, as evidenced by the agreement from Abram Roberts to John Wetherell, dated May 26, 1912, and Wetherell conveyed to Zimmerli and the plaintiff when the latter bought on June 6, 1912.

Zimmerli swears that he bought the property for himself in the first instance, and when called upon to explain how it came to be in Wetherell's name, does so by saying that he started out to purchase for Wetherell, that Wetherell was not very prompt in closing out the deal, wanting time to consider it, and talk it

B. C.

C. A.
1914

RICHES
v.
ZIMMERLI.

Galliher, J.A.

over with his wife; that he then informed Wetherell he had given his (Zimmerli's) cheque for the deposit and would take it himself, but this does not explain why he had the agreement for purchase made out in Wetherell's name.

We have then on the one side the representations that Wetherell was the owner, and the written documents which *primâ facie* support that, and on the other side Zimmerli's statement that he was the owner and the fact that he paid practically all of the first deposit by his own cheques.

I do not know whether Wetherell was available at the time of the trial, but it appears to me that if Zimmerli's statements are true as to the original purchase, Wetherell would have been a very important witness on his behalf, and he was not called.

I do not think the evidence, such as it is, and open to the gravest doubt considering the methods of the defendant, sufficient to displace the *primâ facie* ownership disclosed by the documents, especially when coupled with the representations made to the plaintiff.

I would dismiss the appeal and uphold the judgment below, but on a different ground—that of secret profits.

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A.:—This appeal has relation to the purchase of certain land near Sidney, upon the Saanich Peninsula, being six acres in area, a portion of section 13, range 3, east. The action went to trial in the County Court of Victoria, and the learned County Court Judge (Lampman, Co.J.) gave judgment in favour of the plaintiff for $750, holding that a breach of duty was established, that is, we can only assume, although it is not stated in words, that it was held that a fiduciary relationship existed, and that the appellant Zimmerli owed a duty to the respondent in connection with the purchase of the land.

The facts being gone through as adduced at the trial may be summarized as being the following. Riches was approached by Zimmerli about buying Saanich acreage, it is not clear that Zimmerli after this, or acting on this knowledge, brought about the purchase of the property from Roberts, who owned the land; but the fact is on May 26, 1912, the land in which Riches subsequently acquired a half interest, was purchased in the name of Wetherell for $3,000 and on June 6, 1912, the same land was sold by Wetherell to Riches and Zimmerli for $4,620, agreements for sale in each case being executed (it is to be observed, though, that the agreement of sale shews the consideration as $4,500, and the interim receipt $4,620), the interim receipt being given by Zimmerli to Riches and himself, under the name of Vancouver Island Insurance Co., a company for which Zimmerli was agent, in fact it may be said, in so far as it can be said in law, to have been Zimmerli's company.

An interim receipt was signed, which reads as follows:—

B. C.

C. A.

1914

RICHES v. ZIMMERLI.

McPhillips, J.A. (dissenting)

Interim Receipt. June 6, 1912. Received from George John Riches and Ernest Zimmerli the sum of two hundred and 00 100 dollars, being deposit on account of purchase of one lot, 6 acres, north-east corner of E. Saanich road and King's ave., N. Saanich, for the sum of $4,620, on the following terms: $2,270 cash, balance $350 dollars every 6 months until paid. The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Time is the essence of this agreement, and unless payments with interest are punctually made at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance $5 to be paid by the purchaser. This receipt is given by the undersigned as agent, and subject to the owner's confirmation. V. I. INSURANCE AGENCY. Ernest Zimmerli, *Agent*.

It would appear that Wetherell really held the property for Zimmerli, and this was unknown to Riches, Riches always believing that Wetherell was the owner, and Zimmerli always said the purchase price was to be $750 an acre net to Wetherell.

The trial was held in Victoria on April 28, and June 11, 1913, a year having elapsed since the purchase, and Zimmerli undertook to say that the land was at the time of the trial unsaleable.

It would seem that Riches sold his interest in the property by trading it for a motor car; he had apparently listed it, at one time for $850 an acre, and had even asked $1,000 an acre for it, and had expected to get that price when he purchased it. The motor car Riches said was worth $750.

Riches went to see the land before purchasing and no question of misrepresentation as to area or quality of the land arises.

It would appear that shortly after the purchase, or when the second payment fell due, the date is not made clear, instruments of transfer between Riches and Zimmerli took place, whereby each became entitled to a certain three acres out of the six purchased.

Evidence was given that at the time of the purchase the market value of property where this land was situate, near to Sidney, was from $700 to $800 per acre, and there was quite a lot of dealing in land, and it was sworn to that $750 was the market price in June, 1912.

Zimmerli, in his evidence, states that in September, 1912, he sold his three acres at $1,000 an acre, the land being taken at that figure by the Wood Motor Co. in the purchase of an automobile.

Upon the facts of this case I do not think that it can be successfully contended that Zimmerli was in the position of an agent employed to buy land for Riches, when the land was bought from Roberts by Wetherell. It must be admitted that the purchase by Wetherell was really a purchase by Zimmerli.

Were this a case where the facts established the position of principal and agent, the plaintiff Riches being the principal and the defendant Zimmerli the agent, the agent being deputed to

B. C.

C. A.
1913

RICHES
v.
ZIMMERLI.

McPhillips, J. A. (dissenting)

buy the land, and within the decision of *Hutchinson* v. *Fleming* (1908), 40 Can. S.C.R. 134 (which went from the Supreme Court of British Columbia) then unquestionably the judgment could be sustained—that is, if it was that after the establishment of the agency Zimmerli bought the land for Riches—although bought in Wetherell's name; but that was not the position of matters as I find them on the facts, and we have no finding of the learned trial Judge to that effect, and if it were found it would be unsupported by evidence.

We are not assisted by any precise finding from the learned County Court Judge, therefore we must sift the evidence for ourselves. The highest plane that can be made out from the evidence may be said to be that Zimmerli was drawing to Riches' attention land in a certain locality in which the appellant then had land, and that land is eventually the land which is purchased without his interest being disclosed.

This may even be putting the case too strongly against Zimmerli upon the evidence, as possibly the situation was nothing more than the pointing out, or the calling attention, to certain parcels of land that could be acquired and this would not constitute the relationship of principal and agent.

It must be admitted that real estate agents, and land brokers, by merely calling attention to lands which are for sale, being their lands, or the lands of others, and inducing persons to purchase the lands, do not upon these facts alone place themselves under any fiduciary relationship.

Now, in this particular case it cannot really be said that anything in the nature of a fiduciary relationship existed.

It is true that Riches paid Zimmerli $60; which it is contended was a commission to Zimmerli and that by reason of this the fiduciary relationship is proved. I cannot agree to this view, we must have more than this to establish the relationship as understood by the law.

Further, as to this $60, it has been variously explained. Riches said he was to pay $750 net per acre to Wetherell, and if he bought the property he was to pay a commission over and above that, and if he did not buy the property he was to pay for the hire of the motor car to see the property, Riches taking along with him, to make a pleasure trip out of it, his wife and sister.

The evidence is clear here that Wetherell in buying the land was buying it for Zimmerli, but is there any evidence that in the buying of the land it was bought for Riches, and that Riches would be in any way called upon to take it? It seems to me that no such case is made out, and all the facts go to disprove it. Zimmerli could in no way shift the burden of the purchase upon Riches.

Therefore, Zimmerli, in buying in Wetherell's name from Roberts, was in no way buying from Riches; it was not the case of an agent doing anything entrusted to him.

In fact to establish the case and support the judgment, Zimmerli must be estopped from saying that he bought the property on his own behalf, or otherwise than for Riches, and therefore the enhanced price was profit that belonged to Riches.

It is true if the case could be made out that there was a fiduciary relationship existing at the time between Riches and Zimmerli, and the land was bought with the intention and expectation that Riches would be induced by him, Zimmerli, to buy it, he would be considered to have bought on behalf of Riches, and be incapable of retaining any profit arising out of his effectuating the sale to Riches, but such is not the case upon the facts as disclosed to me.

Then the respondent here (Riches) is in this difficulty; he carried out the purchase which could have been set aside—if for the moment this is conceded, merely to view the case as presented from the respondents' point of view—and retained and afterwards sold the property, and what is his remedy?

In considering this point the case of *Re The Cape Breton Company* (1885), 54 L.J. Chy. 822, is instructive. Cotton, L.J., at p. 826, said:—

> As far as I can see there is no decision which favours the case of the appellant—a case, that is, of persons who have adopted a purchase which they could set aside, and have retained, and have afterwards sold, property of this kind, being allowed to hold their vendors responsible for the difference between what they gave for the property and what the vendors had given. In my opinion there is no authority for the contention, and therefore this appeal fails.

The *Cape Breton Company* case was referred to by Lord Davey in *Burland* v. *Earle* (1902), 71 L.J.P.C. 1, at p. 8:—

> Reference may also be made to the judgments of Mr. Justice Pearson and Lord Justice Cotton and Lord Justice Fry in *Re Cape Breton Co.* (1884) (1885). To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing.

Now if this were a case where a fiduciary relationship existed at the time of the purchase of the land, and Zimmerli covertly bought property which was his own and Riches, in ignorance of this, sold the three acres he was entitled to, whereby he cannot reconvey, the question would be how could the loss which Riches sustained be arrived at? It has been held that in such a case if the property were not fairly worth the price paid for it there might be recovered the difference between the real value and the price.

Now, proceeding upon the above hypothesis, (with which of course I do not agree is the case before us) what evidence is there before us of the difference between the real value and the price?

The evidence that is before us seems to me to establish the market value as being as great, if not greater than the price paid, and certainly the evidence of Riches upon the point is that he held the land at $850 to $1,000 an acre after his purchase.

B. C.

C. A.
1914

RICHES
v.
ZIMMERLI.

McPhillips, J.A.
(dissenting)

The evidence given by Riches as to the value of the land is so absurd that in my opinion no reliance can be placed upon it, as against the other and positive evidence that was adduced at the trial, in view of the common and general knowledge of the values of all Saanich peninsular property which may be said to be of public notoriety, owing to the acquirement of right of way through the peninsula by the British Columbia Electric Railway Co. and the Canadian Northern Railway Co., and the fact that the land in question is close to Sidney, and particularly well situated, to shew the unreliability of this evidence it is only necessary to quote some of it.

At p. 21 of the Appeal Book, Riches, examination-in-chief:—

Q. Have you an automobile? A. Yes, I have.

Q. How long have you had it? A. I think I bought it last September.

Q. And you have used it and driven around the country? A. Oh yes, in my business as a broker I have been interested in different properties in the vicinity of Victoria, and different properties on the Island.

Q. Are you well acquainted with the property now at Sidney? A. Yes, very well acquainted.

Q. Have you any property for sale there? A. Listed with me?

Q. Yes. A. Yes, I have some water frontage there; a very nice place indeed.

Q. Now, as a broker, what do you know about values of property now? What do you say the property is worth now, this particular property per acre? A. Well, you couldn't sell it.

Q. You couldn't sell it? A. You could not sell it; you could put it almost any price, you couldn't sell it now.

Q. Now, what would you say supposing there was a demand for property at Sidney, this particular property, what would you say would be the market price of it? A. The price would depend a lot, of course, on the demand.

Q. Of course, you say there is no demand at present, you could not sell the property at all? A. At Sidney, under any circumstances, unless you almost gave it away.

Q. Has there been any demand since you purchased it? A. No, it has got worse.

Q. Have you disposed of this particular interest you had in it? A. Well, I got rid of it in a way.

Q. How did you get rid of it? A. I traded it for a motor car. I couldn't sell it at all, and I took any amount of people to look at it, and could not possibly sell it at all.

Q. What did they say? A. I stated my price; they just laughed at me. I offered it to one man for $600 an acre.

THE COURT:—When was that? A. It would be somewhere about three months ago, your Honour. I did ask as high as a thousand dollars an acre for it until I knew better.

In my opinion even were this a case where the difference in price could be considered, I unhesitatingly say that my view of the evidence is that at the time of the purchase and for a long time thereafter, the market price was as great as that for which it was purchased, namely, $750, and even higher, and there is

no satisfactory evidence at all before us to establish any difference in price, and the *onus probandi* as to this was on the plaintiff in the action.

This is a most unsatisfactory case in every way, the evidence is given in the most casual manner, dates are not fixed, transactions take place and you cannot tell when they took place, documents apparently were executed whereby the parties each transferred to the other a certain three acres out of the six jointly purchased. These documents were not brought before the Court, nor was the date fixed when they were entered into; no evidence is given as to the time when Riches became aware of the fact that Zimmerli had any interest in the land, or that it was really his although in Wetherell's name, and the fact that Riches disposes of his three acres without complaining to Zimmerli of depreciation in value or advising him of his intention to do so; and the sales made of the land by both parties for motor cars without really fixing the date of those sales; in fact a disordered jumble of evidence is before us, and we are expected to pass upon a question of very great importance, that is, whether upon the facts a fiduciary relationship existed? In my opinion the evidence falls very far short of establishing this.

In view of the unsatisfactory condition in which the case comes before us I think the language of Kennedy, L.J., in *Kinahan* v. *Parry* (1911), 80 L.J.K.B. 276, a principal and agent case, is much in point. At p. 277 he said:—

> I agree with Lord Justice Vaughan Williams in thinking that this is an unsatisfactory case. I am not satisfied that all the facts have been so fully disclosed as they might have been. For some reason or other the parties would seem to have left largely to inference what might have been proved by direct evidence.

I am by no means satisfied with the evidence of Riches that he sold his three acres or his interest therein for a motor worth only, or taken as being worth only $750, it is inconceivable that he would do so, and if he did, it was a reckless sacrifice of valuable property.

The plaintiff had to make out his case, and when the case is one of fraud it must be made out without any reasonable doubt, and in my opinion it has not been made out, in fact, falls far short of it, and whilst it is necessary that there should be fair dealing in all business transactions, still the proper extent of the agency must be established before a fiduciary relationship can be said to exist.

In Halsbury's Laws of England, vol. 1, at p. 182, we find this language:—

> 392. The relation is of a fiduciary nature whenever the principal reposes trust and confidence in the person he selects as his agent. This is so in all cases of general agency, but where the agency is not a general one, its fiduciary nature depends upon the circumstances of the particular case.

B. C.

C. A.
1914

RICHES
v.
ZIMMERLI.

McPhillips, J.A.
(dissenting)

The authorities cited for the above quoted proposition are *Makepeace* v. *Rogers* (1865), 4 DeG. J. & S. 649, 46 Eng. R. 1070; *Foley* v. *Hill* (1848), 2 H.L.C. 28, 9 Eng. R. 1002; *Fluker* v. *Taylor* (1855), 3 Drew. 183, 61 Eng. R. 873; *Mackenzie* v. *Johnston* (1819), 4 Madd. 373, 56 Eng. R. 742.

The circumstances of the case before us do not warrant it being found that a fiduciary relationship existed. Further, the conduct of Riches throughout was not that of one who believed or felt that he was over-reached, and having sold the land there can be no setting aside of the sale now, and his inaction and the surrounding circumstances are plainly against the contention set up.

In my opinion the language of Fry, L.J., in the *Cape Breton* case (1885), 54 L.J. Chy. 822, aptly fits this case. At p. 829 he said:—

> This case is not a case of an agent who after he has accepted the agency has acquired property the purchase of which was within the scope of his agency, and then resells that property to his principal at a larger sum—in which case it is obvious that the principal may say that the original purchase by the agent at a smaller price was a purchase on behalf of the principal. Nor is this the case of a man who accepts an agency to buy some article in the market, and then tries to sell to his principal his own goods—in which case it may be that the agent is liable for not performing his agency by purchasing in the market, supposing it was possible for him so to do. Nor, again, is this the case of an agent who by any subsequent acts of his own has rendered the rescission of the contract by his principal impossible—in which case I express no opinion whether a right could be proved by the principal or not, notwithstanding the non-rescission of the contract.
>
> The option which the principal had in this case has been adopted by confirming the contract. Now the question is whether after that affirmance the agent is liable in any sum to his principal. It seems to me plain that there is no authority which determines this point. It is a point, therefore, to be determined upon principle, and not upon authority.
>
> Now, notwithstanding the very powerful criticisms of Lord Justice Bowen on the judgment of Mr. Justice Pearson, I think the judgment of Mr. Justice Pearson in this case was right. I think that it is a case in which the adoption of the contract by the principal puts an end to any further rights in the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim not only to retain the property, but to get the difference between the price at which it was bought, and some other price, is—however you may state it, and however you may turn the proposition about—a thing which is plainly impossible; or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which I confess I do not understand.

It therefore follows that in my opinion the appeal should be allowed, and the action dismissed with costs, here and below to the appellant.

Appeal dismissed.

Re HUDSON BAY FIRE INS. CO. v. WALKER.

B. C.

C. A.
1914

British Columbia Court of Appeal, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. ARBITRATION (§ IV—42)—APPOINTMENT OF ARBITRATOR BY COURT—PENDING ACTION.

The defendant insurance company, on an action on a fire insurance policy, is not entitled to ask for the compulsory appointment of an arbitrator for the assured, under secs. 6 and 8 of the Arbitration Act, R.S.B.C. 1911, ch. 11, to fix the loss in terms of a statutory condition on the policy after the defendant has delivered its statement of defence in such action, as the Court thereby obtains seisin of the entire matter.

[*Doleman* v. *Ossett Corporation*, [1912] 3 K.B. 257, applied.]

Statement

APPEAL by the defendant company from the judgment of Hunter, C.J.B.C., refusing to make an order appointing an arbitrator to represent the plaintiff in a pending arbitration to fix the loss on an insurance claim, after defendant's appearance and delivery of statement of defence in an action for recovery under the policy.

The appeal was dismissed.

Reid, K.C., for the appellant insurance company.

McLean, K.C., for the respondent.

Martin, J.A.

MARTIN, J.A.:—It is clear from the decision of the Court of Appeal in England in *Doleman* v. *Ossett Corporation*, [1912] 3 K.B. 257, that because the appellant company herein has delivered a defence, it has placed itself in such a position that the action brought against it by Walker must proceed, under sec. 6 of the Arbitration Act, R.S.B.C. 1911, ch. 11, and therefore as Lord Justice Fletcher Moulton puts it at p. 269:—

> The Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted.

And the rule is not changed merely because a part only of the dispute is sought to be arbitrated; here, the value of the property apart from the liability. To allow a part of the proceedings to go on before the arbitrators concurrently with the balance of them before the Court is inconsistent with the idea that "the Court has seisin of the dispute," *i.e.*, the whole dispute. Lord Justice Fletcher Moulton, p. 271, supports this view by saying:—

> It is now necessary to turn to clause 32 of the contract between the parties in this case, in order to see whether it is wholly, or to some and to what extent, an arbitration clause.

B. C.

C. A.
1914

RE
HUDSON BAY
FIRE INS.
CO.
v.
WALKER.

Martin, J.A.

Lord Justice Barwell, p. 274, refers to the impropriety of the Court entering "upon a struggle for priority with the lay tribunal," and adds:—

> Such a position is to my mind an impossible one, inconsistent with the dignity of the Court and with the construction of the Act. The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action, but the arbitrator makes his award on the same day in favour of the defendant?

But it is said this is not an application to stay proceedings under sec. 6, and that the learned Judge should have made the order asked for under sec. 8, sub-sec. (*e*), which directs that "the Court or a Judge shall . . . appoint an arbitrator," etc.

It is, however, clear that any Court or Judge is justified in circumstances like the present in refusing to make an order which would be obviously abortive, if it did make the order it would thereby also make itself a party to a waste of the money and time of its litigants, and this arbitration has been "rendered abortive by the action" (*Doleman* v. *Ossett*, [1912] 3 K.B. 257, at 268) for reasons above stated.

The appeal should, I think, be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal. The plaintiffs having instituted proceedings in the Courts, and having delivered their statement of claim, and the defendant company, after appearance entered, having delivered their statement of defence, are, I think, precluded from availing themselves of the provisions of sec. 6 of ch. 11, R.S.B.C. 1911 (Arbitration Act).

The forum has been chosen, and the Court is seized of all the matters in controversy, and as is pointed out in *Doleman* v. *Ossett Corporation*, [1912] 3 K.B. 257 at 273, in the judgment of Farwell, L.J.:—

> If the defendant (as here) pleads to the action and disentitles himself to apply under sec. 4 (our sec. 6) of the Act, he thereby submits to the jurisdiction of the Court, which involves the same consequences as the refusal of an application under sec. 4 (our sec. 6) . . . If this be not so, sec. 4 seems to me useless. If the arbitration can go on against the will of the plaintiff after writ, what is the object of applying to stay the action? If the action goes on, can it be said that the Court is to enter upon a struggle for priority with the law tribunal and grant an injunction to restrain the arbitration proceedings or entertain applications to advance the trial on the ground that they will be outstripped by the arbitrator? Such a position is to my mind an impossible one, inconsistent with the dignity of the Court and with the construction of the Act.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal by the company from the refusal of Hunter, C.J.B.C., to make an order appointing an

arbitrator to act with the already appointed arbitrator of the company for the purpose of ascertaining and assessing the loss or damage sustained by the assured (Annie Kate Walker). The application made did not include an application for a stay of proceedings under sec. 6 of the Arbitration Act (ch. 11, Rev. Stat. of B.C., 1911).

It would appear that the assured did not upon her part take any steps to enforce the statutory condition of the policy providing for a reference to arbitration, but commenced an action on April 19, 1913, against the comapny for a fire loss under the policy of insurance.

The company entered an appearance to the action on April 29, 1913, the statement of claim was filed on May 10, 1913, and the statement of defence on June 20, 1913, and it would not appear that a reply was filed, but by the effluxion of time the pleadings were closed on June 30, 1913.

On June 23, 1913, the company, through its solicitor, served notice on the assured of the appointment of its arbitrator, and that if the assured did not appoint an arbitrator within seven clear days, an application would be made to the Supreme Court, or a Judge thereof, under the Arbitration Act, to appoint an arbitrator on the assured's behalf, or a sole arbitrator.

Not until September 12, 1913, was this application made—the assured not having appointed an arbitrator. It is of course to be remembered that the months of July and August comprise the long vacation months, and the long vacation had commenced before the lapse of the seven days referred to.

The application came on to be heard before the Chief Justice of British Columbia on September 15, 1913, and the learned Chief Justice refused to make the order applied for, that is, refused to appoint an arbitrator to act for the assured along with the arbitrator already appointed by the company.

The appeal by the company is advanced upon the ground that arbitration is provided for by the 16th statutory condition which is contained in the policy, and that the company is entitled, notwithstanding the lapse of time between the filing of statement of defence and close of pleadings, to have the arbitrator appointed.

For the respondent, the assured, however, it is contended that by reason of the state of the action and delay, there is no right in the company to now have an arbitrator appointed.

This appeal brings up for consideration a somewhat debatable point, and one that as recently as during the year 1912 was under consideration by the Court of Appeal in England in *Doleman & Sons* v. *Ossett Corporation*, [1912] 3 K.B. 257, and in which the Court divided in opinion, the Court being composed of Vaughan Williams, L.J., Fletcher Moulton, L.J., and Farwell, L.J., the appeal being from Scrutton, J. It was held, reversing Scrutton, J. (Vaughan Williams, L.J., dissenting), that an award made

B. C.

C. A.

1914

RE HUDSON BAY FIRE INS. CO. v. WALKER.

McPhillips, J.A.

pending an action was of no avail, and no bar to the plaintiff's claim in the action. Vaughan Williams, L.J., at 263, said:—

It has been suggested that it is impossible that the two proceedings, the one under the reference to arbitration, and the other the subject of a pending action, can possibly be allowed to go on together, because there might in such a case be a race between two concurrent proceedings. But the case of *Lowes* v. *Kermode* (1818), 8 Taunt. 146, shews clearly that an award made can be pleaded pending an action *puis darrein* continuance. And in the case of an award in favour of the defendant, inasmuch as the award orders no payment, a plea of award does not require any further satisfaction.

This view, though, was not agreed to by Fletcher Moulton, L.J., nor Farwell, L.J.

Fletcher Moulton, L.J., at 271, said:—

I am therefore of opinion that, so soon as an action is brought in respect of a difference to which an arbitration clause applies, there is a complete breach of that clause so far as that particular dispute is concerned, and that the only right which arises directly therefrom is a claim for damages for breach of contract. The defendant may, however, apply to stay the action under the provisions of sec. 4 of the Arbitration Act, 1889, but if he neglects so to do, or if the Court refuses to stay the action, the Court has the sole and exclusive jurisdiction to decide the dispute.

Farwell, L.J., at p. 273, said:—

The plaintiffs cannot be deprived of their right to have recourse to the Court when the agreement is a mere agreement to refer, unless the Court makes an order to that effect under sec. 4 of the Arbitration Act. They can, of course, deprive themselves of such right by their own act after writ, as for example by going on with the arbitration and obtaining an award; but, when nothing has been done by them since writ, and the only matter relied upon is an award made since writ without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement, because there is no act of the plaintiff's subsequent to the writ on which reliance can be placed, and is bad. It is not a question of revoking the submission; it is a question of the construction of sec. 4 of the Act. It is impossible to suppose that the Court, on refusing an application to stay, and deciding that the action must go on, means to allow the arbitration to go on also with the result that the decision first obtained will prevail, or that one or other proceeding will be an idle waste of time and money. The result is the same, if the defendant (as here) pleads to the action, and disentitles himself to apply under sec. 4. He thereby submits to the jurisdiction of the Court, which involves the same consequences as the refusal of an application under sec. 4, except, perhaps, that in the latter case any attempt to proceed with the arbitration might be a contempt of Court, while in the former it might not. If this be not so, sec. 4 seems to me useless; if the arbitration can go on against the will of the plaintiff after writ, what is the object of applying to stay the action? If the action goes on, can it be said that the Court is to enter upon a struggle for priority with the lay tribunal, and grant an injunction to restrain the arbitration proceedings, or entertain applications to advance the trial on the ground that they will be outstripped by the arbitrator? Such a position is to my mind an impossible one, inconsistent with the dignity of the Court

and with the construction of the Act. The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action, but the arbitrator makes his award on the same day in favour of the defendant. Is one to be set off against the other, or which is to prevail? Or suppose that the arbitrator refrains from publishing his award in deference to a protest from the plaintiff who has succeeded in the action. Would such protest be a breach of the covenant to refer, and entitle the defendant to his action for damages against the plaintiff? It appears to me impossible to allow more than one proceeding to continue without landing the Court and the parties in inextricable difficulties.

With all respect to Scrutton, J., I do not think it is a question of public policy. It is rather a question of the settled practice of the Court. In my opinion this appeal should be allowed.

It is to be remarked that the statutory condition providing for arbitration has not added to it what was added in the policy under consideration in *Guerin* v. *The Manchester Fire Assurance Co.* (1899), 29 Can. S.C.R. 139, the policy in that case had these words added:—

It is furthermore hereby expressed, provided and mutually agreed that no suit or action against the company for the recovery of any claim by virtue of this policy whall be sustainable in any Court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided.

It was held in that case that no action would be maintainable against the company for any claim under the policy until after an award was obtained, and that the award was a condition precedent to any right of action to recover a claim for loss under the policy.

Sir Henry Strong, Chief Justice of Canada, said at 151:—

Further, the arbitration clause, added to the conditions by the variation to condition 16, provides that no action should be maintainable until after an award had been obtained pursuant to the terms of the conditions fixing the amount of the claim. The Court of Review considered this provision void as tending to oust the jurisdiction of the Courts of law and so contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally established Courts of justice is null, but nevertheless in the case of *Scott* v. *Avery*, 5 H.L. Cas. 811, the House of Lords determined that a clause of this nature and almost in the same words as that before us making an award a condition precedent, was perfectly valid, and that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though of course not a binding authority on the Courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the

B. C.

C. A.

1914

RE HUDSON BAY FIRE INS. CO. v. WALKER.

McPhillips, J.A.

question of liability should first be determined by arbitration: *Trainor* v. *Phoenix Fire Ins. Co.*, 8 Times L.R. 37; *Kenworthy* v. *Queen Ins. Co.*, 8 Times L.R. 211; *Lantalum* v. *The Anchor Marine Ins. Co.*, 22 N.B. Rep. 14; *Dawson* v. *Fitzgerald*, 1 Ex.D. 257.

Now, in the case before us the statutory condition remains unaltered, and it is not a condition precedent to action brought that an award be had.

The point we have to consider was dealt with in the case of *Cole* v. *Canadian Fire Insurance Co.* (1908), 15 O.L.R. 336. Although it is right to remark that the application was made after notice of trial had been given, yet all the defences of the insurance company were withdrawn, and it was represented that the whole matter in dispute was the amount of the loss. The Court consisted of Falconbridge, C.J.K.B., Anglin and Riddell, JJ., being an appeal from the order of Meredith, C.J.C.P., staying all proceedings in the action until furtherorder of the Court—an application under sec. 6 of the Arbitration Act, R.S.O. 1897, ch. 62, a section similar to the one in the British Columbia Arbitration Act.

The decision of the Court was that the application being made after delivery of the statement of defence was too late.

Mr. Justice Riddell said at p. 338:—

> In *Hughes* v. *Hand-in-Hand Insurance Co.* (1883), 3 C.L.T. 600, 4 C.L.T. 34, appearance was entered on the 2nd November, 1883, and upon the same day notice of motion was served, returnable the 5th November. It will be seen that the insurance company in that case brought themselves within the provisions of what corresponded at that time with what is now sec. 6 of the Arbitration Act; and were in a different position from that of the defendants here.
>
> The fact that the right to arbitration is given by legislation does not make that right, when given, any higher than if it had been obtained by private contract, and I am of opinion that the application is too late.
>
> There is no hardship in so holding. No claim can be made against the insurance company until the lapse of sixty days from the delivery of the proofs of loss. This is surely ample time to allow to an insuring company to determine whether they desire to contest the amount. Then, even after the accruing of the cause of action and issue of the writ, they have some eighteen days before their statement of defence is due. During this time an application may be made for a stay and if the defendants, instead of moving for a stay, choose to put in a pleading, they must be held to have elected that method of having their rights determined, and to have waived the provision for arbitration. Upon an application to stay (if made at the right time) the Court could make an order staying the action generally, if the only question were that of amount, or staying the action, so far as regards the amount, if there were other issues.

Whilst it is true that in the case before us counsel explained that no application was made to stay the proceedings (in any case that could not be made after delivery of pleadings), yet we see that the Court in Ontario really dealt with the making of

C.

C. A.
1914

RE
HUDSON BAY
FIRE INS.
CO.
v.
WALKER.

McPhillips, J.A.

any award, and if that view be the correct one, then any award made would be abortive unless, of course, the assured assented to the arbitration proceedings, which is not the case, as we have counsel here opposing.

Therefore, under the decision of the Divisional Court in Ontario, and that of the Court of Appeal in England, both holding against the contention which was so ably advanced by Mr. Reid on behalf of the appellant, I feel constrained to decide that in my opinion the opportunity for the appointment of an arbitrator on behalf of the assured by an order of the Court, and an award by arbitrators under the statutory condition, is past, although I must admit that the reasoning of Vaughan Williams, L.J., in his dissenting judgment in the Court of Appeal, impresses me very much.

It follows that in my opinion the appeal will stand dismissed.

Appeal dismissed.

GRAHAM ISLAND COLLIERIES CO. v. MACLEOD.

B. C.

C. A.
1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. CORPORATIONS AND COMPANIES (§ V B 1—176)—CAPITAL STOCK—SUBSCRIPTION—ALLOTMENT—FORFEITED AND CANCELLED SHARES.

Where a company accepted an application for a definite number of shares not specifically identified or ear-marked, and gave due notice of the allotment thereof made at the directors' meeting, the subscriber cannot repudiate the contract because of the tender to him of shares previously allotted to another and which the company claimed had been cancelled as forfeited and contest in an action for the price the regularity of the forfeiture, if the company always had other shares available to give the applicant in their stead and was willing to do so.

[*Graham Island Collieries Co.* v. *McLeod*, 11 D.L.R. 838, affirmed.]

2. CORPORATIONS AND COMPANIES (§ V B 2—182)—SUBSCRIPTIONS FOR SHARES—STIPULATIONS AS TO CALLS.

A stipulation that a balance of the subscription price of shares should be payable "on call within eighteen months after allotment" means that such balance shall not be payable within the eighteen months except on call, but that on the expiry of that time it becomes due and payable without call. (Dictum *per* Macdonald, C.J.A., and Martin, J.A.)

3. CORPORATIONS AND COMPANIES (§ V F 3—263)—UNPAID STOCK—DEFENCE THAT ALLOTMENT IRREGULAR—STATUTORY REQUIREMENTS (B.C.).

Section 95 (1) of the Companies Act, R.S.B.C. 1911, ch. 39, declaring voidable within a limited period at the instance of an applicant for shares an allotment made in contravention "of the provisions of the last preceding section," includes by such reference all of sec. 94, and applies to make voidable within the limited period an allotment subsequent to the first as regards the statutory condition for five per cent. being payable on application, to which cases sec. 94 extends, although the other sub-sections are restricted in their application to first allotments only. (*Per* Martin, J.A.)

Statement

APPEAL by the defendant from the judgment of Clement, J., in the plaintiff's favour, *Graham Island Collieries Co.* v. *McLeod*, 11 D.L.R. 838.

The appeal was dismissed.

B. C.

C. A.

1914

GRAHAM ISLAND COLLIERIES CO. v. MACLEOD.

Macdonald, C.J.A.

J. A. MacInnes, for the appellant (defendant).
J. W. deB. Farris, for the respondent (plaintiff).

MACDONALD, C.J.A.:—Since the argument I have read the evidence through and am confirmed in the opinion which I then held that the appeal ought to be dismissed.

There is no merit, in my opinion, in the objections raised by the appellant to the cancellation of Kerr's subscription, and the re-issue of the shares, which were intended for him, to the defendant, but even if that objection could be supported it is clear that defendant subscribed for shares and now declines to pay for any shares though his subscription was accepted, and shares were allotted to him. The respondent is ready to issue other shares if he be not satisfied with those which were set aside for him against the time the appellant shall pay the balance due on them.

The question of whether or not the company properly forfeited Kerr's shares is not one which affects the decision of this appeal, for if it were assumed that the forfeiture was not properly made, though I think it was, that is a matter to be attacked in another way, and not by refusal of a subscriber to accept and pay for his shares.

The defendant's contention that the balance of the subscription price of the shares was not due under the terms of the allotment because of the term in it that such balance was payable "on call within 18 months after allotment," cannot in view of the fact that the action was not commenced until the expiry of that period be given effect to. I read that term to mean that such balance should not be payable within such period except on call, but that on the expiration of the period the balance became due and payable without call.

Irving, J.A.

IRVING, J.A.:—The defendants' application made on August 8, 1910, was accepted, and an allotment made October 12, 1910. The defendant was duly notified, and so the contract was completed in every respect.

The application not being accompanied with the cash, the allotment may have been irregular and the contract therefore voidable; but that point was not pleaded, and in any event as the writ was not issued until July, 1912, that defence would not succeed.

The evidence to my mind fully justifies the learned trial Judge in inferring that exhibit (p. 74) is a copy of the notice of allotment sent to the defendant, although the copy does not bear his name, yet as he was the only person to whom shares had been allotted at the meeting of October 12, 1910, there can be no doubt that the notice was sent to him.

After the contract between the company and the plaintiff was complete, the directors, or some of them, began to manoeuvre

B. C.

C. A.

1914

GRAHAM ISLAND COLLIERIES CO. v. MACLEOD.

to protect McLeod, but this manoeuvring on their part could not have the effect of rescinding the contract between the company and the defendant.

If they attempted to foist on him any "unclean" shares, or shares other than treasury shares, he had his remedy by application to the Court to rectify the register, but I do not see how he can escape his liability to take the number of shares allotted to him. I would dismiss the appeal.

MARTIN, J.A.:—No good ground has been shewn in my opinion for disturbing the judgment herein. The allotment of October 12, 1910, was a good one, and founded the contract between the parties, which is unaffected by the failure of the company to comply with the provisions of secs. 30 (2), 33 and 101 of the Companies Act R.S.B.C. 1911, ch. 39, respecting the numbering and registration of shares and certificates therefor. Reliance has erroneously been placed upon the fact that the shares which were eventually allotted to the defendant had belonged to the president of the company and been cancelled; but in the circumstances of this case that is quite immaterial because there was no agreement concerning the origin or former ownership of the shares or the allotment of any specific shares and the defendant was not concerned with what I may call the domestic shuffles of the company so long as it carried out its contract with him and it always had shares available to allot in answer to his application. I therefore express no opinion regarding the forfeiture and cancellation of said shares.

Martin, J.A.

It was argued that the appellant could escape the consequences of sec. 95 (1) on the ground that sub-sec. (3) of sec. 94 is exempted therefrom by sub-sec. (6), but in my opinion sec. 95 covers the whole of sec. 94, which is referred to as "the last preceding section," without any exception.

I have only to add that the not very clear expression "balance on call within 18 months after allotment" means at least that after said 18 months the balance is payable without call, and this action was not begun till twenty-one months thereafter.

It follows that the appeal should be dismissed.

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

Galliher, J.A.

McPHILLIPS, J.A.:—This is an appeal from Mr. Justice Clement, the judgment being that the plaintiff company issuing and delivering to the defendant one hundred shares of the nominal value of $100 each in the plaintiff company, the defendant thereupon pay to the plaintiff company the sum of $6,236.64, together with interest on the sum of $6,000 at the rate of 5% per annum from July 13, 1913.

McPhillips, J.A.

Mr. MacInnes, the counsel for the appellant, in a most careful

B. C.

C. A.
1914

GRAHAM ISLAND COLLIERIES CO.
v.
MACLEOD.

McPhillips, J.A.

and able argument, put forward as the main ground of appeal that the contract at best was only executory in its nature; that there was no allotment of stock; that no liability to pay for the stock ensued; that the contract was unenforceable, there being no independent agreement by the defendant to pay the full price of the shares irrespective of whether the plaintiff company carried out its obligations; and the further point not pleaded or taken at the trial that the alleged allotment of October 12, 1910, was illegal and invalid by reason of non-compliance with the provisions of section 94 of the Companies Act.

With respect to the question of the alleged allotment being illegal and invalid, I would hold, if upon the facts I were of that opinion, that it was open to the appellant to advance that argument before this Court notwithstanding that it was not pleaded or urged at the trial, and there is high authority for this course to be found in *North Western Salt Company Ltd.* v. *Electrolytic Alkali Company Ltd.*, [1913] 3 K.B. 422 (C.A.) at 424 where Farwell, L.J., said:—

> I am not sure whether Scrutton, J., intended to hold that it was or was not unlawful. He appears to have decided against the defendants on the ground that the illegality of the contract ought to have been pleaded, and he even refused leave to amend; in my opinion he was wrong in so doing. When it is apparent on the face of the contract that it is unlawful, it is the duty of the Judge himself to take the objection, and that too whether the parties take or waive the objection. This was decided by Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, at law, and by Lord Eldon in *Evans* v. *Richardson* (1817), 3 Mer. 469; and has been consistently acted on ever since, *Scott* v. *Brown & Co.*, *Slaughter & May* v. *Brown & Co.*, [1892] 2 Q.B. 724, being one of the last cases.

I, however, cannot see that there was in this case any illegality of contract, nor do I find upon the facts that sec. 94 of the Companies Act was so infringed upon that the allotment made is not enforceable in the terms of the application duly accepted.

We have the learned trial Judge's holding, and upon the facts I unhesitatingly agree with him that the allotment following the defendant's application was duly made in the resolution of October 19, 1910, and the legal responsibliity of the defendant became absolute and complete to comply with the application made by him, and the subsequent conduct of the defendant by part payment precludes the defendant from setting up successfully that the executory contract is not complete; the plaintiff company has done all that was necessary to execute the contract, and the defendant has done all that which is necessary to imply a promise to pay in the terms of his application; and the plaintiff company is entitled to recover not only upon the implied promise to pay, but the express promise to pay in the terms of his application.

The evidence is, and it has been accepted and believed by the learned trial Judge, that the application of the defendant for the

shares in question—which was sufficient in law—was duly accepted, and the notification of its acceptance duly given to the defendant, and the discovery evidence of the defendant introduced at the trial, amply proves this; and there was no withdrawal at any time before acceptance.

The acceptance was by post, and any withdrawal is not effective unless it reaches the company before the notice of allotment is posted. I admit that it was contended that the notice of allotment, although posted, was never received, but the defendant's conduct by part payment, and the giving of a promissory note in further payment on account of the shares, absolutely precludes the defendant from contending that he was not aware that the acceptance of his application had taken place and due allotment made. The discovery evidence makes the matter perfectly clear.

The authorities bearing upon the point and demonstrating that upon the facts the defendant is liable to pay for the shares applied for, are the following:—*Hebbs Case*, 4 Eq. 9; *Dunlop* v. *Higgins*, 1 H.L.C. 381, 9 Eng. R. 805; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27; *London & Northern Bank*, [1900] 1 Ch. 220.

Everything was done in this case to constitute a valid allotment, and within the meaning of the term allotment as defined by Chitty, L.J. in *Nicol's Case*, 29 Ch.D. 421, 426.

The acceptance here was unconditional and was therefore complete. No new term was imported as considered in *Leeds Banking Co.*, 2 Drew & Sm. 415, 62 Eng. R. 678; *Addinell's Case*, [1865] L.R. 1 Eq. 225; *Jackson* v. *Turquand*, L.R. 4 H.L. 305.

I entirely agree with the learned trial Judge that the defendant is entitled to have issued to him shares in the company different and distinct from the alleged forfeited shares of J. L. Kerr. I refrain from saying anything as to these alleged forfeited shares, or the legality of forfeiture.

It follows that in my opinion the appeal should be dismissed.

Appeal dismissed.

ASSELIN v. DAVIDSON.

QUE.
K. B.
1914

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. March 20, 1914.

1. ACTION (§ I B3—15)—NOTICE AS PRECEDENT TO RIGHT OF ACTION—PUBLIC OFFICERS.

Failure to give the notice of action required by article 88, C.C.P. (Que.), before suing a public officer for damages by reason of an act performed by him "in the exercise of his functions," cannot be set up where there is an absence of good faith by reason of the fact that the officer knew at the time that his act was illegal.

[*Pacaud* v. *Quesnel*, 10 L.C. Jur. 207, referred to.]

2. FALSE IMPRISONMENT (§ II B—11)—ABUSE OF AUTHORITY BY OFFICER.

A peace officer who knows that he is acting illegally in taking a drunken man out of his home and placing him in jail without a lawful warrant is liable in damages to the latter for his abuse of authority although he did not act with malice.

QUE.

K. B.
1914

ASSELIN
v.
DAVIDSON.

APPEAL from a judgment of the Court of Review, which dismissed an action for damages against Robert Davidson, late chief of police of Sherbrooke, because this action was not accompanied by the formalities required by art. 88 of the Code of Civil Procedure. This article is to the effect that no public officer can be sued for damages by reason of an act performed by him in the exercise of his functions, unless notice has been given at least a month before the service of the writ of summons.

The circumstances leading up to the litigation were that Adelard Asselin was in his home in a drunken and disorderly state and that the respondent, on being called upon to intervene, sent one of his constables to Asselin's house, without a warrant; the constable brought Asselin to the police station, whence he was sent over to the nearby jail in order to enable him to wear off the effects of over-indulgence in alcoholic stimulants. When he had become sober, he was released and, after a fatherly talking to on the part of the respondent and the parish priest of the place, wended his way homewards.

In the interval, however, the chief of police, replying to earnest protestations of the jailer who represented that he could not keep Asselin under custody unless by virtue of a warrant of commitment or a warrant of remand, had taken a warrant of remand, which he happened to have in his desk and which had been signed in blank by a local justice of the peace and filled in the blank spaces with Asselin's name.

The Court of first instance found that Davidson had acted in bad faith, had been guilty of an abuse of power and was hence answerable for damages which the Court estimated at $400.

The Court of Review found that Davidson had acted without malice, and with a view to bringing about a better understanding between Asselin and his wife; that he had simply detained Asselin so as to give him an opportunity to sober up; that he wished to save Asselin the humiliation of a trial in the criminal Courts; that he had saved the honour of Asselin and his family, and had thus acted in the best of good faith.

The latter decision is now reversed by the Court of King's Bench.

Emile Rioux, for appellants.

Cote, *Wells*, and *White*, for respondents.

Archambeault, C.J.

The judgment of the Court was delivered by SIR HORACE ARCHAMBEAULT, C.J.:—I share the view of the Court of Review, to the effect that Davidson did not act with malice towards Asselin. He did not know him; but he committed an abuse of power which the Courts of justice are bound to repress and which despoils him of the special protection which the law grants public officers, acting bona fide, in the exercise of their functions. One cannot be in good faith, when one knows that one is acting illegally. Article 3388, R.S. Que. 1909, it is true, declares that

a public officer may be of good faith though he may be acting clearly contrary to law; but this presupposes that he is ignorant of the fact that he is acting contrary to law. As Judge Drummond said in the case of *Pacaud* v. *Quesnel*, 10 L.C. Jurist 207, public officers act in good faith "when doing things which they conscientiously believed to be a part of their official duties."

Archbold's Common Law Practice, 14th ed., vol. 2, p. 1041, says:—

> It seems that a magistrate is not within the protection of this clause unless he *bona fide* believed that the act complained of was done by him in the execution of his duty as a magistrate.

Illegality does not exclude good faith. If the act of the public officer was not illegal, he would not need the protection of the law, as he could not be sued for damages; but he is protected against his illegal act, only on condition that such was performed by him in good faith. Exception to the rule that everyone is presumed to know the law, is made in his favour. In the present case, it is impossible to say that Davidson could have believed in good faith that he had the right to act as he did. In the first place, he had no right to arrest Asselin without a warrant outlining the offence of which Asselin was accused. This offence, as described in the warrant of remand concocted (*fabrique*) by Davidson was one of simple assault—"did unlawfully and cruelly assault his wife."

The Criminal Code (arts. 646 and 647) does permit an officer of the peace to arrest without a warrant a person who has committed the offence mentioned in art. 274—that of having illegally wounded another person or of having made some grave corporal lesion, but not a person who is guilty of a simple assault.

In the second place, even if the respondent had the right to arrest the appellant, without a warrant, he had not the right to keep him in jail under the pretext of giving him an opportunity to become sober; he should have conducted him forthwith before a justice of the peace; and, above all, he had no right to commit a grave criminal offence, that of forging a warrant of remand to prevent the jailer from liberating Asselin, and in order to keep him in jail for 24 hours. It is impossible to suppose that Davidson was in good faith in acting thus. The fact is that he was arraigned for forgery before a district magistrate and that he was condemned to undergo trial before the Court of King's Bench, Crown side.

The Court of first instance was right in declaring that respondent had not acted in good faith and that the Court of Review had confounded the absence of malice with good faith—that is to say, the conscientious belief that one is acting within the limits of one's powers and jurisdiction.

As a consequence, respondent had no right to the special protection accorded public officers acting in good faith in the performance of their duties.

QUE.

K. B. 1914

ASSELIN v. DAVIDSON.

Archambeault, C.J.

The award of the Court of first instance ($400) is excessive, taking into consideration the fact that Asselin, a brutal and drunken husband and wife-beater, was himself the principal cause of all that had occurred. Whilst the Court wished to punish Davidson, suits of this nature for heavy amounts were not to be encouraged. Fifty dollars should have been the limit of Asselin's claim in the first place. Hence Davidson had reason to complain of the judgment of the Court of first instance and was justified in going to review. Judgment will be entered for $50 in favour of appellant with the costs of an action of $100; appellant to pay costs in review and respondents *par reprise d'instance* (William A. Davidson *et al.*) to pay costs of the Court of Appeals.

Appeal allowed.

N. S.

S. C. 1914

HARRISON v. CROWE.

Nova Scotia Supreme Court, Meagher, Russell, Drysdale, and Ritchie, JJ. February 14, 1914.

1. CONTRACTS (§ V C—407)—CANCELLATION BY PARTIES—CONTRACT UNDER SEAL—ABANDONMENT.

To successfully set up the cancellation of an agreement under seal, some definite act of cancellation must be proved; mere inaction under the agreement or the handing of the document over by one to the other without a mutual agreement to abandon it will not be considered sufficient, where in view of the surrounding circumstances such was not inconsistent with the continuance of the agreement as between a father and his adopted son.

Statement

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action against the executors of the late Charles W. Hill deceased, to recover arrears of wages claimed by plaintiff under an agreement in writing entered into between plaintiff and testator whereby the latter in consideration of certain personal services to be rendered by plaintiff agreed to pay him a specified sum per month and further agreed that if he should at any time neglect to pay plaintiff and should die owing him, his executors would pay him without the least delay. The defence to the action was that the agreement was put an end to by the parties.

The appeal stood dismissed, the Court being equally divided.

H. Mellish, K.C., and *J. MacNeil*, for appellants.

C. J. Burchell, K.C., and *C. MacKenzie*, for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff was at an early age "adopted" as a son of the defendant's testator and lived with him throughout his life and after his death with his widow. About the time that he came of age an agreement was entered into between plaintiff and the testator for the payment to the former of $16 a month for services to be rendered. The monthly allowance was paid for six months and no payments were afterwards made. It is contended that the agreement was put an end to by the parties.

N. S.

S. C.
1914

HARRISON
v.
CROWE.

Russell, J.

The only reasons for so contending are that the monthly payments ceased, that the plaintiff surrendered his copy of the agreement to the testator about three months before the death of the latter which took place in March, 1912, and that the plaintiff received gratuities from the testator from time to time after the last payment under the agreement, that the plaintiff was drunk several times during the year or two last previous to testator's death, and that he was confined in a lunatic asylum for six weeks because of epileptic fits to which he was subject, and that he was allowed to go to Boston on one occasion when his ticket was paid for by the testator, and the husband of an adopted daughter of testator was sent to bring him home, the expenses being paid by testator.

I do not see that any of these circumstances, or all of them taken together, could not have existed consistently with the continuing validity and operation of the agreement. Nor do I think that they are sufficient to discharge the obligation which it created. It was an agreement under seal and I think that if it is to be got rid of there must be something clearer and more convincing than any of the circumstances proved in this case. If the plaintiff had expectations from the bounty of testator who stood to him *in loco parentis* he would naturally refrain from pestering him about the agreement, and that is sufficient in my opinion to account for his not making demands for his monthly allowance. The mere fact of handing over the agreement to the old gentleman did not cancel it. It would have been bad policy to have refused to do so. If the testator desired to be released from it I think it was incumbent on him to take some definite action, assuming as I do at least for the purpose of argument, that it could have been put an end to at the instance of one of the parties without the consent of the plaintiff. Probably its effect could have been done away with by notice, or for cause, but neither of these things is pretended. I cannot infer that there was any mutual agreement to abandon it and I think it was in force at the time of the testator's death.

The appeal should therefore in my opinion be dismissed.

Drysdale, J.

DRYSDALE, J.:—This action is against the executors of Charles W. Hill, deceased, and is based on an agreement entered into between the plaintiff and the late Mr. Hill, dated October, 1905. By such agreement the plaintiff entered into an engagement whereby he was to receive from said Charles W. Hill $16 per month for particular personal services specified in detail in the written agreement; such agreement, on its face, specifying that it was entered into by Mr. Hill on the express condition that the plaintiff should "live up to it." That is, as I take it, properly perform the detailed personal services stipulated and provided for therein.

N. S.

S. C.
1914

HARRISON
v.
CROWE.

Drysdale, J.

Services under this agreement were rendered and the monthly wages thereunder regularly paid until April 1906, as appears by the receipts taken and endorsed thereon, after which all payments under such agreement terminated.

It seems to me that plaintiff's own admissions shew that after April, 1906, he had ceased to perform the personal services contracted for by this document. From infancy Mr. Hill had treated plaintiff as an adopted son. He continued to so treat him during Mr. Hill's lifetime and the latter provided for plaintiff in his will. The agreement of October, 1905, was an agreement for peculiar personal services of plaintiff and seems to have been entered into shortly after plaintiff came of age. It was such an agreement as could be terminated any time by either party, and in seeking to enforce a long series of back payments under this document I think, as against the dead, it was incumbent on plaintiff, by clear and satisfactory evidence duly corroborated, to establish that he continued to work under this agreement and that he faithfully performed the services stipulated for. I find no such evidence. On the contrary, I find admissions by plaintiff establishing a state of affairs entirely inconsistent with services under the agreement in question. I notice plaintiff admits that subsequent to this agreement he was in the employ of Mr. Hill in running a grocery business, that he at a date subsequent to the agreement in question became so ill and deranged that for a time he was confined in the epileptic wards of a lunatic asylum, that he visited Boston on Mr. Hill's bounty for a further time, and finally I find plaintiff admitting that he got money from Mr. Hill when he asked for it. The whole evidence of the plaintiff established, I think, a state of affairs entirely inconsistent with the services stipulated for in the written agreement relied upon, and the conduct of both parties only consistent with some arrangement between them other and different from services under the written document. A great deal of the late Mr. Hill's conduct towards plaintiff, towards the latter end of his life, according to plaintiff's own admission, is consistent only with the generosity of a father. Anything approaching services by plaintiff is I think so clearly inconsistent with the stipulations provided in the agreement relied upon that we can only speculate as to what the relations were. When I find the late Mr. Hill in 1906 suddenly ceasing payments under this agreement, that up to that had been very regularly made, and an admitted state of affairs going on thereafter as between plaintiff and Mr. Hill inconsistent with performance by plaintiff of his obligations under the writing contracted for, I think I ought to decline to speculate on the relationship between the parties. It is, I think, enough for me to say that the plaintiff has failed to establish the burden that the law properly casts upon him in an action against the dead man's estate. It was in my view incumbent upon plaintiff

not only to prove the agreement but to prove services under it, and to corroborate his position therein. Instead of satisfying this burden I am of opinion he admits a condition of affairs after April, 1906, entirely inconsistent with performance on his part of the stipulated services provided for. After doing most everything else except perform the stipulated services after April, 1906, and apparently on Mr. Hill's bounty, I wonder what plaintiff's position would have been under the will if the plaintiff after six years of silence had made this demand in Mr. Hill's lifetime. No such demand, I find, was ever made and the fact is extremely important in convincing me that plaintiff acquiesced in other and different arrangements long before Mr. Hill died. I cannot think that the mere discovery of this document and the plaintiff's evidence here makes any reasonable case against Mr. Hill's estate.

I would allow the appeal and dismiss the action.

MEAGHER, J., concurred with DRYSDALE, J. Meagher, J.

RITCHIE, J.:—The plaintiff brings his action against the executors of C. W. Hill upon an agreement under seal which is as follows:— Ritchie, J.

> At request of Alfred Harrison I make the following offer to him, that I will pay him $15 per month, paying him every week, and that the said Alfred Harrison agrees to help me and all of us in and around the house, and that the said Alfred Harrison may have the privilege of having four nights out of the week, naming the nights he wishes to have and letting me know where he is each night in case I have to send for him, and I have no objections to him keeping company with the party he is going with, provided that the said party is of good mind, level-headed and well ballasted, and that the said Alfred Harrison will remain home with me the following evenings, Thursday, Friday and Saturday, to read to me or anything else that I would wish him to do, and I have no objections of signing this agreement providing that the said Alfred Harrison shall live up to it.
>
> And I further agree that should I at any time neglect in paying the said Alfred Harrison his wages, and that I should die owing the said Alfred Harrison any back time, that I still further promise the said Alfred Harrison that my executors shall pay it to him without the least delay.

The plaintiff starts on solid ground with the agreement, but it is urged on behalf of the defendants that the plaintiff ceased to perform the services referred to in the agreement, that the claim is a stale one, and that the evidence shews that the agreement was terminated.

I deal with these grounds of defence in the order which I have mentioned.

As to the continuance of the services the plaintiff swears that he worked for Mr. Hill under the agreement until his death. He is corroborated by Emily Ingraham. Her evidence on this point is as follows:—

> Q. You know, I suppose, that Mr. Hill took Alfred from the Steel Works and took him home? A. Yes, I know that.

N. S.

S. C.
1914

HARRISON
v.
CROWE.

Ritchie, J.

Q. And Alfred worked with Mr. Hill from that time on? A. Yes.
Q. Until Mr. Hill's death? A. Yes.

There is also some corroboration in the evidence of Edwin W. Ingraham. There is no evidence the other way and the corroboration comes from witnesses called on behalf of the defendants. The services must, I think, be referable to the agreement.

As to the claim being a stale one, ordinarily this would be so, but the agreement contains a very unusual clause, namely,

> And I still further agree that should I at any time neglect in paying the said Alfred Harrison his wages and that I should die owing the said Alfred Harrison any back time, that I still further promise the said Alfred Harrison that my executors shall pay it to him without the least delay.

It is said that this is merely an unnecessary declaration that the agreement is to be binding upon the executors of Hill, but when it comes to drawing inferences of fact I think it cannot be disposed of as suggested. It is clear that Hill had it in his mind that he might not during his life pay the wages, and that in that event he desired that it should be quite clear that his adopted son had a claim on his estate for whatever balance might be due.

Then it is said if the agreement had not terminated the plaintiff would have pressed for payment. Ordinarily this would be likely to be so, but in this case the plaintiff had it brought to his mind by this clause that it would be perfectly safe for him to let his wages accumulate and get them in a lump at the death of Hill. He was unmarried, living with Hill, who gave him money from time to time apart from the agreement, as a father would give money to a son. It seems to me that under such circumstances it would be perfectly reasonable for the plaintiff to say to himself, "I don't need this money now; I am sure of getting it later on; so I won't bother the old man about it now."

In consequence of this clause in the agreement I cannot draw any inference against the plaintiff from the lapse of time.

Then what did terminate and put an end to this agreement under seal? I confess that Mr. Mellish carried me along with him at the argument, but I must take the printed case and be able to put my finger on the evidence which terminated this agreement. I cannot find any such evidence. The reasons urged for coming to such a conclusion are set out in the opinion of my brother Russell. I agree with him that it is impossible to hold that any one of the circumstances mentioned or all of them together work a termination of this agreement.

In looking at these circumstances, it is in my opinion most important to keep in mind the relation in which Hill stood to the plaintiff. The will makes it clear that Hill treated the plaintiff as a father would treat his son. If a father has an agreement such as the agreement in this case with his son I cannot see anything inconsistent with the agreement if the father should give the son

money apart from the agreement, give the son a trip to Boston. send a man for him if he got anxious about him, send him to the asylum if it was thought the best thing to do, pay the fines imposed upon him in the Police Court, and generally do all that the average father would do for a son. Then when he comes back have the thing go on as before, without docking his wages for the time he was away, and without deducting the money given him apart from the agreement or the fines he had paid for him.

It was, I think, also urged that the plaintiff was for a time in the grocery business and the bicycle business, but it is uncontradicted that these businesses were carried on for Hill.

In my opinion when the evidence in this case is carefully looked at it is impossible to hold that the agreement was terminated in law.

The appeal should be dismissed, costs to be paid out of the estate.

Appeal dismissed on an equal division.

MUNRO v. STANDARD BANK OF CANADA.

Ontario Supreme Court, Meredith, C.J.C.P. December 12, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ VII A—57)—PREFERENCES—EFFECT OF PRESSURE.

Mere formal pressure by the creditor for security will not support a preference which would otherwise be void; and a chattel mortgage given to the bank for an unmatured debt already incurred will not stand merely because the bank asked for the security if the purpose of same was to give it an advantage over unsecured creditors and to leave the debtor without the means of satisfying other creditors.

2. ASSIGNMENTS FOR CREDITORS (§ VII B—61)—CHATTEL MORTGAGE—SALE BY MORTGAGEE—FOLLOWING PROCEEDS.

The proceeds of sales of mortgaged goods may be followed in the hands of the chattel mortgagee at the instance of the debtor's assignee for creditors, by virtue of sec. 13 of the Assignments and Preferences Act, 10 Edw. VII (Ont.) ch. 64, R.S.O. 1914, ch. 194, on the chattel mortgage being successfully impeached as an unlawful preference.

Statement

ACTION by the assignee for the benefit of creditors of the defendant Ross and by a creditor, as plaintiffs, to have declared void and set aside a chattel mortgage made by the defendant Ross to the defendants the Standard Bank of Canada.

Judgment was given for the plaintiff.

T. G. Meredith, K.C., and *D. C. Ross*, for the plaintiffs.

E. Meredith, K.C., and *W. R. Meredith*, for the defendants the Standard Bank of Canada.

P. H. Bartlett, for the defendant Ross.

ONT.

S. C. 1913

MUNRO v. STANDARD BANK OF CANADA.

Meredith, C.J.C.P.

December 12. MEREDITH, C.J.C.P.:—The parties to this action, upon the argument after the trial of the case, present these three questions for the consideration of the Court:—

(1) Is the chattel mortgage in question invalid, as to the plaintiffs, because of any failure to comply with any of the requirements of the Bills of Sale and Chattel Mortgage Act?

(2) Is such mortgage invalid, as against the plaintiffs, under any of the provisions of the Assignments and Preferences Act?

(3) Are the payments, made upon the chattel mortgage, good?

If the plaintiffs are entitled to succeed upon either the first or the second point, the other of the two need not be considered; and, therefore, it may be more convenient to deal with the second first.

The second point depends upon the question whether the mortgage in question was made by the defendant Ross to his co-defendants, the Standard Bank of Canada, at a time when he was in insolvent circumstances and with intent to give the bank an unjust preference over his other creditors: sec. 5 of the Assignments and Preferences Act, 10 Edw. VII. ch. 64(O.).

Admittedly no new consideration was given for the security the mortgage afforded; if it could be contended that any new consideration were given, it would be one which in itself would vitiate the transaction—the stifling of a criminal prosecution; but there was in fact none such. The mortgage was given to secure payment of a then existing debt, but which was not then, nor for more than four months afterwards, payable. It purports to have been made to secure also further advances, but none such were intended; the debtor had not only come to, but had gone a good deal beyond, that which should have been his "line of credit" tether; causing much anxiety respecting the chances of payment of the indebtedness not only in the local agency but also in the head office of the bank—as the correspondence between the local agent and the general manager makes very plain.

These words, taken from one of the earlier letters of the general manager, shew the view which the bank took of the situation a week or so before the mortgage in question was taken; but the mortgage referred to in them is not the mortgage in question; it is a mortgage upon the debtor's land which was obtained a few days before that in question was given: "Demand a mortgage on this forthwith, as it is better to be in possession of such an instrument, since it will preclude Ross doing anything with the property, although, in the event of other creditors pressing him, and of his being found to be insolvent, a question might be raised as to whether we could retain our security as against them, but better have it. While I am suggesting better security,

this is only a temporary expedient, and the moment you have the cover take the subject up with me, and we shall have in mind realising our money, as that will be the only satisfactory trend the account can take from our standpoint."

The question whether, upon estimated values and supposed liabilities, on one side and the other, the balance would be for or against the debtor, has been much discussed; but, however that may be, the taking by the bank of the land and chattel mortgages, covering substantially all that Ross owned, put him unquestionably in embarrassed circumstances, and would have been an act of bankruptcy if the usual bankrupt laws had been in force here.

Upon the whole evidence, I can come to no other conclusion than that, when that chattel mortgage was given, the debtor was unable to pay his debts in full and in insolvent circumstances: the facts that the failure is not as hopeless an one as failures sometimes are, that his justly secured creditors—not counting the bank in that category—will be paid in full, and that the others may be paid fifty cents on the dollar, and that their claims do not in all amount to many thousands of dollars, does not make it the less so; it is but part of the evidence bearing upon the question: see *In re Jukes*, [1902] 2 K.B. 58.

That the intention of both mortgagor and mortgagees was to give the bank a preference over all other unsecured creditors is self-evident; it was obviously and necessarily a part of the transaction; and, under the circumstances of such a case as this, it was an unjust preference, within the meaning of that term as used in the Assignments and Preferences Act, which is aimed at equality between creditors; unless, indeed, there was some other dominating intention in giving the security. That the preference was especially unfair to the plaintiff Munro is unquestionable. Before the mortgage in question was made, a question had arisen whether he was liable as surety for the defendant Ross upon promissory notes bearing his signature, amounting to about $2,200; he affirmed that Ross had never asked him to sign, and that he never knew he had signed for any greater amount than about $300. When payment of the larger amount was demanded by the holder of the notes, in his difficulty he applied for advice to the local agent of the bank, and was advised by him to give a new note for the larger amount; and that, upon such advice, he did; afterwards, when sued on that note, he defended the action, but then it was too late to rely upon his earlier contentions as to the earlier notes; and it is in respect of the payment of the greater sum, as surety for Ross, that his claim against Ross, in this action, is based. It was urged that the bank's local agent deliberately advised Munro to accept liability for the larger amount so that the bank might thereby benefit in

ONT.
S. C.
1913
MUNRO
v.
STANDARD BANK OF CANADA.
Meredith, C.J.C.P.

their claims against Ross, as they undoubtedly did; but I am quite unable to find in accordance with that contention; I cannot find that there was any conscious intention to bring about such a result, or that the agent consciously intended to do any wrong in that matter; though his loyalty to his employers, and his keen desire to save them from loss, may, and probably did, have some effect upon his judgment. I am sure that he now sees that, in the circumstances, he should have declined to be Munro's adviser. To advise Munro to accept a liability that it is possible he might have successfully resisted, and then to take security for the bank's debt upon all the property out of which Munro could expect to be recouped, is assuredly a hardship upon Munro at the hand of his trusted adviser; but, in itself, is not an injustice such as makes the preference which the bank obtained over Munro an unjust one within the meaning of the Assignments and Preferences Act.

And so really the one substantial question for consideration is, whether there was any dominant purpose, other than to give the bank an advantage over other creditors, in the giving of the impeached mortgage.

For the defendants it is said that there was "pressure;" and that that pressure was the dominant factor in the transaction. And, if that be so, I am bound by the law, as enunciated in many cases in our own Courts, to uphold the transaction. But "pressure" is not a certain, definite, well-understood thing which can be recognised and given effect to as soon as mentioned. It has been said to mean much and little; indeed, from the words of some of the Judges, it would seem as if whether there was pressure or not might depend on who spoke first, that, if the debtor first offered the preference, it would be bad; if the creditor first asked for it, good; a state of affairs that might well seem ludicrous to practical business men. But we have got far beyond such a notion: the question now is, what was the dominant purpose? If to give a preference to one creditor over another, the transaction cannot stand against him.

As I have said, the debt was not payable for several months; pressure by way of enforcing it was out of the question. All that has been urged is, that the pressure was in the nature of a threat of criminal proceedings, a somewhat dangerous position to take; for, as I have said, if the result were an agreement to stifle criminal proceedings, the security so obtained would be invalid on that ground; and one who is threatened with criminal proceedings is not likely to pay the price unless he gets exemption, or some kind of shielding, from them.

But it is quite impossible for me to find that any such threats were the cause in any sense. The debtor needed no such pressure, nor any other than such as a demand from his

bankers. The bank desired the security, and their agent was anxious to get it, in the fear of a loss on this customer's dealings with the bank; and so the bank asked for the security and got it; and, if that is sufficient pressure to support the transaction, it ought to stand; but I cannot think it anything like enough. The dominant purpose was to give the bank an advantage which other unsecured creditors had not; and which, being accomplished, left the debtor without any means of giving like security to them; as well as without the means to pay his debts in full in case of an assignment for the benefit of creditors, or of litigation to enforce their claims, or even in ordinary course if no steps were taken by those who were thus prejudiced to enforce their claims.

Nothing was said by the witness Mr. Girvin—the bank's local agent—as to any such pressure in his long examination and cross-examination and re-examination at the trial; but, later on in the trial, he was recalled, and then gave additional testimony, and even then nothing was said upon this subject until re-examination, when he said that he remembered threatening the debtor, Ross, at the time of the taking of the land mortgage; and, in answer to a question asked by me, eventually said that he would say that Ross gave this mortgage to avoid prosecution. That was getting perilously near to, if it was not quite, evidence of vitiation of the transaction on the ground to which I have already twice referred.

This, however, has no direct application to the mortgage in question—the chattel mortgage given some days later—and in any case, upon the whole evidence, I am unable to find that there ever was any real threat or that fear of criminal proceedings had any effect upon the debtor in any of these transactions. I accept the testimony of this witness as conscientiously given; I cannot think that he had any intention to mislead the Court; but he is still very loyal to his employers and very anxious that they shall not lose anything through Ross, or any of his dealings with Ross, things which cannot but affect his testimony, even quite unconsciously.

The witness seems to have been carefully and skilfully advised in most of these transactions by some one quite familiar with the law bearing upon them; and, among other things, he seems to have been advised that this land mortgage would not stand as against other creditors unless it was obtained by pressure; but, no kind of pressure being needed, the debtor being always ready and willing to give security, it was an impossible thing to play that card, except as a sort of formality; and I am convinced that nothing more than that was done, if anything.

Any criminal offence would have been purely imaginary, if

ONT.
S. C.
1913
MUNRO
v.
STANDARD BANK OF CANADA.
Meredith, C.J.C.P.

any had been charged. The debtor, in giving statements of his affairs, had failed to include some obligations, but he had equally failed to include some assets; so that, even upon the trial of this action, the bank and this witness have earnestly contended that the assets omitted exceeded in value the value of the obligations omitted, and so contended upon substantial grounds. In these circumstances, to say that there ever was a serious thought that the debtor had obtained money from the bank on false pretences, or that they ever had made any such charge against him, would be to say something that could hardly be seriously considered. The day the mortgage in question was taken, this witness wrote to the general manager of his bank these words: "Although Mr. Ross gave a wrong statement, I think it was a case of stupidity; he had never figured out carefully what he really has in his possession." This is the statement of an officer of the bank, whose self-interest would urge the excuse of inaccurate statements for the loan of too much of the bank's money to the debtor. It confirms my view of the actual facts.

Neither fear nor threats of criminal responsibility or prosecution had, as I find, any real part in the chattel mortgage transaction; not to speak of either being in any sense the dominant cause of it.

As against the defendants, that mortgage, therefore, falls, upon this ground; and it becomes unnecessary to answer the first of the questions raised in this action, and when unnecessary, it is generally inadvisable, in a case such as this, in which a court of appeal would be in quite as good a position to consider it as the trial Judge, no conflict of testimony being involved in this branch of the case.

Upon the third point, it is admitted, by the defendants, that the moneys in question are the proceeds of sales of the mortgaged goods by the mortgagees, though through the debtor in some instances; and so they are the proceeds of the sale, by the mortgagees, of goods, of which they acquired title from, and as against, the mortgagor, under the impeached mortgage only; such money can be recovered in this action; that is expressly provided for in sec. 13 of the Assignments and Preferences Act. For the reasons before given, it is not necessary to consider the very different question—what would have been the effect of these payments if this case had to be determined on questions arising under the Bills of Sale and Chattel Mortgages Act only?

All the goods comprised in the mortgage have been sold by the mortgagees, under the mortgage; and the proceeds of the sales have been paid into Court in this action. To such moneys, subject to the payment out of them of all proper charges and costs, the assignee plaintiff is entitled for the benefit of creditors

ONT.

S. C.
1913

MUNRO
v.
STANDARD
BANK OF
CANADA.

Meredith,
C.J.C.P.

generally, according to their rights, to be worked out under the provisions of the Assignments and Preferences Act.

As to the costs, I do not think the case is one in which any of the parties individually should be ordered to pay any costs. The action of the bank in taking, and in acting under, their mortgage, in the result, has been as beneficial to creditors generally—apart from this litigation, of course—as if they had taken the mortgage expressly as trustees for all creditors. The goods have doubtless been saved for the creditors to a greater extent than they would have been if they had been left at the free disposition of the debtor. This is forecast in the letter of the general manager from which I have read: it contains these words, which, to the benefit of all creditors, have come true: "It will preclude Ross from doing anything with the property." It would be reasonable and proper that the bank should have some compensation for their loss and labour in preserving the property and converting it into money. A reasonable way of compensating them would be to allow them their costs, between party and party, of this litigation, out of the estate: the plaintiffs should have their costs of the action, as between solicitor and client, also out of the estate: the result being that all the costs will eventually fall upon the debtor, if he is ever able to pay them, and I am inclined to think that, under all the circumstances involved in this case, he ought to bear them.

Judgment may go accordingly, with the usual stay of proceedings, if desired by either party, for thirty days.

Judgment for plaintiffs.

BARK FONG v. COOPER.

CAN.

S. C.
1913

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. November 10, 1913.

1. VENDOR AND PURCHASER (§ I E—28)—FAILURE TO PAY INSTALMENT—STIPULATION FOR NOTICE—PENALTY CLAUSE.

Where a contract for the sale of land on deferred payments is made to several purchasers individually named, it is not to be inferred that they are partners in the transaction so as to validate a notice to one as a notice to all; notice of intention to forfeit the contract for their default must be given to each of the purchasers under a stipulation therein for a thirty-days' notice in writing demanding payment of the arrears to be delivered to "the purchasers, their heirs, executors, administrators or assigns," and authorizing the vendor to repossess on the default being continued under such notice.

2. SPECIFIC PERFORMANCE (§ I A—14)—DEFERRED PAYMENTS—PENALTY CLAUSE—RELIEF AGAINST FORFEITURE.

As against a penalty clause intended to secure punctual payment of the deferred payments under a land purchase agreement which purported to authorize the vendor on certain defaults to re-possess the property and to absolutely forfeit all payments made, equity will relieve upon the purchaser promptly taking action to reinstate his rights and offering

CAN.

S. C.
1913

BARK FONG
v.
COOPER.

to perform the obligations of which the penalty clause was intended to secure performance, unless the purchaser has by conduct making such a course inequitable precluded himself from that relief; and specific performance may be granted against the vendor still in control of the property he has claimed to re-possess.

[*Bark Fong* v. *Cooper*, 11 D.L.R. 223, 18 B.C.R. 271, reversed; *B.C. Orchards Lands* v. *Kilmer*, 10 D.L.R. 172, [1913] A.C. 319, 23 W.L.R. 566; and *Foyd* v. *Richards*, 13 D.L.R. 865, 29 O.L.R. 119, referred to; *Wallace* v. *Hesselein*, 29 Can. S.C.R. 171, distinguished.]

3. VENDOR AND PURCHASER (§ I A—4)—TENDER OF CONVEYANCE—REJECTING TENDER OF PURCHASE MONEY—CLAIM OF FORFEITURE.

The rejection of a tender of purchase money on the ground that the purchaser's rights had been forfeited for his default in payment, is a waiver of the tender of a conveyance for execution. (*Per* Anglin, J.)

[*Bark Fong* v. *Cooper*, 11 D.L.R. 223, 18 B.C.R. 271, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Bark Fong* v. *Cooper*, 11 D.L.R. 223, 18 B.C.R. 271, 24 W.L.R. 294, dismissing an appeal from the judgment of Gregory, J., at the trial, by which the plaintiffs' action was dismissed with costs.

The appeal was allowed.

By agreement for sale and purchase, dated the 6th day of December, 1910, the defendant (respondent) agreed to sell and the plaintiffs (appellants) agreed to purchase certain lands in the city of Victoria for $1,600, of which $800 was paid in cash, and the balance was payable in two equal instalments of $400 each on the 6th day of June, 1911, and the 6th day of December, 1911. Neither of these payments was made on the due date, and on the 27th of March, 1912, the defendant sent a notice demanding payment and purporting to cancel the agreement of sale, and to forfeit the moneys paid should the default continue after the expiration of thirty days from the date of the notice. This notice was alleged to be given in accordance with the clause in the agreement providing for such cancellation and forfeiture, and setting out that the notice might be well and sufficiently given if "mailed at Victoria, B.C., post office, under registered cover addressed as follows," . . . but the blank space in the printed form was not filled in. A few days later, the plaintiff asked defendant for an extension of time, but this was refused, and on May 10, 1912, the defendant entered into possession of the lands. On May 15, 1912, the plaintiffs offered the defendant the sum of $900, but no conveyance was tendered therewith for execution. The defendant refused to receive this sum.

The learned trial Judge held that the notice of cancellation was sufficiently given, and that the plaintiffs had practically abandoned their purchase and were not in any case entitled to specific performance. The Court of Appeal for British Columbia, in upholding this decision, held further that no sufficient tender was made inasmuch as no conveyance was tendered for execution.

Travers Lewis, K.C., for the appellants.
R. A. Pringle, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree with Mr. Justice Duff. I would venture merely to add that the clause in the agreement belongs to that class of resolutive conditions known in the civil law as *une clause commissoire*. The difficulty in this case has arisen out of the fact that the agreement has been construed below as containing a resolutive condition pure and simple. The difference between the two with respect to the rights of the parties under the agreement is neatly expressed by Aubry & Rau, vol. 4, p. 83, 4th ed.

Davies, J.

DAVIES, J.:—I think this appeal should be allowed and the decree for specific performance as prayed for granted.

I do not think the notice in case of default in making the payments stipulated for, expressly provided for in the agreement of purchase, was given and there was not, consequently, the continuing default in making the purchase payments which the agreement expressly provided would nullify it and operate as a forfeiture of previous payments.

The only remaining reason advanced for refusing the relief asked for was that the circumstances were not such as justified the Court in granting this special relief. I differ from the Courts below on this point also, and cannot see anything on the facts as proved which should preclude the plaintiffs from obtaining the relief they ask.

One-half of the purchase money was paid at the time of the purchase. The notice called for by the agreement to be served upon the purchasers in the event of their failing punctually to make payment of the balance of the purchase money, and thus evidencing the vendors' determination to avoid the agreement and the rights of the purchasers under it, was not given. The evidence does not shew an intention on the purchasers' part to abandon their rights under the agreement, and no evidence was given of any facts which, in my judgment, ought to deprive the complainants of the special relief prayed for.

Idington, J.

IDINGTON, J.:—The term of this contract making time of the essence thereof is so coupled with a specific mode of enforcing it as to form a necessary part thereof. This specification, though somewhat imperfect, may be so construed as to give it some effect, but any such possible construction has not been so followed by the steps taken as to be in conformity therewith. The contract must, therefore, be looked at as an ordinary contract of sale and purchase, destitute of any provision relative to time being of the essence of the contract. So treated, the mere default for a few months (where not a mere deposit but half the purchase money had been already paid), in payment of the two instalments

CAN.

S. C.
1913

BARK FONG
v.
COOPER.

to be made later does not constitute sufficient ground for refusing specific performance.

No case has been cited to us, and I venture to think none can be found, resting merely upon the like default, as in law depriving a vendee, under such circumstances, of his right to specific performance in face of his tender of the balance due.

The appeal should be allowed with costs throughout.

Duff, J.

DUFF, J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of Mr. Justice Gregory, who dismissed the appellants' action for specific performance of an agreement for the sale of land made between the respondent and the appellants on the 10th of December, 1910. The purchase price was $1,600, of which $800 was paid at the time of the execution of the agreement, and the residue was to be paid in two equal instalments, one on the 11th of June, 1911, and the other on the 11th of December, in the same year. In February of 1911, the vendees, the appellants, assigned the benefit of this agreement to one Lim Bang, at the price of $2,500, receiving in cash $1,700 at the time of the assignment and an undertaking to pay on the days respectively appointed for the making of the deferred payments, under the appellants' agreement for purchase. This last agreement contained the clause in the following terms:—

> And it is expressly agreed that time is to be considered the essence of this agreement, and unless the payments above mentioned are punctually made at the time and in the manner above mentioned, and as often as any default shall happen in making such payment, the vendor, his heirs or assigns, may give to the purchasers, their heirs, executors, administrators and assigns, thirty days' notice in writing demanding payment thereof, and in case any such default shall continue, these presents shall at the expiration of any such notice be null and void and of no effect, and the vendor shall be at liberty to re-possess, or re-sell and convey the said lands to any purchaser as if these presents had not been made, and all the moneys paid hereunder shall be absolutely forfeited to the vendor, his heirs, executors, administrators or assigns. The said notice shall be well and sufficiently given if delivered to the purchasers, their heirs, executors, administrators, or assigns, or mailed at Victoria, B.C., Post Office, under registered cover addressed as follows ——— ———

The appellants having made default in meeting the deferred payments provided for in their agreement, on March 26, 1912, the respondent caused a notice to be sent by registered letter addressed to the appellants demanding payment of the overdue instalment, and stating that in default of payment within thirty days from the date of the notice the agreement would be null and void and all moneys already paid thereunder forfeited. The appellant, Bark Fong, was then in China. On the 15th of May following, the appellants tendered the amount overdue, which the respondent refused to accept. On the 27th of the same month,

the appellants sued for specific performance. In the statement of defence the respondent set up the appellants' default, the forfeiture clause in the agreement as quoted above, the notice of March 26, 1912, and, further, alleged that the respondent, on the 10th of May, 1912, "took re-possession of the lands in question" and had been in possession ever since. At the trial the respondent was given leave to add a further defence to the effect that the appellants by their neglect to make the deferred payments had "abandoned and repudiated the said agreement."

The learned trial Judge dismissed the action. He held first that notice had been sufficiently given under the forfeiture clause above set out, and, by implication, that the appellants' rights had thereby terminated. He also held that the default in respect of the deferred payments disentitled them to specific performance. In the Court of Appeal, Irving and Martin, JJ., agreed with the learned trial Judge on this latter ground. Mr. Justice Galliher appears to have taken the view that the appellants were not entitled to succeed owing to the absence of a proper tender of the purchase money or of a conveyance.

I am unable to agree with the view of this case which has been taken in the Courts below. I think the steps taken by the respondent with a view to terminate the agreement under the forfeiture clause were not effectual for that purpose; and that if they had been effectual the appellants would be entitled to relief against forfeiture. I think there is no ground for the suggestion that the respondent did exercise or intend to exercise any right that he may have had to terminate the agreement (on the ground that the appellants' conduct constituted a repudiation of their obligations under it) except the right given him by the forfeiture clause. I have also come to the conclusion that the appellants' conduct was not such as to disentitle them to specific performance.

That the contract was not terminated by the conduct of the parties amounting to mutual abandonment of the contract, as Cotton, L.J., called it, in *Mills* v. *Haywood*, 6 Ch.D. 196 at 202, is very clear. Assuming that the appellants' default was such conduct as would have entitled the respondent to say to them, "You, by your conduct, have declared your intention of not carrying out the contract, and I shall treat the contract, therefore, as rescinded," it is quite plain that that is not the course the respondent took.

On the contrary, he says that on several occasions prior to the giving of the notice in March, 1912, he requested the appellants to fulfil their agreement. The notice itself recognizes the agreement as a subsisting contract, and demands performance of it. The appellant, no doubt, by that notice does declare his intention to terminate the contract, but to terminate it, not as in exercise of any rights he might have had under the general law, but only in exercise of his rights under the forfeiture clause. He

CAN.
S. C.
1913
BARK FONG
v.
COOPER.
Duff, J.

declares his intention to forfeit the moneys already paid. If he had terminated the contract under the general law it is questionable whether he could have retained those moneys. The law upon this point is perhaps not quite settled, but the respondent's notice makes it quite clear that he intended to run no risk of being obliged to refund the moneys he had received. That the vendor's rights under the forfeiture clause were not effectually exercised seems to me equally clear. The notice of the 26th of March was received by two of the appellants. One method of giving the notice is, according to the terms of the contract delivery to the purchasers; and that, I think, is the only method authorized by the contract. The subsequent clause ("mailed at Victoria, B.C.") is obviously incomplete and ought to be disregarded. It was argued that the appellants were engaged as partners in a common adventure, and that service of notice on one would consequently be service on all. I do not think it is necessary to consider whether in the circumstances the appellants ought to be held to be partners in the purchase and sale of the property in question. I think it is immaterial. The agreement does not treat them as partners. It is an agreement between Thos. Cooper on the one hand and three individuals as purchasers on the other, and I entertain no doubt that the agreement contemplated delivery of the notice to each one of these individuals. But, quite apart from that, assuming notice had been properly given, I am quite clear that the appellants are entitled to relief from the forfeiture. The clause is clearly a penalty clause, that is to say, it is a provision intended to secure punctual payment, and that being so, on general principles of equity the appellants are entitled to relief upon coming into Court and offering to perform the obligations of which the clause was intended to secure performance, unless they are precluded from obtaining such relief by some conduct which makes it inequitable that such relief should be granted.

If the vendor, relying upon the effect of this clause, had made a sale of the lands or had rented them to a *bonâ fide* purchaser or lessee, or in some other way dealt with that property so that it would be impossible to restore the parties to their former positions, then any relief which the Court could give might be of only a very limited character. But nothing of the kind has occurred in this case.

The question remains whether the appellants have lost their right by reason of laches. The general principle is stated in Fry on Specific Performance, 5th ed., at 539:—

> The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to

the interference of the court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.

The delay in commencing the action, that is to say, the lapse of the seventeen days between the 10th of May, when the respondent announced his refusal to carry out the contract, and the 27th May, when the action started, is not important, nor was there any delay in the prosecution of the action. The point which has to be considered is whether the delay of the appellants in the payment of the purchase price disentitled them to specific performance. The doctrine of laches, it has been frequently said, is not a technical doctrine, and in order to constitute a defence there must be such a change of position as would make it inequitable to require the defendant to carry out the contract or the delay must be of such a character as to justify the inference that the plaintiffs intended to abandon their rights under the contract or otherwise to make it unjust to grant specific performance. It cannot be said that anything has occurred which makes it inequitable that the respondent should be called upon to perform his contract; the only change suggested is that the property has risen in value. In the special circumstances of this case I do not see why that should be regarded as a ground for thinking it is unfair that the defendant should be held to his contract. Nor do I think that the circumstances in evidence justify the conclusion that the appellants intended to abandon their rights under the contract. The appellants had paid $800 on the purchase price. They had assigned the benefit of their agreement and had made a profit of $900. It may be that two of them were people of no substance, but Bark-Fong, at all events, appears to have been a man of means, and the abandonment of their contract without the consent of Lim Bang might have exposed them to a liability to refund the moneys they had received. The delay is not really difficult to explain when one considers the circumstances. They did undoubtedly expect that Lim Bang, the assignee of the agreement, would, in performance of his contract, provide them with funds for making the payments under their own purchase. The appellants were in possession of the property, which was perfectly good security for the amount due to the vendor; and it was not until March, 1912, when the value of the property was rising, that he began seriously to press for payment. He then gave a notice demanding payment within thirty days. That notice constituted an admission that there was a subsisting contract, and an admission, indeed, that until the end of the period mentioned the contract would not be at an end, and I think, in the words of Malins, V.-C., in *McMurray* v. *Spicer*, L.R. 5 Eq. 527, at p. 538, that this notice excludes all the anterior time in the computation of delay. I do not think that their

CAN.
S. C.
1913
BARK FONG
v.
COOPER.
Duff. J.

conduct from that time forward can be imputed to them for laches. They communicated with Bark-Fong, who was in China, who appears to have acted with all reasonable diligence; and I think, in view of the previous acquiescence of the respondent and of all the circumstances, it would be applying to these appellants an unduly rigorous standard if we should interpret their conduct during this period as demonstrating an intention on their part of not performing the obligations of the agreement or as shewing such a want of diligence as to make it just to withhold the remedy of specific performance.

Anglin. J.

ANGLIN, J.:—Under a written agreement the plaintiffs, on the 6th of December, 1910, became purchasers from the defendant of a property in the city of Victoria, for the sum of $1,600, of which one-half was paid in cash, and the balance was made payable with interest at 7%, $400 on the 6th June, 1911, and $400 on the 6th December, 1911. By a special provision in the agreement the vendor reserved the right on any default in payment to rescind the contract and forfeit whatever part of the purchase money had been already paid by giving to the purchasers and their assigns thirty days' notice in writing demanding payment, at the expiration of which, the default continuing, the contract should be null and void and the moneys paid thereunder forfeited. At the outset of the paragraph containing this power time is declared to be "of the essence of this agreement." On the 24th February, 1911, the plaintiffs re-sold the land, receiving from their sub-vendee all his purchase money except $800. This sum he undertook to pay, with interest at 7%, at the dates and in the manner stipulated for in the plaintiff's agreement with the defendant.

Default was made in payment of the instalment of $400 and interest due in June, 1911. The defendant made some oral demands for payment from one of the three purchasers, but it is not clear upon the record whether these demands were made before or after the second instalment fell due. The default continuing and the second instalment also being overdue, the defendant on March 26, 1912, caused to be mailed a notice addressed to the three purchasers demanding payment and purporting to be given under the special provision of the contract above mentioned. This notice was received by one of the purchasers, who informed his co-purchaser, who was in Victoria, of its receipt. The third purchaser, who was in China, was then written to by one of his co-purchasers to come back at once. It does not appear that he was informed of the notice. No attempt was made to give notice to the assign or sub-purchaser, although the defendant had been informed of the sub-sale. The purchaser, who had received the notice, called on the defendant on March 27, and explained the absence of one of the purchasers in China, and says he asked for more time to make the payment demanded,

which was refused. In his plea the defendant says he re-took possession of the property on May 10, 1912. On May 15, one of the purchasers tendered to the defendant in his solicitor's office the sum of $900, which was rejected. The sufficiency of this tender is not objected to except on the ground that it was not accompanied by tender of a conveyance for execution.

This action for specific performance followed. The defendant pleaded default and laches, rescission by notice, and failure to tender a conveyance. By amendment at the trial he added a plea of abandonment of the contract by the plaintiffs. The learned trial Judge found that the notice had been sufficiently given under the special clause providing for rescission and forfeiture, and also sustained the plea of abandonment. In appeal Irving, J.A., agreed with the trial Judge; Martin, J.A., thought the notice insufficient, but held the case was not one for specific performance on the authority of *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171; Galliher, J.A., relied solely on the failure to tender conveyance, expressing no opinion as to the sufficiency of the notice given.

No doubt the intention of the parties when making the agreement was to provide for the giving, by post, of the notice demanding payment. It was also no doubt a mere accident that this provision of the contract was not complete, a material item in it being left blank. Personal service on the three purchasers, and on their assign, was the alternative method provided for giving notice of the demand in writing. The terms upon which a vendor is given such a contractual right of rescission and forfeiture must be strictly observed. *Marriott* v. *Mills* (unreported). Although he had not complied with the terms, the vendor, under the notice thus served on but one purchaser, proceeded to enforce the provision of the contract for rescission and forfeiture. His action, in my opinion, is clearly not justifiable under it.

Failing to establish compliance with the special contractual provision, he now attempts to assert some right either to rescind by his own act on the purchaser's default or to have rescission decreed by the Court. In his pleading he does not put the case in this way, relying apparently upon the sufficiency of his notice given to only one of the three purchasers, and the continued default, to effect rescission under the special provision of the contract. By that very notice the vendor recognized the agreement as subsisting up to April 26. He did not actually proceed to act upon the footing of rescission until the 10th of May, when he says in his pleading he re-took possession. The purchasers had paid one-half of the purchase money and they made tender of the balance on the 15th of May. Under these circumstances I do not think they had incurred the extreme penalty of forfeiture and rescission; but, if they had, the recent decision of the Judicial Committee in *Kilmer* v. *British Columbia Orchard Lands, Limited*,

CAN.
S. C.
1913
BARK FONG
v.
COOPER.
Anglin, J.

10 D.L.R. 172, [1913] A.C. 319, establishes that they are entitled to relief. In that case and in the recent Ontario case of *Boyd* v. *Richards*, 13 D.L.R. 865, 29 O.L.R. 119, as in the case now before us, the provision for rescission and forfeiture was in the nature of a condition subsequent or of defeasance—not a condition precedent, as I, at all events, thought the condition dealt with in *Labelle* v. *O'Connor*, 15 O.L.R. 519, relied on by counsel for the respondent, was.

It may not be amiss to note in passing that in the judgment in the *Kilmer* case, 10 D.L.R. 172, [1913] A.C. 319 at 322, it is said of *Re Dagenham Dock Company*, 8 Ch. App. 1022, on the authority of which the decision of the Judicial Committee in the *Kilmer* case, 10 D.L.R. 172, [1913] A.C. 319, proceeds: "That was a case like this of forfeiture claimed under the letter of the agreement and a cross-action for specific performance."

A study of the report of the *Dagenham* case, 8 Ch. App. 1022, which came up on a motion by way of appeal from a decision of the Master of the Rolls refusing to order delivery up of certain lands to the applicants, who were vendors asserting forfeiture, does not disclose the pendency of any cross-action for specific performance. The right to that relief is not referred to in the judgment. No doubt that case is a very strong authority in favour of the right of the present appellants, under the circumstances in evidence, to relief from the penalty of rescission and forfeiture. But their right to specific performance involves other considerations.

The principal grounds relied upon at bar in support of the defendant's right to have the Court decree rescission and forfeiture, and in answer to the plaintiffs' claim for specific performance, were an alleged abandonment by the plaintiffs of their contractual rights, and their laches.

The testimony in my opinion fails to shew anything in the nature of abandonment or any facts from which an intention to abandon can fairly be inferred. The payment of one-half of the purchase money in cash and the provision in the re-sale agreement for payment of the balance by the sub-purchaser at the time and in the amounts called for by the plaintiffs' agreement with the defendant; Wing-On's request for time when the defendant demanded payment; and the tender of the balance of the purchase money and interest on the 15th of May are scarcely consistent with an intention to abandon. In the light of the testimony as to the reasons given for the default, the mere delay in payment, the sole ground averred in this plea, put upon the record only by amendment at the trial, will not support it. In *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171, the Court, perhaps, took what may appear to be an extreme view of the duty of a purchaser who claims specific performance to shew that he has always been "ready, prompt and eager to complete." But that decision really rested on the ground that the purchaser had abandoned his contract,

as was evidenced by his declaration made to the vendor that he would be unable to carry it out. In the present case, as already indicated, the circumstances rebut an intention to abandon.

Courts of equity have never formulated a hard and fast rule of universal application that any fixed period of delay in payment of purchase money will afford any insuperable bar to the relief of specific performance. Whether his default disentitles the purchaser to that relief always depends upon the circumstances, and it is a question to be determined in each case, as a matter of judicial discretion, whether under the circumstances the default has been such that it would be unjust and inequitable to enforce the contract specifically.

In the present case it is in the very clause providing for rescission by the vendor upon thirty days' notice to the purchasers, to be given after default, that time is declared to be of the essence of the agreement. It is clear that this stipulation as to time was intended to apply not to mere default in payment at the dates provided in the contract, but only to failure to pay within thirty days after a valid notice, in conformity with the provision for rescission, had been duly given. See *Webb* v. *Hughes*, L.R. 10 Eq. 281. That notice was never given. The abortive attempt to give it serves to shew that the vendor himself did not treat time as of the essence in regard to the dates for payment fixed by the contract. At all events, until he gave the notice of the 27th of March, and probably until, as he says in his statement of defence, he re-took possession on the 10th of May, he may fairly be regarded, if not as acquiescing in the purchaser's delay in payment, at least as not insisting upon any rights which that delay gave him. The entire delay in the present case was less than a year; the delay after notice to the only purchaser who was notified was forty-nine days; and only five days elapsed between the re-taking of possession alleged by the defendant and the tender to him of the balance of the purchase money on the 15th of May.

The right to specific performance has been held not to have been lost by much longer delays. See cases cited in Fry on Specific Performance, 5th ed., p. 541. In the *Dagenham* case, 8 Ch. App. 1022, if it should be regarded, as it seems to have been in the *Kilmer* case, 10 D.L.R. 172, [1913] A.C. 319, as an authority on the question of specific performance, the delay in payment was for over three years. In the present case it is obvious that any injury suffered by the vendor will be fully compensated by payment of interest. Under the circumstances disclosed in the evidence, and having regard to the terms of the contract, I do not think that specific performance should be refused on the ground of laches.

As to the failure to tender a conveyance for execution, the attitude taken by the defendant in his defence makes it quite clear that such a tender if made would have been useless. Tender of

CAN.
S. C.
1913
BARK FONG
v.
COOPER.
Anglin, J.

the purchase money—the really material thing to evidence the plaintiff's readiness and willingness to complete the contract—was sufficiently made. It was rejected not on the ground that it was unaccompanied by a tender of a conveyance for execution, but on the ground that the contract had been rescinded. That would amount to a waiver of the tender of a conveyance.

On the whole case I am, with respect, of the opinion that, in the sound exercise of judicial discretion, specific performance should not be refused. The judgment in appeal should be reversed with costs in this Court and in the Court of Appeal, and judgment should be entered for the plaintiffs for specific performance with costs in the form followed in the Courts of British Columbia.

Brodeur, J.

BRODEUR, J.:—I agree with Mr. Justice Duff.

Appeal allowed with costs.

MAN.
C. A.
1914

OLVER v. WINNIPEG.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, J.J.A. March 16, 1914.

1. APPEAL (§ VII J 3—408)—GROUND NOT RAISED BELOW—NEGLIGENCE—RESPONDEAT SUPERIOR.

A court of appeal ought only to decide in favour of an appellant on a ground first raised on the appeal, if satisfied beyond doubt, first, that the court of appeal has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and secondly that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness-box.

["*The Tasmania*," 15 A.C. 223; *Neville* v. *Fine Arts*, [1897] A.C. 68; *McKelvey* v. *LeRoi Mining Co.*, 32 Can. S.C.R. 664, referred to.]

Statement

APPEAL by defendants in an action to recover damages from the city for an assault alleged to have been committed by an employee of the city of Winnipeg. The case had been tried before a jury and a verdict returned for the plaintiff.

The appeal was dismissed.

W. A. T. Sweatman, and *W. P. Fillmore*, for the plaintiff.

A. B. Hudson, and *J. Preudhomme*, for the defendants.

Howell, C.J.M.

The judgment of the Court was delivered by HOWELL, C.J.M.:—The defendants pleaded "the Public Health Act and set forth that this Act required the city to keep and maintain a nuisance ground for the disposition of garbage and manure to help in the protection of the health of the public and that Hutchinson, the person who committed the act of violence of which the plaintiff complains, was

a caretaker and a statutory officer in charge of and directing the removal to and the disposition of said nuisance ground of said garbage and manure.

The defendants at the trial gave no evidence directly on this issue. One Pearson, the chief city health officer, was examined by the plaintiff for discovery and on the examination, which was put in by the plaintiff on the trial, he stated that Hutchinson "was an employee of the city, nothing to do with the Health Department," and Pearson further stated in the examination put in that Hutchinson had power to warn any one who was loitering on the nuisance ground. Hutchinson was called as a witness and stated that he was engaged on the nuisance ground but he does not say by whom. He said he was to direct where the garbage was to be placed and to keep off trespassers. There was no further evidence to prove that this nuisance ground was one which came under the Act pleaded or that Hutchinson was acting in furtherance of or under that statute.

At the end of the plaintiff's case, counsel for the defendant moved for a nonsuit, but no claim was made that the defe dant was not liable on this ground. In the charge to the jury the learned Judge repeatedly stated that as Hutchinson was an employee of the city the latter was liable if the act complained of was committed in the ordinary discharge of his duty. In no place either on motion for nonsuit or on the charge to the jury was the Judge's attention directed to the well-known law of *Wishart* v. *Brandon*, 4 Man. L.R. 453; and *McCleave* v. *Moncton*, 32 Can. S.C.R. 106.

The defendants took the chance of winning without raising or urging this defence or even suggesting it to the Judge on motion for nonsuit or by objection to the charge and the matter was in no way brought to the attention of the jury.

This defence was strongly urged on appeal. The evidence was quite sufficient to support the verdict on all other grounds. It was strongly urged on appeal that the law of *respondeat superior* did not apply in this case, although the trial Judge told the jury that it did apply and there was objection to his charge on this ground and he was not asked to tell the jury anything as to the facts to be found to support this defence.

The question as to what should be done when a point is raised in appeal which has not been taken in the Court below has often come up in the Courts.

It was discussed in *McKelvey* v. *Le Roi Mining Co.*, 32 Can. S.C.R. 664 at 667, and the following language was used:—

> We therefore, on an appeal, cannot refuse to entertain questions of law appearing upon the record, although they may not have been raised in the Court below and are relied upon for the first time here, where no evidence could have been brought to affect them had they been taken at the trial.

In the case of *Graham* v. *Mayor* etc., 12 Times L.R. 36, the point raised in appeal was that the contract sued on was not under the corporate seal of the defendants. This question had

MAN.

C. A.

1914

OLVER v. WINNIPEG.

Howell, C.J.M.

not been raised in the Court below. The Master of the Rolls said:—

But they had waived the point in Court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now, and the application must be dismissed.

Lord Justice Lopes said he thought

that the defendants' objection might have prevailed if it had been taken in time; but they waived it at the time when they might have raised it, and did not raise it till too late.

Lord Justice Kay said:—

It was clear that they could not, for they would have waived their objection in Court, and, in his opinion, that illustrated what the defendants were trying to do in this case. They had waived the point that the promise of the committee was not binding on them during the trial, and it was too late to do so after verdict.

In the case of *Page* v. *Bowdler*, 10 Times L.R. 423, Mr. Justice Charles used the following language:

I think, therefore, that the point now taken that the relation of master and servant did not exist is not open to the defendant, the appellant. It is clear he must raise a point of law before the Judge at the trial, and it appears to me this point was not really raised.

In the case of *Eyre* v. *The Highway Board*, 8 Times L.R. 648, the following is to be found:—

Lord Esher said, after referring to the notes, that it did not appear that the point was taken at the trial until the case on both sides was closed, and therefore it could not be taken now. The question at the trial was whether there was a right of way at all, not as to a limited right of way or a limited "dedication." The summing up was copious and clear, and a complete exposition of the law on the subject, and contained a sufficient direction to the jury on all the points raised.

Lord Justice Bowen said the Court would never grant a new trial on a point not taken at the trial until the case was closed on both sides.

Lord Justice Halsbury in *Neville* v. *Fine Arts*, [1897] A.C. 68 at 76, uses this language:—

But what puts him out of Court in that respect is this, that where you are complaining of non-direction of the Judge or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial.

This point was again considered in "*The Tasmania*", 15 A.C. 223, where Lord Herschell, at p. 225, uses the following language:—

My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by

and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box.

It seems clear, then, that this Court ought only to decide in favour of the appellant on this ground put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, and second, that no satisfactory answer to these facts could be given by the plaintiff, and I do not think that the requirements of this rule have been satisfied in this case. I do not think that the defendants had this defence in view at all when they were tendering their evidence, and I do not think the plaintiff attempted at all by his evidence to meet such a defence. It does seem to me that there might be considerable evidence to meet this contention which could have been brought forward by the plaintiff if the point had been raised.

I have not considered whether the contention of the defendants on this new point argued is a good defence or not; but, for the reasons above set forth, I think the appeal must be dismissed with costs.

Appeal dismissed.

REX v. McINULTY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. EVIDENCE (§ XII A—920)—CORROBORATION—UNSWORN TESTIMONY OF CHILD—CANADA EVIDENCE ACT 1906.

Neither under Cr. Code sec. 1003 nor under sec. 16 of the Canada Evidence Act, 1906, can there be corroboration of the unsworn testimony of a child of tender years who does not understand the nature of an oath, by similar unsworn testimony of another child.

[*Rex* v. *Whistnant*, 8 D.L.R. 468, 20 Can. Cr. Cas. 322 (dictum of Harvey, C.J.), approved; *Rex* v. *Inman Din*, 18 Can. Cr. Cas. 82, 15 B.C.R. 476, discussed and certain dicta withdrawn.]

Statement

CROWN case reserved by His Honour Judge Swanson, County Judge, on questions as to the statutory corroboration of a child's unsworn testimony.

McIntyre, for the accused.

Maclean, K.C., for Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The questions should be answered in the negative.

B. C.
C. A.
1914
REX
v.
MCINULTY.
Macdonald, C.J.A.

The first question which relates to the construction of sec. 1003 of the Criminal Code is academic and, therefore, ought not to have been submitted, the learned Judge having informed us that he had acquitted the accused of the charge of indecent assault, but as that section is *in pari materia* with the section of the Canada Evidence Act, upon which the second question is grounded, I do not decline to answer it.

In my opinion, no other interpretation could be given of sec. 1003 of the Criminal Code than that given of it in *Rex* v. *Whistnant*, 8 D.L.R. 468, 20 Can. Cr. Cas. 322, that is to say—that the evidence of a child of tender years taken under the sanction of that section is not corroborated by the like evidence of another such child. Similar, but differing in phraseology, is sec. 16 of the Canada Evidence Act. The language of this section is not so clear as that used in said sec. 1003, but, in my opinion, it admits of no reasonable doubt that what is meant is that the evidence taken under it must be corroborated by some other material evidence *of a different character*. There are no authorities directly in point except the dictum of Chief Justice Harvey in the case already referred to, and the inference which it was argued ought to be drawn from the silence of the Judges on that point in *King* v. *Pailleur*, 15 Can. Cr. Cas. 339.

The precise point involved in the second question was raised before us in *Rex* v. *Inman Din*, 18 Can. Cr. Cas. 82, but was not decided, the Court being equally divided. My brother Irving and I found it unnecessary to decide the point, having come to conclusions in favour of the accused on other grounds.

Apart from statutory law, the testimony of children of tender years unable to understand the nature of an oath could not be taken.

Section 16 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and sec. 1003 of the Criminal Code are departures from the ordinary rules, governing the sanctions under which witnesses may testify. The danger of convicting on such unsworn evidence alone in view of the known danger that children of tender years and immature minds are peculiarly susceptible to suggestions from parents or others, led to the provision of this safeguard, that "no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence." There are two alternative interpretations of this provision: the first is that the words "such evidence" has reference to that of a "child of tender years," as an individual, not as a class. The second is the converse of the first. In my opinion the latter is the true interpretation. The unsworn testimony whether of one child or of several children was not to be acted upon unless fortified by other material evidence

B. C.

C. A.
1914

REX
v.
McINULTY.

corroborating it, of a different character, *i.e.*, evidence which is legal evidence apart from this section.

IRVING, J.A.:—The question we have now to determine is whether, under sec. 16 of the Evidence Act, the unsworn evidence of a child can be corroborated by the unsworn evidence of another.

Irving, J.A.

The prisoner's contention is that the 2nd sub-section which enacts that "no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence," prevents a conviction in this case.

In *R.* v. *Inman Din* (1910), 18 Can. Cr. Cas. 82, 15 B.C.R. 476, counsel for prisoner raised this point, and two of the learned Judges expressed an opinion to the effect that unsworn evidence could be corroborated by unsworn evidence under sec. 1003 of the Code. The Chief Justice and I expressed no opinion on that point, because, speaking for myself, I had already determined in my mind that the so-called corroboration was not corroboration in fact.

The case of *Rex* v. *Whistnant*, 8 D.L.R. 468, 20 Can. Cr. Cas. 322, before the Supreme Court of Alberta on sec. 1003 of the Cr. Code seems to me well decided.

In my opinion the words "such evidence" in section 16 (2) mean "evidence so given," the unsworn evidence admitted under this section, and I would therefore hold that one child cannot be corroborated by the unsworn evidence of the other child.

I would answer the second question in favour of the prisoner.

The learned Judge left a question to us as to corroboration under sec. 1003 of the Cr. Code, but as he acquitted the prisoner of the charge in regard to which it was necessary to invoke sec. 1003, I see no reason why we should be called upon to answer it.

GALLIHER, J.A.:—I agree with the dictum of Harvey, C.J., in *Rex* v. *Whistnant*, 8 D.L.R. 468, 20 Can. Cr. Cas. 322, that under sec. 1003 of the Criminal Code the evidence of one child of tender years not under oath does not constitute the kind of corroboration required under that section of the evidence of another child of tender years.

Galliher, J.A.

The language of that section, I think, places it beyond doubt. The language of sec. 16 of the Canada Evidence Act, R.S.C. 1906, ch. 145, is, however, not so clear, and in the case of *Rex* v. *Inman Din* (1910), 18 Can. Cr. Cas. 82, my brother Martin, with whom I agreed, was of opinion that sec. 16 was wider than sec. 1003 of the Cr. Code and that such evidence would be corroboration.

B. C.
C. A.
1914
REX
v.
MCINULTY.
Galliher, J.A.

Since the case at bar was argued before us solely on this one point (and very ably presented by Mr. McIntyre of counsel for the accused) I have consulted with my brother Martin and after the best reconsideration we can give to the section (which it is still open to us to do, as no opinion was given on the point by a majority of the Court) and in the absence of direct authority (for *Rex* v. *Pailleur* (1909), 15 Can. Crim. Cas. 339, does not directly decide the point), I am of opinion, and my brother Martin authorizes me to state that he agrees with me, that we took too wide a view of sec. 16 in the *Inman Din* case—that the effect is the same under both sections and that the words "such evidence" in sec. 16, sub-sec. 2, mean "Evidence so given," *i.e.*, evidence of the class receivable under the main section. It follows that the conviction must be quashed.

McPhillips, J.A.

MCPHILLIPS, J.A., concurred with MACDONALD, C.J.A.

Conviction quashed.

QUE.
1913

MIQUELON v. VILANDRE CO.

Quebec Superior Court (District of St. Francis), Globensky, J. November, 1913.

CORPORATIONS AND COMPANIES (§ VI F 2—357)—*Winding-up—Employees' priority for wages—Auditor.*]—Contestation of petition of claimant for a privilege in winding-up proceedings for alleged salary as an auditor of the company.

J. Nicol, for claimant.

O'Bready, and *Panneton*, for liquidators.

GLOBENSKY, J., held that an accountant temporarily engaged by the day to make an audit of a company's books and who is not subject to any direction or control in so doing, has no preferential claim for his remuneration on the company being wound up, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, sec. 70.

Section 70 which confers a special privilege limited to wages during three months prior to the winding-up order is to be restrictively interpreted and the rule "*noscitur a sociis*" is to be applied in construing the words designating the class to which the special privilege applies. The words "clerks or other persons in or having been in the employment of the company in or about its business or trade," do not include such an employment. The object of the law seems to have been to protect persons whose sole or at least whose chief employment is with one employer and whose principal means of support are derived therefrom.

Order accordingly.

REX v. WEBB.

MAN.

C. A.
1914

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 16, 1914.

1. WITNESSES (§ III—51)—DISCREDITING — PRIOR STATEMENT TO CONTRARY.

Where a person under conviction for arson is called by the Crown on the trial of another person on the charge of wilfully setting the same fire, to prove that the latter had instigated him to commit the offence, the testimony of the convict that he had caused the fire at the instance and direction of accused may be rebutted by the testimony of other prisoners that the convict had admitted to them that the accused had had nothing to do with the fire, on the convict denying having made such admissions.

2. TRIAL (§ I D—15)—STATEMENT OF COUNSEL—ADVERSE COMMENT TO JURY ON JUDGE'S RULING ON ADMISSIBILITY OF EVIDENCE.

It is error for which a new trial will be granted that the Crown counsel in his address to the jury told them that certain material evidence for the defence which the trial judge had ruled to be admissible should not have been allowed, as the effect of counsel's statement may have been to induce the jurors to disregard such testimony.

Statement

CROWN case reserved.

J. Allen, for the Crown.

R. A. Bonnar, K.C., and *W. D. Card*, for the accused.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—The accused was charged with having wilfully set fire to a building and stock of goods therein. The alleged offence had been committed four years previous to the trial. The main witness against the accused on the trial was a man named Marshall who swore that he had himself caused the fire but had done so at the instigation of the accused. Marshall had pleaded guilty to a charge of arson in connection with the same matter and was serving a sentence of six months in gaol at the time of the trial.

The defence tendered the evidence of certain prisoners confined in the same gaol with Marshall as to statements made by him to them inconsistent with his evidence at the trial, and to the effect that he had admitted to them that the accused had had nothing to do with the fire in question. Counsel for the Crown objected that sufficient foundation for the reception of the evidence had not been laid. The trial Judge overruled the objection and allowed the evidence to be received. In his address to the jury the counsel for the Crown told the jury that this evidence was not admissible and should not have been allowed. The jury found the accused guilty.

We think that the ruling of the trial Judge was correct, and that the evidence in question was properly received. But whether the ruling of the Judge presiding at the trial was right or

MAN.

C. A.
1914

REX
v.
WEBB.

Perdue, J.A.

not, it was the duty of counsel to accept that ruling when once it was made. If he desired and intended to test the correctness of the ruling there were means of doing so provided by law. The evidence in question was very material and if the jury believed it they would not have been justified in convicting the accused. It may well be that the effect of the Crown counsel's statement to them was to lead them to believe that no attention should be paid by them to that evidence when they were arriving at their verdict.

We think that upon this ground, and upon this ground alone, a new trial should be granted.

New trial ordered.

QUE.

1914

REX v. DUBUC.

Quebec Court of King's Bench (Crown side), Lavergne, J. March 25, 1914.

APPEAL (§ I C—25)—*Criminal cases—Keeping disorderly house—Limited right of appeal.*]—Appeal by Rachel Dubuc from a conviction on summary trial by the Recorder's Court of Montreal for keeping a disorderly house. The Recorder had imposed three months' imprisonment and a fine of $200 with three months' additional imprisonment if the fine were not paid.

LAVERGNE, J., held that the right of appeal which formerly existed under sec. 797 of the Criminal Code 1906, from a conviction on summary trial for keeping a disorderly house is abrogated as to appeals from a Recorder's Court by the amendment made to sec. 797 by the Criminal Law Amendment Act, 1913. By virtue of the amending Act, appeals under sec. 797 for offences under paragraphs (*a*) or (*f*) of sec. 773 are maintainable only where the trial takes place before two justices of the peace sitting together.

Appeal quashed.

ONT.

S. C.
1913

ADDISON v. OTTAWA AUTO AND TAXI CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 15, 1913.

1. SALE (§ III C—72)—RESCISSION — FRAUD AND MISREPRESENTATION—TRADE CUSTOM.

A representation made on the sale of an automobile that it was a "perfectly new car" will be a ground for rescission of the contract by the party deceived who had accepted delivery of the car on the faith of the representation, where the car was in fact a car which had been sold and used during the previous season and had since been "rebuilt," and where the vendor knew that the purchaser in requiring the assurance that it was a "perfectly new car" meant that it had not been previously sold and used and was ignorant of the trade custom set up by the defence of treating "rebuilt" cars as new.

[*Erlanger* v. *New Sombrero Co.*, 3 A.C. 1218, applied.]

ONT.

S. C. 1913

ADDISON v. OTTAWA AUTO AND TAXI CO.

Statement

APPEAL from the judgment at trial in favour of plaintiff.

The appeal was dismissed.

The action was to recover the purchase-price of a Russell motor car which the plaintiff bought from the defendant company for $2,400, and which, she alleged, was purchased by her relying upon representations made to her by the defendant company that the car was a "perfectly new one" and that it was a 1913 model, which, as she alleged, were untrue and were fraudulently made by the defendant company.

October 2. The action was tried before BOYD, C., without a jury, at Ottawa.

E. J. Daly, for the plaintiff.

G. F. Henderson, K.C., for the defendant company.

Boyd, C.

BOYD, C. (at the conclusion of the trial):—This case presents two questions on the facts. First of all, were any such statements made as the plaintiff complains of in her statement of claim. The defendant, or its representative, Ketchum, who is said to have made these statements, denies making them. It is a question of credibility between himself and the other witnesses. I do not see my way to reject what they have said; not only the plaintiff, but her son and her daughter, testify to these expressions having been used by the defendant, that this was an absolutely new car and that it was a 1913 model. I suppose that last was simply an emphatic way of putting it, that the thing was up to date, that it was a very new car, absolutely new. I am strengthened in that conclusion by what Ketchum himself says, that he was not asked the question, that the matter did not come up. He says, if he had been asked the question whether it was an absolutely new motor, he would have said that it was.

I find that he did say that; and the question then is, on the second branch of the case, whether he was justified in the use of those words. Now, it may be that in his own mind, it may be that bringing in the custom of the trade, it may be that looking at it as a purely business transaction, in the sense in which that word is used within the business, it is a new car; he may feel justified in so representing it. But he was not dealing with this woman as by custom of trade, or with her as a dealer who had equal knowledge with himself. He was dealing with one whose custom he solicited. He approached her in the matter, he was urgent in the matter, and she was a perfect novice, as were all those around her, in the matter of these new machines which trouble the roads and the foot-passengers. He knew all about it; she did not know anything about it. She trusted him; asked him certain questions, on the truth of the answers to those questions relied implicitly, and paid her

ONT.

S. C. 1913

ADDISON v. OTTAWA AUTO AND TAXI CO.

Boyd, C.

money, so that the transaction rests at that point. Nothing turns at all upon the writing which was given after, which, it is said, contains the terms of the sale. It does not contain this term upon which the sale was made, that it was a perfectly new car; she asked him this question, and he said it was absolutely new. When she found out the facts, she at once repudiated the sale; she had bought a second-hand machine, as she found out, and she was willing to turn it over to him, and it had then become a third-hand machine. She spoke to him about it. He could not deny the facts; they were patent. It had been sold to Galarneau; it had been used by Galarneau; it had gone through an accident, a wreckage. It had been returned to the factory; it had been repaired or replaced or dealt with and varnished up and handled in such a manner that it was returned and looked a new machine, and it may be, for all I know, that it was as good as or better than a new machine; but she was the person to judge about the matter. Those things, in my opinion, should clearly have been communicated to her in reference to this transaction; and if she, knowing the history of the machine, that Galarneau had had it and that it had come to injury and had been repaired and been made as good as or better than new—she was the person to say, "Knowing that, I will take the car." Probably, knowing that, she would have beaten down the price. She would have said: "Well, you know it is not an absolutely new one, and Galarneau will know I have got the machine he had, and it is not a new one, and I must have some rebate in the price." She was not in a fair position in dealing with this man on the representation that was made. The machine, I think, was not a new one, in the sense in which it was spoken of between these two parties, spoken of as absolutely new. Even the witness called by the defendant, Mr. Marlow, said very fairly that he knew it was not an absolutely new car; he said it was a new car for the purpose of being sold to customers. So it might be if customers did not make inquiries about it. If she made no inquiries about it, she, of course, would have no relief; but, when she made inquiries, having some suspicion about the rug and other things, about its newness, and was assured that it was a perfectly new car, that was a statement which was not according to the facts, when the facts were known. Even Marlow says that when you knew the history of the machine, you could not say it was absolutely new. This car was ear-marked; it had its number; it was number 1750. After it came into existence and became that car with that number, it became the subject of sale and was sold in February, 1912, to Mr. Galarneau. He was the owner of it; he used it as the owner; had it for several months; ran it for three or four weeks until this accident occurred. Then it was returned

to the factory to be dealt with. It was replaced or repaired; some parts straightened out which were bent; other parts replaced which were cracked, at a cost of $500, and the witnesses say that it was made as good as new. Well, she was the person to judge whether that was so or not, having been told these facts. She did not want something as good as new; she wanted a new machine. She did not want an equivalent for the machine she was getting; she wanted one that was quite absolutely new, did not want something that was equivalent to a new one. She was not dealing in that way. The defendant may be quite justified, in the way business is done, in saying that he bought this as a new machine and sold it as a new machine. That really is not the question: not the question how the trade would understand it or what customs obtain in the trade in dealing with these things. The question is, whether an innocent purchaser, a perfect novice in these things, when she asks for a perfectly new car, is to be given one which had been used before; and, however it may be repaired and revarnished, is not a new car. That is not what she wanted; she did not want a car as good as new; she wanted a new car. I cannot say, on this sort of evidence, that there was not a statement made to her which entirely misled her. She purchased what she did not want; and, when she came to know it, she repudiated it. Even the evidence given by Mr. Ketchum himself shews that he felt and acted in the transaction knowing that she was not getting a perfectly new car. He made concessions on that footing. The evidence, indeed, taken from his primary examination, throws a great deal of light upon this phase of the transaction. He gave her several things, thrown in. She got these things surely on account of the car having been used, that it had been purchased and used by a previous purchaser. She was the second purchaser of the car, not the first. He says: "That was practically my reason for putting in all these things. I did not tell her it had been used; she could see it." I think that shews that he felt that she was getting something less than a new car; she had been getting a car that had been used, and so these concessions were made to induce her to buy at the price which he asked. I do not know that I need say anything more on that.

I think that she is entitled to relief; and I think the proper relief is to return the purchase-money, which shall be returned forthwith, and the car returned forthwith. The car is there, not a first-hand or a second-hand car, but a third-hand car. There will be no interest on the money. She has had the use of the car; he has had the use of the money. I think the one will offset the other. Costs to the plaintiff.

The defendant company appealed from the judgment of BOYD, C.

ONT.
S. C.
1913
ADDISON
v.
OTTAWA
AUTO AND
TAXI CO.
Argument

G. F. Henderson, K.C., for the appellant company:—The car, although it had been rebuilt, was, according to the custom of business, a "new car," and the question is as to the intention of the parties. This was an executed contract, and there can be no rescission except on the ground of actual fraud, as laid down in *Derry* v. *Peek* (1889), 14 App. Cas. 337; see also *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308; *Kennedy* v. *Panama New Zealand and Australian Royal Mail Co.* (1867), L.R. 2 Q.B. 580. The learned Chancellor did not intend to find fraud—he meant to find, as it is submitted the fact was, that it was a case of innocent misrepresentation, inasmuch as the car was in substance and fact a "new car," and so understood by the agent. Counsel referred to Fry on Specific Performance, 5th ed., p. 370; Addison on Contracts, 11th ed., p. 126; *Shurie* v. *White* (1906), 12 O.L.R. 54. Even if there were fraud, it is now too late to claim rescission, as the plaintiff is unable to make restitution: Fry, *op. cit.*, p. 564; *Udell* v. *Atherton* (1861), 7 H. & N. 172; *Clarke* v. *Dickson* (1858), E.B. & E. 148, approved in *Urquhart* v. *Macpherson* (1878), 3 App. Cas. 831; *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44, 54. The plaintiff has suffered no damage; and, after the use she has made of the car, it would be unfair to allow her to return it.

E. J. Daly, for the plaintiff, the respondent, argued that she relied upon the representations made to her by the appellant company, and promptly repudiated the contract after discovering that they were untrue. He referred to *Forman & Co.* v. *The Ship "Liddesdale,"* [1900] A.C. 190; *Bowes* v. *Shand* (1877), 2 App. Cas. 455; Benjamin on Sale, 5th ed., pp. 438, 441, 449; *Bell* v. *Goodison Thresher Co.* (1908), 12 O.W.R. 477.

Henderson, in reply, referred to *Wallis Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394, the *"Sainfoin"* case, to which a reference was made by MEREDITH, C.J.O., in the course of the argument.

Meredith, C.J.O.

December 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 2nd October, 1913, which the Chancellor directed to be entered, after the trial before him, sitting without a jury, at Ottawa, on that day.

The action is brought to recover the purchase-price of a Russell motor car which the respondent purchased from the appellant for $2,400, and which she alleges was purchased by her relying upon representations made to her by the appellant that the car was a perfectly new car, and that it was a 1913 model, which, as she alleges, were untrue and were fraudulently made by the appellant.

As the facts are fully stated in the reasons for judgment, it is unnecessary to restate them. The findings are that the representations were made as the respondent alleges and that they were untrue, and, as I understand the reasons for judgment, that they were fraudulently made by Ketchum, the managing director of the appellant.

We are of opinion that these findings are supported by the evidence, and that the only one of them as to which there can be any question is as to the representations having been fraudulently made.

It may be that, in a secondary sense and according to the custom of the trade, the car might be properly described as a new car, although even that is doubtful upon the evidence, but it was not in the ordinary sense of the words a "new car," and certainly not a "perfectly new car;" it may be that, made to a person who was aware of such a custom, a representation that the car was a new car would not have been untrue; but the question here is, was the car a "perfectly new car," in the sense in which these words were used by the respondent and understood by Ketchum? And I think it is quite clear that it was not. The car had been previously sold to a man named Galarneau, who had had it in his possession for three months, and had driven it, as he says, about 250 to 300 miles, when it was badly damaged owing to its having been driven into a ditch. I say badly damaged because the expense which was incurred in bringing it into the condition in which it was when it was sold to the respondent was about $500. It is true that most of the damaged parts were replaced by new parts; but in some cases all that was done was to repair the damaged parts, as was done in the case of an axle which had been bent and was not replaced by a new one, but only straightened.

That Ketchum knew that the respondent was ignorant of any custom of the trade which would justify the car being called a new car is beyond question, and the evidence satisfies me, as I have no doubt it satisfied the Chancellor, that Ketchum knew that, when she required him to assure her that it was a "perfectly" or an "absolutely" new car, she meant one that had not been previously sold and used, and that, when he answered her inquiry in the affirmative, he intended to mislead her, knowing or fearing that if the history of the car had been told to her she would not have bought it.

The respondent is, therefore, entitled to rescind—there being no question as to her having repudiated promptly after discovering the deception that had been practised upon her—unless, owing to the condition of the car due to its having been used from the time of its purchase in September until the 3rd of the following May, she is not in a position to make restitution.

ONT.
S.C.
1913
ADDISON
v.
OTTAWA
AUTO AND
TAXI CO.
Meredith,
C.J.O.

The cases cited by Mr. Henderson on this branch of the case have, in my opinion, no application now that both law and equity are administered in the Court and the rules of equity prevail. The reasons for the decisions in the cases cited are pointed out by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1278-9, where he says: "It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of Law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke* v. *Dickson*, E. B. & E. 148, and the cases there cited. But a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state that they were in before the contract."

In *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, 456-7, Rigby, L.J., referring to this statement of the law with approval, says (p. 457): "The obligation of the vendors to take back the property in a deteriorated condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles it is thought more fair that they should be compelled to accept compensation than that they should go off with the full profit of their wrongdoing. Properly speaking, it is not now in the discretion of the Court to say whether compensation ought to be taken or not. If substantially compensation can be made, rescission with compensation is *ex debito justitia*."

In *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221, 240, it was held that the fact that the purchaser had gone into possession and had sunk an oil-well on the property purchased did not disentitle him to rescission, he offering to account for the profits derived from the well.

See also *Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223, 232.

Acting in accordance with the practice stated by Lord Black-

burn, the Chancellor allowed as compensation for any deterioration in the car and for the use of it by the respondent the amount of the interest on the purchase-money, to which she would have been entitled, and we cannot see that, under all the circumstances, the allowance is not a reasonable one.

The appeal fails and should be dismissed with costs.

Since the foregoing was written, my attention has been called to a recent case, *Robertson* v. *Kennedy Motor Co. Limited*, [1912] 2 Scots L.T.R. 366, in which the facts were somewhat similar to those of the case at bar, though the action was for breach of a warranty.

Appeal dismissed.

WESTON v. COUNTY OF MIDDLESEX.

Ontario Supreme Court, Meredith, C.J.C.P. December 12, 1913.

1. HIGHWAYS (§ IV A 5—150)—DEFECTS IN—PLACING GRAVEL ON ROAD DURING WINTER—LIABILITY OF MUNICIPALITY.

To unnecessarily place gravel on a highway in repairing the same during the winter months in violation of sec. 558 of the Ontario Consolidated Municipal Act 1903, R.S.O. 1914, ch. 192, so as to leave the middle of the road impassable, without giving notice of the danger, or closing the road, or providing a safe way for traffic, renders a municipality liable for an injury sustained by the upsetting of a sleigh as the result of the condition in which the road was left.

2. HIGHWAYS (§ IV C—210)—DEFECTS IN—LIABILITY OF MUNICIPALITY—INJURY TO TRAVELLER—CONTRIBUTORY NEGLIGENCE.

To drive a properly loaded sleigh on a much travelled highway, the middle of which had been rendered impassable by gravel placed thereon during the winter months, is not contributory negligence, sufficient to prevent a recovery for an injury sustained by the upsetting of the sleigh where the municipality neither gave warning as to the condition of the road, nor provided a safe way for traffic.

3. HIGHWAYS (§ IV C—210)—DEFECTS IN—LIABILITY OF MUNICIPALITY—INJURY TO TRAVELLER—CONTRIBUTORY NEGLIGENCE.

That a person who was injured by the upsetting of a sleigh as the result of placing gravel in the middle of a highway during the winter months in violation of sec. 558 of the Ontario Consolidated Municipal Act of 1903, R.S.O. 1914, ch. 192, did not get off and walk until the unsafe places were passed, does not amount to contributory negligence, where his conduct, under the circumstances, was that of a reasonably prudent man.

4. HIGHWAYS (§ IV C—210)—DEFECTS IN—LIABILITY OF MUNICIPALITY—INJURY TO TRAVELLER—CONTRIBUTORY NEGLIGENCE.

That a person injured by the upsetting of a sleigh by reason of the gravelling of a highway during the winter months in violation of sec. 558 of the Ontario Consolidated Municipal Act of 1903, R.S.O. 1914, ch. 192, continued on the same side of the road, after knowledge of its condition and did not attempt to break a new track in the snow on the opposite side, does not amount to contributory negligence, where to have done so would have been extremely dangerous.

Statement

ACTION for damages for personal injuries sustained by the plaintiff, as he alleged, by reason of nonrepair or obstruction

ONT.

S. C.
1913

WESTON
v.
COUNTY OF
MIDDLESEX.

of a highway. The plaintiff was travelling along the highway in a loaded sleigh; the sleigh upset, and he was thrown out and severely injured.

Judgment was given for the plaintiff.

T. G. Meredith, K.C., and *R. G. Fisher*, for the plaintiff.

J. C. Elliott, for the defendants, the Corporation of the County of Middlesex.

Meredith, C.J.C.P.

December 12. MEREDITH, C.J.C.P.:—Although this case may, and, as I think, ought to, be determined upon two simple and plain grounds, it would hardly be fair to the parties to pass over in silence the other grounds which were so elaborately and carefully developed and discussed, on each side, in the long trial of this action; and the less so as the subject of the rights, duties, and obligations of municipal corporations respecting highways is one of such wide-spread interest and importance that no opportunity for making these things, in any respect, plainer and better understood, should be avoided; and also the less so as all of these grounds have, more or less, a bearing upon the things to be considered in dealing with the case upon the two points which seem to me clearly to settle the rights of the parties in respect of the matters in issue between them.

In the public interests, the highways must be maintained for the public benefit; and so legislation has for many years put that duty upon the municipal corporations of the Province, and given them the power, limited as to amount, of raising by taxation money, generally, to meet this and all other their obligations.

Generally speaking, this obligation is imposed by statute in words such as these: "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained:" see the Consolidated Municipal Act, 1903, sec. 606, which was in force when the accident involved in this action happened; and the Municipal Act, 1913, sec. 460, which has since come into force.

Having regard to the common law respecting highways and their repair, the conditions of this new country, and the obvious purposes of this legislation, and that of the same character which preceded it, there was no difficulty in giving to the word "repair" the broad and elastic meaning, speaking roughly, of sufficient from time to time for the reasonable needs of the traffic, having regard to the financial means of the municipality to meet such needs: so that whilst, in the earliest stages of the settle-

ONT.

S. C.
1914

WESTON
v.
COUNTY OF
MIDDLESEX.

Meredith,
C.J.C.P.

ment of the country, a road which would be sufficient for a team of oxen and a rough waggon, or, it might be, even a "stone-boat," might comply with the statutory requirement, in these days, in some places, nothing less than a well-paved way will do; though the obligation in all cases is comprised in the one and same word "repair." Let me repeat that I am speaking generally; and let me add that in respect of the obligation of the defendants in regard to roads assumed by them, as this one was, under an Act for the Improvement of Public Highways, 7 Edw. VII. ch. 16, in which the obligation is also expressly conferred, the words are (sec. 12), "shall be maintained and kept in repair by the corporation of the county in which such roads are situate:" though it may very well be that the obligation is really not widened by the addition of the word "maintained."

The road was a township road, but the county corporation for the purposes of, and under, the enactment I have just mentioned, recently assumed the road; and admittedly were at the time of the accident, and for some time before had been, alone, bound, under this statutory obligation, to maintain and repair it.

And so we start out under no controversy, nor any doubt, as to the defendants' connection with, and statutory obligation respecting, the road in question at the time of the accident: though even that indeed is all immaterial in one view, that I hold, of this case.

In the first place, it may be observed that the defendants' purpose in assuming the statutory obligations respecting the highway, and in doing the work upon it, in which they were engaged at the time of the accident, was a praiseworthy purpose. It will hardly be contended that "repair" of the roads of this Province has kept full pace with the needs of traffic, traffic which has not only increased in quantity but in some respects changed greatly in character. And so they ought not to be impeded in such good work, or even discouraged, by unreasonable obstruction or even unreasonable fault-finding or criticism, or by merely vexatious or frivolous litigation or claims; though of course good intentions, or even great general good actually accomplished, cannot be made a shield against the claim of any one who has sustained substantial injury through their wrong; they make no such contention, but meet the plaintiff's claim fairly and squarely in a denial of having been guilty of any negligence which was the cause of his injury; and on the additional ground that, if they had been guilty of negligence, without which he would not have been hurt, he too was guilty of negligence, without which he would not have been hurt, which negligences should be set off the one against the other.

After "assuming" the highway—as it is termed in the en-

ONT.
S. C.
1913
WESTON v. COUNTY OF MIDDLESEX.
Meredith, C.J.C.P.

actment—the defendants proceeded with the work needed in the fulfilment of the obligation to maintain and repair it; not by any means to make a perfect road of it, but to bring it into the category of a good country road; not macadamised; merely graded and gravelled, with the gravel left after raking, to "traffic consolidation," not consolidation by means of a steam roller, the incomparably better way, but of course considerably more costly.

The gravelling was intended to have been done in the summer of 1912; but wet weather interfered; it was not done in the autumn of that year, though that season is not said to have been exceedingly wet; but it was taken up and carried on in the winter following, which is said to have been a mild one; and the gravelling, in the way I have mentioned, was going on when the accident happened. The gravel was dumped in the middle of the road and at once raked over to give it an even, rounding surface, and to remove the largest stones near the top so as to bring them under the next load of gravel that was dumped; but no rolling or other work was done to consolidate the gravel, or make it any better fit for traffic.

Whilst the work was going on, the road was left quite open for traffic; no warning notice or sign of any kind was put up or given.

On the morning of the day of the accident, there was snow enough upon the ground to make sleighing, though sleighing of an indifferent kind; some vehicles on the roads were on wheels, but most of them were on runners. The plaintiff and his son, a young man, were in the plaintiff's sleigh on a pair of bob-sleighs; and they had a load of three calves, weighing probably about 250 pounds each, securely tied in two boxes within the rack with which the sleigh was provided. They proceeded along the highway in question, which was their proper road, and a much-travelled one. The track was well-broken before them, and ran along the south side—their left-hand side—of the road, between the newly-laid gravel, which had no snow upon it, and the ditch; a space of seven feet or a little more. There was no track on the right-hand side of the gravel; plainly, upon the whole evidence, because the right-hand side was less safe and suitable for traffic than the other; and there was no track on either side between the road and the fences.

Until they came to the new-laid gravel they were able to get on comfortably, keeping in or towards the middle of the road, but, when compelled by that gravel to take to the single track on the side of the road, they encountered difficulty and danger, so much so that they thought it necessary, or advisable, to get out and walk, which they did, steadying the sleigh by holding it down to prevent an upset; but they had again got into the sleigh

and were driving on slowly and steadily, from the driver's seat, when the accident happened. The difficulty and the danger they met with was the slewing of the bobs on the snow and ice owing to the slant in the road towards the ditch.

The sleigh upset eventually, and the men, as well as everything else in the sleigh, were thrown out in or over the ditch, and the plaintiff, a man of about 60 years of age, sustained a bad break, near the shoulder of his right arm, and a painful blow on the right side of his body; and this action is brought to recover damages for the personal injuries thus sustained.

The work upon the road was placed by the defendants entirely in the hands of their county engineer, a man quite competent to carry it out, and he employed farmers living in the neighbourhood to do the work, none of whom were trained road-makers, though some of them had had some experience in work of the same character as that which was to be done.

The plan adopted by the county engineer, in regard to the width and shape of the surface of the road, was that recommended by the Department of Public Works of the Province in respect of work being done, as this was, under the provisions of an Act for the Improvement of Public Highways, which requires that the regulations of that Department, with respect to highways, be followed to entitle the corporation to the provincial grant provided for in the Act.

This is a general outline of the case, and I shall now deal with the various points made on each side, in detail: those made on behalf of the plaintiff necessarily first.

His first contention is, that the defendants are liable to him in damages for the injuries and loss he sustained through the accident, because their plan of construction was an improper and a dangerous one; and because by reason of such mode of construction the accident was caused.

In support of that ground, testimony was given, in the plaintiff's behalf, by a competent civil engineer, of many years' experience, that too much fall was given to the road from its centre to its sides, making it dangerous to traffic when not in the centre of the road; that it was quite unnecessarily twice as inconvenient and dangerous, in this respect, as it need be; that the fall from centre to outsides, at the ditches, is one inch in twelve inches, though one in twenty-four would be ample. The county engineer supported the greater fall mainly on the requirements of the Department of Public Works of the Province, without compliance with the regulations of which the provincial grant towards the cost of the work could not rightly be had.

The proper slope of a road, from centre to ditch, must necessarily be a matter of compromise between the direct conflicting interests of the traveller and of the road. In the interests of

ONT.

S. C. 1913

WESTON v. COUNTY OF MIDDLESEX.

Meredith, C.J.C.P.

man, animal, and vehicle a perfectly flat, level, and straight road is the road most desirable for ease and speed in travelling; for the road itself the shape most desirable is that which will quickest dry it and best keep it dry. And the proper point of compromise may, and indeed must, differ under different circumstances—the width of the road, the material of which it is constructed, and other considerations.

But the defendants were not, at their peril, bound to choose only that which was in truth the best—a difficult thing where "doctors differ" so much as they do even in the testimony adduced in this case; they were bound to use that care which reasonable men in the management of their own affairs of the like kind would exercise, under all the circumstances of the case.

They appointed a competent man, their own engineer, to plan and carry out the work; and he did that which legislation made necessary to obtain the benefit of the Act under which the highway had been "assumed" by the defendants. In this I am quite unable to find that the defendants were guilty of actionable negligence, whether or not it would have been better road-making if one, or less, in twenty-four, instead of one in twelve, had been the plan of construction.

These views do not conflict with the law that a statute-imposed duty is not performed merely by employing competent other persons to perform it. The question is not: who was guilty of negligence? but is: was there any negligence in following the plan of the Department?

This ground of action fails to support the plaintiff's claim.

The plaintiff's second ground is: that there was actionable negligence on the part of the county engineer in inefficient oversight of the work and in the employment of incompetent men to do it. The work was not let by contract, but was left altogether in the hands of the engineer, who purchased the materials and hired the men and teams, and generally controlled the whole work. If one had to find whether such a system is the best, there would be no difficulty in reaching the conclusion that it is not, and, indeed, that it is far from it. And it may, indeed, be thought that awakened interest in the need of far better roads, and efforts to obtain them, are hardly likely to be very successful until a municipality such as the defendants,' with such means as it has at its command, undertakes road-making with an experienced road-making gang, well equipped for the purpose—especially with the best of road-rollers and stone-crushers: that until a better method is adopted its efforts may be disheartening, and the results far from really "good roads."

But the method which they adopted in this case is one that is, and long has been—perhaps quite too long—in vogue in this Province; and there are other considerations than merely what

is really the best method, especially the consideration of cost; so that, upon the whole evidence and under all the circumstances of the case, I am unable to say that the method adopted was in itself a negligent one. And, again, the direct point is: was the road in repair?

The county engineer was only infrequently on the ground; with his multifarious other duties it was perhaps impossible for him to be there frequently, but it does not appear that if he had been there more frequently the state of affairs existing at the time of the accident would have been much different; he, as the defendants' authorised agent, assumes responsibility for the then existing state of affairs; and so perhaps nothing depends on this point: it is involved in the question whether there was actionable negligence in the condition of the road when the accident happened. So, too, in regard to the men employed: they were not experienced road-makers, they were farmers living in the neighbourhood, some of them having had some experience in the kind of work that was being done on this road: very few farmers, if any, have not had some experience in dumping gravel in the middle of the road, and it requires no great experience to rake the surface of the dump over evenly, drawing the larger stones to the place where the next load is to be dumped. But this can hardly be called real road-making; and is open to many objections, one of which is, obviously, the conflicting interests of road and farm which may arise from time to time, in which the farmer is not likely to favour the public road against his private interests; good roads will hardly be accomplished if they are to be worked at only when it is convenient for the farmer to work upon them; but, again, this is but one of the very many things to be said in favour of a competent, well-equipped gang of road-makers—for several counties if a single county of such extent and wealth as Middlesex cannot afford the necessity, or is timorous over it.

This ground, for these reasons, is not given effect to as an efficient cause of action.

The third ground is: that it was not only negligence, but in the teeth of a statutory prohibition, to put gravel upon the highway in winter, as was done in this case, done designedly as to a very considerable portion of the road, and done after the county engineer had been warned—pointedly warned by ratepayers—as to the impropriety and the danger of so doing.

The Municipal Act, 1913, provides that "stone, gravel or other material shall not be put on any highway for the purpose of rebuilding or repairing it during the winter months so as to interfere with the use of sleighs, unless another convenient highway is provided while the rebuilding or repairing is being done:" sec. 495.

ONT.

S. C.
1913

WESTON
v.
COUNTY OF
MIDDLESEX.

Meredith,
C.J.C.P.

The Consolidated Municipal Act, 1903, provided that "no stone, gravel or other material shall be put upon the roads for repairs during the winter months so as to interfere with sleighing:" sec. 558.

It is said that the word "rebuilding" was first brought into this enactment by the Commission charged with the revision of the statute-laws of the Province in their revision of the Municipal Acts, which "revision" was passed by the Legislature, as an Act, after the accident in question happened. I have not taken time to inquire whether that is so or not, because it does not seem to me to be a question which need be considered in the proper determination of this case.

The defendants' position upon the question of a statutory prohibition is this: there was no prohibition against rebuilding until after the accident; and rebuilding is not repair, as the later enactment shews; and what was done was not repair.

But I am clearly of opinion that the work being done upon the highway in question, and which was the cause of all the trouble, was "repairs," within the meaning of that word contained in the 558th section of the Act of 1903; and, if so, the defendants purposely did, notwithstanding fair warning, that which the statute-law declared that they should not do; for, otherwise than as to the meaning of the word "repair," the work done was plainly, if not admittedly, of the character so prohibited. It was done in the winter months so as to interfere with sleighing so much that the plaintiff's sleigh was upset to his serious bodily injury, and other sleighs were upset, and all sleighing interfered with, in being forced to a narrow way along the side of the road close to a ditch, where, owing to the pitch of the road towards the ditch and the snow and ice, there was difficulty and danger in driving.

Before the defendants "assumed" the road, it had been graded and gravelled, but had been allowed to get out of repair: the statute-imposed duty of the township, in which it is situated, to repair it, had been neglected: in the course of "repair" it had come up from a blazed line to the stage of a gravelled-to-some-extent-road; but the needs of traffic had long called for more "repair," and such needs were entitled to that which they called for. The county "assumed" it for the purpose, with the aid of the provincial grant, of bringing it reasonably up to such needs: to perform the duty of keeping it in repair as the statute required, such "repair" including, as I have said, the growth from a blazed line to a paved street, according to the needs of traffic, having regard to the means available for the purpose.

The work, which the defendants thus planned to do, was merely a re-grading and a re-gravelling of the road, to be done by somewhat primitive methods, though perhaps yet often un-

avoidable methods, because roads are more plentiful than are the means of keeping them in repair by better methods. The gravel was merely to be dumped and raked, and left, in the middle of the road, to be made compact only by the traffic over it, a method vigorously and frequently condemned by the Department of Public Works in the pamphlet put in by the defendants at the trial as authority for the methods they adopted; and a method which, however time-honoured, or dishonoured, it may be, all will agree should give way to the road-roller as soon as that change is reasonably possible. The defendants' whole duty under the Municipal Act, as I have pointed out, is comprised in the elastic word "repair," which, as I have said, makes "rebuilding" or reconstruction, or whatever other name may be applied to it, imperative when need for such work arises. The Act under which the road was "assumed" by the defendants adds—as I have said—the word "maintained"—"shall be maintained and kept in repair;" and so brings the defendants under the obligation to maintain; and assuredly the work being done was one of maintenance, as well as repair—repair being really the more comprehensive word: sec. 12, 7 Edw. VII. ch. 16. This section also refers to construction as well as repair; another word which was perhaps not necessary, but which was evidently intended to apply to a road not yet made; and so cannot apply to the road in question, which had long been constructed up to the state of a gravel road, which needed, and was getting, only repair for its improvement, its statute-required improvement, which the township ought to have done, but did not, and which the defendants assumed.

The contention, strongly pressed by Mr. Elliott, that "repair" in the section of the Act of 1903 under discussion, was meant to apply only to loads dumped here or there in small quantities; that it was not intended to apply to any extended gravelling, seems to me, notwithstanding his much experience in municipal matters, to be rather the opposite of that which the Legislature said and meant. Their purpose was to save the travelling public from the dangers which, in winter, gravel laid in the road would occasion; the danger of being driven from the centre to the sides of the road, in sleighs. The difficulty of finding a suitable track and remaining in it when driving on steel or iron shod runners, made for the purpose of slipping and sliding, is very plainly much greater than driving in a "buggy" upon unfrozen responsive ground, where almost any farmer, at all events any farmer's son, can drive over mounds and into and out of ditches in such a manner as to make the inexperienced imagine that a "buggy," top-heavy and easily upset as it may seem, is in reality a thing that cannot be upset. I cannot find or imagine any reason why an extensive putting on

ONT.
S. C.
1913
WESTON
v.
COUNTY OF
MIDDLESEX.
Meredith,
C.J.C.P.

of gravel in winter should be excluded, and the putting on of small quantities included, in the prohibition: I can very easily find good reason why in some cases the small quantities would be more than excusable, the case for instance of a sudden wash-out, or other inextensive hole, in the road, caused in any of the ways that are by no means uncommon, or, at all events, unknown. It could hardly be a breach of the provisions of either Act to repair such breaks, almost, if not invariably, of no great extent, and to cover, or make, the reparation with gravel. It is impossible for me to find or imagine any good reason why such gravelling as that in question is not within the mischief intended to be prevented by this legislation: why the like evil in the little extent should be prohibited, and not in the great.

Much reliance was placed by the defendants on the introduction of the word "rebuilding" in the enactment of last year; but it is quite obvious that that, or any other introduction in the later enactment, could not take away from the force or effect of the earlier one, and, as I have pointed out, there seems to me to be no manner of doubt that the earlier enactment covered such work as that in question; that the word "repair," used in the section of the Act imposing the duty to repair, had quite too long been held to apply to such work, and much more advanced work, to leave any room for doubt: and no good reason can be suggested why the same word "repair," used in each section of the same Act—606 and 558 of the Act of 1903—should not have the same meaning attributed to it in the one as in the other It is not necessary for me to consider why the word "rebuilding" was added to the earlier legislation; but we all know that verbal changes were very extensively made by the Commission in their revision of very many enactments; whether this was an appropriate or inappropriate one need not be discussed; but I may say that, as the word "build" is not ordinarily applied to road-making, it occurred to me that it might have been meant to apply to bridges, though the word "highway" would have included them, and ordinarily stone or gravel, or other like material, is not part of a bridge. A very learned Judge, when a Law Lord, sitting in the House of Lords, very emphatically repudiated the use of the word "build" even as to a railway, saying (*Young* v. *Corporation of Leamington* (1883), 8 App. Cas. 517, at p. 528): "I desire to add that I did not use the word 'build' in speaking of the making of a railway. I should as soon think of saying 'building' a footpath." And I have not yet discovered any other use of it in the statutes of this Province respecting the making of repairs of highways. In all the circumstances of the case, I cannot think this point one of any great importance. I have to deal with what the law was, not with that which the Legislature might have thought it was, if there really were any thought on the subject.

How far the Courts go in favour of a suffering plaintiff in cases of disregard of a statutory mandate, and of personal injury, is shewn in the recent case of *Jones* v. *Canadian Pacific R.W. Co.* (1912), 3 O.W.N. 1404, according to the judgment of the Privy Council (1913), 13 D.L.R. 900, 29 Times L.R. 773. There the company's wrong was disregard of an order that no one should be employed in certain work, who had not undergone a certain eye and ear test; a man was so employed by them and an accident happened; the company was held liable irrespective of whether any eye or ear defect had anything to do with the accident, and indeed without any finding of the jury that the man himself was the cause of the accident in any way.

In this case, as I have said, disregard of the statutory prohibition was directly the cause of the plaintiff's injury: if the gravel had not been placed in the middle of the road, he could have driven there quite safely and comfortably; the new-laid, unrolled, and bare gravel drove him, and all others travelling in sleighs, to the side of the road, slippery and inclining so as to make it dangerous to traffic; not only to loaded sleighs, but to light "cutters."

And, quite apart from any statute upon the subject, no one could but find that it is an act of negligence to place gravel in the centre of a road in winter, in this country, if that reasonably can be avoided. In ordinary circumstances, it quite unnecessarily adds much to the dangers of traffic; and, a minor evil, is not as good for the road itself, and so is seldom, if ever, done except in cases of emergency. As the defendants' warden, in his fair and altogether satisfactory testimony at the trial, put it—it is unwise if avoidable. The gravel ought to have been placed upon the road in the previous summer; but that was a wet season, and, having regard to present Middlesex methods of road-repair, that may have excused the failure through that season; but it was not applicable to the autumn. It is not said that the autumn was unusually wet. But the autumn is not the most convenient time for the farmer, it is the time when farm-needs conflict with road-needs, and naturally the road gets the worst of it, where farmers, and not regular road-makers, are employed. It probably meant not only considerable additional expense to the defendants, but also great difficulty, if not the practical impossibility, of getting the farmer to forgo his fall ploughing, or other work, on his own farm, to draw gravel to a public road for the public benefit, even at more than "going wages." But, if able to find excuse for all that, I cannot but find, on the whole evidence, that the gravel-laying should have been delayed until the next following gravel-laying season. Little, if any, time would have been lost, and no danger, such as that from which the plaintiff suffered, would have been incurred.

ONT.

S. C.
1913

WESTON
v.
COUNTY OF
MIDDLESEX.

Meredith,
C.J.C.P.

Again referring to the pamphlet so much relied upon by the defendants and their engineer, I find much support for this view in places heavily underlined, apparently by the county engineer, but which evidently were not enough to turn him, or his employers, from the cheaper, and much more convenient and profitable, for the farmers employed, method of dumping in winter; instead of laying and rolling in summer. Let me read a very few of these underlined warnings: "Rolling is essential to the construction of a good stone road. It is impossible to build a stone road cheaply and durably without a roller, and the same is true with regard to the best class of gravel roads. Roads built of loose stone take from one to three years of traffic to consolidate. During that time such roads are a serious obstruction to traffic. The consolidation of loosely spread stone or gravel by traffic is a slow process, causing much inconvenience to travel, during which the earth or subsoil becomes mixed with the stone." Assuredly little would have been gained in the way of packing frozen, loose, dumped gravel during the winter—a one to three years' process, according to the Department of Public Works—and any advantage that might be gained in the spring would be more than off-set by the disadvantages in the winter, when dangers are greatest. The difference between a council smiling at a lower cost than was expected, and a council frowning at a greater, ought not to weigh too much in the way roads are repaired.

On this ground I cannot but think the defendants liable in damages to the plaintiff, unless the plaintiff lost such right by contributory negligence; that is, his own negligence.

The fourth ground of the plaintiff's claim is, that the defendants were, through their servants, the county engineer and those he employed in the work, guilty of misfeasance in needlessly obstructing the highway.

I can but find that the way was put in a needlessly dangerous condition by the defendants, and that that condition was the proximate cause of the plaintiff's injury.

The defendants were quite within their right, they were but doing their duty, in repairing the road; but neither right nor duty justifies putting needless obtacles in the way of the travelling public, for whose benefit the highways are maintained, and who have the highest rights respecting them. No hardship is imposed upon municipalities in this respect; they are not compelled to make brick without being provided with straw. If their work cannot be carried on without danger to traffic, they can close the highway against traffic for a time reasonably sufficient to perform their duty to keep the road in repair. If that be not done, it is their duty to make as reasonably safe a way for the traffic as the circumstances will permit, and to give

ONT.

S. C. 1913

WESTON v. COUNTY OF MIDDLESEX.

Meredith, C.J.C.P.

reasonable notice, when it is not apparent, of the condition of the road. Their duty in these respects was very much, if not altogether, neglected. No notice was given, the road was not stopped up, no attempt was made to provide a safe way, but the public were left to pick out a road as best they could, in winter, with fresh snow falling from time to time, the centre of the road being effectually blocked against sleighs by the freshly laid gravel, uncovered with snow. Those driving over the road did the best they could: with loaded waggons they could do nothing but drive along the new gravel in the middle of the road; perhaps safe enough but not pleasant or good for man, horse, or waggon; a thing to be avoided, but it could not. For sleighs the bare gravel was practically impassable, and they were obliged to seek a way where there was some snow. The defendants had failed to lay or mark out any way for them, as they easily might have done at the sides of the road between ditch and fence: in this difficult position, in which, owing to the absence of any warning notice, far enough back upon the road to give them a choice of another way, they found themselves, in the exercise of their rights over the highways, without any fault on their part, they did that which seemed to be the best thing to be done under the circumstances, broke a track in the new-fallen snow along the road, between the gravel and the ditch, on the left-hand side, and held to that track until after this accident happened. The road between the gravel and the ditch was narrow—a little over seven feet in width—and sloping towards the ditch with a fall of one foot in twelve wherever the grading had been done in accordance with the county engineer's plans and his orders. In such a track, with bad sleighing, it hardly needed any evidence that there was a good deal of slewing. The county engineer, in his testimony, given in a very fair manner, though evidently feeling that he must be right and his opponents wrong, frankly admitted that, under the circumstances, if there were a fall of one in twelve in the road taken by the traffic, it was dangerous to the plaintiff; but contending that at the very spot where the accident happened his plan had not been followed; that, owing to the hardness of the road, a slope of only about one in twenty-four had been obtained; and so it must have been through some fault of the plaintiff himself that the accident happened.

Although there is contradictory testimony on the subject, the evidence seems to me to be overwhelming that this narrow track sloped so much towards the ditch, and owing to the snow and frost was so slippery, that it was impossible to prevent slewing so much and so great as to put sleighs, "cutters" as well as loaded sleighs, in much danger of being upset. Several were, and more would have been if those occupying them had not

ONT.
S. C.
1913
WESTON
v.
COUNTY OF
MIDDLESEX.
Meredith,
C.J.C.P.

adopted various means of preventing it, such as getting out and walking, getting out and standing on the higher runner, and putting the weight on the higher side.

Nor can I have any doubt that the plaintiff's upset was caused by the sloping form of the road; that his sleigh slewed as much as he and his son testified to, and eventually went over through that slewing, which was unpreventible with the road in the condition in which it then was, owing to the gravel being placed in the middle of the road when it was, and remaining placed as it was. The road was not reasonably fit for traffic; nothing was done to make it so; and no notice was given of its condition. With the slope designed and intended to be executed, and which the Department of Public Works required, the road, thus blocked in the centre with gravel against sleighs, and thinly covered with snow, could not but be dangerous, especially for top-heavy loads, and yet no warning notice was posted and no attempt made to keep open enough of the road to make it passable in safety or to break a track elsewhere where the traffic on runners might safely go.

It would be much against the weight of evidence to find that the plaintiff's sleigh did not upset where the slope was as designed, that the accident happened a few feet away, where for a short distance the man in charge of the "grader" failed to get the right slope. The sleigh was assuredly more likely to go over where the greater danger was: it is less probable that it would have survived all the slewing and danger, only to fall when it reached the one short safe spot existing only through the "accident" of the man employed to do the grading failing there to obey his instructions and to keep to the scheme of construction without which there would not be any right to the provincial grant.

In addition to the positive testimony of the two occupants of the sleigh, others, who "righted it" immediately after the accident, testified to its unsteadiness, its inclination to tip over, even then, by reason of the slope in the road.

On this ground, also, I am clearly of opinion, and find, that the defendants were guilty of negligence which was the proximate cause of the plaintiff's injury.

Is, then, the plaintiff deprived of any right of action by reason of any negligence on his part?

It is contended for the defendants that he is, on more than one ground:—

First, that he should not have gone upon this road at all with the load he had. But can the defendants fairly contend for that, in the face of the fact that they gave no warning of any kind against any kind of traffic over that road. In the absence of any such warning, why should not any one assume, even with

the fullest knowledge that the road was being repaired, that a safe way through was provided. It is impossible for me to find that the plaintiff did not exercise ordinary care in travelling upon this road, which was a much travelled one and the proper road for him to take in the business in which he was engaged; it was an open highway without any kind of warning posted, or otherwise, against its use.

Second, that the plaintiff's three calves which he had in the sleigh ought not to have been conveyed in that way, but should have been driven on foot over this road. That, however, is quite contrary to common knowledge and to the evidence. The mode of conveyance adopted was the better way for man and beast; indeed, on such a road, in such weather, with such animals, the task of driving them would have been at least very much more difficult than it is merely to speak about, unfair to and not in the interest of man or beast.

Third, that the way in which the calves were placed in the sleigh was negligent; but the evidence is all the other way: they were in two boxes, one in one and the other two in the other; and all securely tied by the head. There is nothing in this point.

Fourth, that, having found the road so dangerous that the plaintiff and his son both got out and walked; they should have so continued until they were past the place where the accident happened. They testified that they thought they were over the worst of it and might safely get into the sleigh again; and it seems to me that it cannot reasonably be found that in doing that they did any more in their own ease than reasonable men ordinarily would do. It is to be borne in mind that a municipality's duty to keep a highway in repair is not well performed in keeping it in such bad repair that the traveller is obliged to take such unusual precautions for his own safety as to save the negligent corporation from such actions as these by taking altogether upon himself the whole duty of avoiding injury at the dictation of that which is said to be a first law of nature—self-preservation. It would at least be hard upon those who are entitled to a road in repair if they could be told that it is a complete answer to their complaint, based upon the neglect of the duty to repair, that they did not longer continue to walk in the slush and snow; that their failure to abandon their right to be driven in the sleigh, and to continue walking in such a road on such footing, completely absolved those who neglected their statute-imposed duty to repair from all the statute-imposed consequences of such neglect.

And fifth, that the plaintiff should not have followed the beaten track, but should have crossed to the north side of the road and have broken a new track there between the ditch and the fence. For more than one sufficient reason that contention,

ONT.
S. C.
1913
WESION
v.
COUNTY OF MIDDLESEX.
Meredith, C.J.C.P.

however, has no weight in my mind; indeed, if the defendants had taken that course, and had "come to grief," the charge of contributory negligence would, as it seems to me, have had more force. It might well be said that one who, finding himself in a bad piece of road, but seeing the track over which others must have passed safely, rejects it and takes his chances in breaking a new one, if not reckless, certainly takes some risk upon himself. But in any case the defendants had no right to put travellers upon a much travelled road to any such lottery as following a bad track, which others had gone over safely, or else breaking out of it into a new one, which might be worse. If there were a safe way between ditch and fence—off the travelled part of the road—on the north side, they should have made a way to it and have pointed it out plainly; instead of that, there was nothing whatever to point to any other way than that which the plaintiff took. In order to go in the way it is now said he should have gone, it would have been necessary, first, to cross the bare gravel heap of considerable height, then the ditch on the right-hand side of the road, and then to have proceeded along a part of the highway not intended for traffic; if he had done all or any of these things, and suffered, can it be doubted that the defendants themselves would have been strongest in condemnation of him for "flying to the devil he did not know instead of sticking to the devil he did know." Indeed, this contention seems to me to harm rather than help the defendants; it accentuates their want of care in obstructing the highway in winter, without either stopping traffic over it or else providing a safe way through, a thing which might easily have been done at very little cost; but nothing was done, notwithstanding ample warning from disinterested ratepayers. I mean disinterested in this litigation further than their remote interest, adverse to the plaintiff, in common with other ratepayers who provide all the means from which claims such as this, if successful, must be paid. In the pamphlet before referred to, travellers are likened to sheep in the way they follow one another. But the simile is inapt in any such case as this. The traveller exercises his judgment soundly: in a dilemma he concludes that it is better to follow the track over which he sees that many must have passed in safety, than break a new one, which may be a worse one, for aught he knows, as well as being one which the judgments of all those who have gone before him have rejected.

It follows from what I have said that I cannot find that the accident was caused by anything other than the condition of the road.

The suggestion that movement of the calves caused it is but a suggestion; there is no testimony in support of it: all the testimony on the subject is positive that such was not in any way

the cause of the accident; and it is not like a case in which there is no other very probable way of accounting for it.

There is, indeed, very much direct testimony, and evidence, of the dangerous character of the road and the difficulty of even light sleighs keeping their "equilibrium" on it; of much slewing, and of a ridge of snow caused by the slewing; and, of course, the natural and also inevitable result of such slewing in such weather; all of which is in the nature of "the proof of the pudding," and affords a much more probable cause of the accident than any imagined movement of the tied calves can.

It must also be borne in mind that we are dealing with a track only about seven feet wide and sloping one in twelve to a ditch: a twenty-four foot road with a like slope each way is obviously an entirely different thing; upon it there is the possibility of keeping on an even keel except in the short distances required to turn out for other vehicles travelling in the same manner in the opposite direction; and we are dealing with such a narrow strip when slippery with snow and ice, and with the slewing of other sleighs. For even a human being, with all its intelligence and agility, a slippery walk of any kind, with a slope of one in twelve, is not very comfortable or free from danger of falls; and in this case we have to consider not such a being but an inanimate "pair of bob's" made and shod especially for slipping and sliding as much as possible.

In order that it may not appear to have been overlooked, I should perhaps refer to the testimony of the witness Staunton, who testified that the plaintiff's son, on the evening after the accident, told him that one of the horses had bit at the other, and just then the accident happened; the son had, of course, in his testimony, denied ever having made such a statement, saying also that he never had any conversation with the witness on the subject, or been where the witness said it took place, at the time when it was said to have taken place. If it were true that the accident had happened just when such a thing took place, the fact would strengthen the defendants' case that it was not the condition of the road that caused the accident, how much or how little need not be considered. But it must be borne in mind that this evidence could be given, and was given, only for the purpose of discrediting the testimony of the plaintiff's son, who also was merely a witness in the case. It would be different if the plaintiff had made any such statement; it would be an admission making against his claim, provable against him whether he was called as a witness and contradicted it or not. Evidence such as this, for whatever purpose it may be given, is ordinarily not of the greatest weight; it is ordinarily hampered with these difficulties: Is the witness who testifies to contradict the other witness to be be-

ONT.
S. C.
1913
WESTON
v.
COUNTY OF MIDDLESEX
Meredith, C.J.C.P.

lieved in the face of the denial of such witness? Is the memory of the witness, only as to words said in a moment or so by another, to be implicitly relied upon? Did he quite hear and understand what the other said? Did the other quite say what he meant, nothing more or less? And was he telling the truth in that which was said? Staunton gave his evidence in a manner that impressed me as quite sincere, and it was not in any way shewn that he had any interest in the matter, except the somewhat remote one of being a taxpayer on property in the county; but he frankly admitted that he had been ill, in a hospital, for a short time, for some ailment affecting his mind and memory; and the testimony of the plaintiff's son was also such as impressed me favourably; he seemed to be a very intelligent young man, and one, at his time of life and having so much interest in the matter, unusually fair and candid. Then, too, although he told the story of the accident to those who came up immediately after it, and doubtless to many others, yet no one else was called to contradict him in such a manner in any way; and there really was nothing else in all the evidence, or in the probabilities, pointing to anything of the sort having happened, or, if it happened, having caused the accident; and, as the witness Staunton fairly put it, it was not a matter of very much importance; it is a very common thing for one horse of a team to make a nip at the other; and nearly always a very harmless thing. On any such evidence as this it is impossible to overturn the great weight of evidence, including the probabilities, that the condition of the road was the real cause of the accident.

The plaintiff, then, being entitled to recover, what should he have? He should have reasonable compensation under all the circumstances of the case; and the evidence adduced at the trial makes the task of ascertaining the amount of such compensation, usually difficult in such cases, easier than usual. Evidence has been given from which, with no difficulty, his actual loss in money can be computed; and the physicians and surgeons examined as witnesses on each side were quite agreed as to the nature and extent of the bodily injuries sustained by the plaintiff, as to his present condition, and as to what the future has in store for him in respect of his injuries.

His outlay in money in the way of medical and surgical treatment and incidentals directly and indirectly connected with it, I find to be $75.

His loss through being unable to attend to his own farm work and business I find to be $225. It is to be remembered that his disability came unexpectedly and suddenly, when it might have been very difficult to have found any one who could and would

have worked as well as he himself would have done if he had not been injured.

For his pain and suffering $300 seems to me to be a very reasonable amount, less perhaps rather than more than he should be awarded in this respect; however, I find, and award, that sum to be, and as, reasonable compensation, under all the circumstances of the case, in this respect.

In regard to future physical disability by reason of the accident, and to possible future pain and suffering, things not unknown after the fracture of a right arm—a break which all the physician and surgeon witnesses described as a bad one, and which has shortened the arm an inch or more, preventing upward and backward motions very perceptibly, and which also, according to one of such witnesses at least, causes impairment by reason of shorter leverage—an award of $400 I consider also a very reasonable award, not erring in being too much. In that I make no allowance for the injury to the man's body from which he suffered, but from which I find that he has now recovered, and I also take into consideration his age—61—and the falling off in ability to work which naturally comes with increasing years after his present age, as well as the other possible, as well as certain, chances and changes of human life.

There will be judgment for the plaintiff; and $1,000 damages, with costs of action.

Judgment for plaintiff.

HUPP v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. RAILWAYS (§ II D 6—70)—LIABILITY OF RAILWAYS FOR DAMAGES—KILLING HORSE ON TRACK—ANIMAL "AT LARGE."

Where a horse which had been turned out to pasture on unfenced range lands adjoining a railway took fright on being driven into camp by the owner's employee and escaped from his control and was killed by a train, the owner has no right of action against the railway company under sec. 294, sub-sec. 4, of the Railway Act, R.S.C. 1906, ch. 37 (as amended 9 and 10 Edw. VII. (Can.) ch. 50, sec. 8), for, if he had the landowner's permission to pasture on the lands, the horse while thereon was not "at large," and, if he had not such permission, the horse was put "at large" by the plaintiff's wilful act in pasturing the horse there within the exception of the enactment.

[*McLeod* v. *Canadian Northern R. Co.*, 18 O.L.R. 616; *Parks* v. *Canadian Northern R. Co.*, 14 Can. Ry. Cas. 247, 21 Man. L.R. 103, discussed; see also as to animals at large, *Rogers* v. *Grand Trunk R. Co.*, 2 D.L.R. 683.]

Statement

APPEAL by defendant from the judgment of Grant, County Judge, in favour of the plaintiff against a railway company brought under sub-sec. 4 of sec. 294 of the Act alleging the killing of a horse "at large."

B. C.

C. A.

1914

HUPP v. C.P.R. Co.

Macdonald, C.J.A.

The appeal was allowed, IRVING, and MARTIN, JJ.A., dissenting.

J. E. McMullen, for appellant, defendant.

C. W. Craig, for respondent, plaintiff.

MACDONALD, C.J.A.:—The plaintiff turned out his horses to pasture on lands abutting the defendant's railway in the neighbourhood of Drynock, in this province. These lands were in the Dominion railway belt, and there is some evidence that they belonged to one McAllister, and that plaintiff had McAllister's permission to so pasture his horses. The evidence as to McAllister's ownership and plaintiff's permission to use the land is vague and unsatisfactory, but in the result it does not, in my opinion, make any difference who owned the land, or whether the plaintiff had the owner's permission or not. It appears that the plaintiff was in the habit of turning his horses out at night, and while the men in charge of them were driving them to camp in the morning, one escaped from their control, got on the railway track, and was killed by one of the defendant's trains.

It was conceded by his counsel that if the plaintiff can succeed at all, he must do so by virtue of sec. 294 of the Railway Act, [R.S.C. 1906, ch. 37, amended by Statutes 1910, ch. 50, sec. 8]. The case depends on the interpretation to be put upon the term "at large" as used in that section. Animals may be "at large" on a highway in the contemplation of Parliament though in charge of some competent person: sec. 294, sub-sec. 1. Then they may be "at large" whether they be on the highway or not: sub-sec. 4.

If, therefore, the fact of animals being in charge of a competent person renders them none the less at large on the highway, they would be also at large elsewhere than on the owner's own lands, notwithstanding that they were being herded or driven in by plaintiff. By said sub-sec. 4, the railway company is rendered liable for injury to the animal only if it got at large otherwise than by the negligence or wilful act or omission of the owner, or his agent, or of the custodian of the animal or his agent.

If the horse was at large before he escaped from the man in charge, and got upon the railway track, he was no more "at large" afterwards, and being at large, *i.e.*, at pasture, or being driven in by the wilful act of the owner, this section does not assist the plaintiff upon the assumption that the lands from which the horse got on to the track were not lands of the plaintiff's or lands which he had a right to use as his own.

Assuming, on the other hand, that the plaintiff had the

license of McAllister to pasture his horses there, and was in this sense to be regarded as the owner or occupier of these lands, the horses were turned out then upon the owner's own lands, and could not, according to the authority of *McLeod* v. *Can. Northern R. Co.*, 18 O.L.R. 616, and other authorities, be considered, to be at large at all. In this case again the section does not assist the plaintiff.

The only difference between this case and *Parks* v. *C.N.R.*, 21 Man. L.R. 103, 14 Can. Ry. Cas. 247, is that there the horse escaped from the plaintiff's own premises, without negligence or wilful act or omission of the plaintiff, and reached the railway track over the lands of strangers. To find in favour of the plaintiff I should have to go a step further than that case has gone, and further than any other cases to which we have been referred have gone, and say that horses must be deemed to be "at large" on their owner's lands when they break away from the person or persons in charge of them. There is no warrant for that, and hence I cannot see how the judgment in favour of the plaintiff can be sustained.

The appeal should be allowed.

IRVING, J.A. (dissenting):—I would dismiss this appeal. Irving, J.A. (dissenting)

The learned County Court Judge has come to the conclusion that the company has not shewn that the animal when he escaped got at large through the negligence or wilful act, or omission of the plaintiff or his men. In this finding, with which I do not think we can interfere, I think the plaintiff is entitled to hold his judgment.

The animal, after it had been rounded up with the other animals, while being driven to the stable, escaped. In my opinion, it was then "at large" (that is, free from control, unconfined) whether the land upon which the stable was be regarded as the plaintiff's land (under license from McAllister) or not. From that unfenced piece of land he wandered by way of an old trail (possibly a portion of the old Cariboo wagon road) up towards the C.P.R. track, where he was killed.

I think an animal can be said to be "at large" even on his owner's own property, certainly where that property is unfenced. The expression would be inapplicable, I think, to a horse in a corral, or a paddock, but would be quite proper in describing animals turned out on a range.

MARTIN, J.A. (dissenting):—Unless the horse in question Martin, J.A. (dissenting)
was "at large" it is conceded that the judgment cannot stand. There is no evidence to "establish," as required by sub-sec. 4, the company's contention that the horse if he "got at large" did so "through the negligence or wilful act or omission of

B. C.
C. A.
1914
HUPP
v.
C.P.R. Co.
Martin, J.A. (dissenting)

the owner or his agent." The plaintiff had made arrangements with the owner, or lawful occupant, of the adjoining land to erect a temporary camp thereon, but had made no arrangement to pasture his horses thereon, letting them wander at night in charge of a herd, but in daytime they were used in working on the plaintiff's contract. At the time the accident happened, about 7 a.m., the horses were being driven in to the stable to be hitched up, by three men, Brown (the man in charge of the camp) and two others (evidence, pp. 17-8-9) when the one in question got frightened, for some unknown reason, broke away, and got on the railway track, despite the efforts of the men to head it off (there being no fence between the track and McAllister's unfenced land) and was killed. The railway track was about 75 feet above the level of the camp and the stable was about 2000 feet from the track (evidence, pp. 7-8).

The sole point to determine is whether the horse "got at large" within the meaning of sub-sec. 4, when it broke away from the control of the men who were driving it. If land is unfenced I cannot see that ownership has anything to do with the question before us. The expression is not "run at large" as in the Animals Act, ch. 10, R.S.B.C. 1911, sec. 3, or "running wild upon the public lands" under sec. 18, but even under that Act anyone who lets his stallion or bull "run at large" upon his unfenced range might find himself liable under secs. 3 and 11 for damage committed by them upon said range. It cannot, I think, reasonably be said that a horse turned out loose upon an open range to roam uncontrolled is not "at large" even though the land and horse have the same owner. I understand that is what Chancellor Boyd means, when he said in *McLeod* v. *Canadian Northern R. Co.* (1908), 18 O.L.R. 616, 624; "cattle on the lands of the owner are not 'at large' but 'at home,'" *i.e.*, if the lands are enclosed. The case of *Yeates* v. *Grand Trunk R. Co.* (1907), 14 O.L.R. 63, is also one of cattle escaping from an enclosure. I agree with the opinion expressed by McLorg, District Judge in *Krenzenbeck* v. *Canadian Northern R. Co.* (1910), 13 W.L.R. 414 at 420:—

> It seems to me from those authorities that whether cattle are at large or not, depends on whether they are under restraint or control, quite irrespective of whether they are on the plaintiff's land or not.

The case at bar seems to be largely governed by, though on the facts is stronger than, the very similar one of *Parks* v. *Can. North. R. Co.* (1910), 14 Can. Ry. Cas. 247, the only difference being that the horse there had escaped from control for about a day and a night, whereas here for only a few minutes, and that point was pressed upon us. But the principle does

B. C.

C. A.

1914

HUPP v. C.P.R. Co.

not depend upon lapse of time but escape from control, and the horse in the *Parks* case was just as much "at large" the moment he took to his heels as he was one, or one hundred days later.

GALLIHER, J.A.:—Were it not for the wording of sub-sec. 1 of sec. 294, ch. 37, of the Dominion Railway Act, R.S.C. 1906, which would seem to indicate that the statute treats all animals as "at large" whether in custody of owner or servants which are away from home, I should have thought that no animal was at large in any place where it was in the custody or control of the owner, or his servants.

Galliher, J.A.

If the statute has that meaning, and there seems no escape from that conclusion when we read the words there used,

> no horses, sheep, swine or other cattle shall be permitted to be at large upon any highway . . . unless they are in charge of some competent person or persons

—if on a highway, then why not any other place outside the plaintiff's premises—the plaintiff cannot here succeed.

Assuming that the premises in question were McAllister's, and that the plaintiff had acquired them for the purpose of grazing his horses thereon, facts of which I am far from certain upon the evidence, then according to the Ontario decisions the animals were not at large, and there being no duty to fence under sec. 254, the plaintiff cannot recover.

And on the other hand, if the plaintiff had no rights on the land, and McAllister could give him no rights, the animals were there at large, and being there by the wilful act of the plaintiff, he cannot recover under sec. 294, sub-sec. 4, [amended by Statutes, 1910, ch. 50, sec. 8.]

The appeal must be allowed with costs.

MCPHILLIPS, J.A., concurred with MACDONALD, C.J.A.

McPhillips, J.A.

Appeal allowed.

PICKELS v. LANE.

N. S.

S. C.

1914

Nova Scotia Supreme Court, Graham, E.J., Meagher, Longley, Drysdale, and Ritchie, JJ. February 14, 1914.

1. APPEAL (§ VII L 3—498)—AMOUNT OF DAMAGES—LIBEL ACTION TRIED WITHOUT JURY.

Where a libel action is tried with a jury the quantum of damages is peculiarly within their province and will not ordinarily be disturbed on appeal; and the same principle will apply on an appeal by plaintiff to increase the damages awarded by a judge trying a libel case without a jury.

[*Pickels* v. *Lane*, 11 D.L.R. 841, affirmed.]

N. S.
S. C.
1914
PICKELS
v.
LANE.

2. COSTS (§ I—10)—DISCRETION—LIBEL ACTION—REFUSING COSTS TO SUCCESSFUL PLAINTIFF.

The trial judge has a complete discretion as to refusing costs to a successful plaintiff in a libel action, and may take into consideration everything which led to the libel.

[*Harnett* v. *Vise*, 5 Ex.D. 307, followed.]

Statement

APPEAL by the plaintiff from the judgment of Russell, J., *Pickels* v. *Lane*, 11 D.L.R. 841, 13 E.L.R. 276, in an action claiming damages for libel, whereby the plaintiff was awarded only $5 damages and was deprived of costs.

The appeal was dismissed.

D. F. Matheson, K.C., for appellant.

H. Mellish, K.C., for respondent.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—The alleged libel was contained in a letter written by the defendant to one Annie Pickels, a relative, and in respect to the plaintiff, William Pickels, contained the following sentence:—

> I understand all about business with William. When father had his eyes and ears open William stole from him right and left; what will he do when he cannot see and hear?

The defence among other things alleged that the words were true. Also that they were privileged. It was not contended at the trial, nor before us, that the occasion was privileged.

In respect to the justification, evidence was given tending to shew that in respect to one transaction the father and the plaintiff and a brother being part owners of a ship, and the plaintiff as managing owner having collected some disputed insurance, it was not accounted for by him to the other owners until some eighteen months after it was realized. The plaintiff says that he had informed the other owners (they are both dead now) of his receiving this money and that he was going to use it and that there were other unsettled matters between them. At any rate he gave his notes to them when the matter was settled, and, although it is not strictly relevant, it appears that he had not paid the note to his father.

The learned trial Judge found that neither defence was successful and gave the plaintiff a verdict of five dollars and deprived the plaintiff of his costs on the ground, I believe, that the words were partly true and relying on the case of *Harnett* v. *Vise*, 5 Ex. D. 307.

There is an appeal both in respect to the inadequacy of the damages and the refusal to give costs. I do not propose to interfere with this judgment. It is an exceptional case. It has been tried by a Judge without a jury, although it is an

action for libel. The Judge has dealt with the damages and costs as a whole.

It is very seldom that a Court grants a new trial in a defamation action on the ground that the damages are too small. How often plaintiffs have had to submit to a "farthing damages." The assessment of damages is peculiarly in the province of the jury in an action for libel. And the principle ought to be the same although the cause was tried by a Judge. There are special reasons why small damages might be given in this case. First, the plaintiff was in some kind of default in the money transaction. The plaintiff and the defendant are brother and sister and the letter was written to a relative who was nursing the father of the plaintiff and defendant in his old age. I suppose relations when they use exaggerated expressions about each other's conduct among themselves do not really intend to charge them with serious crimes and are not so understood although they use the terms imputing crime. And the injury to the reputation, for that is always the gist of the action, is not a serious matter. In *Harnett* v. *Vise*, 5 Ex. D. 307, James, L.J., I notice, said, at 311:—

> It almost came within the protection afforded to privileged communications. I am satisfied that this letter never did or could have done the slightest harm to the plaintiff, and further that it was not the true cause of the litigation.

If the amount of damages cannot well be disturbed there is a difficulty about disturbing the disposition of the costs. As I have said, the learned Judge has dealt with the two things as a whole. If the verdict of $5 had been given by a jury, one might say inasmuch as the jury has not given nominal or contemptuous damages, why should not the plaintiff have the costs of coming to Court to vindicate his reputation? Ordinarily, in this kind of action, the costs follow the verdict of the jury. No doubt about that.

Apparently this action was brought because the parties had quarrelled in respect to the disposition of the property by Jacob Pickels which brought about a contestation of the will and it was not brought to vindicate the reputation of the plaintiff. The trial Judge has a complete discretion as to refusing costs. He may have thought that this brother's conduct in bringing his sister into Court, under the circumstances, was oppressive, and that the action should not have been brought. In *O'Connor* v. *Star Co.*, 68 L.T.N.S. 146 at p. 148, Bowen, L.J., said:—

> What is "oppression"? Taking a reasonable view, if an action is brought to vindicate a legal right, but that right is not used for any reasonable purpose but only to make mischief and to vex another, it is

N. S.
S. C.
1914
PICKELS
v.
LANE.
Graham, E.J.

oppressive to assert that legal right merely for the purpose of harrassing an adversary.

The learned Judge, in depriving the plaintiff of costs, expressly made use of the circumstance that, while the very comprehensive words of the libel were not shewn to be true there was such a dealing with the money of the part owners as amounted to a misuse of their funds, a serious act of misconduct. He had not concluded himself from so finding by giving judgment for five dollars damages.

The Judge, in disposing of the costs, may consider "everything which led to the libel": *Harnett* v. *Vise*, 5 Ex.D. 307 at 311, James, L.J. That case affords a justification for the judgment as to costs in this case. There the jury had given £10 damages, but the Judge had, properly, it was held, deprived the plaintiff of his costs.

The appeal should, I think, be dismissed and with costs.

Appeal dismissed.

ALTA.
S. C.
1913

BENSON v. INTERNATIONAL HARVESTER CO.

Alberta Supreme Court. Trial before Walsh, J. December 9, 1913.

1. STATUTES (§ II D—125)—RETROSPECTIVE OPERATION—EFFECT ON EXISTING CONTRACTS.

The "Farm Machinery Act," Alberta Statutes, 1913, ch. 15, whereby every "farm machinery" contract includes a warranty as to (*a*) good material, (*b*) proper construction, (*c*) good working order, (*d*) freedom from defects, and (*e*) durability, is not construed so as to have a retrospective effect and cannot therefore be applied to a "farm machinery" contract made prior to the enactment.

[*Sidback* v. *Field*, 6 W.L.R. 309; *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K.B. 310, referred to].

Statement

ACTION brought by the plaintiff to recover certain moneys paid by him on account of a plowing outfit, which he purchased from the defendant company, and also to set aside certain promissory notes and a real estate mortgage given in payment of the balance due on the purchase price of the said outfit and also an action for damages.

The action was dismissed.

The defendant company relied to a large extent on the following provisions in the contract:—

All of said articles are sold subject to the following express warranty, and none other, which said warranty excludes all implied warranties and is hereby made to apply separately to each machine or attachment herein ordered.

First. The company warrants the said machinery to be well made, of good materials, and durable if used with proper care. If upon one day's trial, with proper care, the machinery fails to work well, the purchaser

Statement

shall immediately give written notice stating full particulars wherein it fails, by registered letter mailed to International Harvester Company of America, North Battleford, and allow a reasonable time for a competent man to be sent to put it in order, and shall render necessary and friendly assistance to operate it. If the machinery or any part thereof cannot then be made to work well, the purchaser shall immediately return such part as does not work well, to the above-mentioned place, to which the machinery is hereby requested to be shipped and shall immediately in the manner hereinbefore prescribed give the company written notice of such return, and the said company may either furnish another part or may require the return by the purchaser of the remainder of such machinery to the above-mentioned place to which the machinery is requested to be shipped and then furnish other machinery in its place or refund cash and notes received for same, thereby rescinding the contract *pro tanto* or in whole, as the case may be, and thereby releasing the company from any further liability whatever herein. If other machinery or parts be furnished, same shall be complete fulfilment of this warranty, and in consideration thereof, the purchaser agrees that the other machinery or parts shall be so furnished without any general, express or implied warranty therein. If, however, the trouble arose from improper handling of the machine, the purchaser shall pay the costs of thus righting it.

The use of part or all of said machinery, after three days' trial or failure to give notice as herein provided, shall be conclusive evidence that said machinery is as warranted and represented; and shall estop the purchaser from all defences on any ground to the payment therefor and any assistance rendered by the company, its agents or employees, in operating or in remedying any actual or alleged defect, shall in no case be deemed any waiver or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty nor operate as an extension or renewal of the conditions thereof, and the purchaser shall pay all expenses incurred by the company incidental to rendering such assistance.

No claims, counterclaims, demands or offsets shall ever be made or maintained by the purchaser on account of delays, imperfect construction, or any cause whatsoever, except as provided herein, and the purchaser expressly waives all claim for damages on account of the non-performance of any of the above described machinery.

It is expressly understood and agreed that all warranty of this machinery terminates and expires and all liabilities of the vendor for breach of warranty or recoupment for damages, set off or otherwise, cease entirely at the expiration of one year from the date of shipment, any statutes of limitations to the contrary notwithstanding.

No notice by registered mail was given within the time limited, as required by the provisions of the contract.

The provisions of the Farm Machinery Act were pleaded by the plaintiff.

I. B. Howatt, and *S. E. Bolton*, for the plaintiff.

O. M. Biggar, K.C., for the defendant.

Walsh, J.

WALSH, J.:—I have read all the authorities cited by Mr.

ALTA.

S. C.
1913

BENSON
v.
INTER-
NATIONAL
HARVESTER
CO.

Walsh, J.

Howatt in support of his contention that the Farm Machinery Act applies to this contract, but I have also read a good many much more convincing authorities in support of the other view. Maxwell on Interpretation of the Statutes, says at page 348 of his 5th edition:—

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act.

And at page 350:—

> It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation.

There are a great many authorities which support the conclusion of the author. The latest Canadian case that I have found is the case of *Sidback* v. *Field*, 6 W.L.R. 309; it is a Yukon case, in which Mr. Justice Craig in his judgment collects a very large number of English and Canadian authorities in support of the proposition. The last English case I have run across is *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K.B. 310. I have no hesitation in expressing the opinion that the Farm Machinery Act, ch. 15, Alta. Statutes 1913, does not apply to this contract, which was made some two years before the Act was passed, the Act having been passed some months after this action was commenced. I think it was quite competent for the parties by their contract to limit the period within which the defendant should be liable for breach of warranty. That period is fixed at one year from the date of shipment, which period had elapsed by some months before the action was commenced, and for this reason I think the plaintiff's right of action was barred at the time this action was commenced.

The action, therefore, will be dismissed with costs and the defendant will be entitled to judgment on the counterclaim as set out in the counterclaim; the amount will be computed and ascertained by the clerk, and it will have the usual decree under its mortgage security.

Judgment for defendant.

OKELL v. VICTORIA (CITY).

B. C.

C. A.

1914

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. January 6, 1914.

1. EMINENT DOMAIN (§ III C 1—143) — COMPENSATION FOR LOWERING STREET—ASSESSMENT FOR IMPROVEMENT NOT AN ELEMENT OF DAMAGE.

Under sec. 394 of the Municipal Act, R.S.B.C. 1911, ch. 170, providing for compensation to owners for damage to their property by a municipality in grading and paving the streets, the fact that the owner, whose property was damaged, may later be assessed for a portion of the cost of the work under a local improvement by-law does not constitute an additional element to be considered by the arbitrators in their assessment of the damages.

[*Re Macdonald and City of Toronto*, 8 D.L.R. 303, 27 O.L.R. 179, applied.]

Statement

APPEAL from on order of Morrison, J., dismissing an application on behalf of a property owner to refer back to the arbitrators their award with further directions for the assessment of damages under the B.C. Municipal Act.

The appeal was dismissed.

F. A. McDiarmid, for appellant.

T. R. Robertson, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an appeal from arbitrators. The work of grading and paving streets upon which the appellant's property abutted was being carried out by the municipality under local improvement by-laws. The grade in front of appellant's property was lowered. For this she claimed and was allowed compensation. She also claimed by way of damages an allowance equivalent to the rates charged against her property under the said by-laws; and it is from the refusal to allow that claim that this appeal was brought. I think the arbitrators were right. Mr. McDiarmid, appellant's counsel, relied upon *Re Pryce and the City of Toronto*, 20 A.R. (Ont.) 16, but that case is distinguishable from the present one in this, that there the property owner was being charged with the benefit which his property had derived from the improvements, and it was thought that in those circumstances he was entitled under the statute to have the rates set-off against such benefit. There is no such question in this case, which, in my opinion, is like that of *Re Macdonald and the City of Toronto*, 8 D.L.R. 303, 27 O.L.R. 179, where the distinction I have just mentioned was made.

The appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—It is admitted that the special tax to be levied will be greater than any advantage to be derived from the work, or, in other words, the increase in the value of the

B. C.
C. A.
1914
OKELL
v.
VICTORIA
(CITY).
Martin, J.A.

land because of the work will be less than the amount of the tax necessary to impose on the property to do said work. How, therefore, can it be said that under sec. 394 [Municipal Act, R.S.B.C. 1911, ch. 170], there is anything "beyond" an advantage which does not exist? And if there is no "advantage" it cannot form part of the due compensation. This view is supported by the judgment of Mr. Justice Garrow, in *Re Macdonald and City of Toronto* (1912), 8 D.L.R. 303, 27 O.L.R. 179, and, in my opinion, the arbitrators herein proceeded upon a sound principle.

Galliher, J.A.

GALLIHER, J.A.:—This is an appeal from an order of Morrison, J., dismissing an application on behalf of Okell to have an award of certain arbitrators which was published on May 30, 1913, referred back.

In this award as published, the arbitrators state as follows:—

> We do not consider that the taxes to be charged against the property for local improvements or any portion thereof should be included in the compensation, and in arriving at the amount of compensation awarded have followed this decision as to taxes.

Mr. McDiarmid urges that the arbitrators proceeded upon a wrong principle in not taking the taxes into account as damages.

I assume that the $1,450 awarded by the arbitrators is sufficient to compensate for all damage done the property in question, but Mr. McDiarmid contends that inasmuch as some of the land has been taken away by subsidence and rock blasting, I think in one place two feet, and in another five feet (and which I assume has all been compensated for in the award) that the owner is entitled to have considered as a part of the damages the amount which he will still be called upon to pay by way of local improvement tax.

The result of that would be that where, in making local improvements, the city enter upon the land of an owner and take a portion of it for the purposes of these improvements, that not only should he be compensated for the value of the land taken and the damage done to the property by lowering or raising the grade, but that he should in effect be freed from the payment of any improvement tax, and cites *Re Pryce* v. *Toronto City*, 20 A.R. (Ont.) 16; and *Re Richardson and Toronto City*, 17 O.R. 591.

Re Richardson and Toronto, 17 O.R. 491, was a case of expropriation of lands by the city for the Don improvement scheme, and it was there held that in awarding compensation to the owner under the Municipal Act for the parts of the land taken, the arbitrators should allow for benefit to other land not

taken, but in estimating that benefit they were to take into account as best they could the fact that the owner was liable to be charged as for a local improvement.

In *Re Pryce and Toronto City*, 20 A.R. (Ont.) 16, the decision of the majority of the Court is to the same effect.

Between these cases and the one at bar there is to be noted this marked distinction.

Here there is no suggestion that the arbitrators in arriving at the amount of compensation deducted anything for enhanced value to the property by reason of the local improvement, and shortly, when Okell receives full compensation for the injury done to the property, she is put in the same position as her neighbours affected by the local improvement, and whose lands were not injured, and, like them, is liable to the local improvement tax to be levied.

Galliher, J.A.

The appeal should be dismissed with costs.

McPHILLIPS, J.A.:—Upon further consideration I still remain of the same view I formed at the hearing of this appeal, and cannot agree with the argument advanced by counsel for the appellant, namely, that the award has been made upon a wrong principle in that the arbitrators have not taken into consideration the amount of the special taxes to be charged upon the land by way of local improvement taxes.

McPhillips, J.A.

That which is to be allowed by the arbitrators is "due compensation" as provided for in sec. 394 of the Municipal Act, ch. 170, R.S.B.C. 1911.

This section is, it may be said, word for word the same as sec. 437 of the Ontario Municipal Act, 1903, and the section in the Ontario Municipal Act came up for consideration in the Court of Appeal for Ontario in *Re Macdonald and City of Toronto* (1913), 8 D.L.R. 303, 27 O.L.R. 179, and that Court declined to entertain as an element of compensation the circumstance that the corporation was proceeding under the local improvement clauses of the Act by virtue of which the claimant would be assessed for a portion of the cost of the widening.

It was strongly relied upon by counsel for the appellant that *Re Richardson and City of Toronto* (1893), 17 O.R. 491, and *Re Pryce and the City of Toronto* (1893), 20 A.R. (Ont.) 16, were cases which supported the line of argument addressed to us by him. It is to be observed, though, that upon careful perusal and consideration of these cases they cannot be so read, and in any case are not applicable. To bring this out clearly I refer to the language of Garrow, J.A., 8 D.L.R. 303 at 305, 27 O.R. 179 at 182, in *Re Macdonald and City of Toronto, supra*:—

It is one thing to say that if the claimant is being charged with a

B. C.

C. A.
1914

OKELL
v.
VICTORIA
(CITY).

McPhillips, J.A.

benefit she may offset the amount of such benefit with the amount of the assessment which she is compelled to pay, which was the case of *Re Pryce and City of Toronto*, 20 A.R. 16, to which we were referred, and a totally different thing to say that the tax thus imposed is the proven subject of all allowances as part of the "due compensation" for which the statute provides.

There is nothing before us to shew whether the arbitrators considered the appellant derived any advantage from the work and it may quite well be that the appellant was not charged with any benefit.

Further reference is made to the *Pryce* case by Maclaren, J.A., in the *Macdonald* case, 8 D.L.R. 308, and 27 O.L.R. 185. We find him saying:—

> She also claims that she should have relief over against the city for what she may have to pay towards the twenty-five per cent. of the total expense of the improvements to be levied by local assessment from those specially benefited. This is rather a novel claim, and I can find no shadow of support for it in the case of *Re Pryce and City of Toronto*, 16 O.R. 726, cited in support. It is quite startling to think that a by-law passed in accordance with the Municipal Act should be got rid of in this way and practically nullified by a side wind. In other words, that the twenty-five per cent. assessed on the properties specially benefited can be unloaded upon the city generally by a kind of jugglery. In my opinion the arbitrator was quite right in disallowing this claim.

With this high authority upon exactly similar statute law, that of the Court of Appeal of Ontario, with which I entirely agree, it is made plain that the contention of the appellant is unsupportable.

It is clearly evident, therefore, that Morrison, J., was quite justified in refusing to remit the award for re-consideration to the arbitrators, in that the arbitrators have not awarded the compensation upon any wrong principle.

It follows that the appeal must be dismissed.

Appeal dismissed.

B. C.

C. A.
1914

REX v. McNAMARA.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 3, 1914.

1. EXTRADITION (§ II—19)—IMMUNITY FROM PROSECUTION FOR DIFFERENT OFFENCE.

If an extradited prisoner intends to object that the indictment is for a different charge than that on which he was extradited, it is for him to prove the extradition warrant and so place on the record the fact of the variance, so that a court of criminal appeal may take cognizance of it on a case reserved.

2. STATUTES (§ III—134)—AMENDMENT—EFFECT ON EXISTING PROCEEDINGS.

A statute amending the law as to the selection of names to be summoned for the jury panel for criminal trials will be presumed not to affect a trial at an assize for which the panel of jurors had already been summoned under the former law then in force.

B. C.

C. A. 1914

REX v. MCNAMARA.

CROWN case reserved by Morrison, J.

Statement

A prior decision on an application for bail made to His Honour Judge Howay is reported *sub nom. Rex* v. *McNamara*, 12 D.L.R. 859.

The questions reserved were as follows:—

1. Was I right in overruling the objection taken by counsel for the accused, that John McNamara could not be tried on the indictment by the petit jury summoned for the New Westminster spring assizes, 1913, for the 16th day of June, A.D. 1913?

2. Inasmuch as I was of opinion that the building of Thomas John Trapp, from which the automobile was alleged to have been stolen, mentioned in the indictment, was not within the curtilage of the dwelling-house of the said Thomas John Trapp, was I right in instructing the jury that the accused could be convicted of any offence included in the charge mentioned in the indictment?

3. Was it open to the jury to bring in the verdict of theft of the automobile mentioned in the indictment under the circumstances disclosed in the proceedings?

4. Did I exercise my discretion properly, or did I mislead the jury when I instructed them or gave them the impression in my instructions that the automobile referred to by Henry J. Keen, one of the witnesses for the defence, might have been the automobile alleged to have been used by the prisoner? (See instructions of Court to jury, pp. 23 to 43.)

5. Did I exercise my discretion properly when I decided that the case herein should go to the jury?

6. Was I right in deciding that the garage of Thomas John Trapp was not within the curtilage of the dwelling-house of the said Thomas John Trapp mentioned in the indictment?

7. Upon the above grounds or any of them, should the prisoner be discharged, or in the alternative, upon the above grounds, or any of them, should there be a new trial, or should the sentence be reduced.

A. S. Johnson, for prisoner.

A. H. Macneill, K.C., for Crown.

MACDONALD, C.J.A.:—Seven questions were submitted, for the opinion of this Court, by Mr. Justice Morrison, before whom, sitting with a jury, the prisoner was convicted and sentenced.

Macdonald, C.J.A.

The first question reserved was in relation to the jury. The statute law governing the selection and summoning of jurymen had been amended by a statute which came into force on the 1st July, 1913 [The Jury Act, Stat. B.C. 1913, ch. 34], after the opening day of the assizes, at which the prisoner was tried, but before his trial commenced. I concur in the conclusion ar-

B. C.
C. A.
1914
REX
v.
MCNAMARA.
Macdonald, C.J.A.

rived at by the other members of the Court that the objection to the jury panel was properly overruled by the learned trial Judge. I express no opinion, as it is unnecessary for me to do so, as to whether or not objection was taken in the proper way.

Ques. 2, 3, 5, and 6 are all grounded upon the suggestion of his counsel that the prisoner was indicted and tried on a charge other than the charge or charges on which he was said to have been extradited. The difficulty with which he is faced is that there is nothing in the case except vague allusions to shew that the prisoner was brought to trial after extradition from a foreign country. The warrant was not put in evidence by the defence as it should have been if it were intended to rely upon a variation between it and the indictment. Therefore, even if as was urged by his counsel, Mr. Johnson, it were well understood at the trial that the prisoner had been so extradited, assuming that that would help him here, there is not the slightest evidence that the Court was in any way made cognizant of a variation of that kind, nor does it appear in the case before us that the prisoner, assuming him to have been so extradited, was tried on a charge other than that upon which he was extradited. This Court as a Court of criminal appeal is limited in its jurisdiction to a review of questions of law. We cannot quash a conviction, or order a new trial, unless it appear on the material submitted that a mistake in law was made in the Court below. In the absence of evidence such as I have just adverted to, these questions are meaningless.

The fourth question relates to alleged misdirection by the learned Judge in his charge to the jury. I am unable to find misdirection. That part of the charge complained of was not, in my opinion, calculated to mislead the jury. The learned Judge reviewed the evidence in question and commented upon it, but took care to leave the finding of the facts involved to the jury, whose province it is to find the facts. It was his right, indeed his duty, to review the evidence and to indicate if he saw fit, the impressions he derived therefrom. This he did clearly and without, in my opinion, saying anything which tended to lead the jury into error either in law or fact.

The seventh question is without point, and should not have been submitted to us. It raises no question of law, as, admittedly, the sentence was within the statute. We have no power to interfere with discretion in such matters.

The result is that all the questions are answered in favour of the Crown and against the prisoner.

Irving, J.A.

IRVING, J.A.:—I have reached the same conclusion.

Martin, J.A.

MARTIN, J.A., concurred.

B. C.
C. A.
1914
REX
v.
MCNAMARA.

GALLIHER, J.A.:—I entirely agree with my learned brothers on all the questions, excepting, possibly, the first. I have some doubt on that, but as I understand all the other members of the Court are clear on it, I will content myself by saying that, while I have some doubt, it is not sufficient to cause me to dissent from the other members of the Court.

McPHILLIPS, J.A.:—In my opinion the accused was tried by a Court properly constituted and I do not find any error upon the part of the trial Judge and the questions submitted to this Court by the trial Judge are, in my opinion, correctly answered in favour of the Crown and against the accused. No error or miscarriage of justice took place.

McPhillips, J.A.

Judgment for the Crown.

TOBIN v. McDOUGALL.

N. S.
S. C.
1914

Nova Scotia Supreme Court, Longley, Drysdale, and Ritchie, JJ. February 14, 1914.

1. EJECTMENT (§ II B—21)—OUTSTANDING TITLE—TENANCY IN COMMON.
One tenant in common may maintain alone an action of ejectment against a stranger in possession of the common property.
[*Scott* v. *McNutt*, 2 N.S. Dec. 118, applied.]

2. EJECTMENT (§ II A—5)—ROOT OF TITLE.
In an action of ejectment the plaintiff must trace his title back to his possession of the land or to the possession of some one else through whom he claims, or prove title under a Crown grant.
[*McLeod* v. *Delaney*, 29 N.S.R. 133, approved.]

Statement

APPEAL from the judgment of Russell, J., in favour of defendant in an action by plaintiff to recover possession of land which defendant was alleged to be wrongfully withholding.

The appeal was allowed.

D. McNeil, K.C., for appellant.

C. J. Burchell, K.C., for respondent.

The judgment of the Court was delivered by

Ritchie, J.

RITCHIE, J.:—This is an action of ejectment to recover possession of land. The plaintiff traces his title as follows: The defendant had an interest in the property as one of the heirs of his father, Ronald McDougall. This interest was sold under an execution issued upon a judgment recovered by Mr. McNeil against the defendant. Mr. McNeil was the purchaser and a sheriff's deed passed to him. He mortgaged the lands to Mr. Tobin, the plaintiff, who foreclosed the mortgage, and was the purchaser at the sale under foreclosure, and a deed from the sheriff passed to him. The statement of the conveyance which

N. S.
S. C.
1914
TOBIN
v.
MCDOUGALL.
Ritchie, J.

I have given shews that plaintiff claims through the defendant who got the title to a share of the property as heir of his father Ronald McDougall. In making title it will be observed that the plaintiff did not trace his title further back than the title of Ronald McDougall. There is no evidence that Ronald McDougall was ever in possession, but there is clear evidence that the defendant was in possession after his father's death.

The fact that the defendant is in possession of itself amounts to *primâ facie* evidence that he is legally entitled to possession, until the contrary is proved by the plaintiff. Mr. Burchell, for the defendant, took the point that the plaintiff in order to recover is bound to trace his title back to the Crown, or, failing that, to someone in possession. There is no doubt that this is the rule. It was laid down many years ago in *Cunard* v. *Irvine*, James' Reports, 2 N.S.R. 31, and was recognized and followed in *McLeod* v. *Delaney*, 29 N.S.R. 133. The rule is too firmly established in this province to be open to question, but, in my opinion, the evidence does not bring this case within the rule. It is clear, as I have said, on the evidence, that the defendant was in possession before and at the time that Mr. McNeil recovered his judgment. The plaintiff, therefore, has traced his title back to a person in possession and it was not necessary that he should trace it any further back.

The land after the death of Ronald McDougall was owned by the defendant and his brothers and sisters as tenants in common. The plaintiff has the share of the defendant and, in my opinion, is entitled to recover as against the defendant, though he could not recover if the other heirs of Ronald McDougall were defendants in possession and defended as such for their own interests.

The case of *Scott* v. *McNutt*, 2 N.S. Dec. 118, a case which Mr. McNeil says he did not cite to the learned trial Judge, effectually disposes of this branch of the defence. I do not think that *Scott* v. *McNutt*, 2 N.S. Dec. 118, can be distinguished from this case and in this view I understand Mr. Burchell to agree. The undivided interest of one tenant in common extends over the whole lands. The principle is stated in Warvelle on Ejectment 128, as follows:—

> Whatever objection might be urged against it with respect to the now infrequent estate of joint tenancy does not apply to tenants in common. Such latter persons are not limited in interest and never escape the rule requiring joinder of parties, while the possession of one is the possession of all, and for these reasons there is nothing incongruous or inconsistent in an action by one of them to recover from a stranger the possession of the common property. As the action is now conducted in all of the States, it is sufficient for the plaintiff in ejectment upon the trial, to shew a right in himself to the possession of the premises at the time of the

commencement of the suit, and this a tenant in common certainly does when he discloses his title, notwithstanding that such proof may also shew that another has substantial interests in the land.

By the deed to McNeil, the interest of the defendant as tenant in common passed and thus left the defendant no longer a tenant in common and therefore in the position of a stranger to the title.

The remaining point for the defence is the effect of the conveyance to McQuarrie. This cannot prevail, because it cannot be denied that the conveyance of this fifteen acres, assuming it for the sake of argument to be good as a conveyance of the defendant's interest to that extent, still left an interest or share in the defendant in respect of which he remained a tenant in common at the time Mr. McNeil's judgment was recovered.

The result is that, in my opinion, this appeal must be allowed with costs.

Appeal allowed.

WOOD v. GRAND VALLEY R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 15, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 2—111)—LIABILITY OF PRESIDENT ON AGREEMENT EXPRESSLY ENTERED INTO ON HIS OWN BEHALF AND THAT OF THE COMPANY—SIGNATURE OF COMPANY.

Where, by an agreement which is in writing, but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written document will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking.

[*Wood* v. *Grand Valley R. Co.*, 10 D.L.R. 726, 27 O.L.R. 556, affirmed in this respect.]

2. CONTRACTS (§ VI A—411)—RECOVERY BACK OF MONEY PAID—NON-PERFORMANCE OF PROMISE—DAMAGES.

Money cannot be ordered repaid as upon a failure of consideration, where the failure is the non-performance of a promise, the remedy in such case is the recovery of damages for the breach of the promise.

[*Wood* v. *Grand Valley R. Co.*, 10 D.L.R. 726, 4 O.W.N. 556, reversed in part; *Wood* v. *Grand Valley R. Co.*, 5 D.L.R. 428, 3 O.W.N. 1356, 26 O.L.R. 441, reinstated in part.]

3. DAMAGES (§ III A 1—45)—MEASURE OF COMPENSATION FOR BREACH OF CONTRACT TO COMPLETE RAILWAY.

The loss of benefits which would ordinarily accrue to merchants in the transaction of their business from the construction of a line of railway connecting with another railway the place where their respective businesses were being carried on, is not too remote to be considered in assessing damages to such merchants who purchased bonds of the railway under an agreement by the railway company to complete and operate the line in respect of the company's failure so to do.

[*Wood* v. *Grand Valley R. Co.*, 10 D.L.R. 726, 27 O.L.R. 556, 4 O.W.N. 556, affirmed in this respect.]

ONT.
S. C.
1913
WOOD
v.
GRAND
VALLEY
R. Co.
Argument

APPEAL by the defendant Pattison and cross-appeal by the plaintiffs from the order of a Divisional Court of the High Court of Justice, the reasons for which are reported in 10 D.L.R. 726, 27 O.L.R. 556, affirming with a variation the judgment of Middleton, J., 5 D.L.R. 428, 26 O.L.R. 441.

The appeal was allowed in part.

C. J. Holman, K.C., for the defendant Pattison:—If the plaintiffs be entitled to damages at all, they should be only nominal damages. Both the learned trial Judge and the Divisional Court are in error in their respective methods of assessing the damages—the Divisional Court, because it practically gave the respondent companies judgment for the recovery of the price which they gave for the bonds, which could only have been given rightly if the consideration had wholly failed; the learned trial Judge, because his estimate of the loss sustained by the breach of the agreement was practically guesswork. There was no such evidence given as would form a basis for the ascertainment of the loss sustained by the breach of the agreement: *Village of Brighton* v. *Auston* (1892), 19 A.R. 305; *Sapwell* v. *Bass*, [1910] 2 K.B. 486. If *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, is authority for the proposition that the Court can value a chance, then that case is distinguishable from ours. On the question of damages, I also refer to *Williams* v. *Stephenson* (1903), 33 S.C.R. 323; Sedgwick on Damages, 8th ed., p. 245; *Dullea* v. *Taylor* (1874), 35 U.C.R. 395; *Fitzsimmons* v. *Chapman* (1877), 37 Mich. 139; *Town of Whitby* v. *Grand Trunk R.W. Co.* (1902), 3 O.L.R. 536. Evidence of the intention of the parties to the agreement should not have been received: *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, at p. 572; American and English Encyclopædia of Law, 2nd ed., vol. 6, p. 796; *Township of Nottawasaga* v. *Hamilton and North Western R.W. Co.* (1888), 16 A.R. 52. The agreement, if there was one, was indefinite. There are no parties mentioned in it; nor does it provide for the operation of the railway after construction: Dicey on Parties to an Action, p. 104; *Wetherell* v. *Langston* (1847), 1 Ex. 634, at p. 644. The agreement was signed by the appellant only as president of the railway company. Under the provision in the agreement as to making through traffic arrangements with the Canadian Pacific Railway Company, the appellant was only bound to do all things lawful to secure these arrangements. I refer to the authorities cited before the Divisional Court. The appellant should have been allowed costs by the Divisional Court on account of the large reduction in the amount of the judgment made by that Court.

G. H. Watson, K.C., and *Grayson Smith*, for the defendants the Grand Valley Railway Company:—The company had no

power to construct the railway to St. George, as can be seen by a reference to the Company's Acts of incorporation; nor had Pattison authority to bind the company to any such agreement.

G. F. Shepley, K.C., and *J. Harley*, K.C., for the plaintiffs:—As to the railway company, as a corporation, being bound by the agreement, we submit that it is liable. The company cannot take our money and refuse to carry out the contract. The judgment is also right in holding the defendant Pattison personally liable. As to the damages, we contend that the plaintiffs should recover the amount which they paid for the bonds of the railway company: *Griffith* v. *Richard Clay & Sons Limited*, [1912] 2 Ch. 291.

Argument

December 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant Pattison from the order of a Divisional Court dated the 30th December, 1912, affirming with a variation the judgment dated the 7th June, 1912, which Middleton, J., directed to be entered, after the trial of the action before him, sitting without a jury, at Brantford, on the 26th May, 1912; and there is a cross-appeal by the respondents from the order of the Divisional Court in so far as it reduced the damages awarded by the trial Judge.

Meredith, C.J.O.

The reasons for judgment of the trial Judge are reported (1912), 5 D.L.R. 428, 26 O.L.R. 441; and those of the Divisional Court (1912), 10 D.L.R. 726, 27 O.L.R. 556; and the facts are there fully stated.

We see no reason for differing from the conclusions of the trial Judge and the Divisional Court as to the liability of the railway company and of the appellant for such damages as the respondents have sustained by reason of the breach of the agreement entered into between the railway company and Pattison and the respondents. There was ample evidence to shew that the railway company acted upon and obtained the benefit of the agreement and to establish that the obligations of the agreement were to rest upon the appellant personally, as well as upon the railway company. It is not necessary to consider the question raised by Mr. Smith on behalf of the railway company as to the authority of the company to construct a line from Blue Lake to St. George; for, even if it had not that authority at the time when the agreement was made, the agreement which it entered into is wide enough to include an obligation to obtain it.

It was argued by Mr. Holman that the document which was drawn up when the agreement was concluded was not signed by the appellant except in his capacity as president of the railway company. I am not satisfied that this contention is well-founded; but, even if it were, I agree with the view of the trial Judge and the Divisional Court that the appellant was bound by

ONT.
S. C.
1913
WOOD
v.
GRAND VALLEY R. CO.
Meredith, C.J.O.

the parol agreement which he had entered into as to the extension of the railway to St. George and the other matters dealt with in the written document.

It was also contended by Mr. Holman that the provision of the document as to making through traffic arrangements with the Canadian Pacific Railway Company was qualified and controlled by the subsequent provision as to the appellant doing all things lawful to secure these arrangements, and that the latter was all that he bound himself to do. I am unable to agree with that contention; there is nothing in the later provision inconsistent with the obligation being, as the language used in the earlier provision imports, an absolute one.

There is more difficulty as to the damages. The contention of the respondents throughout has been that they are entitled to recover what they paid for the bonds of the railway company which were purchased on the faith of the agreement. The trial Judge decided, and rightly so we think, that the respondents were not entitled to that relief, because it could not be said that the consideration had failed; and he assessed the damages at $10,000, being of opinion that the loss of the benefits which might reasonably be expected to have flowed from the performance of the agreement was at least that sum.

The Divisional Court took a different view of the matter, and came to the conclusion that only the two respondent companies had sustained damages beyond nominal damages, and that the sums paid by them for the bonds they purchased ($1,940 each) afforded "some approximation of the amount of damages sustained, as representing the amount practically lost by relying on the word of Pattison," and varied the judgment of the trial Judge by reducing the damages to $3,880 and "giving to the other plaintiffs the $10 paid into Court, as nominal damages."

I am, with great respect, of opinion that the mode of assessing the damages adopted by the Divisional Court was erroneous. It is practically giving to the respondent companies judgment for the recovery of the price they paid for the bonds—relief they were entitled to only if the consideration had wholly failed; and I agree with the view of the trial Judge that they were not entitled to that relief, for the reasons which he gives for so holding.

The method of assessing the damages adopted by the Divisional Court was also, I think, open to the objection that it is substantially the same as that which this Court held in *Village of Brighton* v. *Auston*, 19 A.R. 305, to be an improper one.

Nor am I able to agree with the contention of the counsel for the appellant that the respondents were not entitled to more than nominal damages.

That the motive which led the respondents to purchase the bonds was the desire to secure the extension of the railway to St. George and the traffic arrangements with the Canadian Pacific Railway Company for which the agreement provides, is not open to question, and that they anticipated that important benefits to them individually, and apart from those which they would share with the inhabitants of the locality, would follow if that should be accomplished, is also beyond question; and there was evidence upon which it was open to the trial Judge to find that there was a reasonable probability that these anticipations would have been realised, measurably at least, if the agreement had been performed.

There was, however, an entire absence of evidence to supply the data upon which the amount of the loss sustained by the breach of the agreement could be ascertained. There was nothing to shew the extent of the business carried on by the respondents at St. George or the amount of "freight" that was shipped to or from their manufactories, or the expense of teaming it to or from the stations of the existing railways which serve the district in which St. George is situate, nor was there any evidence as to the effect or probable effect in reducing freight rates and those expenses which would have resulted if the agreement had been implemented by the extension of the railway and the making of the traffic arrangements for which it provides.

In the absence of evidence of this character, any estimate of the loss sustained by the breach of the agreement is, I think, practically guess-work: *Williams* v. *Stephenson*, 33 S.C.R. 323.

There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at £100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that "where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their

ONT.

S. C. 1913

WOOD v. GRAND VALLEY R. CO.

Meredith, C.J.O.

best to estimate; it is not necessary that there should be an absolute measure of damages in each case:" per Fletcher Moulton, L.J., at p. 795.

Sapwell v. *Bass*, [1910] 2 K.B. 486, as explained by the same Lord Justice in *Chaplin* v. *Hicks*, [1911] 2 K.B. at p. 797, is not inconsistent with that case.

It will be observed that the plaintiff in *Chaplin* v. *Hicks* furnished all the data for estimating her damages that, in the circumstances of the case, it was possible for her to give; while in the case at bar the respondents failed to supply the data I have mentioned, and which it was in their power to furnish, and which, if furnished, would have assisted in arriving at a conclusion as to the loss they had sustained by the breach of the contract of which they complain. No doubt, even if such data had been furnished, the ascertainment of the amount of the loss would have been a difficult matter, but not so difficult as to warrant the conclusion that the damages were not susceptible of assessment.

It was said by Mr. Holman that the agreement makes no provision for the operation of the railway after it should be built; but, if that be the case, the only result is, that another difficulty will be added to those which exist in assessing the damages, as the tribunal which assesses them will have to take into consideration the probability that the railway would have been operated if it had been built.

Upon the whole, I am of opinion that the order of the Divisional Court should be discharged and the judgment of the trial Judge vacated, and that there should be substituted for them a judgment declaring that the respondents are entitled to recover from the appellant and the railway company the damages sustained by the respondents by reason of the breaches of the agreement in the pleadings mentioned, of which they complain, directing a reference to ascertain the amount of the damages, ordering the appellant and the railway company to pay to the respondents their costs up to and inclusive of the trial, and reserving further directions and the question of costs subsequent to the trial, except those of the appeals to the Divisional Court and to this Court, until after the report on the reference, and that there should be no other costs or any costs of any of the appeals to any of the parties; and the cross-appeal of the respondents in the main appeal should be dismissed without costs.

Judgment accordingly.

TOBIN v. HALIFAX (City).

N. S.

S. C. 1914

Nova Scotia Supreme Court, Graham, E.J., Meagher, Russell, and Ritchie, JJ. February 14, 1914.

1. NEW TRIAL (§ III—10)—JURY—NON-DIRECTION AS GROUND FOR.

The failure of the trial judge to direct the jury clearly as to the distinction between misfeasance and non-feasance will not serve as a ground for a new trial where the verdict given is entirely in accordance with the evidence, non-direction being a ground for a new trial only where it produces a verdict against the evidence.

[*Great Western R. Co.* v. *Braid*, 1 Moo. P.C.N.S. 101, 15 Eng. R. 640, referred to.]

2. HIGHWAYS (§ IV A 6—157)—IMPERFECT CONSTRUCTION OF SIDEWALK—MISFEASANCE.

To leave an unfinished gap in a cement sidewalk at the crossing of another sidewalk and to finish the grading at such gap with loose earth or ashes on a hillside where it would soon wash away and leave a dangerous hole is misfeasance for which the municipality is liable to a person injured by falling into the hole so made.

Statement

APPEAL by defendant from the verdict or findings of the jury given on the trial herein and the order of Longley, J., founded thereon. The action was brought by plaintiff against the city of Halifax claiming damages for injuries received while walking along one of the streets of the city in consequence of the unsafe condition of the sidewalk, which, it was alleged, had been negligently and insufficiently constructed by defendant, owing to which and to the street being insufficiently lighted plaintiff was tripped up and thrown down and suffered injuries including a fracture of the knee. On the trial before Longley, J., the jury found in favour of plaintiff that the injury complained of was caused by the negligence of defendant and that such negligence consisted in the work not being properly finished, and awarded plaintiff the sum of $2,000 damages. The Court was moved to set aside the verdict and findings and to enter judgment for defendant on the ground that there was no evidence on which the same could be supported, and as against evidence, and for misdirection and non-direction.

The appeal was dismissed, MEAGHER, J., dissenting.

F. H. Bell, K.C., for appellant.

H. Mellish, K.C., and *J. B. Kenny*, for respondent.

The judgment of the majority of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—The jury has found that the injury complained of was caused by the negligence of the defendant and that the negligence consisted in the work not being properly finished.

In May, 1911, the city of Halifax constructed a concrete sidewalk along the western side of Granville street, at the southern end of it, where it enters Salter street, and at right angles

N. S.

S. C. 1914

TOBIN v. HALIFAX CITY.

Graham, E.J.

to the latter. They substituted for the old brick sidewalk which had been there this concrete pavement. Its terminus was extended to the edge of the kerb of the Salter street sidewalk on its northern side. That was the mode in which the junction was formed. So that anyone walking up or down the asphalt sidewalk on Salter street would cross this end of the concrete sidewalk projecting from Granville street.

The concrete admitted of a better grade along Granville street than that of the former brickwork. Salter street is one of the steepest streets running up from the harbour and the grade of that sidewalk lengthwise was much steeper, of course, than the even surface from side to side of the Granville street sidewalk. So that had to be considered in making the junction. The grades were different. The city people were contented to cut down the asphalt sidewalk at the end for some two feet or more up the hill and that gap was covered up with earth or ashes and earth, and it was left in that condition. By and by the autumn rains came in due course and the steep sidewalk down Salter street with the buildings at its side formed a convenient bed for the collection of surface water naturally flowing down hill and naturally washing out this earth junction. I rely on the evidence given by the defendants. At page 19 Mr. Downey, the foreman of streets, says:—

How long could you reasonably expect that clay to stay there? A. It is hard to say. It is liable to be washed out in an hour. If it were in a level place with no rain it might last for a year.

And in cross-examination, he says:—

Q. This is a pretty steep street, one of the steepest in the city? A. Yes, I guess it is.

Q. The steeper the street the more likely the clay would be to wash out? A. Sure.

Q. In such a place it might wash out in an hour? A. Provided it rained.

Q. When you went to see it after the accident, there was some evidence that it had been washed out? A. Yes.

Q. You do not know when it was washed out? A. No.

Q. You have no idea? A. No.

Q. You repaired it? A. Yes.

Q. With ashes? A. Yes, we took some of the stuff that was washed out and got some more ashes. . . .

Q. What would it have cost to have replaced those two feet with concrete? A. We could not do it because it was not ordered. . . .

Q. It would have cost $6 to do it with concrete? A. Yes.

Q. And it would be cheaper in asphalt? A. I think it is cheaper.

No real excuse was given for not making the junction with concrete. Mr. Doane's statement as to filling the space with asphalt, that it was "like repairing an old rubber; you could

not unite the old and the new," does not meet the contention that even asphalt would have been much better than earth and ashes, and that for a temporary junction, until the Salter street sidewalk is itself in time replaced with a concrete sidewalk asphalt, although not good for a permanent job, was much better than what was used.

So, as I said, the rain came, a result that should have been anticipated, and Mr. Doane, the city engineer himself says, p. 18:—

Q. I suppose there is no doubt that the sidewalk as the lady described it would be dangerous? A. Yes.

And the lady says that walking up on that side in the evening she stepped over the kerb and into the hole and was tripped up and fell and her knee was seriously injured, the kneecap being fractured.

Unless I have mis-stated the facts I think the case does not require a reference to the cases. The distinction between misfeasance and non-feasance, between construction and disrepair or neglect to repair has become a familiar one. The jury had good sense when it said that the work was "not finished." If a builder or anyone in that line had left a piece of work for an owner in that condition he would, I think, have sent for him to return and finish the job. This in my opinion was a work of construction, putting down the Granville street sidewalk, and the want of a proper junction almost inevitably resulted in what happened. One would suppose that it never rained in Halifax the way some of the city witnesses speak. A juror's experience would be quite otherwise I am sure. The city had plenty of money to construct this pavement, and surely to construct the incidents of a proper junction with the surrounding work. In my opinion, there is no ground for disturbing the findings of the jury.

The learned counsel for the city referred to the summing up and although it was highly favourable to his client he complains that negligence was not properly put to the jury; that the word was used without any definition.

Now it is clear from the summing up that sometime during the trial, whether by counsel or by the Judge, there was a definition given and the learned Judge adopted it by reference. He says:—

It was stated in the definition what negligence was; the learned counsel said that this was negligently lowering the sidewalk, but, etc.

It is clear that the jury knew from this what they had to pass on. But suppose the matter was omitted. It is no time for silence on the part of counsel merely because he finds a Judge summing up favourably for his client if he is in fact omitting

N. S.
S. C.
1914
TOBIN
v.
HALIFAX CITY.

to mention some obvious and usual thing. It has been held that

non-direction is only a ground for granting a new trial where it produces a verdict against the evidence: *Great Western Railway Co.* v. *Braid*, 1 Moo. P.C. N.S. 101, 15 Eng. R. 640.

It cannot be said that this verdict is not entirely in accordance with the evidence.

Graham, E.J.

The subject of the damages given by the jury, $2,000, was mentioned. I agree with the jury. The infirmary bill and the doctors' bills approximate $380 or $400. The plaintiff was 93 days in the infirmary under the doctor's directions.

She had been carrying on a dressmaker's business and could not, up to the time of the trial, do the work necessary to obtain for her the same income. The doctor says, "She is limited at least half in her earning capacity."

Q. Is it a permanent injury? A. Yes, any injury to the joint is.

Q. Is it likely to be painful up to the present time where there is movement? A. Yes, distinctly so. Time will have a tendency to relieve that. . . .

Q. What do you say as to the probability of her ultimate total recovery; is it probable at her age (67) that she will ever absolutely recover the complete use of her leg? A. I would say it would be improbable.

She herself says:—

Q. You say that you suffered great pain? A. Yes. . . .

Q. Is you knee still troublesome? A. Yes, it is. I cannot walk half a block even with a stick.

Q. At the time the accident occurred you were doing a dressmaking business in the city? A. Yes.

Q. How long in consequence of the accident were you prevented from doing that work? A. For five months.

Q. In consequence of the accident have you been disabled from doing your work? A. Yes.

Q. You are not able to work as usual? A. No.

I think that the city received very favourable consideration in the summing-up as to this matter of damages and the jury have not felt at liberty to exaggerate in the slightest the materials which go to make up this plaintiff's claim. The application of the defendant should be dismissed and with costs.

Meagher, J. (dissenting)

MEAGHER, J., was of opinion that there had been a mistrial on account of the failure of the trial Judge to instruct the jury with respect to the distinction between misfeasance and non-feasance.

Russell, J.
Ritchie, J.

RUSSELL and RITCHIE, JJ., concurred with GRAHAM, E.J.

Appeal dismissed.

BAKER v. MacGREGOR.

B. C.

C. A.

1914

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. ALTERATION OF INSTRUMENTS (§ I—2)—CONTRACTS—MATERIALITY.

The alteration which will avoid a written contract when made without the privity of the obligee, must be as to a material point thereof, and the insertion in a broker's "bought note" of the name of the plaintiff claiming thereon as the principal for whom the other broker named had contracted with notice to the issuing broker of the name of such principal would not be held to be a material alteration even if there was not evidence of assent thereto by the obligee, where the insertion of the name made no attempted change in the plaintiff's rights.

[*Cooke* v. *Eshelby*, 12 A.C. 271; *Suffell* v. *Bank of England*, 51 L.J.Q.B. 401; *Pattinson* v. *Luckley*, L.R. 10 Ex. 330, referred to.]

Statement

APPEAL from judgment of Clement, J., in favour of the plaintiff in a stock-broking transaction.

The appeal was dismissed.

Whiteside, K.C., for the appellant (defendant).

Woodworth, for the respondent (plaintiff).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The evidence of the defendant Robertson appears to me to more clearly shew the nature of the transaction in question than that of defendant MacGregor. It shews that Robertson had had several transactions with MacGregor on Baker's behalf, and that on the day in question, April 29, MacGregor had in his hands $600 of Baker's money, and wanted Robertson to get Baker to re-invest it in stock futures and suggested that he, MacGregor, would sell to Robertson for Baker 4,000 shares of Steamboat Mountain stock at 20c. per share, and would give a bought note to Robertson as Baker's broker agreeing to re-purchase the shares at the end of sixty days at 25c. per share. Robertson says that he paid MacGregor $200, which, with the $600 already mentioned, made up the $800 for which the shares were purchased. It was really for the use of this sum of $800 that MacGregor was agreeing to pay in sixty days $200, that is to say, he was selling the shares to Robertson as Baker's broker for $800 and agreeing to buy them back at end of sixty days for $1,000.

MacGregor, in his examination for discovery, says that he dealt with Robertson as with other brokers. If the transaction was a brokerage one, pure and simple, and not a personal contract with Robertson, then it does not matter whether Baker's name was mentioned or not.

It appears that Robertson after receiving the bought note from MacGregor, altered it by inserting the words "for Thomas Baker," and it was contended that this alteration voided the transaction. If I am right in the conclusion that the trans-

B. C.
C. A.
1914
BAKER
v.
MAC-
GREGOR.

action was a brokerage one, the insertion of those words in the bought note did not in any way affect its terms. The fact is, if the plaintiff's and Robertson's stories to the effect that MacGregor bought the shares for Baker through Robertson are believed, that his (MacGregor's) liability in the matter has not been affected in the slightest degree by the insertion of the words. They were simply superfluous words. I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—In my opinion the learned trial Judge has reached the right conclusion in this matter and, therefore, the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the judgment of the learned trial Judge.

In *Cooke* v. *Eshelby* (1887), 12 A.C. 271, Lord Watson says, at 278:—

> It must be shewn that he (the agent) sold the goods as his own or in other words that the circumstances attending the sale were calculated to induce and did induce in the mind of the purchaser a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal, and it must also be shewn that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal.

Here the defendant says he was dealing with the agent as a broker. He had had several deals with him before, some as principal and some as agent. There is a conflict of evidence, the defendant swearing he thought he was dealing with Robertson as a principal and Robertson swearing that MacGregor knew that Baker was principal. Be that as it may, MacGregor made no inquiries to assure himself that he was dealing with Robertson as principal. Moreover, Baker did nothing by which Robertson was enabled to hold himself out as the principal, in fact he demurred, because the contract was not made out in his name until assured it was all right. I cannot distinguish this case from *Cooke* v. *Eshelby*, *supra*. The appeal should be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The action is one brought to recover the sum of $1,000 upon a bought note entered into by the appellant MacGregor, with his co-defendant Robertson, the latter, as alleged, being a broker acting for the plaintiff. Both MacGregor and Robertson were brokers and had large transactions together.

The appellant MacGregor bought of Robertson, as set forth in the bought note, 4,000 Steamboat Mountain Mining Corporation shares at 25c.—$1,000—the terms being 60 days, the date of the transaction being April 28, 19...., the year being left in blank, but upon the evidence it can be said to have been 1911.

It is contended that the words "for Thos. Baker, Esq.," were inserted in the bought note by Robertson unauthorizedly. However, Robertson swears that MacGregor was to have inserted these words at the time, and it was the agreement at the time, and that he did so carrying out the well-understood agreement, when he noticed the omission. Robertson also states that he advised MacGregor that he had done this, and presumptively it was assented to, and apparently the learned trial Judge was satisfied upon the evidence on this point, and as it was a matter eminently for decision by the learned trial Judge, I think this question may be dismissed from further consideration, remarking only that the material alteration of written documents after their delivery is most unwarrantable, and can only be supported when the surrounding circumstances admit of the Court finding that the alteration under the circumstances was right and proper, and made by one of the parties to the contract with authority express or implied. Here it may be remarked that the bought note without the added words would be equally enforceable, as I view the facts, and looking at the evidence of Robertson, which, apparently, was accepted by the learned trial Judge, Robertson asked MacGregor to insert "for Thomas Baker," and it being omitted, he did so, coupled with his (Robertson's) statement at p. 55 of the appeal book,

> he (MacGregor) asked me to get Mr. Baker to employ money in the four thousand Steamboat Mountain Mining Corporation shares and he (MacGregor) said he would give me a contract to get them back at 25c. a share.
>
> Q. And did MacGregor know whose money was to be thus employed? A. Yes.

So that it can well be said, in my opinion, that the alteration by Robertson was an alteration for which MacGregor was responsible, and at the worst, Baker being the undisclosed principal, the bought note is not avoided, but enforceable according to the original terms—which will make no difference in the way I view the facts of the case.

It might be further said that the alteration is not one that could be said to be a material alteration, one altering or attempting to alter the character of the writing itself.

The question of the materiality of an alteration was considered in *Suffell* v. *Bank of England* (1882), 51 L.J.Q.B. 401, where the alteration was that of a number upon a Bank of England note, and it was there held that it was a material alteration, and a *bonâ fide* holder for value was held not entitled to recover. Jessel, M.R., at p. 403, said:—

> First as to the general law upon the subject, which I take to be settled now beyond dispute, it may be safer to cite the very words of the authorities which have settled the law. The leading case on the sub-

B. C.
C. A.
1914
BAKER v. MACGREGOR.
McPhillips, J.A.

ject, which, from the time of James I. when it was pronounced, has been so treated, is *Pigot's* case, 11 Rep. 26*b*., and whatever may be said of the third resolution in that case, no doubt or question has ever been raised as to the validity and application of the second resolution, which I will now read. "Secondly, it was resolved that when any deed is altered in a point material, by the plaintiff himself or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void."

So that the alteration must be in a point material, and the erasure of a single word which is material destroys the instrument.

The Master of the Rolls goes on to cite the cases establishing that the rule is not confined to deeds, but applies to bills of exchange, bought and sold notes, concluding with these words, at 404:—

The result is that the law, as settled by those cases, applied to all instruments in writing; and there was no distinction for this purpose between an instrument under seal, which is called a deed, and an instrument without a seal which is not a deed.

It is to be noted though that, at p. 407, the Master of the Rolls carefully guards the decision come to; he there refers to the judgment of Lord Coleridge, which in that case was under appeal, and quotes this language of Lord Coleridge:—

It has always been held that the alteration which vitiates an instrument must be a material alteration, that is, must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of (7 Q.B.D. 271).

Then *Sanderson* v. *Symonds*, 1 B. & B. 426; and *Aldous* v. *Cornwell*, 9 B. & S. 607, 37 L.J.Q.B. 201, L.R. 3 Q.B. 573, are cited as clear authorities to shew that an immaterial alteration will not do. I am by no means satisfied at present that that statement is incorrect as regards an ordinary mercantile contract which contains nothing but a contract. It is difficult to see how an alteration could be material if it did not affect the contract, but there may be such cases, and I expressly reserve myself the right of saying, if that case should ever occur, that it has not been decided by the authorities referred to.

In Smith's Mercantile Law (1905), 11th ed., vol. 1, at p. 313, we have this statement of the law founded upon *Master* v. *Miller* (1793), 4 Term Reports 320:—

A bill is avoided by alteration, if it be materially altered without the assent of all parties liable thereon except as against a party who has himself made, authorized or assented to the alteration, and subsequent endorsers.

Then, at p. 677 in Smith's Mercantile Law, the same volume, we have this stated:—

But a mistake in both notes as to the seller's name was considered not

to vitiate the contract if it were not shewn that any one was prejudiced thereby.

This statement is supported by a footnote (*n*) reading as follows:—

Mitchell v. *Lapage* (1816), Holt 253. One of the grounds of the ruling of Gibbs, L.J., was that the buyer had assented to the substitution of the firm named in the notes as sellers, and this is the ground on which it can best be supported. See the notes to this case in the revised Reports, vol. 17, p. 635.

I have not overlooked *Powell* v. *Divett* (1812), 15 East 29, 32, 104 Eng. R. 755, where it was held that:—

A material alteration in a sale note by the broker after the bargain made at the instance of the seller without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him; there being no other evidence in writing of the contract to satisfy the Statute of Frauds.

Upon the facts of the case before us it seems to me there was ample evidence upon which the learned trial Judge could hold, and this Court likewise can hold, that MacGregor assented to the alteration, in fact it was the contract, and in effect is no material alteration.

In *Pattinson* v. *Luckley* (1875), L.R. 10 Ex. 330, we have the case of an altered contract—and where the Court took the view that it was a material alteration, having relation to orders for extras—a new trial was directed, but Bramwell, B., at 44 L.J.Ex. 183, said:—

What he is really bound to do is to shew the actual contract, and that being so, I doubt very much indeed whether the document was, under the circumstances, so spoiled as not to be the governing instrument. For a variety of instances may be put. Suppose, instead of the *quantum meruit* being for the advantage of the defendant it were to his detriment. Our only alternative is to say that he has no option to rely on the document or *quantum meruit* at his pleasure. No doubt there are cases where a man may so conduct himself as to give an option, take for example the case in the Court of Exchequer Chamber where a quantity of cargo was put on board a vessel, and it was a short cargo but the consignee was entitled to a full one. The person for whose benefit it was shipped may say, "I will or will not take it and you shall not be allowed to say the contrary, because you have broken the agreement." But I doubt whether a man can say, "This or that is the contract according to my pleasure." There is another difficulty. Suppose the action were on a deed, and the deed was mutilated so as to be no longer binding under certain circumstances, does the plaintiff lose the benefit which he would have from the fact of the contract being by deed so that the debt could be barred by the Statute of Limitations in six years only? And, if the seals were cut off a deed which had previously passed an estate, no doubt the estate is not lost. It seems to me the terms of the contract must be ascertained,

B. C.

C. A.
1914

BAKER
v.
MAC-
GREGOR.

McPhillips, J.A.

I think the case of the *Earl of Falmouth* v. *Roberts*, 11 L.J.Ex. 180, and the observations of Parke, B., thereon, are of great value as shewing us what ought to be the right conclusion here, namely, what was the bargain; and if the instrument has ceased to have an intrinsic operation, we must look at it to see the terms.

It would seem that at the trial the question was raised as to whether the action was brought upon the bought note which contains the alteration, and what took place is to be found at p. 59 of the appeal book, and reads as follows:—

Mr. Whiteside:—I submit, my learned friend has not made out his case. In the first place he is relying upon a contract which has been materially altered.

THE COURT:—No, you see he is not suing on that document, but for money he says he loaned these two gentlemen instead of one.

Mr. Whiteside:—His pleadings shew that is what he is relying on and that is what the evidence certainly shews.

THE COURT:—It is only the evidence of the transaction.

Mr. Whiteside:—That is the agreement on which he is suing. He goes down and demands payment of this $1,000.

THE COURT:—On the wording of that document, it is in the nature of an admission.

The statement of claim being turned to, it is seen that the action is formulated on an advance made by the respondent Baker to the appellant MacGregor, and that the bought note was only one element of the transaction, and a portion of the terms of the contract.

Therefore, the learned trial Judge, upon the authority of *Pattinson* v. *Luckley* (1875), L.R. 10 Ex. 330, was well entitled to rule as he did.

Were it that the alteration is a material one, and was not assented to by the party to be charged (MacGregor) it is seen that the bought note can be looked at to see what the contract was, and its terms.

It is a matter for remark that a most extraordinary bonus was paid for the advance made of $800, namely, $200 for the loan of $800, for sixty days. However, this was not dealt with by counsel upon the argument, and I assume needs no further reference being made to it other than it indicates the recklessness of the brokerage business as carried on in stock of absolutely no value, as matters seem to have turned out.

Now, with regard to the facts adduced at the trial, there is evidence establishing the fact that MacGregor well knew that the money he received was the money of Baker, and also that Baker was making the advance to him.

It was attempted at the trial, and is argued here, that MacGregor dealt with Robertson, his co-defendant, in this action, as principal in the transaction, and that the equities existing be-

tween them must be recognized, that is, set-off of accounts, and that no sum is due or owing by MacGregor, therefore the action should stand dismissed.

In my opinion, any such contention is upon the evidence absolutely untenable, as MacGregor stated that he dealt with Robertson as a broker, and that they mutually dealt with each other in a large way; it is true that in other portions of his evidence he attempts to say that Robertson in the transaction we have before us dealt as principal, but we have as against this the express finding of the learned trial Judge that he dealt with him as a broker. The learned trial Judge's reasons for judgment being as follows:—

> I am unable to find that the defendant MacGregor knew on the 28th day of April, 1911, that Robertson was agent for the plaintiff in taking the defendant's bought note, but he dealt with him as a broker, and I can see nothing in the plaintiff's conduct to induce a belief on the defendant's part that Robertson was selling as principal. *Cook* v. *Eshelby* (1887), 12 A.C. 271, therefore applies, and the plaintiff is entitled to judgment for $1,000 with interest at 5 per cent. from June 27, 1911, with costs. None of the costs occasioned by making Robertson a defendant should be taxed against the defendant MacGregor. The shares, the subject-matter of the deal are said to be worthless, but the defendant MacGregor is entitled to them.

To enable the appellant MacGregor to succeed upon this appeal, it is necessary to establish to the satisfaction of this Court, and against the finding of the learned trial Judge, that upon the evidence the respondent Baker allowed Robertson to appear as principal in the transaction. Were that established it would admit of MacGregor being entitled to meet the action by the set-off of the debt due to him by Robertson, that is, if the debt was incurred before MacGregor knew of the true relationship, that is, that Robertson was acting for Baker.

When it is apparent that it was an advance of money—a loan—to contend that the money was advanced by Robertson to MacGregor is an idle contention upon the facts, as, admittedly Robertson was not in funds; and even upon the other phase of things it is apparent that MacGregor and Robertson were dealing with each other as brokers—which in its very statement imports principals into the transaction.

The most destructive point of evidence against MacGregor's contention is this—that he received the $800 which with the agreed-upon bonus of $200 makes up the $1,000 sued for, by taking to himself $600, the money of Baker then in his hands, and $200 which Robertson handed to him, and with the knowledge of Robertson's financial position, can it for a moment be contended that MacGregor dealt with Robertson as being the principal in the transaction? What warrant would there be to

B. C.
C. A.
1914

so appropriate $600 of Baker's money? The conclusion is an irresistible one, that MacGregor well knew that Baker was the principal, not Robertson.

It follows that the appeal, in my opinion, should be dismissed, and the judgment of the learned trial Judge affirmed.

Appeal dismissed.

MAN.
K. B.
1914

REX v. HAGEL and WESTLAKE.

Manitoba King's Bench, Curran, J. March 9, 1914.

1. WITNESSES (§ II B—43)—CROSS-EXAMINATION IN CRIMINAL CASES—DIRECTION OF COURT TO CALL ALLEGED ASSOCIATE IN THE OFFENCE.

Where, on charges of assisting a prisoner to escape and of conspiring with the prisoner for that purpose, the indictment is laid without calling before the grand jury the prisoner, who had been re-captured, the trial judge is not bound to give a direction asked by the accused that the prisoner be called as a witness for general cross-examination without making such witness a witness for the accused, nor a direction that the Crown make the prisoner its witness, if the Crown is prepared to permit counsel for the accused to interview such prisoner as to the evidence he can give and offers to facilitate his being called as a witness for the defence if desired.

[*R.* v. *Holden*, 8 C. & P. 606; *R.* v. *Stroner*, 1 C. & K. 650, distinguished.]

Statement

CRIMINAL trial at the assizes.

One John Krafchenko was committed for trial by the police magistrate at Winnipeg on a charge of murder. That evening he escaped from the police station. The accused, Percy Hagel and John Westlake, were indicted at the following assizes on two charges: one for conspiring with Krafchenko and others to assist the said Krafchenko in escaping, and one for assisting Krafchenko to escape.

Counsel for the accused raised the question that Krafchenko who was in custody awaiting trial, was an important witness but his name was not placed by the Crown on the back of the indictment and he asked that the Court order that the Crown be directed to call Krafchenko as a witness, or, in the alternative, that the Judge call him and examine him as a witness neither for the Crown nor the defence, but in the interests of justice.

R. A. Bonnar, K.C., and *H. D. Cutler*, for the accused.
E. Anderson, K.C., and *R. B. Graham*, for the Crown.

Curran, J.

CURRAN, J.:—Counsel for the accused ask for an order from me as the trial Judge at this assize, directing that one John Krafchenko, named in the indictment as one of the confederates of the accused in the alleged conspiracy, be called by the Court as a witness indifferent to either prosecution or defence in the

furtherance of justice. It is contended that as this party is alleged to be one of the conspirators, though not indicted or charged as an offender, he must be in possession of some knowledge of the offence and that in the interests of justice he ought to be called by the Court to enable the accused to derive any benefit possible from his cross-examination by their counsel. The Crown refuse to call him and his name is not among the Crown witnesses endorsed upon the indictment, nor was he examined by the Grand Jury.

The following authorities have been cited by counsel for the accused in support of the motion: *Regina* v. *Holden*, 8 C. & P. 606; *Regina* v. *Stroner*, 1 Car. & Kir. 650; Roscoe, Crim. Ev., 13th ed., 115. These cases do not, I take it, establish any general principle applicable to all criminal cases. The first was a case of trial for murder. The prisoner and deceased and their families lived in the same house and on a certain night there was a dispute between them and blows passed in the presence of the wife of the deceased and her daughter. The daughter was not called by the prosecution nor was her name on the back of the indictment, though she was present in Court, having been brought by the defence. Counsel for the prosecution stated to the Court that he did not intend to call her. The learned trial Judge, Patterson, J., said:—

> She ought to be called. She was present at the transaction. Every witness who was present at a transaction *of this sort* ought to be called even if they give different accounts; it is fit that the jury should hear their evidence so as to draw their own conclusions as to the real truth of the matter.

The daughter of the deceased was examined. It further appeared that a post mortem examination of the body of the deceased had been made, at which three surgeons, Briant, Mayer and Henderson, attended or took part. Briant and Mayer were called by the prosecution but not Henderson. It further appeared that some difference of opinion existed amongst these surgeons as to the cause of death. Henderson's name was not on the indictment as a Crown witness, but he was present in Court. The learned trial Judge said:—

> As he is in Court I shall insist on his being examined. He is a material witness who is not called on the part of the prosecution, and as he is in Court I shall call him for the furtherance of justice.

Henderson was then called and examined by the learned Judge himself.

The other case was one of rape, tried before Lord Chief Baron Pollock, at the Shrewsbury assizes. The prosecutrix swore that almost immediately after the commission of the offence she complained of it to her employer's wife, a Mrs.

MAN.
K. B.
1914
REX
v.
HAGEL
AND
WESTLAKE.
Curran, J.

Smith, and shewed Mrs. Smith some blood in the cowhouse where the offence was alleged to have taken place and that Mrs. Smith said 'Pooh.'' She further stated that on the day following the offence her clothes were washed by a washerwoman named Chetwood and that these clothes had blood upon them. Neither Mrs. Smith nor the washerwoman had been bound over to give evidence and their names were not upon the back of the indictment. Both parties were in attendance at the trial as witnesses for the defence. The learned Judge, upon being apprised of this said:—

> They must be both called as witnesses *for the prosecution*, but I shall allow the counsel for the prosecution every latitude in examining them.

Roscoe, Crim. Evid., 13th ed., at p. 115, says:—

> A Judge has power to call and examine a witness who has not been called by either of the parties and if he does so neither party can cross-examine without the Judge's leave. Such leave ought, however, to be granted if the evidence given is adverse to either party but the cross-examination should be confined to the answers given and a general cross-examination should not be permitted.

This latter relief is not, however, what the counsel for the accused wishes. He wants the person named called and put in the box for general cross-examination without in any way making such person his own witness. It is not, as I understand the object of the motion, that the trial Judge should call the witness and examine him himself and limit cross-examination to matters arising out of the answers so given. The question then is, are the two cases cited any authority for the order sought? I do not think they are, at all events, sufficient authority to warrant my departing from the usual practice. The Crown has offered to permit counsel for the defence free access to the proposed witness who is now confined in the Provincial Gaol at Winnipeg upon a commitment for the crime of murder, and awaiting his trial at the Morden assizes, which will be held on the 10th instant. I suggested this course to the accused's counsel as he had previously alleged as a reason for making the motion that he was denied access to this man and did not know and had no means of knowing what evidence he would give if called, and he therefore did not feel justified in calling and making this man a witness for the defence. To obviate this difficulty counsel for the Crown made the offer I have just referred to, upon which counsel for the accused said he did not, for personal reasons, wish to go near the party or have anything to say to him, but insisted that the Court ought to call Krafchenko and have him put in the witness-box for full cross-examination by the defence.

Now, I think the circumstances here are very different from

those which existed in the cases cited. Here the proposed witness is implicated directly in the offence charged against the accused and though not indicted with them might have been. The witnesses referred to in the cases cited were in no way connected with the offences charged. In the one case the daughter and her mother were the only spectators of the crime, and as such manifestly both ought to have been called by the Crown. All of the medical men who assisted at the post mortem though differing in opinion as to the cause of death should, in fairness to the accused, also have been called by the Crown. In the other case it is apparent that the Crown officers did not wish to call the woman Smith fearing, if the fact was not actually known to them, that she would deny the complaint and so weaken their case, which actually happened, resulting in an acquittal. Neither Mrs. Smith nor the washerwoman were in the remotest degree implicated in the offence charged. They were both perfectly indifferent witnesses who, under the circumstances of that case, ought to have corroborated the testimony of the prosecutrix in a very important matter, that of her prompt complaint of the outrage and condition of her clothing if the story told by the prosecutrix was true. In such a case ought not the Crown, in justice to the accused, and to the end that the truth might be elicited, have called these parties. I think so, but can these cases be held to establish generally in all criminal cases the right of an accused person to invoke the special intervention of the Court on the general ground of the furtherance of justice when the ordinary means of conducting his defence are fully open to him. I do not think so.

I have no means of knowing what evidence Krafchenko can or will give. He may deny all knowledge of the alleged conspiracy or may freely admit it and implicate the accused. The Crown is the best judge of how it will prove its case. The trial Judge has no right to interfere with this judgment, and I certainly would have no right to direct the Crown in such a case as this to make Krafchenko their witness. Apparently the Crown thinks it can establish its case without Krafchenko's evidence or it would call him. If the defence wants him as a witness he is freely available to them. Had the Crown not made the offer of access, I would have felt differently about the matter and there would then have been reasonable ground for the request.

As it is, Mr. Anderson, representing the Crown, has offered to detain Krafchenko here long enough to permit the accused's counsel to interview him, and if desired, call him as a witness for the defence at the opening of the trial to-day or within such reasonable time, having regard to the trial of Krafchenko at Morden, as can be allowed. This arrangement seems to me to be

MAN.

K. B.
1914

REX
v.
HAGEL
AND
WESTLAKE.

Curran, J.

eminently fair and one which fully meets the demands of justice to the accused. There is no reason, in my judgment, for departing in this case from the usual order of procedure in criminal cases, and I therefore deny the motion.

I do this upon the assumption that the offer made by the Crown still holds good and is fully implemented to the end that the accused's counsel may have ample opportunity of interviewing John Krafchenko and ascertaining what evidence, if any, he can give upon this trial, and so determining, as is their undoubted right, whether or not to call him as a witness on their behalf. If this is not permitted then the order asked for may be made upon further application.

Ruling accordingly.

B. C.

S. C.
1914

CLARK v. SWAN.

British Columbia Supreme Court, Macdonald, J. March 19, 1914.

1. CONTRACTS (§ III A—201)—ILLEGAL BY EXPRESS PROVISION—VIOLATIONS OF STATUTE—PUBLIC POLICY.

No right of action can spring out of an illegal contract; an agency contract constituting an essential part of a scheme to evade the British Columbia Land Act, R.S.B.C. 1911, ch. 129, and therefore illegal as contrary to public policy, is not enforceable.

[*Brownlee* v. *McIntosh*, 15 D.L.R. 871, 48 Can. S.C.R. 588, followed; *N.W. Salt Co.* v. *Electrolythic Alkali Co.* (1912), 107 L.T. 439, referred to.]

Statement

ACTION in damages for alleged misrepresentations and for the return of money paid upon a land contract.

The action was dismissed, but without costs.

J. R. Green, for plaintiff.

A. D. Macfarlane, for defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff seeks to recover damages from the defendant for misrepresentations made to him by the defendant with respect to a parcel of land, comprising approximately 12,800 acres, situate in the Naas Valley, British Columbia.

In the month of September, 1910, defendant represented to the plaintiff that such lands were good bottom lands that would only cost $20 to $30 per acre to clear, and were first-class agricultural and fruit lands. The defendant also furnished a written report to the plaintiff in addition to making such verbal representations as to the character and quality of the land. It appears that the plaintiff, being desirous of obtaining a large quantity of land in the Naas Valley, arranged with H. N. Boss to state such land under the Land Act for purchase from the Provincial Government. Boss in turn employed the defendant and accompanied him into the district, and, acting under instructions from plaintiff, supplied defendant with the names of persons who would be used, as ostensibly desirous of purchasing such land. Boss also arranged for one Dybhaven to assist in the staking and paid him

directly for his services. The defendant was to receive 25c per acre for each acre of land so staked and reported upon.

After the staking had taken place, defendant returned to Prince Rupert and thence to Victoria, with a letter of introduction to the plaintiff. He gave him the report, and at the same time made the statements which I find grossly misrepresented the character of the land. It was intended that the land should be obtained for agriculture and sold to intending purchasers for that purpose. Defendant was well aware of the object of the proposed purchase from the Government, and on the strength of the report and representations plaintiff paid the defendant at the time $500, and subsequently a further sum of $100. As a further result of such favourable representations, plaintiff paid provincial Government $6,400 on account of purchase, and expended in advertising in the *Gazette* $260, and later on, having negotiated for a sale, felt justified in proceeding with the survey of the property at a cost of $6,400. I accept his statements that all these payments were made on the strength of the report and representations made by the defendant. Defendant, except for the question of the illegality of the transaction, would be liable to the plaintiff for these amounts.

It appears that a sale of the property was made to Mr. Cronyn, of London, Ontario, and he paid on account of the purchase $50,000, but on making a personal inspection of the land, rescinded the transaction and obtained repayment of a large portion of the money and security for the balance. It might be that the defendant would also be liable for the loss of profit which thus ensued to the plaintiff, but this claim was not pressed at the trial by the plaintiff.

Defendant, however, seeks to escape liability on the ground that the whole transaction, in which the parties were engaged, was contrary to public policy, as being an evasion of the Land Act, and thus illegal. It is quite apparent that the persons whose names were used by the defendant in staking the land were not really intending purchasers from the Government; they were simply utilized for the purpose of enabling the plaintiff to secure a number of sections of land contrary to the provisions of the Act, which provides that only one section can be purchased at one time. This practice of using names for staking has been too prevalent in the province, and was recently considered by the Supreme Court of Canada in *Brownlee* v. *McIntosh*, 15 D.L.R. 871, 48 Can. S.C.R. 588, 26 W.L.R. 906. The facts are similar to those disclosed in this action, and Duff, J., in referring to them, says:—

> It is perfectly obvious that the scheme entered upon and successfully carried out by McIntosh and Garnham through the agency of the plaintiff was a fraud upon the Land Act.

He then refers to the sections of the Act dealing with the right to purchase, and points out the restrictions upon purchase, of even an additional section of land, without having complied with the

B. C.
S. C.
1914
CLARK
v.
SWAN.
Macdonald, J.

conditions as to improvements. He refers to the scheme being one to obtain the lands in violation of the provisions of the statute although in professed compliance with it, and then sell the lands to bona fide purchasers. I quote his judgment as follows:—

> Any agreement entered into for the purpose of carrying out or facilitating the carrying out of this fraud upon the Land Act would be an agreement which it would be the duty of the Courts to refuse to enforce as soon as the character of it should become apparent. The contract set up by the plaintiff under which he agreed to assist in the sale of the lands is necessarily tainted by the character of the scheme as a whole. It follows that the action ought to be dismissed. For these reasons I concur in dismissing the appeal with costs.

When it became apparent at the trial that the lands in question had been staked in the manner indicated, I considered whether I should not apply this decision immediately. The statement of claim, however, was framed in such a way as not to disclose any illegality, and the plaintiff's counsel developed his evidence in the same manner, so it was only as a matter of defence that the nature of the transaction became evident.

I was impressed by the fact that the parties, engaged in staking in this manner, were simply following in the train of numerous instances of a like nature, and that it was advisable to have all the evidence available before the Court. Had I not entertained this view, I would have followed the cases referred to in *N.W. Salt Co.* v. *Electrolythic Alkali Co.* (1912), 107 L.T. 439 at 440, and dismissed the action.

It was contended that the decision in *Brownlee* v. *McIntosh* was not applicable to the present facts, and that the misrepresentations which brought about the loss to the plaintiff existed as a separate cause of action. I cannot disassociate this cause of action from the subject matter, out of which it arose. Carried to a logical conclusion, it would mean that the plaintiff might not be able to succeed in an action involving the title or ownership of the property so illegally acquired, but might recover in an action for misrepresentation, as to the character of such property. This would be inconsistent, and in my opinion this position taken by the plaintiff is not tenable. The misrepresentations having been made in the manner and under the circumstances indicated, plaintiff cannot recover. "No right of action can spring out of an illegal contract." See Broom's Legal Maxims, p. 570, and cases there cited.

It was contended that in any event the plaintiff was entitled to recover the $600 paid to the defendant. Having found that the nature of the transaction was illegal, the Court will not assist in the recovery back of moneys under such circumstances.

As to the question of costs, I think the defendant, on the facts disclosed, is not entitled to his costs. The action is dismissed without costs.

Action dismissed.

INDEX OF SUBJECT MATTER, VOL. XVI., PART 3

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XVI., PART 3.

EDBORG v. ROYAL BANK.

B. C.

S. C. 1914

British Columbia Supreme Court, Macdonald, J. March 18, 1914.

1. LIENS (§ II—7)—EMPLOYEE'S LIEN ON ASSETS OF EMPLOYER IN PRIORITY TO BANK'S STATUTORY SECURITY.

The statutory charge in favour of employees to the extent of three months' wages owing to them by the wholesaler or other person giving a statutory security to a bank under sec. 88 of the Bank Act (Can.), 1913, may be enforced by direct action by the employees against the bank, if the latter has taken possession of or disposed of the property covered by the security.

2. ESTOPPEL (§ II C—35)—BY RECORD—JUDGMENT AGAINST ONE OF TWO DEBTORS.

A default judgment irregularly signed against the employer in an action for wages brought against the employer and also against the bank which had taken possession of and sold the effects of the employer under the latter's statutory security given the bank under sec. 88 of the Bank Act (Can.), 1913, will not bar the plaintiff from proceeding with the action against the bank, where the irregular judgment was abandoned by plaintiff at the trial of the claim against the bank, and leave would if necessary be given to have the judgment formally vacated, but, *semble*, both remedies might be pursued concurrently and no abandonment would be necessary to save recourse against the bank had the judgment been regular.

[*Wake* v. *C. P. Lumber Co.*, 8 B.C.R. 358, distinguished; *Hammond* v. *Schofield*, [1891] 1 Q.B. 453, applied.]

3. BANKS (§ VIII C1—192)—STATUTORY SECURITY—PRIORITY FOR WAGES—BANK ACT (CAN.), 1913.

As against a bank taking possession under a statutory security given to it by a wholesaler or other person under sec. 88 of the Bank Act (Can.), 1913, the employees of the company may enforce their prior lien to the extent of three months' wages either by resort to the assets or by a claim in debt against the bank which has disposed of the same, the intent of sec. 88 being that the bank obtaining the benefits of the security must also assume its burdens.

[*Richardson* v. *Willis*, 42 L.J. Ex. 68, applied; *Pomerleau* v. *Thompson*, 16 D.L.R. 142, referred to.]

Statement

TRIAL as against the bank of an action brought by employees of the Imperial Timber and Trading Co., Limited, against that company and the Royal Bank of Canada, which had taken a statutory security on the company's assets under sec. 88 of the Bank Act (Can.), 1913, and had realized thereon without satisfying the wages claims which by that section are made "a charge upon the property covered by the said security in priority to the claim of the bank thereunder."

The section further provides that such wages, etc., "shall be paid by the bank if the bank takes possession or in any way disposes of the said security or of the products, goods, wares and merchandise, stock or products thereof, or grain, covered thereby."

Judgment was given for the plaintiffs against the bank.

S. S. Taylor, K.C., and *Jamieson*, for the plaintiff.

Sir C. H. Tupper, K.C., and *Head*, for defendant bank.

B. C.

S. C.
1914

EDBORG
v.
ROYAL
BANK.

Macdonald, J.

MACDONALD, J.:—In this action the plaintiffs seek to recover from the defendant bank under sub-sec. 7 of sec. 88 of the Bank Act. This sub-section as amended in 1913 reads as follows:—

> The bank shall, by virtue of such security, acquire the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby as if it had acquired the same by virtue of a warehouse receipt; provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale purchaser, shipper or dealer, by any wholesale manufacturer, or by any farmer in connection with any of the several wholesale businesses referred to, or in connection with the farm, owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession, or in any way disposes of the said security or of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby.

The intention of this change was that the salary and wages of employees should, to a limited extent, be protected, in the event of the bank taking a security under sec. 88 of the Act and attempting to realize thereunder. Heretofore, employees were in danger of losing their claims, and the amendment being remedial, such a liberal construction should be applied as will best ensure the attainment of the object of the Act. The legislation was following the trend of other enactments, creating a like preference in favour of wage earners. It was doubtless deemed especially necessary, where a security is thus taken by a bank, as the employees might have no knowledge of its existence, and a major portion of them might even be in total ignorance of the financial position of their employers. They might by their services be improving the value of the property covered by the security, and then find, if steps were taken to realize under the security, that their claims were completely lost.

Even if the usual meaning of the language of the amendment falls short of the purpose intended, I think a more extended meaning should be applied, if fairly susceptible. I question if this be necessary, and consider the amendment applicable to the facts disclosed in this action, both on the ground of the bank having taken possession and also having disposed of property covered by its security under sec. 88. I think the statute in addition to giving a lien also creates a debt which may be recovered by action.

> Wherever a statute gives a right to a sum of money, and provides no other means of enforcing it, an action lies.

Per Kelly, C.B., in *Richardson* v. *Willis* (1873), 42 L.J.Ex. 68. Mertin, B., in the same case, referred to *Comyns Dig.* tit. Debt, A 9:—

> Debt lies upon any statute which gives an advantage to another for the recovery of it.

Subject to the consideration of a further matter affecting the liability, I find the defendant bank liable to the several plaintiffs for the amounts due them up to the time of taking possession. As to the plaintiffs employed by the month, this would apply to the end of December, 1913, and to those hired by the day, up to December 24, 1913.

The situation, however, as to liability, became complicated by the form of the action and subsequent proceedings.

Plaintiffs claimed from the defendant Timber & Trading Company at common law, and sought also to recover in debt from the defendant bank under the statute. Both these claims were included in the same writ of summons, and the defendant Timber and Trading Company not having entered any appearance, final judgment by default was entered against such company, and the action proceeded as against the defendant bank. At the trial counsel for the defendant bank contended that through this default judgment having been signed an election had taken place, and that the plaintiffs were debarred from enforcing any statutory claim they might have against the bank.

Counsel for the plaintiffs, while not admitting that the judgment had been properly entered, applied *ex parte* in open Court, and obtained an order vacating the judgment, and subsequently counsel formally abandoned any claim against the Timber and Trading Company, and sought to recover solely from the defendant bank.

If the default judgment had not been entered, and both defendants were regularly before the Court at the trial, I think I could properly have applied the provisions of o. 16, r. 11 (marginal No. 133) providing that no cause should be defeated by misjoinder.

The question is whether the judgment having been entered on January 14, 1914, and remaining of record until the trial, operated as an effectual defence to the defendant bank. As apparently all the tangible assets of the Timber and Trading Company had been taken possession of by the bank, no material object was gained by the entering of the judgment, nor does it appear that any execution was issued thereunder. It was an unnecessary step to take, and was not likely to confer any present or future benefit upon the plaintiffs.

Unless the defendant bank obtained a vested right by the signing of the default judgment, I think the plaintiffs should not be injured, by what I consider was a mistake. In *Kendrick* v. *Barkey* (1907), 9 O.W.R. 356 at 361, Riddell, J., says:—

> Courts were not made and are not sustained by the people for the sake of counsel, but counsel exist for the assistance of the Courts in determining the rights of the people. I do not therefore hold plaintiff to her election, if such it can be called.

If the signing of the judgment even for the moment operated as

B. C.
S. C.
1914
EDBORG
v.
ROYAL
BANK.
Macdonald, J.

an election by the plaintiff as between the two defendants, then was it such a binding act that it could not be remedied, even though the other defendant was unable to shew that it had in the meantime been prejudiced by the course pursued?

Plaintiffs contended that the judgment was so irregularly signed that it was not simply voidable, but void. The grounds in support of this contention are that the writ was not specially endorsed, nor was it for a liquidated demand, and it would appear that both these statements are correct, and the judgment was thus irregularly signed.

The plaintiffs could have moved to set aside the judgment so irregularly entered: see Chitty's Archbold's Q.B. Prac., 14th ed., p. 265.

In *Doe & Gretton* v. *Roe* (1847), 4 C.B. 576, Maule, J., said:—

> I do not see why you should not have leave to set aside your own judgment without assigning any reason for it.

Still, in order to set aside the judgment, an application should have been made on notice pursuant to the rules, and I do not think that the order made at the trial was sufficient to formally vacate the judgment and the record.

Assuming that the judgment was irregularly signed and was not properly set aside, did it nevertheless operate as a conclusive election and a bar to the plaintiffs' right to recover? Were the plaintiffs in a worse position than if they had proceeded to trial in the ordinary course against both defendants?

If the judgment had been regularly signed and operated as a conclusive election, it created a vested right in the defendant bank. The judgment could not even by consent be set aside to the prejudice of such defendant: see "*The Bellecairn*" (1885), 10 P.D. 161.

I considered, however, that judgment was irregularly and improperly obtained, and that the defendant bank was in the same position at the trial as if the judgment had not been entered.

In *Hammond* v. *Schofield*, [1891] 1 Q.B. 453, Wills, J., at p. 455, said:—

> If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed.

No defence was delivered, nor objection taken by the defendant bank, based on this default judgment until the commencement of the trial. If a formal and proper setting aside of this judgment be necessary, then I think the plaintiffs should, as to the defendant bank, be in the same position as if they had been afforded an opportunity before the trial of moving for that purpose. If this course had been pursued, it would no doubt have been successful. If the plaintiffs sought to recover in the alternative, this would doubtless have been the correct procedure, as there

cannot be two judgments for the same debt, except where there is a separate liability: *Morell* v. *Westmoreland*, [1904] A.C. 11.

It was contended on the part of the plaintiffs that the defendant bank could not without a plea to that effect set up as a defence at the trial that the judgment operated as an election. I think such defence, even though ineffectual, was open to the defendant bank to be raised at the trial without being specially pleaded. The case of *McLeod* v. *Power*, [1898] 2 Ch. 295, is decisive on this point. The facts there disclosed that a judgment had been signed against one joint debtor, and at the trial a defence was sought to be set up by the other defendant on this ground. Such defence was allowed although not pleaded, but the successful defendant was ordered to pay costs up to the time when the judgment had been obtained, and no subsequent costs were allowed to either party.

Plaintiffs contend, however, that even if the judgment had been regularly signed, and was not properly set aside, that the defendant bank is in any event liable, on the ground that the statutory liability has not been destroyed by the plaintiffs pursuing their common law liability.

They practically contend that they could have sued the Timber and Trading Co. separately and obtained judgment for their claims, and still not have the lien in their favour afforded by the Bank Act destroyed, nor the right to sue and recover against the bank affected. In other words, that both remedies for collection might be pursued either together or separately. I consider this position tenable.

Wake v. *C.P. Lumber Co.* (1901), 8 B.C.R. 358, was cited against this contention, and as a conclusive authority in favour of the defendant bank, but it appears to me that the facts, as well as the statutes there considered, are quite distinguishable from the present action. Mr. Justice Martin in his judgment at 360 says:—

> The alleged liability of the defendant is not a *debt* but a statutory penalty under sec. 27 of the Mechanics' Lien Act: *Dillon* v. *Sinclair* (1900), 7 B.C.R. 328.

He expresses surprise if two separate judgments for the same claim could be recovered against two strangers, one as and for the debt (wages) and the other as and for a penalty. Here the plaintiffs may have sought in launching their action to recover judgment for the same claim against two distinct persons, but it was solely an action for debt, and defendants were not strangers. The bank in the course of its business loaned money to its co-defendant, and in securing such advance it might be said to have only received from its debtor a lien or mortgage on the property which was to be subsequent to the claim of the plaintiffs against the same debtor. It obtained the benefits to be derived from sec. 88, and had also to assume its burdens. A lien is not ordinarily destroyed by obtaining judgment for the debt. *Vide* Jones

B. C.

S. C.
1914

EDBORG
v.
ROYAL
BANK.

Macdonald, J.

on Liens, p. 675. I do not think the lien afforded by statute was destroyed in any way, and the property covered by the security given the bank may either be resorted to by plaintiffs for payment of their claims, or the more direct course of action for debt pursued: see on this point *Pomerleau* v. *Thompson* (1914), 16 D.L.R. 142.

The statute might be construed as creating a guarantee on the part of the bank, and placing it in the position of a surety. In that event, while there would be no liability on the part of the bank until default of the employer as principal debtor, still such employer could be sued and judgment recovered without releasing the bank. See De Collyer on Guaranty, 3rd ed., p. 207.

In my opinion the intention of the statute is clear as creating a liability, and nothing transpired to prevent plaintiffs recovering their claims from the defendant bank. There will be judgment accordingly for $10,051.80, and costs.

Judgment for plaintiff.

MAN.

C. A.
1914

THOMAS v. WINNIPEG (City).

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 16, 1914.

1. MUNICIPAL CORPORATIONS (§ II G2—223)—FIRE DEPARTMENT—VOLUNTARY ESTABLISHMENT—NEGLIGENCE.

Where a municipal corporation is not bound by law to establish and manage a fire department, but has elected to create it by by-law, it is liable for damages sustained by the negligence, during their performance of duty, of the servants employed by the municipality to carry on the department.

[*Hesketh* v. *Toronto*, 25 A.R. (Ont.) 449; and *Shaw* v. *Winnipeg*, 19 Man. L.R. 234, followed.]

Statement

APPEAL by defendant municipality in a County Court action. The action was brought to recover damages for injuries caused to the plaintiff's automobile by a motor hose wagon belonging to the city of Winnipeg. The trial Judge entered a verdict for the plaintiff for $150.

The appeal was dismissed.

J. T. Beaubien, for plaintiff.

A. B. Hudson, and *J. Preudhomme*, for the defendants.

Cameron, J.A.

The judgment of the Court was delivered by CAMERON, J.A.:—This action is brought in the County Court of Winnipeg by the plaintiff to recover damages for injuries caused to his automobile by a motor hose wagon belonging to the city. The automobile was standing on Young street at a short distance from Ellice avenue where the street and the avenue intersect. The plaintiff gives the distance between the automobile and Ellice avenue as 46 feet as he measured it (in company with a police officer who came up to the automobile after it was struck), and says the motor

wagon was going at a rate of 20 to 25 miles an hour. In his evidence the police officer says the automobile was standing over 80 feet from the intersection. Fox, the driver of the motor wagon, gives the distance as from 20 to 25 feet, but he says he could not say safely "to a foot." The evidence of Miller, the driver of the domestic hose wagon that preceded Fox's motor wagon, is that he was going at the rate of 25 or 27 miles an hour coming down Ellice avenue before turning down Young street where he stopped at the hydrant on the east side of Young near its intersection. Before reaching Young he says he began to slow down and that he went into Young at the rate of between 5 and 6 miles an hour. Fox says the domestic wagon obstructed his view and he did not see the automobile until he was practically upon it, when he put on the emergency brake. The trial Judge entered a verdict for the plaintiff for $150 and costs.

The question here raised involves the liability of the city for the negligence of firemen appointed and paid by it. The city may pass by-laws for appointing fire engineers and firemen and promoting, establishing and regulating fire companies and property-saving companies: Winnipeg charter, sec. 703, sub-sec. 41, stats. 1902, ch. 77.

The law is thus stated in Dillon on Municipal Corporations, 5th ed., vol. 4, 1660:—

> Although a municipal corporation has charter power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, *it is not liable for the negligence of firemen appointed and paid by it*, who, when engaged in their line of duty upon an alarm of fire, ran over the plaintiff, in drawing a hose-reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff, caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department; nor for like negligence, whereby sparks from the fire-engine of the corporation caused the plaintiff's property to be burned. The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an Act of the Legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondeat superior* has, therefore, no application.

This statement of the law is based on numerous authorities from different States of the Union. I refer particularly to *Hafford* v. *New Bedford*, 16 (Gray) Mass. 297, in which it was held by Bigelow, C.J., that a municipal corporation is not responsible for the unlawful or negligent acts of officers appointed, in obedience to an Act of the legislature, to perform public services in which

MAN.

C. A.
1914

THOMAS
v.
WINNIPEG
(CITY).

Cameron, J.A.

the corporation has no private interest, and from which it derives no special benefit or advantage as a corporation. This is quoted with approval by Sir William Ritchie, C.J., in *McSorley* v. *St. John*, 6 Can. S.C.R. 531 at 544, and is frequently referred to elsewhere.

In *Wishart* v. *Brandon*, 4 Man. L.R. 453, the charter of the defendants provided for the appointment of a police force, the members to be appointed by, and to hold office during the pleasure of a board of police commissioners. The defendants provided the pay. A member of the police force arrested the plaintiff for an alleged breach of a by-law. It was held by the full Court that the defendants were not liable. Amongst other cases quoted by Sir Thomas Taylor (then Mr. Justice Taylor) in his judgment were *Hafford* v. *New Bedford*, 16 (Gray) Mass. 297; *Maximilian* v. *New York*, 62 N.Y. 160; and *Elliott* v. *Philadelphia*, 75 Pa. 347. That it was a by-law of the city that was called in question makes no difference: p. 459. *Wishart* v. *Brandon* is cited in Dillon on Municipal Corporations, 5th ed., vol. 4, 1655, as quoting the text at p. 458. now found at page 2879:—

> If the corporation appoints or elects them, can control them in the discharge of their duties, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies.

It is also stated in Dillon, sec. 1656:

> *Police officers appointed by a city are not its agents or servants* in such a sense as to render it responsible for their unlawful conduct or negligent acts in the discharge of their public duties as policemen, and accordingly a city is not liable . . . for an arrest made by them which is illegal for want of a warrant or for other cause, in support of which many cases, including *Wishart* v. *Brandon*, are mentioned (some of which cite the text).

In *Hesketh* v. *Toronto*, 25 A.R. (Ont.) 449, it was held by the Ontario Court of Appeal, upholding the verdict of a jury in an action tried by Chief Justice Armour, that though a municipal corporation is not bound by law to establish and manage a fire department, yet when it has elected to create it by by-law and to provide for carrying it on through the medium of a committee and of officers and servants appointed under its authority, it is liable for damages sustained by the negligence of the servants employed by it while in the performance of its duties. It appears from the judgment of Chief Justice Burton that the decisions in the United States were considered, but the Chief Justice distinguishes between such of them as avoid the liability and the case before him by pointing out that there was in Toronto no legislation creating separate officials with specified duties, but that the city is left to its discretion to pass by-laws as was there done, in the terms of the Winnipeg city charter in the section above

quoted. I confess that this distinction does not strongly appeal to me. I think it can be fairly contended that the duty of furnishing fire protection against loss of property and life is no less imperative on the city because it is left to its discretion than if it was positively imposed by law. However that may be, the unanimous decision of the Court of Appeal appears to cover the very point in question here.

In Biggar's Municipal Manual at p. 597, it is said:—

> The rule which exempts a municipality from the torts of officers appointed to perform a public duty has in the United States been extended to firemen, citing *Hoffard* v. *New Bedford*, 16 (Gray) Mass. 297, but the reasoning of these cases has not been adopted by our Courts, citing *Hesketh* v. *Toronto*, 25 A.R. (Ont.) 449, and *McPherson* v. *St. John*, 32 N.B. 423.

In *Winterbottom* v. *London Police Board*, 1 O.L.R. 549, the plaintiff was injured by being run over by a patrol wagon alleged to have been negligently driven by a police constable. The police board is constituted in London as it is in Winnipeg. In the judgment of Robertson, J., the authorities are reviewed. The judgment in *Wishart* v. *Brandon*, 4 Man. L.R. 453, was approved, and as the action was against a board with powers defined by statute and its composition in accordance therewith, the reasoning was held to be obviously applicable.

In *Stanbury* v. *Exeter*, [1905] 2 K.B. 838, it was held that an inspector appointed by the corporation under the Diseases of Animals Act, where the negligence alleged was in respect of his having, whilst acting under an order of the Board of Agriculture, seized sheep suspected of sheep scab. Lord Alverstone says at 842:—

> The duty imposed upon the inspector was imposed on him as inspector by the order (of the Board of Agriculture pursuant to the statute) and . . . the County Court Judge was right in holding that no action would lie against the corporation.

Mr. Justice Wills considered the case of an inspector under the Act as analogous to that of a police officer.

> And nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties,

and he refers with approval to the passage in Beven on Negligence, 2nd ed., vol. 1, pp. 388-9, 3rd ed., vol. 1, p. 326:—

> If the duties to be performed by the officers appointed are of a public nature and have no peculiar local characteristics, then they are really a branch of the public administration for the purposes of general utility and security which affect the whole Kingdom; and if that be the nature of the duties to be performed, it does not seem unreasonable that the corporation who appoint the officer should not be held responsible for acts of negligence or misfeasance on his part.

p. 843. Darling, J., held the question was

> whether the act done purported to be done by virtue of corporate authority, or by virtue of something imposed as a public obligation to be done,

MAN.

C. A.

1914

THOMAS v. WINNIPEG (CITY).

Cameron, J.A.

not by the local authority, but by the officer whom they were ordered to appoint.

I think the distinction between the facts there before the Court and those presented to us is quite clear. In *Stanbury* v. *Exeter*, [1905] 2 K.B. 838, the case of *Forsyth* v. *Canniff*, 20 O.R. 478, was referred to on the argument.

In *Enever* v. *The King*, 3 Com. L.R. 969, it was held that a peace officer is himself responsible for unjustifiable acts done in the exercise of his authority, but this responsiblity does not extend to the body appointing him.

In *Nettleton* v. *Prescott*, 21 O.L.R. 561, affirming on appeal the judgment of the Divisional Court, 16 O.L.R. 538, the distinction is drawn between the cases where the municipal corporation acts as deputy for the general government and where, in local affairs, it represents the interests of those inhabitants only within its jurisdiction.

McCleave v. *Moncton*, 32 Can. S.C.R. 106, was a case where the corporation was held not liable where police officers had illegally executed a search warrant.

Without discussing further the numerous decisions, it seems to me that the authority of the judgment of the Ontario Court in *Hesketh* v. *Toronto*, 25 A.R. (Ont.) 449, recognized by this Court in *Shaw* v. *City of Winnipeg*, 19 Man. L.R. 234, must be followed in this case, and that we must hold the city responsible for the acts of the driver of its motor wagon.

With reference to the provisions of the city by-law No. 7397 forbidding a vehicle to remain stationary so as to impede traffic, it seems to me difficult to argue that this was being violated by the plaintiff; nor do I consider that he was shewn to have left his automobile longer than five minutes within thirty feet of the street corner. There was evidence before the County Court Judge sufficient to justify his verdict and I would dismiss the appeal.

Appeal dismissed.

QUE.

1914

REX v. BIRCHENOUGH.

Quebec Court of King's Bench (Crown side), Lavergne, J. March 25, 1914.

INDICTMENT, INFORMATION AND COMPLAINT (§ IV—75)—*Quashing indictment — Irregularity in grand jury proceedings.*] — Motions to quash four indictments on the ground that the grand jury had sworn all the witnesses for all four bills at the same time and had heard the evidence together on all four charges.

LAVERGNE, J., refused the motions to quash, holding that the Court could not compel disclosure of what had occurred before the grand jury in its secret deliberations. If the evidence had been taken together on all four bills, such a practice was to be discouraged.

NORTH VANCOUVER v. LOUTET.

B.C.

C. A.
1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. ARBITRATION (IV—42)—APPOINTMENT OF ARBITRATOR BY COURT ON PARTY'S DEFAULT.

While under sec. 8 of the Arbitration Act, R.S.B.C. 1911, ch. 11, the Court, on an application to appoint an arbitrator in default of appointment by either party, may consider a nomination by the party in default, and if it sees fit to select his nominee, it has no jurisdiction to make an order, in the nature of a mandamus, directing the defaulting party to nominate and appoint its arbitrator within a time limited.

Statement

APPEAL from the order of Clement, J., directing the municipality, which had previously failed and refused to make any appointment, to make an appointment within a time limited.

The appeal was allowed and the order set aside.

Ritchie, K.C., for the appellant.

J. P. Hogg, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an appeal from an order of Clement, J., whereby it was ordered that the corporation of the city of North Vancouver should within the time therein limited appoint an arbitrator for the purpose of determining the compensation (if any) that should be paid by the appellants to the respondents for damage resulting from the doing of certain street work by the corporation, and which is said to have injuriously affected the said lot.

The respondents appointed their arbitrator pursuant to The Municipal Act, R.S.B.C. 1911, ch. 170, sec. 394, and served the prescribed notice on the corporation requiring it to appoint its arbitrator. This the corporation neglected to do, and application was made to the said Judge to appoint an arbitrator pursuant to sec. 8 of the Arbitration Act, ch. 11, R.S.B.C. 1911. It was contended by counsel for the corporation that sec. 8 was not applicable to arbitrations under said sec. 394. I have dealt with that point in my reasons for judgment in *Re Lots* 19 & 20, *Block* 25, *Dis. Lot* 273, *North Vancouver*, just handed down. [*North Vancouver* v. *Jackson*, 16 D.L.R. 400.]

The difficulty in this case is that the order of Clement, J., is not the order authorized by said sec. 8. It does not appoint an arbitrator but orders the corporation to do so. It was therefore, in my opinion, made without jurisdiction, and must be set aside.

This was the view held by me, and by the majority of the Court, at the close of the argument, and the appeal was then allowed and the order set aside. On the following morning, respondent's counsel applied to us to re-open the case on the plea that he had inadvertently overlooked in his argument sub-section (f) of said sec. 8. It was also represented that there was great danger of the respondent being barred from recovery by reason

B.C.
C. A.
1914
NORTH VANCOUVER v. LOUTET.
Macdonald, C.J.A.

of the Statute of Limitations should he fail to sustain the order below. Lest a miscarriage of justice should result from a slip of counsel, we acceded to his request.

In my opinion the said sub-section does not assist the respondent, but merely authorizes the judge to accept the nominee of the party in default. The learned Judge might have done that, and instead of himself selecting the arbitrator, might have named in his order the arbitrator desired by the party in default. That, however, was not the course taken. The order appealed from is in form an order of mandamus directing the corporation to appoint some person not named. It is clearly unauthorized by the Act, and therefore cannot be supported. If hardship results it will be because the plain provisions of the Act were disregarded.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal, and set aside the order made herein.

Whether the Arbitration Act can or cannot be read into the Municipal Act, so as to provide for the appointment of an arbitrator upon the council making default, need not be determined in this case.

In any event, I do not think the learned Judge could make the order appealed from under any section in the Arbitration Act.

Galliher, J.A.

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

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal is to be disposed of by the consideration of the Municipal Act and the Arbitration Act.

The question before us is this—has the Arbitration Act application when the appointment of arbitrators is the matter being dealt with?

It would appear that the corporation of the city of North Vancouver in the grading of Second street, acting under a by-law, as the respondents contend, passed under the Local Improvement Provisions of the Municipal Act, injuriously affected lot 23, block 137, group 1, Vancouver district, the property of the respondents, in that in the grading, the level of the street in front of the lot was lowered, and that access to the dwelling house situated on the lot, and in occupation by a tenant, is wholly cut off, and to lower the lot to the street level will involve the removal of a thousand yards of earth.

It would appear that on November 1, 1911, a claim was made by the respondents in pursuance of section 251 of the Municipal Clauses Act, 1906, ch. 32, R.S.B.C. 1911, ch. 170, and by letter of date January 16, 1912, request was made of the council of the city of North Vancouver to appoint its arbitrator.

It would not appear that the corporation took any steps to appoint an arbitrator.

On June 2, 1913, the respondents claim to have appointed His

Honour Judge Grant, of the County Court of Vancouver, their arbitrator, and that a written notice was given to the corporation of this appointment on or about June 9, 1913.

On July 3, 1913, the respondents took out a summons in Chambers, in the Supreme Court, asking for an order appointing an arbitrator to act as the nominee of the corporation in determining the compensation to which the respondents were entitled resulting from the exercise of the powers of the corporation in grading Second street, and reducing the level of the street in front of lot 23.

The application came on for hearing before Clement, J., and it was ordered by the learned Judge that the corporation do within seven days appoint an arbitrator to act on its behalf.

It was admitted upon the argument that quite outside of the question of whether the Arbitration Act applied or not, the order as framed was not supportable, as if the Act did apply, the proper order would be one appointing an arbitrator for and on behalf of the corporation—the corporation having failed to do so; and it was pressed upon us that if this Court were of the opinion that the Arbitration Act did apply, the Court of Appeal might appoint the arbitrator.

The Municipal Act (ch. 170, R.S.B.C. 1911, sec. 394, sub-sec. (*a*)) provides the procedure for the appointment of arbitrators to ascertain the compensation payable where a municipality is required to make due compensation for any damages suffered beyond any advantage derived from the work.

The sub-section reads as follows:—

> The municipality shall appoint one, the owner or tenant or other person making the claim, or his agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the Judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator.

It is apparent that the legislature intends that the municipality shall appoint its arbitrator, and no provision is made for any procedure in default of this being done.

The municipality failing to do what the statute requires, the question arises, what procedure is there available to enforce the appointment or to proceed in default of appointment?

It was forcefully argued before us that the Arbitration Act applies, and that an arbitrator may be appointed by a Judge of the Supreme Court.

As to the application of the Arbitration Act to other acts with provisions for arbitration, we have a judgment of the Privy Council as to the effect of the provision in *Zelma Gold Mining Co.* v. *Hopkins* (1894), 64 L.J.P.C. 45. The Lord Chancellor (Lord Herschell) at p. 48, said:—

B. C.
C. A.
1914
NORTH VANCOUVER v. LOUTET.
McPhillips, J.A.

Stress was laid by the learned Judge below upon the provisions of the 24th section of the Arbitration Act, which enacts that the Arbitration Act shall apply to every arbitration under any Act passed before or after the commencement of that Act as if the arbitration were pursuant to a submission "except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act." But the only effect of that section is to apply the arbitration provisions to arbitrations under any other Act, as, for example, arbitrations under the Companies Act, except so far as the arbitrations under those Acts are conducted pursuant to statutory provisions inconsistent with the provisions of the Arbitration Act. Its effect is in no way to introduce into arbitrations under the Arbitration Act any of the provisions for arbitration contained in any of the other Acts, such as the Companies Act.

It is to be observed that Lord Herschell in *Tabernacle Permanent Building Society* v. *Knight*, [1892] A.C. 298, at p. 306, dealing with the question whether the Arbitration Act applied to an arbitration under the Building Societies Act, said:—

> The Arbitration Act which confers upon the Court the power to order a case to be stated, if it applies, adds no doubt to the provisions which are to govern an arbitration under the Building Societies Act; but it is clear that the fact that the provision is an additional one does not of itself shew that there is any inconsistency in the two Acts, for if so, the 24th section (similar to 25th section in B.C. Act) would never have any operation. I think the test is whether you can read the provisions of the later Act into the earlier without any conflict between the two. This you can clearly do as regards the enactment under consideration. For these reasons I concur in the judgment of the Court below.

It is seen that Lord Herschell places the matter for consideration in this terse way—Is there conflict between the two Acts, that is, between the Municipal Act and the Arbitration Act, relative to the appointment of arbitrators?

Little or no assistance can be obtained upon the point of whether the present case is one for the appointment of an arbitrator from the cases in England or Ontario, the arbitration Acts there in force differing from the Act in force in this province in that with us the Arbitration Act covers references to three arbitrators, and the Municipal Act provides that the compensation shall be decided by three arbitrators.

Whilst upon the argument I took a different view and was, as then advised, disposed to hold that the Municipal Act was a code by itself, I have, after careful consideration and examination of the authorities, satisfied myself that there is no conflict between the Arbitration Act as we have it and the Municipal Act, and that the situation of affairs existent is one that is amply capable of being met by the application of the Arbitration Act.

Under the provisions of the Municipal Act an award may be made by any two of the arbitrators, and under the Arbitration Act the award may be made by a majority of the arbitrators which is in effect the same.

That the arbitrator appointed by the Court or a Judge will have the same authority as if appointed by the municipality is clear when sub-sec. (e) to sec. 8 of the Arbitration Act is read. It reads as follows:—

> If any appointment is not made pursuant to the notice mentioned in the last two preceding sub-sections within seven clear days after the service of such notice, the Court or a Judge shall, on application by the party who gave the notice, appoint an arbitrator, third arbitrator, or umpire, as the case may be, who shall have the like power to act in the reference and make an award as if he had been duly appointed by the parties or by the arbitrators respectively and by consent of all parties.

It was contended that in some way the application was out of time—as to this there is no such definite evidence before us that this can be satisfactorily passed upon.

However, it is to be remarked that the claim was made, and apparently in time, and the statute is precise that the claim being filed, unless accepted by the council, shall forthwith be determined by arbitration (Municipal Clauses Act, 1906, sec. 251, sub-sec. 6; and Municipal Act, ch. 170, R.S.B.C. 1911, sec. 403).

It would therefore seem to me to be impossible for the municipality to successfully set up any bar—in that the council did not proceed forthwith, and my view of the statute is that it is mandatory upon the council to proceed to arbitration.

There is full opportunity when the arbitration proceedings are pending, and during the hearing, to have a special case stated for the opinion of the Court upon any questions of law arising—for instance, as to whether the proceedings are out of time, or whether the claim is one for compensation to be determined by arbitration, or whether the proceedings must be by way of action.

In the result, therefore, my opinion is that the order appealed from cannot be supported, as it is not in form such as is authorized by the Arbitration Act. The learned Judge should have appointed the arbitrator, the municipality having failed to appoint, and being unwilling at the time of the application to appoint, with his leave, an arbitrator.

This brings one to the consideration of what a Court of Appeal should do under the circumstances. My opinion is that this Court might proceed to appoint the arbitrator, but that would be somewhat inconvenient, and I do not see that the ends of justice necessarily require it. If they did, I would unhesitatingly so decide, but it seems to me that this can still be done by a Judge of the Supreme Court, and, if necessary, this appeal, if allowed, should be without prejudice to any further application to a Judge of the Supreme Court to appoint an arbitrator.

In my view the Judge of the Supreme Court is not a *persona designata* under the Arbitration Act, and his order was a judicial order from which an appeal lies. The case *Re Faulkner* (1903), 5 O.L.R. 609, in the Court of Appeal of Ontario, supports that view.

B. C.
C. A.
1914
NORTH VANCOUVER v. LOUTET.
McPhillips, J. A.

Further, I am of the opinion that under order 58, rule 4, No. 868, the Court of Appeal has power to make the order which ought to have been made, but as I have already intimated, it would not seem to be necessary to do so.

I would, therefore, allow the appeal, but without prejudice, should that be necessary, to the respondents to make a further application to a Judge of the Supreme Court for the appointment of an arbitrator should the municipality continue in its failure to make such appointment.

Appeal allowed.

B. C.
C. A.
1914

NORTH VANCOUVER v. JACKSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. ARBITRATION (§ IV—42)—COMPULSORY APPOINTMENT OF ARBITRATOR BY COURT—B.C. ARBITRATION ACT.

Failure by a municipality to appoint its arbitrator under sec. 394 of the Municipal Act, R.S.B.C. 1911, ch. 170, falls within sec. 8 of the Arbitration Act, R.S.B.C. 1911, ch. 11, read with sec. 25 thereof, under which an order may be made by the Court appointing an arbitrator to represent the party who has failed to appoint his own arbitrator.

[See also *North Vancouver* v. *Loutet*, 16 D.L.R. 395.]

2. EMINENT DOMAIN (§ III C2—150)—TO WHOM COMPENSATION MUST BE PAID—UNREGISTERED OWNER, STATUS.

An unregistered owner of lands setting up a claim for compensation for expropriation thereof or injury thereto under sec. 394 of the Municipal Act, R.S.B.C. 1911, ch. 170, may escape the disability imposed by sec. 104 of the Land Registry Act, R.S.B.C. 1911, ch. 127, provided such owner, prior to the commencement of his proceeding to obtain compensation, shall have procured and registered a conveyance of such lands, thus perfecting his title before action. (*Per* Macdonald, C.J.A., and Galliher, J.A.)

3. ARBITRATION (§ IV—40)—SUBMISSION—COMPULSORY APPOINTMENT—REMEDY.

Where a general arbitration Act authorizes the appointment compulsorily by the Court of an arbitrator on default of either of the parties to a statutory submission to make his own appointment, the Court will not seek to find at common law some other more tedious and expensive remedy, by way of mandamus or the like, to reach the same end. (*Per* Macdonald, C.J.A.)

Statement

APPEAL from the order of Murphy, J., appointing an arbitrator for one of the parties to a statutory arbitration after the default of such party to make his own appointment.

The appeal was dismissed, IRVING, and MARTIN, JJ.A., dissenting.

Ritchie, K.C., for the appellant.
Griffin, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The order appealed from is one appointing an arbitrator pursuant to R.S.B.C. 1911, ch. 11, sec. 8, in default of appointment by the appellant corporation of the city of North Vancouver.

The injury to the property for which the respondent claims

compensation under R.S.B.C. 1911, ch. 170, sec. 394, is caused by lowering the street grade in front of said lots.

The appellants attacked the order on several grounds, only two of which I think it necessary to discuss: (1) that said sec. 8 cannot be invoked for the appointment of an arbitrator in an arbitration under said sec. 394, because it is alleged it is inconsistent therewith; and (2) that as the respondent's interest in the lots at the time the injury was done was that of a purchaser under an unregistered agreement, he could have no complaint because of the operation of sec. 104 of the Land Registry Act, R.S.B.C. 1911, ch. 127, which declares that certain instruments of which the said agreement is one, shall not be deemed to pass any estate or interest at law or in equity in the land being dealt with until registration of the instrument; in other words, that the said agreement had no effect in passing any estate to the respondent.

This Court has already considered the rights of the parties as between themselves under instruments of that class: *Goddard* v. *Slingerland*, 16 B.C.R. 339; *Chapman* v. *Edwards*, 16 B.C.R. 334; but not under circumstances such as here where the owner's right to compensation under a statute for injuries arising out of the exercise of statutory powers is in question.

Before these proceedings to obtain compensation were commenced, the respondent had procured and registered a conveyance of said lots, thus perfecting his title before action. The appellants were aware from the beginning that the respondent was the real owner. They assessed him as owner for the year 1911, in the summer of which year the work complained of was done, and also in the year 1912, so that if appellant's contention is to prevail, it is not because they were misled into paying compensation to the registered owner, or were otherwise prejudiced, but because of a section of a statute dealing with land titles and the protection of purchasers and creditors of vendors. I do not suggest that the protection of the Land Registry Act, R.S.B.C. 1911, ch. 127, does not extend to persons and corporations in the position of the appellants who have to pay compensation for land injuriously affected by them. It may be that the respondent could not take the proceedings he is now prosecuting until he had become the registered owner. I do not stop to consider that question here. The question I have to determine is, can the respondent, who was as between himself and the vendor the equitable owner of the land when the damage was done, and who as between himself and his said vendor, is the party injured, and who before taking proceedings perfected his title by getting in the legal estate and complying with said section 104, R.S.B.C. 1911, ch. 127, on the facts above recited carry on this litigation? I am of opinion that he can. He is the only person injured. It is quite clear that the vendor has suffered no injury, having sold the property to the respondent before the grade was lowered.

B. C.
C. A.
1914
NORTH VANCOUVER v. JACKSON.
Macdonald, C.J.A.

The respondent's right to commence proceedings might have been suspended until he registered his conveyance, but I have no doubt that once that was done he was in a position to recover compensation in the manner which he is seeking to do here.

The other question turns on the question of whether or not there is any inconsistency between sec. 8 of the Arbitration Act R.S.B.C. 1911, ch. 11, and sec. 394 of the Municipal Act R.S.B.C. 1911, ch. 170, as applied to the facts of this case. We have been referred to some of the English authorities, but it is to be borne in mind that the English Arbitration Act, which was passed in 1889, was not then as wide in its scope as is our Act as we now find it. The English Act did not authorise the appointment of an arbitrator by the Court where the submission was to three arbitrators, one to be appointed by each of the parties and the third to be selected by the two arbitrators, as is the case here. Hence it was held in *Re Smith & Service* and *Nelson & Sons*, 25 Q.B.D. 545, that the Court had no jurisdiction in a case of that kind to appoint an arbitrator where one of the parties had made default in appointment. Sec. 8 of our Act, however, covers the very case. It was contended that said sec. 394 is a complete code in itself, providing how arbitrators shall be appointed to fix compensation under it, and that it excludes by implication the provisions of the Arbitration Act. It was argued that when the corporation failed to appoint an arbitrator, the proper course was to apply to the Court for a mandamus. By sec. 25 of the Arbitration Act R.S.B.C. 1911, ch. 11:—

> This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act.

The object was to supply deficiencies in submissions to arbitration. It is suggested that because the common law provided a means of compelling the appointment of an arbitrator, that that means should be held to fall within the exception in sec. 25, particularly the words "any rules or procedure authorized or recognized by that Act." In this case the Municipal Act. With deference I do not think that that construction can be given to those words. Such procedure is neither directly nor indirectly recognized by the Municipal Act. It is a procedure quite independent of the Act. The most that can be said is that it provides for the appointment of an arbitrator for the corporation when such might be accomplished in another way by an order of mandamus. Even if I were in doubt I should resolve that doubt in favour of the simpler and less expensive procedure.

I would dismiss the appeal.

Irving, J.A. (dissenting)

IRVING, J.A., (dissenting):—The main question involved in this appeal is as to the application of sec. 8 (*c*) of the Arbitration

Act, ch. 11, R.S.B.C., 1911, to the 251st section of the Municipal Act of 1906 (now sec. 394 of ch. 170, R.S.B.C., 1911.

The learned Judge appealed from came to the conclusion that the Arbitration Act did apply, by virtue of the provisions of the 25th section of the Arbitration Act. It is unnecessary to set it out again.

Much weight was placed by counsel for the respondent on the words "except in so far as the same is inconsistent," and it was argued that as there is no provision in the Municipal Act for the appointment of an arbitrator to represent the corporation in the event of that body making default, the Arbitration Act could be invoked and the difficulty cured in that way.

But I think we must take a broader view of the case than that. The sections of the Municipal Act under consideration contemplate a peculiarly appointed board. Under certain circumstances the Court can set aside or ignore the appointment made by the corporation and appoint all three arbitrators. This peculiar arrangement strikes me as being inconsistent with the circumstances contemplated by the Arbitration Act, and lends much force to Mr. Ritchie's argument that these sections in the Municipal Act constitute a code in themselves for the settlement of these difficulties.

The sections in question can be traced back to the Municipal Act 1893 (ch. 33, sec. 269 *et seq.*) and were therefore in force when the Arbitration Act was passed (April 12, 1893). It is a well-established principle that they who come and obtain Acts of Parliament, such as railway Acts, do in effect submit to do whatever the legislature empowers and commands them to do, that they will do nothing else; and that they will do and forbear all they are thereby required to do and forbear, as well with reference to the interests of the public as to the interests of individuals. In my opinion, similar principles must be taken to govern bodies incorporated under the Municipal Act, and relying on that principle the legislature thought it unnecessary to make provision for a case of default on the part of the municipal body—the remedy in the event of refusal by the corporation to appoint an arbitrator would be by mandamus.

In Tapping on Mandamus (1853), p. 81, a long list of reported cases is given in support of the statement that the writ lies to command a railway or other company incorporated by Act of Parliament to issue a warrant or other statutory process, and summon a jury for the purpose of assessing compensation or damages incurred in pursuance of its Act. It would seem from this that at the time the Arbitration Act was passed, there was a procedure for dealing with the corporation in the event of its neglecting or refusing to do its duty, and having regard to the established practice and principles that I have endeavoured to indicate in what I have just said, I should say it was a procedure

B.C.

C. A.

1914

NORTH VANCOUVER v. JACKSON.

"recognized" by the Municipal Act. The "recognition" may be by reasonable implication, or by express authorization.

On these grounds I would hold the 8th section of the Arbitration Act does not apply to the sections of the Municipal Act in question.

Irving, J.A. (dissenting)

The case of *R.* v. *Mission* (1900), 7 B.C.R. 513, although it does not decide the point now under consideration, shews that mandamus was regarded by some of the profession as the proper remedy, and as the learned Chief Justice McColl, who had a very great deal of experience in municipal matters, did not demur to the procedure by way of mandamus, I think we may take it that he recognized it as the correct practice.

It is unnecessary for me to deal with the other points.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting):—In my opinion sec. 8 of the Arbitration Act is in the language of sec. 25 "inconsistent with" the established and well-recognized procedure under sec. 394 (*a*) of the Municipal Act, and the two cannot be conveniently or properly worked together; therefore the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal for the reasons given by the learned Chief Justice.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal really involves questions similar to a great extent to those considered by me in *North Vancouver* and *Loutet*, 16 D.L.R. 395 (having reference to lot 23, block 137, district lot 27, group 1, Vancouver district).

In view of that fact it is quite unnecessary to repeat my reasons there expressed for coming to the opinion that the Arbitration Act applies in respect to the appointment of an arbitrator—in a case such as this—where the municipality has failed to appoint an arbitrator.

With reference to the case of *Norwich Corporation* v. *Norwich Electric Tramway Co.* (1906), 75 L.J.K.B. 636, which was an additional authority to those to which we were referred in *North Vancouver* and *Loutet*, 16 D.L.R. 395. Mr. Ritchie laid great stress upon the point that it was there held that a provision in a general Act was not held to apply, Vaughan Williams, L.J., at p. 639, saying:—

> In my judgment sec. 33 of the Act of 1870 (Tramway Act), by appointing a special tribunal which is to deal with disputes of this kind, has to that extent ousted the jurisdiction of the Court. The decision of the House of Lords in *Crosfield & Sons* v. *Manchester Ship Canal Co.*, 74 L.J.Ch. 637, is really conclusive that this is a case in which the jurisdiction of the Court is ousted.

It is, however, a matter of remark that the case before us is not one calling in question the jurisdiction of the Court, but it is the consideration of the question whether the legislature has left the statute law in such a state that it is unworkable, that is, the

municipality failing to appoint an arbitrator, the tribunal contemplated to decide the compensation through the default of the municipality, cannot be brought into being.

The present appeal brings to the attention of the Court that which would be a blot upon the statute law if there were no means available to constitute the tribunal which is to decide the compensation.

This is all the more pointedly indicated where we have the legislature enacting that the claim for compensation, unless accepted by the council, shall be forthwith determined by arbitration, Municipal Act, R.S.B.C. 1911, ch. 170, s. 403.

It is the province as well as the duty of the Court to so construe the statute law as to carry out the object intended to be attained when the intention is discernible and when we have the Arbitration Act made applicable generally to every arbitration under any Act, it does seem to be right and proper to hold, and agreeable to convenience, reason and justice, that where there is default upon the part of either party in the appointment of an arbitrator, that there is machinery available, and power in the Court, to carry out that which is plainly intended.

It is true that the Court has limitations upon its authority, as stated by the Lord Chancellor (Lord Halsbury) in *Cooke* v. *Vogeler Co.* (1900), 70 L.J.Q.B. 181, at 184, where he said:—

> And if, on the other hand, it is manifest that the language of the statute does not reach the case supposed, no Court has jurisdiction to enlarge the ambit of English legislation beyond what the Legislature has permitted.

Is this not only the case of the legislature permitting the Arbitration Act to apply, but directing that it shall apply to every arbitration under any Act except when inconsistent.

There is no inconsistency—in fact, to apply the Arbitration Act to the Municipal Act to work out the appointment of the arbitrators, and to constitute the tribunal contemplated by the legislature, accomplishes a consistent whole.

With respect to the many exceptions taken to the right of the claimant to compensation upon the various grounds advanced, and most carefully and forcibly argued, I do not consider that these are matters that we are called upon to go into—they can all be urged and may be taken up by way of stated case for the opinion of a Judge of the Supreme Court during the course of the reference.

It therefore follows that in my opinion the appeal should be dismissed, and the order of Murphy, J., appointing an arbitrator on behalf of the city of North Vancouver, be confirmed.

Appeal dismissed.

MAN.

C. A.
1914

WEILGOSZ v. McGREGOR.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 16, 1914.

1. EVIDENCE (§ II H 1—270)—STATUTORY PRESUMPTION—AUTOMOBILE ACCIDENT—NEGLIGENCE.

Section 63 of the Motor Vehicle Act, R.S.M. 1913, ch. 131, places the onus of proof upon the automobile owner or driver in respect of damage done by collision with a bicycle; and the effect of the statute is that negligence in the operation of the automobile is *primâ facie* presumed because of the collision.

[*Toronto General Trusts Co.* v. *Dunn*, 20 Man. L.R. 412, followed.]

Statement

APPEAL by plaintiff from the County Court in an action brought to recover damages for injuries sustained by him through a collision with the defendant's motor car. The trial Judge entered a verdict for the defendant.

The appeal was allowed.

C. Blake, for plaintiff, appellant.

J. F. Kilgour, for defendant, respondent.

Howell, C.J.M.

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

Richards, J.A.

RICHARDS, J.A.:—I have read the judgment of my brother Perdue, and am not prepared to disagree with anything he has there said. I, however, prefer to base my finding only on the ground that the driver of the car, for whose negligence the defendant was liable, was guilty of negligence that caused the injury. It is undisputed that he did not, when about to leave the bridge and turn into Pacific avenue, or when on that avenue, sound the horn, so as to warn travellers on the avenue of the approach of the car.

Sec. 7 of 1 Geo. V. (Man.) ch. 28 (now sec. 15 of ch. 131 R.S.M. 1913), made it a statutory duty to sound the horn whenever reasonably necessary to warn pedestrians or others of the approach of the car.

The car in question was coming down grade over the approach from the bridge to the street and was about to cross the avenue and proceed easterly down grade towards Eighth street, along the side of the avenue furthest from the bridge. Those facts would make it "reasonably necessary" to sound the horn even if the driver saw no one on the avenue.

His negligence was greatly aggravated by the fact that he did, while still on the bridge, see the plaintiff turn from Eighth street westerly into the avenue. That shewed him that the plaintiff and the car must meet or pass on the avenue. He also saw the plaintiff coming westerly and upgrade towards the car after he had brought it into the avenue. But neither on the bridge nor on the avenue did he sound the horn. It seems to me that the driver's negligence was clearly the cause of the injury. I agree with my brother Perdue as to the disposal of the appeal and as to the judgment to be entered in the County Court.

PERDUE, J.A.:—This is an action for damages in respect of injuries sustained by the plaintiff through a collision with the defendant's motor car. The action was brought in the County Court of Brandon and the County Court Judge entered a verdict for the defendant. The accident took place on April 23, 1913, at about half past eight o'clock in the evening. The plaintiff, who was riding a bicycle, had come north along Eighth street to Pacific avenue and had turned west along the latter, intending to cross the bridge which opens northward from Pacific avenue across the railway tracks. The accident occurred near the entrance to the bridge. The motor car had come south across the bridge and had just turned, or was in the act of turning, east along Pacific avenue when it came in contract with the plaintiff's bicycle. The plaintiff was severely injured. He was knocked senseless, his leg was broken and bicycle smashed. He was in the hospital for two months and did not resume work until September.

The plaintiff states that he was on the proper side of the street at the time he was struck. It is admitted that no horn was sounded or other warning given by the driver of the car while crossing the bridge or immediately preceding the accident. The plaintiff did not see the car until it was almost upon him and until it was too late for him to avoid it.

By section 63 of the Motor Vehicle Act, R.S.M. 1913, ch. 131, it is declared that:—

> When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

An interpretation was placed upon the above section by Robson, J., in *Toronto General Trusts Co.* v. *Dunn*, 20 Man. L.R. 412 at p. 414. He says:—

> In short, sec. 38 (present sec. 63) is a rule of evidence, not a rule of substantive law. By it the happening of the accident *primâ facie* indicates negligence. Such accidents are by sec. 38 included among that class where *res ipsa loquitur* and negligence is presumed, unless its absence is shewn.

The decision in that case was upheld by this Court on appeal.

The defendant therefore came into Court with a presumption of negligence against him, which it was incumbent upon him to displace, quite independently of any case of negligence made against him by the plaintiff. To rebut this presumption the defendant called several witnesses. Two of them, who were riding in a motor east along Pacific avenue behind the defendant's car, saw it turn off the bridge and saw it come to a standstill after the accident. One of them says that the car moved forward about ten feet after striking the plaintiff, and that the plaintiff's body was lying near the north wheel of the car partly under and protruding from beneath the rear end of the car. The companion

MAN.
C. A.
1914
WEILGOSZ
v.
McGREGOR.
Perdue, J.A.

of this witness says the plaintiff's body was lying about five feet behind the car. The occupants of the motor car which caused the injury give an account of the accident which is completely at variance with the above. The driver states that he had crossed to the south side of Pacific avenue, that the plaintiff came west on the wrong side of the street straight for the car, that the driver stopped the car and when it was at a standstill the plaintiff rode straight into the front part of the car, went right over the car and fell on the right side of it midway between the front and the hind wheel. He says the force of the blow dented the sheet steel cover of the engine pretty badly and broke the cup off the water cooler. The bicycle had fallen between the two front wheels. All this, according to the witness, the plaintiff accomplished by riding his bicycle upgrade and striking the car while it was at a standstill. Much the same evidence is given by a companion of the driver who was in the car at the time.

The evidence of the last two witnesses is quite inconsistent with that given by the other two witnesses called by the defence and with the evidence of the witness Mack, who was called by the plaintiff. This last witness was on Pacific avenue going eastward near Eighth street when he heard the sound of the bicycle tire as it burst when the collision took place. He turned around and saw the motor car just stopping, but still moving, after the accident. According to him the car was diagonally across the middle of the street and the plaintiff was lying a few feet behind it.

I think the account of the accident given by the driver of the car and his companion is incredible, and it is contradicted by the other witnesses called for the defence. There was, however, an admission of a fact by the driver of the car which in itself is evidence of negligence. The driver of the car admits that as he turned from the bridge, which is higher than the street, he saw the plaintiff rounding the corner of Eighth street. He says the plaintiff was coming on the wrong side of the street, that he saw him for some seconds before the collision, yet the horn was not sounded or warning given to the plaintiff. This was a direct contravention of section 15 of the Act, R.S.M. 1913, ch. 131. The omission to give warning to the plaintiff was in the circumstances an act of negligence quite independently of the provision of the statute. It would be an act of ordinary prudence on the part of the driver to sound the horn when he was about to pass from the bridge down to Pacific avenue, so as to warn persons passing along that street. Further, the driver does not give any reasonable or even plausible excuse for colliding with the plaintiff whom he had in view from the time the plaintiff turned the corner of Eighth street.

With great respect, I think the learned County Court Judge overlooked the onus that the statute had placed upon the defendant, that it was incumbent upon the defendant to prove an

absence of negligence on his part. To my mind, the evidence adduced by the defence proved negligence, instead of disproving it.

I think the appeal should be allowed with costs and a verdict entered in the plaintiff's favour in the County Court for $350, together with County Court costs, including a counsel fee of $25.

CAMERON, J.A.:—The effect of sec. 38 of the Motor Vehicle Act, 7 & 8 Edw. VII. ch. 34 (now sec. 63 of R.S.M., ch. 131), was considered by Mr. Justice Robson in *Toronto General Trusts Co.* v. *Dunn*, 20 Man. L.R. 412 at 414. "By it the happening of the accident *primâ facie* indicates negligence." "Negligence is presumed unless its absence is shewn."

Sec. 13 of the Act provides that

> Every motor vehicle shall also be equipped with an alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of such vehicle.

I think this was an occasion within the purview of this section. The evidence is that there was no horn sounded.

The statutory provision limiting speed according to locality is to be found in sec. 14, ch. 38, 1 Geo. V., whereby sec. 56 is added to the original Act and is now to be found in sec. 33, R.S.M., ch. 131. With this is to be read sub-sec. (*a*) of sec. 23, sec. 13, ch. 39, 10 Edw. VII., now to be found in sub-sec. (2) of sec. 30, R.S.M. 1913, ch. 131. It seems clear on the evidence that sec. 56 was not observed in this case. The chauffeur says he was going "at a very little over six miles an hour." William D. Weedy says he "saw the McGregor car whirling round from the bridge." The use of the term "whirling" instead of "turning" conveys to my mind the idea of turning with swiftness or velocity.

My conclusion, therefore, is that, on the evidence, the defendant has failed to displace the onus cast on him by sec. 38 of ch. 34, 7 & 8 Edw. VII. [sec. 63, R.S.M. 1913]. Not only so, but the presumption is thrown against him all the more strongly by these violations of provisions of the law.

I think the account given by the chauffeur and by his companion Davis of the occurrence, makes a strain on one's powers of credence. They state that at the moment of impact the motor was at a standstill and that the plaintiff came squarely against the motor with such speed that the force of contact threw him over the right front part of the motor, damaged the motor in the sheet steel covering of the radiator and injured the lamps, and he (the plaintiff) passing over the radiator fell on the ground on the south side of the car "about the middle and three or four feet from the car," as the chauffeur says at p. 27*a*. He says the bicycle went under between the two front wheels. It is to be borne in mind that the plaintiff was going up an incline. Now it does seem to me, in all these circumstances, that the plaintiff was going

MAN.

C. A.

1914

WEILGOSZ v. MCGREGOR.

Cameron, J.A.

at such a rate of speed that he struck a stationary motor with such great violence that there resulted the disastrous consequences to him and his bicycle and the damage to the motor described in the evidence, is incomprehensible by the ordinary mind. And if we have regard for the evidence of Mr. Weedy and Dr. Fitzpatrick, as to where the plaintiff and the bicycle were after the collision, it seems impossible to hold that the story of the chauffeur that the motor was stationary when the bicycle came against it, is well founded.

I think the appeal must be allowed and agree with the judgment of Mr. Justice Perdue in the amount fixed by him as the damages to be assessed.

Appeal allowed

MAN.

K. B.

1914

INLAND INVESTMENT CO. v. CAMPBELL.

Manitoba King's Bench, Macdonald, J. March 25, 1914.

1. DAMAGES (§ III A1—51)—MEASURE OF DAMAGES—ON CONTRACTS BY AGENTS—REAL ESTATE BROKER—WARRANTY OF FUTURE SALES.

Under an exclusive agency contract for the sub-dividing and sale, by a real estate agent, of a tract of suburban land, under which the agent stipulates to sell quarterly at a fixed price a fixed number of lots, the principal may recover damages measured by the agreed price and terms, provided the agent's sales fall short of the stipulated minimum, regard being had to the probable number of lapsations which would have occurred had sales actually been made up to the number contemplated by the contract.

Statement

ACTION for damages for breach of a land subdivision agency agreement.

Judgment was given for the plaintiff.

J. B. Coyne, and *J. B. Hugg*, for the plaintiffs.

A. J. Andrews, K.C., and *W. H. Curle*, for the defendant.

Macdonald, J

MACDONALD, J.:—This is an action for damages for breach of an agreement entered into between the plaintiff Millidge and the defendant.

The facts are these: Millidge was the owner of the north-west quarter of section sixteen (16) in township ten (10), range nineteen (19), west of the principal meridian in Manitoba, and entered into an agreement with the defendant whereby the latter was given the exclusive right of selling the said land.

The defendant agreed at his own expense to have the lands subdivided into lots and the plan thereof registered, but first to register a plan of the most northerly eighty acres of the said lands before subdividing any other portion thereof, and agreed not to register a plan of any other portion until he should have sold sixty per cent. of the lots shewn on the plan of the said eighty acres.

The plaintiff Millidge fixed the minimum price and the terms

upon which the lots might be sold. In all other respects the management, prices, terms, etc., were under the control of the defendant.

The agreement between the parties contains the following paragraph:—

> The agent agrees energetically and actively to employ the machinery of his office immediately in promoting the sale of the said lands and covenants and agrees to sell not less than one hundred and fifty (150) lots thereof within three months of the date hereof, and further covenants and agrees thereafter not to sell less than one hundred and fifty (150) in each successive three months until all of the above described land shall have been sold. In the event of the agent not having sold the number of lots in any of the said periods as above provided, then the owner at his option shall have the right to terminate the agency hereby created and put an end to this agreement upon giving to the agent one month's notice in writing of his intention so to do, which notice shall be sufficiently given if delivered at the agent's office in the Somerset block in the city of Winnipeg, and at the time mentioned in the said notice for the termination of the agency hereby created the same and this agreement shall be at an end unless the agent shall before the expiration of the time mentioned in the said notice have sold a sufficient number of lots to remedy his default, in which case the agency shall be continued subject to the further right of the owner from time to time to take advantage of further default. In case of such cancellation, the owner, upon receiving out of the unpaid purchase moneys of lots sold by the agent up to the time of the taking effect of said cancellation, sufficient to make up the full sum per lot as hereinafter set out shall convey to said agent or his nominee any or all lots so sold.

It is for the breach of this part of the agreement that the action is brought.

To comply with this agreement the defendant would be required to sell 750 lots at not less than $100 per lot; ten per cent. of which to be paid in cash and ten per cent. in equal successive instalments, provided that twenty-five per cent. of the lots might be sold on terms of five per cent. cash and five per cent. a month in equal successive monthly instalments.

The movement given to real estate was the result of a scheme concocted by real estate agents and others anxious to acquire wealth at the expense of the public, and in the language of these men is known and described as a real estate boom.

The defendant is a real estate agent of experience, and no doubt acquainted with all the turns and corners in the business, and if sympathy were of any avail he would not be entitled to any. He expressly and unqualifiedly contracted to sell lots that then were not, at their best, worth more than ten dollars each at not less than one hundred dollars each, and he knew it must be a quick movement. His remuneration was large and attractive, and he was confident of satisfactory results, and did not think it necessary to refer to and guard against any unforeseen cause or event which might prevent him from succeeding in his undertaking.

MAN.

K. B.

1914

INLAND INVESTMENT CO. v. CAMPBELL.

Macdonald, J.

It is urged that the Courts should not countenance schemes of this character, but, as between schemers the contention does not carry weight.

The question here arises entirely on the construction of the agreement. There is to my mind clearly a breach, and there is no defence offered to excuse or explain it, and there is nothing to explain the cause of the failure to carry out the agreement excepting that the boom collapsed earlier than anticipated and the gullible public became wise, at least for a little while.

The question now is as to damages, and it seems to me the parties have themselves, under their agreement, set the measure at which they are to be estimated.

The defendant was to sell at not less than $100 per lot property which was not worth more than at most $10 per lot. For making this sale he was to be allowed $45. The loss then to the plaintiff, allowing $10 per lot as the value of the land, would be $45. But the plaintiff fixes the terms upon which the defendant is to sell, namely, ten per cent. in cash and ten per cent. in equal successive monthly instalments, provided that twenty-five per cent. of the lots might be sold on a five per cent. cash payment, and five per cent. per month in equal successive monthly instalments.

Evidence was tendered of the result of payments under agreements of sale similar to this, but in all cases the sales were in connection with sub-divisions where the property increased in value, whereas here the prices at which lots sold were inflated and fictitious and within a short time fell to their intrinsic worth. This evidence, therefore, even if admissible, would not be of any value.

The purchasers of property such as that in question would not, it is reasonable to assume, be of the financially sound class, and being so quickly undeceived and finding the bubble so suddenly broken, would not put forth any effort to carry out their purchases; on the contrary, they would feel justified in doing everything possible to resist any effort to compel them to pay, and thus many sales would fall through. The percentage of such it is difficult to estimate, but considering the character of the property and assuming that of the purchasers it is safe to conclude that the great majority of sales would not be carried out. Of the seven original purchasers at least four of the sales fell through, and the payments made were refunded. One sale was cancelled after the first payment, which was small, and upon one sale two instalments only have been paid and nothing more paid since December, 1912.

A trifling percentage of the purchasers paid in full at the time of purchase, and a lesser number paid the purchase price in full in instalments.

The remainder of the sales are incomplete in so far as payments are concerned, and it is evident that few will pay who can avoid

MAN.

K. B. 1914

INLAND INVESTMENT CO. v. CAMPBELL.

Macdonald, J.

it. Twenty-five per cent. of the 750 lots could be sold on a five per cent. initial payment, the balance on a ten per cent. payment. Assuming, then, that the twenty-five per cent. were sold upon a five per cent. deposit payment and the balance, less the 181 which have been sold, on a ten per cent. deposit, there would be realized the sum of $4,750—fifty-five per cent. of which would be the plaintiff's. This, then, is a clear loss to the plaintiff under the agreement, without taking the value of the unsold land into account.

The plaintiff claims his percentage of the full amount of the purchase price under the terms of the agreement; but as the defendant would be responsible only for the 55% of the proceeds, it is necessary to ascertain what those proceeds would likely be to ascertain the damage.

It seems to me a reasonable mode of ascertaining what the subsequent payments would be to take as a basis the result of the sales made and estimate the damage from that basis. I refer it to the Master to ascertain and fix the damages, and reserve the question of costs and further directions.

Judgment for plaintiff.

BROWN v. "ALLIANCE No. 2."

CAN.

Ex. C. 1914

Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J. March 24, 1914.

1. SHIPPING (§ III—10)—BREACH OF DUTY—PROPERTY IN CHARGE OF MASTER OF VESSEL—LIABILITY FOR LOSS OR DESTRUCTION.

The master in charge of a small fishing vessel must *primâ facie* account for the missing appurtenant property of the owner (for instance, fishing gear) entrusted to such master's charge; although the rule might be modified in larger vessels where such property is entrusted to the custody of various officers.

2. TRIAL (§ I C—12)—RE-OPENING—SURPRISE.

An application by the plaintiff in an action, after trial and before judgment, to re-open the case and introduce further evidence, will be refused where no surprise is shewn, it appearing that his attention was sufficiently drawn to the point involved by the pleadings, evidence and argument before the case was closed.

Statement

CONSOLIDATED actions by seamen for wages against a fishing vessel, involving a set-off as to missing fishing gear.

Judgment was given for the wages; but as to the master in charge the set-off was allowed, resulting in a judgment against him for the surplus thereof.

Walls, Jr., for the plaintiff.

F. C. Elliott, for the defendant.

Martin, L.J.

MARTIN, L.J.:—These are consolidated actions for wages against the ship "Alliance No. 2," an auxiliary gas boat, 95 feet long, engaged in the halibut fishing. Four of the claims are those of fishermen, and they were disposed of at the trial, that of Davis

CAN.
EX. C.
1914
BROWN
v.
"ALLIANCE
No. 2."
Martin, L.J.

being settled when called on for hearing, and judgment being given in favour of Armstrong, William Brown, and Milne for the full amount claimed. I was asked not to give said Brown and Armstrong their costs of suit as their conduct on the vessel had not been satisfactory, and was open to suspicion as regards the missing fishing gear, and their threats against Larsen, the chief engineer, with respect to the same, but though I felt justified in giving them a warning in open Court I do not, on further consideration, think I would be justified in taking the extreme step of depriving them of costs.

Judgment was reserved on the claim of the master, Daniel Brown, but a few days after the trial was over, a motion was made to re-open the case, and, in effect, to allow the master to give further evidence to account for the missing gear in his charge which his employers, the owners of the ship, sought to make him liable for. Such an application is an ususual one which should only be granted in a very special case, and also in circumstances which would, in any event, not put the other party at a disadvantage or in an unfair position. The matter was fully argued, and I have come to the conclusion that the application should be refused in the circumstances before me. The attention of the plaintiff was sufficiently drawn to the point by the pleadings, on the evidence at the trial and during the argument; there has been no surprise, and the fact that the evidence in his favour was not more fully brought out when it might, possibly, have been, is not enough to re-open the case; he had the opportunity but did not take advantage of it. The application will therefore be dismissed, with costs.

Then as to his claim and the counterclaim. I allow him his wages and give him judgment therefor, but hold him responsible for the value of the missing gear, $349.59, less two skates thereof at $17 each, which were lost and tardily accounted for at the trial. I am unable on the evidence to allow any further deduction. The vessel was amply outfitted with fishing gear, new, and additional gear to the value of $349.59 having been put on board before sailing, which was admittedly in the custody of the master and which he must account for. In a small vessel of this description which carried on only master, mate, chief and assistant engineer, cook, and one seaman (not counting the fishermen who were not shipped as seamen and therefore did not perform seamen's duties), the master must personally account for the property of the owner entrusted to his charge, whatever may be said as to his responsibility in larger vessels where property may be entrusted to the custody of various officers. It would never do for this Court to encourage the opinion that a well-equipped fishing vessel may leave a port in charge of a master and return with, *e.g.*, missing tackle, boats, gear, etc., and the master escape any responsibility simply by omitting to give any

reasonable explanation of what has become of said property; on the contrary, it is his duty to give it to his owners at the first opportunity, and in the present case he should have done so when his attention was directed to the shortage in the gear and his wages refused on that account, instead of which he did nothing, treating the matter, in effect, as one in which he had no deep concern.

The result of the adjustment of the accounts and opposing claims is that the plaintiff is indebted to the owners in the sum of $76.52, for which sum said owners will have judgment against the plaintiff over and above his claim against them. The costs of claim and counterclaim will be allowed in the ordinary way, and the reserved costs of the adjournment of the trial will be costs in the cause.

Judgment for plaintiffs.

DICK v. CALGARY.

Alberta Supreme Court, Simmons, J. March 16, 1914.

1. ACTION (§ I B 3—17)—CONDITION PRECEDENT—NOTICE OF ACTION—INJUNCTION TO RESTRAIN ALLEGED ULTRA VIRES CONTRACT OF MUNICIPALITY.

Section 125 of the Calgary municipal charter making it a condition precedent that one month's notice in writing shall be given before action against the city is not limited to damage claims, but applies to actions from any cause; and consequently a preliminary notice is essential in an action for a restraining order against the municipality to prevent its carrying out a land purchase claimed to be ultra vires.

Statement

INJUNCTION motion in an action by A. A. Dick and others, suing on behalf of themselves and the other ratepayers of the city of Calgary, for an injunction restraining the city from proceeding with the purchase of lands for an abattoir and stockyards.

The injunction was refused because of want of notice of action under the Calgary charter.

W. T. D. Lathwell, for the plaintiffs.

Clinton J. Ford, for the defendant.

Simmons, J.

SIMMONS, J.:—On or about September 30, 1913, the defendant corporation passed by-law number 1,579, authorizing the council to raise the sum of three hundred and fifty thousand dollars to purchase fifty-five acres of land, being part of the south-east quarter of eleven (11), twenty-four (24), one (1), west of the 5th meridian, for the purpose of establishing and locating thereon union stockyards, abattoirs, warehouses and manufactories, such portions of said land, as may hereafter be determined, to be sold or leased in parcels to persons, firms, or corporations, for

ALTA.
S. C.
1914
DICK
v.
CALGARY.
Simmons, J.

the said purpose. The said by-law was submitted to the ratepayers and approved by them.

Counsel for the defendant city admit that when the city by-law was under consideration by the council, the existence of by-law number 492, passed on April 6, 1903, providing for a stockyards agreement with one John S. Hall, or his assigns, had been overlooked.

The plaintiffs now ask for an injunction restraining the city from proceeding to purchase the lands in question, described in the city by-law; secondly, from purchasing or agreeing to purchase any interest in the contract made between the city and said John S. Hall, by the by-law of 1903; and thirdly, generally, from carrying out the purposes of by-law 1579.

Under the amended statement of claim the plaintiffs claim that the said by-law is *ultra vires* of the powers of the city of Calgary under their charter. The defendant city rely on sec. 125 of the city charter, which requires one month's notice in writing of the intention to bring an action against the city from whatever cause it may arise. Sections 123, 124 and 125 of the city charter are those dealing with questions of notice. Section 123 is the counterpart of sec. 468 of the Ontario Municipal Act. The Courts in the province of Ontario have held that sec. 468 of their Municipal Act, dealing with the question of notice, applies to actions against the city for damages only where something is alleged to have been done under an illegal by-law. Section 125, however, of the Calgary municipal charter goes much further, and specifically says that one month's notice in writing shall be a condition precedent to all suits and actions against the city from whatever cause they may arise. The matters raised by the plaintiffs in their statement of claim in regard to the illegality of the by-law are of a very important character, and go to the question of validity of legislation. I indicated at the oral argument that the duty was upon the city to shew that the powers purporting to be used under by-law 1579 had been specifically created under their municipal charter by the provincial legislature. Subsequent to that oral argument, the defendants have raised the objection as to want of notice, and I regret that I am bound to hold, under sec. 125 of the city charter, that the plaintiffs' present action fails on the ground that they have not given the one month's notice in writing of their intention to commence action.

As this disposes of the present application, I therefore do not deal with the question of the validity or invalidity of the by-law in question.

The application for injunction, therefore, is dismissed with costs.

Injunction refused.

GRAF v. LINGERELL.

ALTA.

S. C.
1914

Alberta Supreme Court, Walsh, J. March 25, 1914.

1. BILLS OF SALE (§ II A—7)—NON-REGISTRATION—SUBSEQUENT CREDITOR.

The "creditors of the bargainor," as against whom sec. 9 of the Bills of Sale Ordinance, N.W.T. ch. 43 (Alta.), makes absolutely void a sale by the bargainor without immediate delivery or actual and continued change of possession or the registration of a bill of sale, includes not only the then existing creditors but also the subsequent creditors of the bargainor.

[*Barker* v. *Leeson*, 1 O.R. 114, approved; and see Barron & O'Brien on Chattel Mortgages, 2nd revised edition, 454, 455.]

2. ANIMALS (§ I A—6)—PROPERTY RIGHT IN—PROGENY.

There is a common law presumption of property, in the progeny of domestic animals, running to the owner of the dam as against the owner of the sire.

[*Dillaree* v. *Doyle*, 43 U.C.Q.B. 442; *Roper* v. *Scott*, 16 Man. L.R. 594, referred to.]

Statement

INTERPLEADER issue, the plaintiff being an execution creditor of two brothers and the defendant being a brother of the execution debtors. Seventeen head of horses seized by the sheriff were involved. The defendant claimed some of those as purchaser from the execution debtors, some as joint owner of the animals' sire, and others by purchase from outside parties.

Judgment for the plaintiff in part.

A. L. Smith, for the plaintiff.

H. J. Maher, for the defendant.

Walsh, J.

WALSH, J.:—This is an interpleader issue, the plaintiff being an execution creditor of two brothers Charles and Enoch E. Lingerell and the defendant being Joseph F. Lingerell, who is a brother of the execution debtors. Seventeen head of horses seized by the sheriff under the plaintiff's execution form the subject-matter of the controversy.

Seven of these animals are claimed by the defendant either by direct purchase from the execution debtor, Charles Lingerell, or as the increase of other animals so bought by him. These seven animals are divided into three classes, (A) the bay mare "Pet," and a yearling out of a mare named "Fly," both of which the defendant claims under an alleged purchase thereof from the execution debtor, Charles Lingerell; (B) a brown mare four years old, the foal of a mare named "Old Slick," which last mentioned mare he claims to have bought from Charles four years ago whilst she was in foal with what is now the mare in question; and (C) a sucking colt, and a yearling out of "Pet," a yearling out of "Old Slick," and a yearling out of another mare named "Old Bess," all of which dams the defendant claims to have purchased from Charles, long before any of those foals was conceived.

ALTA.

S.C.
1914

GRAF
v.
LINGERELL.

Walsh, J.

No bill of sale was given to the defendant upon the sale of either of the animals in class (A) or of the dams of any of the animals in class (B) and (C), nor was any of the said sales accompanied by an immediate delivery or followed by an actual and continued change of possession of the animal so sold. I think it is quite clear for this reason that the sales of the animals in class (A) are, under section 9 of the Bills of Sale Ordinance, absolutely void as against the plaintiff.

I think for the same reason that the defendant's claim to the animal in class (B) cannot be sustained. She was part and parcel of "Old Slick" at the time that the defendant says he bought the dam. If the dam had been seized she would have been in the same category as the animals in class (A) and I do not see how the defendant's claim to her colt, which was then in gremio, can be any better than his claim to the dam.

I have more difficulty with the animals in class (C). Whilst in my opinion none of their dams could, under the circumstances, have been held by the defendant as against the plaintiff's execution, there is this difference between them and the animals in class (B) that they were not being carried as foals when their dams were purchased by the defendant, but they were foaled as a result of their dams being bred by him to a horse after their purchase. The sire of these animals was a stallion named "Choice Goods" who was then owned by the execution debtors and the defendant in equal shares. Each of these animals was therefore sired by a horse in which each of the execution debtors had as large an interest as the defendant and is out of a dam which the defendant could not have held as against the plaintiff's execution. The ownership of the sire, however, has not I fancy any bearing upon the question of the ownership of these animals as it seems to be quite clear under our law that the brood of all tame and domestic animals belongs to the owner of the dam. I merely mention the facts bearing upon their paternity to shew that no equity arises in the defendant's favour by reason of them: *Dillaree* v. *Doyle*, 43 U.C.Q.B. 442; *Roper* v. *Scott*, 16 Man. L.R. 594; and *Temple* v. *Nicholson*, Cassels, Supreme Court Digest, p. 114, are authorities for the proposition that the property in the progeny of domestic animals is in the owner of the dams, but in no one of these cases was a claim made under circumstances such as those which exist here. It seems to me though that if I am right in holding that the sales of these dams were as against the plaintiff absolutely void it must follow under the facts of this case that no property in their increase ever became vested in the defendant as against the plaintiff. He has never had any possession either of the mares or their foals as distinguished from the pos-

session of his brothers, the execution debtors. Apart from this I am not satisfied that any of the purchases from his brother Charles, which the defendant sets up, was an honest transaction with the exception perhaps of the foal of the mare "Fly" for the price of which mare and foal the defendant's cheque for $140 is produced. The circumstances surrounding the alleged purchases of the other animals fill me with suspicion of the *bona fides* of the defendant's claim, especially when considered in the light of the evidence as to the dealings of the brothers as amongst themselves and with strangers. I hold, therefore, that these seven animals are liable to seizure under the plaintiff's execution.

It is true that the plaintiff was not a creditor of Charles Lingerell at the date of any of these alleged sales by him, but it seems to be quite clear that "the creditors of the bargainor" as against whom sec. 9 of the Bills of Sale Ordinance makes absolutely void such sales as these are not only the then existing but also the subsequent creditors of the bargainor (see the second revised edition of Barron & O'Brien on Chattel Mortgages 454, 455, and cases there noted and particularly *Barker* v. *Leeson*, 1 O.R. 114).

Another horse seized is a yearling out of a bay mare which the defendant claims to have purchased from a man named Gwyn. He produces a memorandum signed by Gwyn evidencing this transaction in which he, the defendant, is named as the purchaser. This horse was given by Gwyn, however, in payment for his board at the Lingerell house. This house was maintained at the expense of the three brothers and I think that the debt which Gwyn owed was to them and not to the defendant alone. At the time of this transaction the execution debtors were getting into deep water financially and I am satisfied that this horse was put in the name of the defendant alone for the purpose of defeating their creditors. The defendant and the execution debtors are, I think, co-owners of this yearling, each of them being entitled to an undivided one-third interest in it, and the interests of the execution debtors in it are subject to the plaintiff's execution.

Another yearling is claimed by the defendant as a foal of one of his mares, but of which mare he does not know. Enough was established by the evidence of the plaintiff's witnesses to shift to the defendant the onus of proving his claim to the goods in question. He has not satisfied this onus as to this animal which I therefore adjudge to be liable to the plaintiff's execution.

The remaining eight horses are claimed by the defendant under purchases either of them or of their dams from four

ALTA.

S. C.
1914

GRAF
v.
LINGERELL.

Walsh, J.

strangers. In each case the purchase by the defendant is established with a reasonable degree of certainty. Three of these purchases are evidenced by writing under the hand of the vendor, namely those from Stanley Downs, Percy Shillam, and Alfred Kirkby, and the defendant is named as the purchaser in each of them. There is no written evidence of the purchase from Flansberg.

There is nothing beyond the general evidence of the course of dealing by these brothers amongst themselves and with others to indicate any interest of the execution debtors in any of these animals. I am asked to find upon this evidence that the three brothers were partners and that these horses were assets of the partnership. I do not think that I can do that. There certainly is a good deal in the evidence to justify the suspicion that there has been a deliberate attempt on the part of these men to get all of their assets in the name of the defendant and all of their liabilities in the names of the execution debtors. I am unable, however, to find that any of these horses were ever the property of any one of them, but the defendant and I must give effect to his claim to them, although I must say that I do so with a mind not entirely free from doubt upon the question.

The plaintiffs succeed upon more than one-half of their claim. They will have the general costs of the issue taxed under the second column of the schedule. No additional costs were incurred by reason of the plaintiff's claim to the horses with respect to which the defendant has succeeded, and partly for this reason and partly because I think the plaintiff was justified in making him prove his title no costs of the same will be taxed to him. The defendant will also pay the plaintiff's and the sheriff's costs of the interpleader order.

Judgment for plaintiff in part.

N. S.

S. C.
1914

HENDERSON v. INVERNESS R. CO.

Nova Scotia Supreme Court, Russell, Drysdale, and Ritchie, JJ.
March 10, 1914.

1. EVIDENCE (§ IV B—494)—BURDEN OF PROOF—DELIVERY—RECEIPTS TO CARRIERS—RECEIPT PRIOR TO LOCATING GOODS.

The rule of evidence that a written receipt signed and delivered (acknowledging the delivery of goods by the shipper to a consignee) shifts the burden of proof, cannot be applied in favour of the shipper, in the face of the consignee's direct denial of delivery and the fact that such receipts were by the consignee company's rules of business exacted prior to inspection or delivery of the goods and that such receipts were not really effective until a later stage when the goods, if found, might be checked and delivered.

Statement

APPEAL by plaintiff from the judgment of Meagher, J., in favour of the defendant.

N. S.

S. C
1914

HENDERSON
v.
INVERNESS
R. Co.

The appeal was allowed and a new trial granted.

The action was to recover the cost price of a case of clothing delivered to defendant by the Intercolonial Railway at Point Tupper to be carried thence to Inverness and there delivered to plaintiff, which, it was alleged, defendant neglected and refused to deliver on demand. Also for loss of profit thereon and for the amount of freight paid.

Statement

The cause was tried before Meagher, J., when the only question contested was the fact of delivery or not to plaintiff's servant at Inverness.

The learned Judge held that the burden of proving delivery was upon defendant in the first instance as against plaintiff's evidence that he never received the goods, but the production of the truckman's receipt discharged that burden, and, in turn, cast it upon the plaintiff, and in the view which he took of the evidence upon that branch, and the extent to which he felt constrained to believe it or otherwise, plaintiff had not satisfied it to such an extent as to oblige him to find, or justify him in finding, in his favour.

While so finding, he stated that he did so with reluctance and not without some misgiving that his view might be erroneous.

The evidence shewed that it was a general custom in defendant's office to sign for the goods in the office and then go to the freight store to take delivery, and that in this case when they went to the store and failed to find the package the assistant said it must be in the car and that the truckman would get it in the morning.

D. McNeil, K.C., and *T. W. Murphy*, for appellant.

H. Mellish, K.C., for respondent.

RUSSELL, J.:—I concur in the opinion read by Mr. Justice Ritchie. As I understand Mr. Bain's evidence, the receipt by the plaintiff's truckman for the goods was not taken into the freight shed at all. It was signed in the office before any goods were delivered and kept there. The only paper taken into the freight shed was the piece that the truckman would retain for his employer. The goods, if found, would be ticked off on this paper, or, if not found, would not be ticked off; though not much importance can be attached to the failure to have the goods ticked off.

Russell, J.

It is explained, that when there is only one item, it is not unusual to make no mark on the paper. In an ordinary case when the goods were not found in the freight shed, it would have been the duty of the station agent, when he returned to his office, to mark the receipt "short." But he would not do so in a case like this, if we can accept McQuarrie's evidence, because he would expect to find the goods in the morning.

N. S.

S. C.
1914

HENDERSON
v.
INVERNESS
R. CO.

Russell, J.

There is no dispute as to the goods having been handed over to the defendant company at Point Tupper. It seems to me that there is a burden imposed upon the defendant to shew that he delivered them; at all events, there is such a burden after the plaintiff has sworn that he never received them. I do not think that this burden is satisfied by the production of a receipt signed under the circumstances and according to the custom proved in this case. The receipt, thus explained, cannot, I think, properly play any part in the determination of the issue. I think the circumstances are all consistent with the carelessness, or thoughtlessness, of a truckman, who was not very intent upon his master's business, and that a very probable solution of the mystery is, that the goods are in one or other of the many freight sheds between Point Tupper and Inverness, unless they have since been misdelivered, or taken out by someone who had no right to them.

Drysdale, J. (dissenting)

DRYSDALE, J. (dissenting):—The plaintiff's accredited agent McQuarrie signed a receipt for the goods in question and regularly paid the freight thereon. The question for the trial Judge was whether or not the goods were delivered to plaintiff's clerk or agents. The receipt, of course, could be explained and an attempt was made by McQuarrie and McDonald to shew that the receipt was given by mistake and that the goods never were actually received.

The learned trial Judge discredited both these men, as I read the full and carefully considered findings herein. If the learned trial Judge did not believe McQuarrie in his attempted explanation of the receipt, it seems to me that ought to be an end of the case. I think this question was peculiarly one for the trial Judge. It was argued that the learned Judge was in error as to the burden of proof, but I do not think so. It is not a case where the doctrine as to the burden of proof need be considered. The question I think is, was the learned Judge satisfied with the attempted explanation of the receipt given and payment of freight made. He distinctly finds he was not and discredits both McQuarrie and McDonald, this being really wholly for the trial Judge.

I would affirm the judgment below and dismiss the appeal.

Ritchie, J.

RITCHIE, J.:—The question in this case is as to whether or not the defendant company delivered to McQuarrie, the truckman of the plaintiff, certain goods which had been brought over its line to Inverness.

One thing is certain, and that is, that the plaintiff never received the goods. He swears very positively to this, and the learned trial Judge states that he was a "careful, conscientious witness."

A receipt for the goods was signed by McQuarrie, and, having regard to the question of the burden of proof as applied to the case by the trial Judge, it becomes important to consider under what circumstances the receipt was signed. The practice in regard to the signing of receipts is disclosed in the evidence of the plaintiff. At page 11 of the case he says:—

> When we receive the freight advice, the boy goes to the station and he signs the receipt in the station for goods received, then they take this bill, he and the agent, and go together to the freight shed, after the receipt has been signed, and when they find the goods and the box is delivered over to the truckman, a check mark is put opposite the box on the bill. This check mark was lacking on the bill with regard to this box, and that satisfied me at once that the box had not been delivered, that the truckman had not received the box.

It is common ground that the practice was as stated in the evidence just quoted. The freight bill was produced and the box was not checked off. I do not, however, attach much weight to this, because the evidence shews that the checking was often omitted.

The learned trial Judge finds in favour of the defendant company, as he states, "with reluctance, and not without some misgivings that my view may be erroneous."

The Judge was in doubt, and I think, on the face of the judgment, it is clear that his view as to the burden of proof was an element in leading him to the conclusion at which he arrived. It, therefore, in this case of doubt, becomes important as to whether or not the learned Judge's view as to the burden of proof was correct. In the judgment it is said:—

> The burden of proving delivery was, of course, upon the defendants in the first instance, they had to shew, as against the plaintiff's evidence, that he never received, I mean that it never came into his store, due performance of their contract to carry and deliver. The production of the truckman's receipt discharged that burden and, in turn, cast it upon the plaintiff, and to the extent to which I feel constrained to believe it, or otherwise, I do not think he has satisfied it, at any rate to such an extent as to oblige me to find, or justify me in finding, in his favour.

If the learned Judge was wrong in his application of the burden of proof, then it seems to me clear that in this case, which is recognized by the Judge as a doubtful one, the judgment cannot stand.

I cannot bring my mind to the conclusion that the receipt, signed under the circumstances which I have mentioned, discharged the burden which rested upon the defendant company and cast it upon the plaintiff. If it was the case of an ordinary receipt which would not be given until the goods were delivered, I would have no difficulty in following this part of the decision, but it was a receipt signed at a time when there is

N. S.

S. C. 1914

HENDERSON v. INVERNESS R. CO.

Ritchie, J.

no dispute that the goods had not been delivered. The only evidence of delivery to McQuarrie was the receipt. The evidence shews that it did not mean that he had received the goods, being signed before he and the station agent went to look for them. I cannot see how such a receipt changes the burden of proof. The company's case is this receipt. It is met by a straight denial on the part of McQuarrie. If, without any reference to the burden of proof, the learned Judge had found against McQuarrie's evidence, that would have been an end of the case for the plaintiff, but the judgment in terms shews that the burden of proof weighed with the Judge.

With very great deference, I think the possession of the goods being admitted by the defendant company, the burden of proof was, and remained throughout the trial, upon the defendant company to prove delivery.

I therefore think there should be a new trial and I would let the costs of the appeal abide the final result.

New trial ordered.

N. S.

S. C. 1914

THOMSON v. HALIFAX POWER CO.

Nova Scotia Supreme Court, Graham, E.J., Meagher, Russell, and Longley, JJ. March 19, 1914.

1. EMINENT DOMAIN (§ I D 3—67)—WATER RIGHTS—LAKES AND STREAMS —PUBLIC USE—PRIOR PUBLIC UTILITY FRANCHISE.

A right of expropriation granted to a mining and power company by legislative authority in its Act of incorporation as to "lakes or streams or lands covered by water" will be construed as not including public rivers nor those in which rights and franchises of other corporations such as river improvement companies had become vested by special legislation.

2. EMINENT DOMAIN (§ I D 3—67)—WATER RIGHTS—INTERFERENCE WITH PRIOR FRANCHISE—GENERAL POWERS AS TO STREAMS AND LAND COVERED BY WATER.

Mere general words in an expropriation clause of an incorporating statute will not confer the right to compulsorily acquire property which had formerly been acquired in the same way by another company where the purposes of the earlier project would be seriously interfered with.

3. STATUTES (§ II B—113*a*)—STRICT CONSTRUCTION—STATUTORY GRANTS —EMINENT DOMAIN.

Statutes purporting to confer a power to acquire land compulsorily under eminent domain process for the benefit of a power company or the like, are to be construed strictly.

[*Simpson* v. *South Stafford Co.*, 34 L.J. Ch. 380; *Illinois Central* v. *Chicago*, 53 L.R.A. 411, referred to.]

Statement

APPEAL from the judgment of Ritchie, J., in favour of plaintiff, in an action claiming (*a*) damages for trespass; (*b*) an injunction to prevent further acts of trespass; (*c*) an order to restrain defendant from proceeding with a proposed expro-

priation of plaintiff's lands in connection with a project for developing electricity from water power; (*d*) an order to restrain defendant from proceeding with such expropriation until the prior determination of the respective rights of plaintiff and defendant company in the lands, etc., sought to be expropriated.

The learned Judge, in the judgment appealed against, held that defendant's Act of incorporation did not authorize the expropriation of the lands in question and granted the injunction applied for.

H. Mellish, K.C., and *F. H. Bell*, K.C., for appellant.

T. S. Rogers, K.C., for respondent.

N. S.

S. C. 1914

THOMSON v. HALIFAX POWER CO.

Statement

The judgment of the Court was delivered by

GRAHAM, E.J.:—By the Acts of 1911, ch. 113 (N.S.), an Act to incorporate Tungsten Mines Limited was passed, incorporating certain persons and their associates for the purpose of mining tungsten. The Act contains very comprehensive powers lettered from (*a*) to (*r*) section two. They are rather larger than our largest coal mining companies possess, and with coal, many by-products may be turned out. Still, it was a mining company with apt provision for mining coal and carrying the coal for shipment by railways, and as an incident of the latter, carrying passengers, but generally restricted in other cases to a county or two. It also had the incidental power to generate, sell and deliver electric energy, no doubt locally in connection with the generation of electricity for the operation of the main purpose.

Graham, E.J.

It had expropriation powers as follows: sec. 17:—

> Whenever it shall be necessary that the company should be vested with lands, or an easement therein for the purpose of sinking shafts for mining or quarrying or putting down slopes or for lands for its shaft houses, machine shops or works, or for constructing an electric light and power plant, roads or railroads, or whenever it may be necessary for the company to *acquire lakes or streams or lands* covered by water, or any easement therein, or to acquire land for the purposes of a *right of way for any pipe or pipe lines*, or for storing water thereon, or for the erection of pole lines, and no agreement can be made for the purchase thereof, it shall be lawful for the company to apply by petition to the Governor-in-council shewing the situation of the *lands, lakes or streams, or lands covered with water*, required for the purposes of the company, a description thereof by metes and bounds, the names of the owners or occupiers thereof, and any encumbrances thereon that may be known to the company, and the amount which the company has offered to pay the person or persons owning or occupying the same and praying for the expropriation thereof.

Section 18 provided for notice being served upon the

N. S.
S. C.
1914
THOMSON
v.
HALIFAX
POWER CO.
Graham, E.J.

owners or occupiers of the land, lakes, streams or lands covered with water, fixing a time for the hearing by a Commissioner of any objections to such expropriations, and a report.

Section 19, provided for the hearing by the Governor-in-council, which,

> if satisfied, the property or easements sought to be expropriated is actually required for carrying on the works of the company and is not more than is reasonably necessary therefor, and is otherwise just and reasonable, shall thereupon by order-in-council declare the lands, lakes, streams, lands covered with water, or easements therein sought to be expropriated, or any portion thereof, to be vested in said company in fee simple, or the estate sought by said petition free from encumbrances subject to the payment of damages hereinafter provided for.

Sec. 23 provided that on payment of the damages the company should have a title in fee simple to the property so expropriated.

At the next session of the Legislature, an Act was passed 1912, ch. 187, substituting a section for section one of the earlier Act, by which the name of the company was changed to the Halifax Development Co., or, perhaps, a new company was incorporated with that name. I notice that the name of one corporator is the same in both Acts. Also two provisions of the earlier Act having to do with the acquisition of another company, the Schelite Mines Co., the articles of which might identify the county in which the Tungsten was actually supposed to be were repealed. Also a further Act was passed in that same session, ch. 188, amending sec. 2, sub-sec. (*c*) of the earlier Act and substituting the following provision:—

> To construct, purchase, operate or maintain, or to contribute to the purchase, construction, operation or maintenance of any building, railway, tramway, wire-rope tramway, canal, wharf, bridge, pier, road, hydraulic works, reservoir, aqueducts, furnaces, sawmills, crushing works, electric light and power plant, factories, warehouses, shops and pulp mills, and to operate such railway, tramway, wire-rope tramway, mills, lighting plant and works by steam, electricity, water or other motive power *for the purposes of the company only as included in the objects thereof.*

I make no observation upon the proper construction of the last two lines.

By the Acts of 1913, ch. 173, the name was again changed to the "Halifax Power Company."

Thus with a few strokes of the pen the mining of tungsten seems to have been treated as a matter of minor importance, no doubt, because there was no tungsten to mine and the development of water power to produce electricity for Halifax in competition with other companies was hinted at, mainly in the name. The Act became a floating Act, no situs was fixed and the lakes and rivers of the province, wherever the company

would choose to land, apparently became subject to the expropriation provisions.

And now a petition has been presented to the authority named, namely, the Governor-in-council, mainly asking that body to vest in them parts of two rivers with the lakes in their course, namely the Indian river and the North-East river at St. Margaret's Bay, 23 miles from Halifax, and Indian river is from twenty to twenty-four miles in length.

The general scheme seems to be to divert the North-East river flowing into St. Margaret's Bay by means of a flume into the Indian river, drying up the North-East river below that point of junction, including Coon pond and Mill lake. Also to divert the Indian river at a point upwards of a mile from its mouth into an artificial watercourse to the company's proposed lower power station, practically drying up the Indian river in its original course from that point to the sea.

Paragraphs 4 and 5 of the petition are as follows:—

Your petitioner desires to at once proceed with the erection and construction of a plant and the other necessary work for development of power to and from and in the vicinity of the rivers above-mentioned, and for such purposes it is necessary that your petitioner should be vested with other lands in the vicinity of said rivers and easements therein for constructing your petitioner's proposed electric light and power plant, and it is also necessary for your petitioner to acquire lakes, streams and portions of said rivers and tributaries and lands covered with water and easements therein in the vicinity of the said rivers and other lands for the purposes of a right of way for pipe or pipe lines proposed to be constructed by your petitioner and for storing water therein.

Annexed hereto is a plan shewing sections and portions of the said Indian river and North-East river, and the lands in the vicinity thereof, referred to in this petition, which it is necessary for your petitioner to acquire for the purposes aforesaid, such portion of said rivers, streams, lakes, lands and lands covered with water being coloured red on such plan, and annexed hereto are also descriptions by metes and bounds of the several lots of land and land covered with water which it is necessary for your petitioner to acquire for the purposes aforesaid and which are shewn on said plan.

Mr. McColl, a director of the defendant company, speaking first more particularly of the Indian river, says:—

Q. You were speaking about these lands being taken along the river. You say you took 50 feet on either side? A. Yes.

Q. Then I understand that the water of the stream will be diverted by this dam into the flume? A. Yes, a large proportion of the water.

Q. Then you would expect the stream to be practically dry during a part of the season? A. Possibly. We are intending to have the right to do so if we want it. We will probably get a little water down the stream at times.

Q. But you propose to have the right to take all the water? A. Yes.

N. S.

S. C.
1914

THOMSON
v.
HALIFAX
POWER CO.

Graham, E.J.

Q. And in connection with this power scheme to use all the water at certain seasons? A. Yes.

Q. What seasons do you expect not to use the water, any other time except freshets? A. No. The water naturally runs off these rivers about 7 and 8 months in the year, 90 per cent. runs off. The balance between 3 and 4 months. Under our proposition this will be prevented by storage dams.

Q. You will utilize water that would otherwise go to waste? A. Yes.

Q. How do you affect the quantity of water passing by there? A. We take the right to utilize the whole thing.

Q. Of course, during freshet periods, when the water is running over the dam, it will go down stream or through the flume? A. If it goes over the dam it will go down stream.

Q. And when would you expect that to happen? A. We propose not to have that happen often.

Q. What you have said about the lower development applies to the North-East river? A. We would likely take the right to divert all the water.

Q. There you would expect also, except at freshet time that the one river is all turned into the other? A. We may let some water go down. We are taking out rights we are expecting to get.

Q. You are expecting to use all the water? A. Yes.

Q. But you can't hold it at freshet time? A. Yes.

Q. In planning 50 feet each side of the stream, you are not taking the soil of the bed of the stream? A. Yes, that goes with the sides of the stream, I understand.

Before passing, I wish to say that the presumption making the thread of the stream the boundary, while well established, seems to me might be open to question in the expropriation of property, particularly when the consummation of the acts of expropriation will result in there being no stream there. Apparently, in order to acquire the stream, the defendants acquire fifty feet each side of it, and leave the stream itself and the bed of it to implication.

Upon the petition, the Governor-in-council appointed a commissioner to take evidence. I say nothing about that enquiry, but I do think that such pertinent evidence as the amount of capital of the company subscribed and paid up and hence the ability to meet an award for the compensation, after a vesting order is made, would be one of the most important bits of evidence to elicit to satisfy the Governor-in-council, and that it should not have been ruled out. That, as well as other rulings, cannot be reviewed here nor anywhere else, if the Legislature is to have sway. Apparently when the purpose of the defendant company became a little more apparent, the plaintiff's solicitor withdrew and applied to this Court for restraining orders. One for a company, Lewis Miller & Co., owning 90,000 acres of timber land partly on these

and another river, the other for a fishing club, who own, or are in occupation of land on the banks of the Indian river below that block of land, and whose fishing and riparian rights will be very seriously injured, if not destroyed.

The earlier action, Millers', met with the misfortune on the appeal in respect to an interlocutory injunction of an equally divided Court, and we were told at the argument that the defendants thereupon secured from the Governor-in-council a revesting order vesting the property sought to be expropriated in the defendants.

The fishing club's case has been tried. There has been a restraining order granted by the Judge. That forms the subject of this appeal.

1. In my opinion, the provisions of sec. 17 are not sufficient to cover the property sought to be taken compulsorily. I place it upon two grounds, first, that the river is a public river under the statutes of the province, and, secondly, that other incorporated companies, improvement companies, by special legislation, have acquired statutory rights in this river, and that in either case, the provisions of sec. 17 of the Act of incorporation of this defendant company should be construed to cover only private streams and those in which there were not those public rights or rights of other corporations, vested in them by special legislation.

I refer first to those statutes which make provision for the floating down rivers of sawlogs, timber and so on. Similar statutes have been considered in respect to Upper Canada, in the case of *Caldwell* v. *McLaren*, 9 A.C. 392, and also in Quebec, in the case of *Maclaren* v. *The Attorney-General*, 15 D.L.R. 855, decided by the Judicial Committee of the Privy Council on January 20, 1914. It the latter case, it is said:—

> The rights of users of rivers for the purpose of navigation and the carriage of timber, are independent of the ownership of the bed of the river, and whatever be the source from which they originally came are now protected by statutes which are very far-reaching in their provisions. (A section of the Quebec Act is then quoted.) This is only one of many statutable provisions securing to the public the use of the rivers whatever be the private rights existing therein and however this appeal be decided, these rights of the public will remain unaffected.

The legislation in this province seems to be quite as wide for the protection of the public in the use of rivers. I refer to the revised statutes of Nova Scotia 1900, ch. 95, and particularly sec. 15, of course with its amendments.

The Indian river is proved to be a river that has been used in a profitable, practical manner in transporting logs from the land on its banks to the place of manufacturing. To the north of W. A. Black's property, Lewis Miller & Co. (which company

N. S.
S. C.
1914
THOMSON
v.
HALIFAX
POWER CO.
Graham, E.J.

acquired the land of the Dominion Lumber Co.) own some eighty or ninety thousand acres of timber lands. The evidence shews that at least for forty years this river has been used for log driving, not only by those owning this block, but by various persons owning separate lots along its banks. Then there is special legislation, in which the Indian river and other rivers by name are specially mentioned, and in these, the right of the public is recognized, and rights are vested in other corporations. I refer to the Act of 1875, ch. 90, an Act to incorporate the St. Margaret's Bay Lumber and Lumber Driving Co., continued in force until the year 1915, by the Act of 1895, ch. 141. This legislation had in view the incorporation of certain persons along the river to make improvements and make them beyond the boundaries of their own lands and throughout the course of the river, with a view to increase the floatability of the river by making it navigable for logs, timber and lumber. It recognized the right of the public to send down it logs, timber and lumber, the persons using it thus to pay tolls for the user to those who make the sluiceways, dams and other improvements, with a lien on the logs, etc., passing through these dams and sluices.

By another provision, the Improvement Co. had power to acquire compulsorily from the owners or occupiers, land or other property for sites for dams or sluiceways, on payment of compensation to be ascertained by arbitration. That company included among the corporators the name of Todd, Polleys & Co., who were then owners of the block of timber lands I have just mentioned.

By the Acts of 1896, ch. 101, Young Brothers & Company, Limited, a lumber company, were incorporated, with powers of acquiring the goodwill of any business within the objects of their company and their lands, privileges, rights and contracts, etc. The evidence shews that they succeeded Todd, Polleys & Co. in the ownership of the block of land I have mentioned. By sec. 20 it was provided that the company should have power to build dams and sluices on (among other rivers) Indian river, and to improve each of said rivers and its tributaries so as to make each or any of the said rivers, etc., navigable for logs, timber and lumber. By the Acts of 1901, ch. 132, the successors to Young Brothers & Co., Ltd., in the ownership of this block of land, viz., the Dominion Lumber Co., acquired the like powers in respect to this river.

Under these Acts improvements were, from time to time, made. Dams were constructed at five or six different places which were useful for storing the water until a sufficient amount had accumulated to float the logs along to the next dam.

The effect of all this was to make this river like a public highway. The right to take tolls proclaimed it a highway. And, moreover, the improvement corporations, under their legislation, acquired valuable rights or franchises.

It is purposed now with general words to destroy the public rights, and the rights and franchises of the corporations by diverting this river. In my opinion, the general words "streams and lands covered with water" ought to be limited so that these statutory rights will not be altered. Section 17 has abundant scope for application for private rivers in which there are no such rights. Take the case of highway, you cannot acquire compulsorily a highway under general words enabling you to take land.

I cite a passage from a Massachusetts case, merely because it is like this case, but the principle of construction is maintained by abundance of English authority.

In *Commonwealth* v. *Coombes*, 2 Mass. 489 at 492, Parsons, C.J., said:—

> The statute gives a general authority to the Sessions to lay out highways, but the statute must have a reasonable construction. This authority therefore cannot be extended to the laying out of a highway over a navigable river, whether the water be fresh or salt, so that the river may be obstructed by a bridge. A navigable river is, of common right, a public highway, and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public.

And in *Keen* v. *Stetson*, 5 Pick. 492 at 495:—

> A public highway cannot be laid out across a navigable stream, except by a license from the Legislature. Why? Because it will destroy an existing highway, the river itself, in which all the citizens have an interest.

It is clear that with mere general words enabling a company to compulsorily acquire property in general it cannot take property formerly acquired in the same way by another company, if its use for the later project would seriously interfere with its use for the earlier one. There would have to be express power given by the Legislature to take the particular property or necessary implication. This is clear from the following cases: *Queen* v. *South Wales R. Co.*, 14 Q.B. 902, 117 Eng. R. 346; *Dublin and Drogheda R. Co.* v. *Navan Co.*, 5 Irish Reports Equity 393; *Housatonic R. Company* v. *Lee*, 118 Mass. 391; *Boston and Maine* v. *Lowell*, 124 Mass. 368; *Re City of Buffalo*, 68 New York 167; *Prospect Park in Williamson*, 91 New York 552; *New Jersey Southern Railway* v. *The Long Branch Commissioners*, 39 New Jersey Law 28.

2. I propose to deal with another question of construction to shew that the words of sec. 17 of this Act do not apply.

N. S.

S. C.
1914

THOMSON
v.
HALIFAX
POWER CO.

Graham, E.J.

It is not surprising, when the Legislature is asked in a summary way to turn a mining company (with some incidental powers) into a company for making, transmitting and selling electricity at a distant point that some of the provisions do not exactly fit the new project.

This expropriation section has to be construed strictly. The company, of course, must, in a compulsory acquisition of property, be restricted to the purposes mentioned in the provision. The section deals with lands, but it also deals with "lakes or streams or lands covered with water," and in such provisions (to be construed strictly) that classification is generally followed. The taking of water is specifically mentioned. And when they are all mentioned, the general meaning of the word "lands" is restricted. In the case of the *Illinois Central* v. *Chicago*, 53 L.R.A. 411, the expression was "lands and streams." The Court said:—

> Moreover, if the Legislature intended, by the use of the word "land" to include lands covered with water, why use the word "streams"? for all streams are but lands covered with flowing water.

Throughout the whole of sec. 17 the classification is apparent.

> Lands may be taken for the purpose of constructing an electric light and power plant. (Then it deals with the other subject) or whenever it may be necessary for the company to acquire lakes or streams or lands covered by water or any easements therein or to acquire land for the purposes of a right of way for any pipe or pipe lines or for storing water thereon or for the erection of pole lines and no agreement can be made,

Now I say with a good deal of confidence, that the proposed artificial watercourse is not a "pipe" or "a pipe line," nor is it a structure for the "storing of water," nor has it anything to do with "pole lines." And further, that in no sense is a transmission line to transmit electricity to a distance for sale, a "pipe or pipe line." When the company comes to engage in mining all of these expressions will find their natural and appropriate meanings. In 22 Am. & Eng. Ency. 825, it is said: "A pipe line is a connected series of pipes for the transmission of oil, gas or water."

I hardly think it necessary to cite authority to shew that legislation to acquire land compulsorily should be construed strictly. Indeed such legislation as this could not be passed in this way in England. But I refer to a passage in the Lord Chancellor's Judgments in *Simpson* v. *South Stafford Co.*, 34 L.J. Ch. 380.

3. In this action a number of witnesses have been called by the defendants to prove that the artificial watercourse (whatever it may be or do for the fishermen) will really be better for

transmitting logs than the river in its original bed. No doubt if it ever comes to assessing compensation these witnesses will be heard from again. The fact is stoutly disputed by other witnesses, but I think its consideration is irrelevant. The Legislature must, in terms, give the power and it is no answer to urge that although it is not within the terms of the Act, people interested will really be benefited by the diversion of the river. To that kind of an argument, in *Herron* v. *Rathmines Improvement Corporation*, [1892] A.C. 498 at 523, Lord Macnaghten said:—

> Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. It is idle for the promoters to say that they have given all that he can want, or something just as good as that which the Act required them to give, or even something still better if he only knew his own interest. It is enough for him to shew that the thing which is offered is not the thing which the Act said he was to have. It is too late to call for a fresh deal at that stage of the game.

4. The defendants have questioned the power of this Court to interfere with the act of the defendants in setting in motion the Governor-in-council to vest this property in the defendants.

The argument took the form of an answer "wait and see—if the company has not the right to acquire the property, the Governor-in-council will no doubt so decide."

Now that argument does not come with very much force when this defendant company, in the *Lewis Miller Company* case (the injunction failing through this Court being equally divided) promptly obtained an order from the Governor-in-council vesting in the company just such property as the Judge in this case has decided they had no right to acquire.

But I cannot imagine a more appropriate remedy than an injunction if the statute does not cover the property sought to be acquired. It is *ultra vires*. There cannot be a greater invasion of a man's property than to apply for an order vesting it in the applicant. That is worse than taking a forcible possession of it. It constitutes a cloud on the title and that is always a subject for the interference of a Court of equity. In Brice on Ultra Vires, 3rd ed., 468, it is said:—

> Special powers and privileges are given to corporations in a qualified manner only, and not absolutely. It has become a well-settled head of equity that any company authorized by the Legislature to take compulsorily the land of another for a definite purpose, will, if attempting to take it for any other object be restrained by the injunction of the Court of Chancery from so doing: *Galloway* v. *Mayor of London*, L.R. 1 H. of L. 341.

N. S.

S. C.
1914

THOMSON
v.
HALIFAX
POWER CO.

Graham, E.J.

And in Kerr on Injunctions, 4th ed., 85, it is said:—

> The inability of private persons to contend with these powerful bodies, raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers and prevent them from deviating from the terms prescribed by the statute which gives them authority. If they enter upon a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect his land by stirring one step out of the exact limits prescribed by the statute. The principle upon which the Court interferes in such a case, is not so much the nature of the trespass as the necessity of keeping such bodies within control. It is incumbent on them to prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise. If there is any doubt with regard to the extent of the power claimed by them, that doubt must be for the benefit of the landowner and should not be solved in a manner to give to the company any power that is not clearly and expressly defined in the statute.

In *Manchester & R. Co.* v. *Great Northern Railway Co.*, 9 Hare 284 at 287, Turner, V.-C., said:—

> It has hardly been denied in the argument of this case that where a railway is about to take lands not authorized to be taken under the summary powers given to them by the Legislature, the case is a proper one for the interference of this Court by injunction.

In one of the cases already mentioned, *Simpson* v. *Staffordshire Water Works Co.*, 34 L.J. N.S. 380, there had been given under the Act a notice to treat merely. This bill prayed, among other things, for an injunction restraining the defendants from proceeding to summon a jury to assess the value of the field and from using it for any other purpose than the construction of an aqueduct. The minutes of the decree appear at page 391 of the report.

Also in the case of *Herron* v. *Rathmines Improvement Commissioners*, [1892] A.C. 498, there was an injunction. The fact that there is an intervening authority or tribunal does not make their form of relief less appropriate. Nothing was more common than a party in one Court applying to another Court to prevent his opponents from going on in the first Court, and when there is not a letter in the statute authorizing the first tribunal to do the act it proposes to do, one would think that an injunction was a most appropriate remedy.

The exercise of the statutory powers to be

> satisfied that the property is actually required for carrying on the works of the company and not more than is reasonably necessary.

and is "otherwise just and reasonable" we could not of course interfere with. But that is not this case. Here there is not jurisdiction over the subject-matter, and with deference, a tribunal, particularly one without any appeal from its determina-

tion, is not the best tribunal to decide whether it has jurisdiction over the subject-matter or not.

In *Alexandria & F. R. Co.* v. *Alexandria and Washington R. Co.*, 40 American Reports 743 at 746, the Court says:—

> If the foregoing views are correct, and I think they are, the County Court of Alexandria (the Court which had condemned the property) has no delegated authority to exercise the right of eminent domain under the statute in such cases and consequently, had no jurisdiction to adjudicate the question whether the land should be taken from one company and given to another company, and upon this ground the judgment of the County Court was *coram non judice*, and consequently null and void.

Moreover it is shewn by Sir George Jessel, M.R., in the case cited below, *Hedley* v. *Bates*, 13 C.D. 498, that this would be a proper case for an injunction. I refer also to *Stannard* v. *Vestry of St. Giles*, 20 C.D. 5, and Kerr on Injunctions, p. 5.

5. The defendants contend that in so far as the point of this being a public river and the right of the public being interfered with goes, the Attorney-General should be a party to the action.

I think that any person who has a special interest which will be destroyed by the defendants' act, may legitimately contend that the provision of a statute relied on to justify the act is inapplicable because such a construction would involve an interference with the rights of the public in another respect and that could not have been intended.

This point would certainly not be open in the case of *Lewis Miller & Co.* v. *Halifax Power Co.*, 13 D.L.R. 844. I refer to *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109, approved of by Davies, J., in *McIlreith* v. *Hart*, 39 Can. S.C.R. 557. And even if there is room for the contention in this case, I think the first proposition of Buckley, J., in the English case would apply here.

In my opinion, the appeal should be dismissed and with costs.

Appeal dismissed.

MACDOUGALL v. PENTICTON.

B. C.

S. C.
1914

British Columbia Supreme Court, Macdonald, J. March 25, 1914.

1. DAMAGES (§ III A—42a)—CONSTRUCTION AND ENGINEERING CONTRACTS—DELAY IN SUPPLYING MATERIALS TO CONTRACTOR.

If a municipal corporation by its own act causes the work to be done by a contractor under a contract for an improvement, to be more expensive than it otherwise would have been according to the terms of the original contract, it is liable to him, in the absence of stipulations to the contrary, for the increased cost.

2. ESTOPPEL (§ III F—80)—BY ASSENT—ENGINEERING CONTRACT—CERTIFICATE OF NAMED REFEREE.

The acceptance of progress certificates from the engineer, who is declared by the contract to be the sole referee to "prevent all disputes and litigation," will not debar the contractor in respect of labour only in the installation of a public improvement from claiming damages not mentioned in the progress certificates for delays caused by the municipality's neglect to promptly supply the necessary material which it was to do at its own expense, as it cannot be assumed that the latter damages were to be included in a reference of disputes to the engineer which the entire contract shews to have been contemplated only in respect of the contractor's work.

3. CONTRACTS (§ IV D—390)—BUILDING AND CONSTRUCTION CONTRACTS—STIPULATION TO REFER DIFFERENCES TO ENGINEER—DISQUALIFICATION.

Where an engineer is appointed by the contract to be the arbitrator or referee between the partners on questions as to the execution of the work, he must retain a neutral position between the parties, and if he places himself in such a position that his independence is destroyed and he is no longer a free agent, the stipulations so to refer and for his certificate as a referee become inoperative.

[*Hickman* v. *Roberts*, [1913] A.C. 229, and *Bristol* v. *Aird*, [1913] A.C. 241, referred to; and see Annotation on Engineers' Decisions under Construction Contracts, at end of this case.]

ACTION for damages for breach of contract.

M. A. Macdonald, for the plaintiff.

S. S. Taylor, K.C., and *Robert Smith*, for the defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiffs seek to recover damages from the defendant municipality, for breach of a contract entered into between the parties on July 21, 1911. The contract provides for the performance by the plaintiffs of all labour required for the construction of a waterworks system for the municipality and the supply of a certain portion of materials necessary for that purpose.

The plaintiffs were required to commence the work within ten days from the awarding of the contract and to proceed therewith vigourously and continuously until final completion on or before January 31, 1912. There were clauses providing for a penalty for non-completion within the stipulated period, and granting a bonus for fulfilment of the contract within the time specified.

Defendant agreed on its part to supply the bulk of the material required, consisting principally of valves, hydrants, iron and steel pipes, and special castings. Such material was to be delivered either f.o.b. cars or on the wharf at Penticton, B.C., and plaintiffs were to remove and haul it to the site, with as little delay as possible upon receiving notice from the engineer. They were

required to pay demurrage in the event of such removal not taking place within 48 hours after receiving notice.

Evidence was adduced shewing that a contract of this kind, in order to be carried on profitably, requires that the work should be pursued continuously from the time of commencement, and this would necessitate an adequate supply of material being constantly on hand. I am satisfied that the plaintiff tendered upon this understanding and that the parties intended that the work should be commenced as soon as the municipality had made certain financial arrangements, and be carried on so as to be completed in the early part of the ensuing year.

The municipality was threatened with an epidemic of typhoid fever, so it was a work of necessity that would not brook delay. The contract being executed upon this clear understanding, plaintiffs allege that they commenced work immediately and sought to proceed vigourously and continuously, but that there was delay on the part of the municipality in delivering the material and that loss resulted therefrom.

As to the right of action by a contractor against a municipality for the extra cost of performing a contract through fault of the municipality, see Dillon on Municipal Corporations, 5th ed., vol. 2, sec. 813, p. 1225:—

> If a municipal corporation by its own act causes the work to be done by a contractor under a contract for an improvement, to be more expensive than it otherwise would have been according to the terms of the original contract, . . . it is liable to him, in the absence of stipulations to the contrary, for the increased cost.

Plaintiffs also seek to recover damages for default on the part of the municipality in other portions of the contract, but the main issue is as to whether delays took place and whether the defendant is liable therefor.

Defendant in addition to denying that any delay occurred invokes the provisions of sec. 116 of the specifications, which were incorporated with and formed a portion of the contract. This section deals with the supply of the material and the liability that might result from delays in connection therewith, and is as follows:—

> It being understood and agreed that the parties of the first part are to supply the necessary pipe, hydrants, valves, herein specified from time to time as required, so as to enable the parties of the second part to proceed continuously, and that in the event of the parties of the first part being unable through any delays, not caused by them or by their negligence, to deliver the said material or any part thereof as required by the parties of the second part, the parties of the first part are not to be held responsible or in any way liable for any loss or damage occurring to the parties of the second part thereby. In case of delay in delivering material as aforesaid by the parties of the first part, an extension in time for completion of this contract equal to the time of such delay shall be allowed the contractor.

B. C.
S. C.
1914
MACDOUGALL
v.
PENTICTON.
Macdonald, J.

I do not think this provision relieves the defendant from liability. The language is somewhat difficult to construe, but it would appear that if there is any delay in such delivery caused by the said municipality, or by its negligence, it is not relieved therefrom, nor is the failure to deliver to be simply compensated by extension of time for completion. Having expressly agreed to supply material, the onus of escaping responsibility for non-delivery is cast upon the defendant. The parties dealt upon the basis that one was to do the work and the other supply the material, and if the plaintiffs were delayed in their work by non-delivery, then unless this section can be beneficially utilized, the defendant would be liable for breach of the contract. The defendant sought to prove that the section could be so applied, and that it was impossible, under the circumstances, to furnish the material from time to time, as required by the plaintiffs. I think that the arrangements made for the supply of material were not carried out in a businesslike manner. The call for tenders provided for a deposit of 5% of the amount of the tender as a guarantee that the bidder would, if successful, promptly execute a satisfactory contract and furnish a bond if required. While this condition was thus stipulated in the circular asking for tenders, it was not observed, and the municipality was left unprotected as to time of delivery of the material. For example, a contract was prepared for execution by Robertson & Godson as to supply of cast iron pipe, it provided for delivery, within a certain period, and penalty for non-performance, but it was not executed, and the municipality was thus not in a position to enforce delivery of the material, nor did the municipality place the contractors for material under any bond or other penalty, in the same manner as it bound the plaintiffs. The plaintiffs had a right to expect, not only from the terms of the circular calling for tenders, but also from the generally accepted way of letting contracts of this kind, that the municipality had safeguarded itself, so that if delivery of the materials did not take place as required, and loss ensued to the plaintiffs through delay, the municipality would have recourse to such contractors, and thus could recoup itself for any damages paid the plaintiffs. The council of the municipality may have excused itself from not insisting upon proper contracts for material being executed through stress of circumstances, and the pressing necessity for the work being speedily commenced and completed. However, in the event of delays occurring, through the default of the material-man, this would not excuse the municipality, and it could not be expected that a loss resulting from such delay should be borne by the plaintiffs.

It is contended that, as a matter of fact, there was no delay in the delivery of the material, nor were the plaintiffs' workmen idle at any time on account of the manner of delivery. It is suggested that because the plaintiffs' workmen moved from one

portion of the work to another no real delay occurred in the work, or loss resulted therefrom.

I find that there was delay in the delivery of the material. Mr. Bennett, the reeve of the municipality, candidly admitted that there was no doubt the "material did not come as we expected."

Then as to the men being shifted from place to place in order to facilitate the work on account of non-delivery of the necessary material from time to time as required, I find that this was a form of delay caused by the defendant and resulted in loss to the plaintiffs.

It was submitted that the only penalty might be an extension of time for completion, and the reeve of the municipality stated that he understood the time would be extended. But in my opinion the loss that ensued is one that was not intended to be, and could not be, compensated by simply extending the time for the fulfilment of the contract. Defendant is not relieved from its covenant as to supply of material as required. See Hudson on Contracts, 2nd ed., vol. 1, p. 546; *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C.P. 310 at 327.

It was stated by the engineer that, even if there were any delay, it would have been avoided if the plaintiffs had carried on their work in a different manner. But the evidence did not satisfy me that delays would not have occurred even if the work had been pursued in the manner suggested by the engineer. It is worthy of mention that the engineer had power under the contract, if the methods or appliances appeared insufficient or inappropriate for securing the quality of work, or rate of progress required, to order the plaintiffs to increase their efficiency or improve the character of the work, but no such order was given. It is a fair assumption that the character of work and rate of progress was not of such importance, or so unsatisfactory, as to warrant the order being given.

Defendants then sought to escape liability on the ground that the engineer was the sole judge or referee upon all questions arising out of the contract; and that all claims for damages of any kind were required to be submitted to be arbitrated upon and decided by the engineer. It was further submitted that all claims now sought to be recovered had been so dealt with by the engineer of the municipality, and that the certificates given by the engineer operated as a bar to recovery by the plaintiffs. I do not consider that the granting of any of the progress certificates had the effect now contended for by the defendants. There were some small claims allowed for extra work allowed by the engineer, but as to the large amount of claims on account of damages for delay, and other causes, I do not think that the engineer adjudicated upon such claims.

It is a question whether under the terms of the contract, even

B. C.

S. C.
1914

MACDOUGALL
v.
PENTICTON.

Macdonald, J.

if the engineer were in such a position of independence, that he would be entitled to act, that he had power to deal with any damages that might arise through default on the part of the municipality to supply materials according to the contract. The clause in the contract declaring that the engineer shall be the "referee to prevent all disputes and litigation" seems to provide for deciding every question which may arise relative to the execution of the work on the part of the plaintiffs, and that the decision of the referee shall be final and conclusive. It does not specifically give power to the engineer to decide questions arising out of the performance by defendant of its portion of the contract. I do not think this clause assists the defendant, though the provision at the end as to a certificate being a condition precedent for the commencement of any action by the plaintiffs to recover any damage "on account of any alleged breach" of the contract requires consideration. I think, however, that this latter part of the clause is governed by the preceding portion thereof.

Even if the contract was intended to provide for arbitration, and that the engineer should be sole referee, I think by his course of action and surrounding circumstances, he placed himself in such a position that his independence was destroyed, and he was no longer a free agent. He was in a very delicate position, and should have retained a perfectly neutral position between the parties. The contract as far as the arbitration proceedings were concerned thus became inoperative. It is true that plaintiffs sought to have a reference as to their claims, and if such reference had proceeded they might have been bound by the result. It, however, proved abortive and left the parties in their original position.

While the engineer may have been perfectly honest in dealing with the matter, still in his judicial position there was the danger of his favouring his employers. I think the same ground was also applicable as to his certificates, if they are set up as an adjudication, and that the plaintiffs are free to resort to an action to recover the damages to which they may be entitled. As to independence required in an engineer or architect, acting in a judicial capacity, vide *Hickman* v. *Roberts*, [1913] A.C. 229; *Bristol* v. *Aird & Co.*, [1913] A.C. 241.

At a time when the work was nearing completion, the defendant municipality sought to obtain possession of a portion of the water works system, and two agreements were entered into bearing date respectively August 19, 1912, and September 9, 1912. It is submitted that these agreements operate as a waiver and estop the plaintiff from recovering. I do not think that the agreements were so intended, nor did they have any such effect.

In my opinion the action of the plaintiff for breach of contract is well founded, and there should be reference to the registrar to determine the nature and extent of the damages arising from delay on the part of the defendant municipality in delivering material.

B. C.

S. C.
1914

MACDOUGALL v. PENTICTON.

Macdonald, J.

I am anxious not to trammel the referee and so am not expressing any opinion as to the liability with respect to any particular item of such claim. All of them, save those that I will presently deal with, are left for his consideration and separate report.

I allow and disallow certain items which need not be included in the reference:—item 14 of $440 is allowed at $220; item 15 of $224 is allowed; item 19 of $480.75 is disallowed, as the plaintiffs have already received credit therefor; item 28 of $15 is disallowed; item 29 of $20 is disallowed; item 31 of $1575 is disallowed; item 34 of $1000 is allowed at $800.

There will be judgment in favour of the plaintiffs for the amount thus allowed, and a reference as to the balance of the claim for damages.

Plaintiff is entitled to general costs of the action up to trial. The costs of reference are reserved.

Judgment for plaintiff.

Annotation—Contracts (§ IV D—360)—Stipulation as to engineer's decision—Disqualification.

Annotation

Engineers' decisions under construction contracts.

Mr. Gregory, in his work on Engineers and Architects, says:—

"Not only in the function of directing the work that is to be performed under a contract which provides for payment proportionate to the work exacted, but also in the function of determining the amounts to be received by the contractor, as interim advances upon progress certificates, is it quite reasonable that the parties, in committing the exercise of such functions to the engineer or architect, charged by the employer with the duty of directing and superintending the performance of the work, should do so because of his being such agent of the employer, rather than with the expectation that he would be indifferent between the parties, notwithstanding his being such agent. In a contract for an entire work, a provision for the payment of any portion of the contract price of the entire work, before its completion, is a stipulation of a concession to the contractor. The parties are not to be deemed to have intended to commit the function of determining the measure of such concession, to a tribunal indifferent between them, or, indeed, to have carefully considered the extent to which the tribunal to which they have committed it, would not be indifferent between them, when the employer has gone no further in putting it beyond his own control than agreeing to commit it to the agent whom he entrusts with the function of directing and superintending the performance of the work. See the judgment delivered by Lord Chancellor Cranworth in the House of Lords in the case of *Ranger* v. *Great Western Railway Co.* (1854), 5 H.L.C. 72.

"A conflict has sometimes been regarded as existing between the case of *Ranger* v. *Great Western Railway Co.* (1854), 5 H.L.C. 72; and the cases of *Kemp* v. *Rose* (1858), 1 Giff. 258; and *Kimberley* v. *Dick* (1871), L.R. 13 Eq. 1, but when the difference in the nature of the matters that were committed to the determination of the engineer or architect is considered, all conflict disappears.

"In the contract in the case of *Ranger* v. *Great Western Railway Co.* (1854), 5 H.L.C. 72, the contractor stipulated for the final settlement of

B. C.

Annotation

Engineers' decisions under construction contracts.

Annotation (*continued*)—Contracts (§ IV D—360)—Stipulation as to engineer's decision—Disqualification.

accounts by three engineers, one to be appointed by each of the parties and a third by the two so appointed, and he only agreed that the questions arising during the prosecution of the work should be determined by the company's engineer alone. He could not be regarded as having carefully weighed the extent to which the engineer would not be indifferent between the parties, because he had only agreed to commit to such engineer the determination of matters which the company might reasonably have the intention to keep within their own control, or of matters which would only have temporary effect, and in respect of which any error or injury might be subjected to future rectification or redress. The contractor was held to have no right to be relieved of the obligation to submit to such determination, merely because, when he entered into the contract, he was unaware that the engineer was a shareholder in the company.

"But in the cases of *Kemp* v. *Rose*, supra, and of *Kimberley* v. *Dick*, supra, the contractor had agreed to submit to the determination of the architect, not merely questions arising during the prosecution of the work, and of temporary operation or effect, but questions affecting the equivalence between the amount which he was to receive in final payment for the work, and the burden of his undertaking in respect of the performance of the work. His agreement to submit to the determination of the architect, in such matters, having been made in ignorance of an agreement or understanding existing between the employer and the architect tending to create a bias in the mind of the latter in addition to that which would be necessarily incident to his employment, the contractor was held to be relieved of his undertaking to abide by such determination."

In *Hickman* v. *Roberts*, [1913] A.C. 229, the circumstances were that a building contract provided that the decision of the architect of the building owners on all matters in relation to the work should be final and that payments should be made on the certificate of the architect. The architect, under a misapprehension of his position, allowed his judgment to be influenced by the building owners and improperly delayed issuing his certificates in accordance with their instructions. After the completion of the work and the expiration of the period of maintenance the contractor sued the building owners for the final balance alleged to be due under the contract, but the final certificate was not issued until after the commencement of the action:—It was held by the House of Lords that the building owners were precluded from setting up as a defence to the action either that the issue of the certificate was a condition precedent to the bringing of the action or that the certificate was conclusive as to the amount of the claim.

In a later case before the House of Lords, it was held that where a contractor executes works under a contract containing a provision for the reference of disputes to the engineer of the other party to the contract, and upon the settlement of the final account there arises a bonâ fide dispute of a substantial character between the contractor and the engineer involving a probable conflict of evidence between them, the fact that the engineer, without any fault of his own, must necessarily be placed in the position of Judge and witness, is a sufficient reason why the matter should not be referred in accordance with the contract; and the Court will there-

Annotation *(continued)*—Contracts (§ IV D—360)—Stipulation as to engineer's decision—Disqualification.

B. C.

Annotation

Engineers' decisions under construction contracts.

fore refuse to stay an action by the contractor for payment of the account: *Bristol* v. *Aird*, [1913] A.C. 241.

The latter case leaves it in doubt whether, where the action embraces several items, all within the reference clause, as to some of which the arbitrator is disqualified from acting, the Court should allow the action to proceed as to these items and allow the remaining items to be referred.

Lord Parker, of Waddington, stated that it was the practice of the Chancery Division to stay an action as to one matter in dispute and at the same time to allow it to proceed as to another, notwithstanding that both matters are within the reference, and that in many cases that was a desirable course: *Bristol Corporation* v. *John Aird & Co.*, [1913] A.C. 241 at 261.

Lord Atkinson said in the *Bristol* case, [1913] A.C. 241 at 247:—"If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, then he must be held to his contract. Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the fourth section of the Arbitration Act vests in them, 'We are not satisfied that there is not some reason for not submitting this question to the arbitrator.'"

An architect's decision as to the value of work performed or of materials furnished for a building erected under a contract declaring that his decision should be final, is not open to attack if he acts fairly and honestly and no collusion between him and the contractor is shewn: [*Hamilton* v. *Vineberg*, 2 D.L.R. 921, 3 O.W.N. 605, affirmed on appeal] *Hamilton* v. *Vineberg* (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

It is no defence to an action for the balance due for the erection of a building that no notice was given the owners of the contractor's application to the architect for a final certificate where the contract was silent in that regard and required the architect upon notice from the contractor that the latter considers the work complete, to issue a final certificate and to make deductions from the price for unfinished work: *Brown* v. *Bannatyne School District* (No. 1), 2 D.L.R. 264, 21 W.L.R. 80, 22 Man. L.R. 260.

B. C.

Annotation

Engineers' decisions under construction contracts.

Annotation *(continued)*—**Contracts (§ IV D—360)—Stipulation as to engineer's decision—Disqualification.**

A document signed by an engineer on the construction of works certifying to the correctness of a statement shewing the balance due a contractor up to a fixed date, and that the same had not been previously certified to, but withholding a sum "pending repairs," is not a final certificate: *Merriam* v. *Public Parks Board*, 2 D.L.R. 702, 20 W.L.R. 603, 22 Man. L.R. 107.

One alleged ground of disqualification of the engineers, raised in the trial Court in the *Merriam* case, 18 W.L.R. 151, and disallowed, was that the engineers, or their employee, had made a preliminary estimate of what the work should cost; and *Kemp* v. *Rose*, 1 Giff. 258, was cited. Robson, J., pointed out that in *Kemp* v. *Rose*, the architect had given to the owner an assurance that the building would not cost more than a certain sum, and on the faith of that the owner proceeded. Under these circumstances, the architect's decision was held not to be binding upon the builder. In the *Merriam* case, the estimate was made by the inspector of works under the engineers, and was not the basis of any action of the defendants. The element present in *Kemp* v. *Rose* of an assurance to the owners as to cost was absent: *Merriam* v. *Public Parks Board*, 18 W.L.R. 151, affirmed on other grounds, 2 D.L.R. 702, 22 Man. L.R. 107, 20 W.L.R. 603.

In *Alberta Building Co.* v. *Calgary*, 16 W.L.R. 443, 450, the architect states that the reason he refused to certify upon the estimates was because the plaintiffs had not satisfied him that some of their men and materials had been paid for.

The contract provided that for 31 days after the completion of the work the owner shall be entitled to retain 20 per cent. of the contract price and to expend it in payment of claims for work and materials, in keeping in repair the streets, etc., and in finishing unfinished work, and that the owner might also hold the same as a guarantee for the faithful performance of the work and as an indemnity against all claims against the plaintiffs by reason of the work. It further provided that, before the issue by the architect of the final or any certificate, the plaintiffs shall, if required, produce to the architect a clearance from the various supply men and duly signed pay-sheets shewing that all wages have been paid, and also that, if at any time there should be evidence of any lien or claim for which, if established, the defendants might become liable, and which should be chargeable to the plaintiffs, the defendants should have the right to retain out of any payment an amount sufficient to indemnify them against any such lien or claim.

The trial Judge found, however, that the refusal of the architect to grant the plaintiffs a certificate upon their estimate, was not, as stated by him, because they had not satisfied him that it was not true that some of their men and materials had not been paid for; but that his reason for refusing was that he was instructed by the city treasurer, and others assuming to act on behalf of the defendants, not to issue it. The fund placed at the disposal of the city council for the construction of the building was exhausted, or nearly so, and the ratepayers had, shortly before, refused the request of the council for a further sum to complete the building. If the plaintiffs had proceeded to finish the work, there was no fund provided out of which they could be paid the contract-price and such extras as they

Annotation (*continued*)—**Contracts** (§ IV D—360)—**Stipulation as to engineer's decision—Disqualification.**

B. C.

Annotation

Engineers' decisions under construction contracts.

might be entitled to. The cessation of work by the plaintiffs would, therefore, tend to relieve the city council from a serious dilemma, and, before the architect's final refusal of the certificate, they had notice, both from the plaintiffs and their solicitors, that the non-payment of the estimate would lead to that result. Scott, J., held that, from a legal point of view, it followed that the architect was actuated by improper motives in refusing to certify to the estimate. Under the terms of the contract, his powers with respect to granting or refusing certificates were quasi-judicial, and, notwithstanding the fact that he was constituted the agent of the defendants, he was bound to decide impartially between the parties to the contract and to deal equally with both. The evidence shewed clearly that he did not so decide, and that, on the contrary, in refusing the certificate he was unduly influenced by pressure on the part of certain officers of the defendants, for which the defendant municipality must be held responsible. The withholding by the architect of a certificate, upon improper grounds, would not disentitle the plaintiffs to recover the amount due to them in respect of their estimate.

In *Alsip* v. *Robinson*, 18 W.L.R. 39, 42, the written contract provided in a general way that the work and material must be to the satisfaction of the architect.

There was, however, an article in the contract, the effect of which was as follows: When the contractor considers that he has completed the work, the proper step for him to take is to notify the architect, which I hold has been done in this case. It is then the architect's duty, within 72 hours, to issue either a final certificate that the work is completed, or a written statement shewing in what respect the work is incomplete. If the owner be dissatisfied with the certificate, or if either the owner or the contractor be dissatisfied with the statement that the work is incomplete in the particular respects specified, then the proper course for them is to arbitrate and carry the award later to the Courts if need be, or perhaps also to take the architect's certificate or statement direct to the Courts, which is a matter on which I do not pretend to pronounce here.

Payments were to be made only upon the written certificate of the architect that such payments were due, "unless the architect is in default in issuing the same."

The contractors duly delivered their final statement to the architect and he took it as such; he neglected to issue a certificate or statement, as he was bound to do, within 72 hours, and his neglect persisted even until the last days within which the plaintiffs could sue. It would seem, under the authorities, that, when the architect, not through fraud or collusion, but merely through neglect, withholds his certificate, the contractor would find himself in a rather awkward position, especially with a limit of time such as is fixed by the Mechanics' Lien Act for the institution of an action; and this provision as to default seems to have been devised to meet such a difficulty. It was held that there was such prolonged inaction and default on the architect's part as dispensed with the certificate by virtue of the exception quoted: *Alsip* v. *Robinson*, 18 W.L.R. 39.

B. C.

S. C.

1914

WHITE v. DONKIN.

British Columbia Supreme Court, Murphy, J. March 31, 1914.

1. CORPORATIONS AND COMPANIES (§ III—31)—WHEN PROVINCIAL COMPANY LICENSE IS REQUIRED—"CARRYING ON BUSINESS," MEANING OF.

Contracts of an unlicensed extra-provincial company, although partly made in British Columbia, must, in order to fall within the incapacity to sue imposed by sec. 168 of the Companies Act, R.S.B.C. 1911, ch. 39, be contracts made in the course of or in connection with some business which the company, in whole or in part, "carries on" in British Columbia.

[*John Deere Plow Co.* v. *Agnew*, 10 D.L.R. 576, 48 Can. S.C.R. 208, applied.]

2. DAMAGES (§ III A 4—80)—BREACH OF IMPLIED WARRANTY—MERCHANTABLE GOODS.

The measure of damages for breach of implied warranty that the perishable goods sold were merchantable, whereas by deterioration they had become valueless, is the return of the money paid the seller and the excess which the buyer had to pay to replace the shipment.

[*Graham* v. *Bigelow*, 3 D.L.R. 404, 46 N.S.R. 116, referred to; and see affirmance of that case on appeal, *Graham* v. *Bigelow*, 15 D.L.R. 294, 48 Can. S.C.R. 512.]

Statement

ACTION by an unlicensed extra-provincial company involving capacity to sue under the prohibition of sec. 168 of the Companies Act, R.S.B.C. 1911, ch. 39.

Judgment was given for the plaintiff.

Mowat, for the plaintiff.

S. S. Taylor, for the defendant.

Murphy, J.

MURPHY, J.:—As to the objection that the action must fail because plaintiffs being an unlicensed extra-provincial company are precluded by the provisions of the Companies Act, R.S.B.C. 1911, ch. 39, sec. 168, from suing in respect of any contract made in whole or in part in the province, I think, even assuming that the contract here in question was partly made in British Columbia, that such contention must fail because of the interpretation put upon that statute in *John Deere Plow Co.* v. *Agnew*, 10 D.L.R. 576, 48 Can. S.C.R. 208. It is there held that such contracts to fall within the prohibition must be made in the course or in connection with some business which the company in whole or in part "carries on" in British Columbia: *per* Duff, J., at 230 [48 Can. S.C.R.].

The plaintiff company carries on no business in this province, particularly if the explanation of the same learned Judge as set out on page 232 [48 Can. S.C.R.] of what constitutes "carrying on business" is adopted, as I think it must be by a Court of first instance at any rate.

I find on the evidence that the fish in question were not merchantable when they were shipped from Vancouver; that in fact they ought then to have gone to where they finally were sent, *i.e.*, the city dump. I think the plaintiffs had opportunity to inspect, and that, on the evidence, they must be held to have accepted the goods.

B. C.

S. C.
1914

WHITE
v.
DONKIN.

Murphy, J.

That, however, does not prevent them from suing on the implied warranty that the goods were merchantable at any rate where, as is the case here, the plaintiffs could only conclude from the correspondence that the defendants were actual dealers in and in fact producers of the commodity furnished. The measure of damages is I consider that plaintiffs ought to be placed in the same position as if at the time of discovery of the true condition of the fish they had been furnished with proper fish. *Graham* v. *Bigelow*, 3 D.L.R. 404, 46 N.S.R. 116, is the latest case I can find on this point. There can, I think, in this case be no question of loss of profits, as plaintiffs apparently actually replaced the fish, though at a higher price. I think plaintiffs on this basis are entitled to a return of all moneys paid for the fish and for its transportation, etc., to Toronto, and, in addition, to the difference between what the fish would have cost them laid down in Toronto and what they actually paid for fish to replace the shipment. If counsel cannot agree on the question the matter may be again spoken to.

Judgment for plaintiff.

ROBILLARD v. GRAND TRUNK PACIFIC R. CO.

MAN.

K. B.
1914

Manitoba King's Bench, Macdonald, J. March 25, 1914.

1. COSTS (§ I—14)—SECURITY FOR COSTS—NON-RESIDENT—ABSENCE WHETHER TEMPORARY OR NOT.

A motion to compel the plaintiff to give security for costs is an interlocutory proceeding and accordingly may be supported by an affidavit of information and belief if reasonable grounds of belief are also stated; the onus may therefore be thrown upon the plaintiff, by proof of absence and of enquiries made which negative permanent residence, to prove that his recent return to the province was a *bonâ fide* resumption of residence therein.

Statement

APPEAL from the decision of the Referee in Chambers dismissing an application for security for costs.

A. Dubuc, for the plaintiff.

J. B. Coyne, for the defendant.

Macdonald, J.

MACDONALD, J.:—This is an appeal from the referee dismissing an application for security for costs.

The action was brought in May, 1912, at which time the plaintiff, it was alleged, was residing in this Province.

In June, 1912, the plaintiff served notice of trial for the assizes in that month. This notice of trial was set aside and nothing further appears to have been done until February, 1914, when a motion was made by the plaintiff for a trial by jury and this was granted.

The plaintiff's solicitor assigned as a reason why the case

MAN.

K. B.

1914

ROBILLARD v. G.T. PACIFIC R. Co.

Macdonald, J.

was not proceeded with at the November assizes that his client was away.

In an affidavit made by the plaintiff in February, 1914, he describes himself as of the city of St. Boniface; but the jurat to this affidavit shews that it was sworn to at Hudson Bay Junction in the Province of Saskatchewan. The defendant then caused inquiries to be made and interviewed an uncle of the plaintiff in St. Boniface, from whom it was learned that the plaintiff was not a resident of St. Boniface and had not been seen by him in the year 1913. He had lived with him for a month and the plaintiff did a great deal of roaming around. It was further learned from this source that the plaintiff's father lived at Pargrave, Manitoba; but that the plaintiff did not live with his parents and was fond of travelling about.

The plaintiff, it is admitted, is a bachelor. Numerous enquiries were made at St. Boniface, at the post office, police station and hotels, but the said plaintiff was not known there.

In February, 1914, it is evident the plaintiff was not in Manitoba, and the material before the referee seems to me sufficient to justify the application for security for costs.

The grounds upon which the learned referee dismissed the application, as I am informed by counsel, is that there is no positive allegation in any of the affidavits in support of the motion that the plaintiff is not a resident of the province.

This, I take it, is an interlocutory application, and as such, under rule 529, information, knowledge and belief is a sufficient ground for such an application if such information, knowledge and ground of belief is set forth and sufficient to justify the belief, which I think in this case it was.

The material used on the application was, in my opinion, sufficient to throw the onus upon the plaintiff that he was but temporarily absent and not having done so, I think the material sufficient to grant the order and the appeal is allowed.

The plaintiff is, I am advised by his counsel, now present in this province, and if he can shew by affidavit and upon examination upon it, if the defendant deems fit so to proceed, that he was but temporarily absent and that Manitoba is his home and that he has returned to make this his *bonâ fide* residence, the order will be vacated.

Order accordingly.

TRIPODI v. WEST CANADIAN COLLIERIES.

ALTA.

S. C.

1914

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ. March 30, 1914.

1. DEPOSITIONS (§ I—4c)—PARTY RESIDING ABROAD—WORKMAN'S COMPENSATION CLAIM.

An applicant claiming as "a dependant wholly dependent upon the earnings of the deceased," under the Alberta Workmen's Compensation Act, 1908, ch. 12, should be granted a commission for the taking in Italy of his own evidence and that of his witnesses as to who are dependants where it appears (*a*) that such evidence is material and necessary to establish the fact and extent of the dependency, and (*b*) that the expense of bringing the witnesses from Italy to Alberta would be prohibitory and unnecessary.

Statement

APPEAL from the judgment of McNeil, District Court Judge, refusing an application for a commission to take the evidence of the applicant in Italy claiming as a dependant under the Alberta Workmen's Compensation Act.

The appeal was allowed.

Lougheed & Co., for the plaintiff (defendant).

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—This is a claim for compensation under the Workmen's Compensation Act brought by the father of a miner who was killed in an accident while in defendants' employ. The applicant is described as having his residence in Italy, and claims as "a dependant wholly dependent upon the earnings of the deceased." The particulars shew that one of the matters in dispute is the question of who are the dependants.

The applicant applied for an order to take the evidence of witnesses in Italy, which was refused by McNeil, District Court Judge.

No reasons for the refusal are given, but it is stated in respondent's factum that leave was given to renew the application on new material, and in support of the dismissal it is urged that the affidavit is insufficient, being founded on information and belief and not shewing the grounds of such belief.

From what has already been stated it is apparent that the evidence of the applicant and perhaps of others is material and necessary to establish the fact and extent of the dependency, and the grounds of a belief in the materiality of the witnesses would be self-apparent, though they are in fact stated by the deponent, pointing out in the affidavit in what respect and why the evidence is material.

The affidavit also points out the prohibitory expense of bringing the witnesses from Italy to Alberta as a ground for his belief in the necessity for the order. This also is an almost self-evident fact. Certainly our ordinary knowledge of geography and common affairs is sufficient to shew that it would be a great expense

ALTA.

S. C.
1914

TRIPODI
v.
WEST
CANADIAN
COLLIERIES.

Harvey, C.J.

to bring witnesses from Italy to Alberta and that consequently this evidence could be much more economically taken by commission.

What I have said meets the second ground urged by respondent, viz., that the affidavit does not shew any good reason why the applicant cannot be examined here.

The third and last ground is that there is nothing in the affidavit to shew that the purposes of justice will be better served by having the witnesses examined abroad rather than before the Court, and that the affidavit is made by a student at law rather than by the applicant or some other proper person. As to this objection, it should be kept in mind that the primary purpose of the Act is to furnish aid to those who need, to those who are dependent upon the earnings which the accident ends or lessens, and the purpose of the Act which is the purposes of justice for this case would be badly served by putting unnecessary expense upon the applicants in establishing their claims for relief. The facts speak for themselves. The evidence to be given by the witnesses is largely formal, and can be as well given on commission as before the arbitrator without injustice to the respondent.

It is desirable that the custom of law students making affidavits when other persons more responsible and more competent could make them, should not be encouraged, but when, as in this case, the facts largely speak for themselves and the affidavit is therefore to a considerable extent formal, and there is no one available who could speak with more authority, the objection appears untenable.

For the reasons stated I think the order should have been granted. The appeal will therefore be allowed with costs, and the order made on the application below as asked for the costs to be costs in the matter of the arbitration.

Appeal allowed.

N. S.

S. C.
1914

MUIRHEAD v. INTERCOLONIAL COAL MINING CO. Ltd.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley, Drysdale, and Ritchie, JJ. March 10, 1914.

1. MASTER AND SERVANT (§ II A 4—60)—SAFETY AS TO APPLIANCES—LIFE IN PERIL.

Where a workman's life is in peril and the superintendent of the works knows it, and has under his control a safety appliance which, if applied, will remove or materially lessen the danger, and there is no sufficient reason for not applying it, then if, in consequence of the non-application, the workman is killed, the death is caused by the negligence of the superintendent, for which the employing company is liable under the Employer's Liability Act, R.S.N.S. 1900, ch. 179.

[*Uylaki* v. *Dawson*, 6 O.W.R. 569, applied.]

N. S.

S. C.
1914

MUIRHEAD
v.
INTER-
COLONIAL
COAL
MINING CO.

2. MASTER AND SERVANT (§ II A 4—60)—SAFETY OF APPLIANCES—GENERAL USE, MATERIALITY OF.

Upon a question of safety of appliances for workmen and the employer's duty in respect thereof, the general use of such appliances, by employers in the class of work involved, is not the determining test.

[*Ship Building Works* v. *Nuttall*, 119 Pa. 149, disapproved.]

Statement

APPEAL by the defendant from the judgment of Meagher, J., in favour of the plaintiff. The action was brought under the Employers' Liability Act, R.S.N.S. 1900, ch. 179, by the widow of William B. Muirhead, suing on behalf of herself and infant children to recover damages for the death of her husband, caused by injuries received while employed as a workman in defendants' mine.

At the time in question, the deceased was assisting in clearing the slope in defendants' mine and was struck by a runaway box car and killed. The accident was alleged to have been due to defects in the condition or arrangement of the ways, works, machinery and plant connected with or used in connection with the business, and in particular, lack of safety appliances, and the fastening apparatus connecting the cars being defective, out of repair and obsolete.

On the trial, questions were submitted to the jury and on their answers thereto judgment was ordered in favour of plaintiff for the sum of $1,500 with costs to be taxed.

The questions submitted to the jury with their answers are set out in full in the judgment of Ritchie, J.

The appeal was dismissed, LONGLEY, J., dissenting.

H. Mellish, K.C., for appellant.

R. H. Graham, K.C., for respondent.

Graham, E.J.
Russell, J.

GRAHAM, E.J., and RUSSELL, J., concurred with RITCHIE, J.

Longley, J.
(dissenting)

LONGLEY, J. (dissenting):—There seems to be no negligence disclosed whatever in the proper and genuine sense of the word. Trains of cars are brought up and down embankments in various mines in Nova Scotia, and have been for more than twenty years, with the contrivance of a simple hook or a coupler. It is not generally known that such are regarded as unsafe or improper. There is no evidence in this mine that they were ever ordered to be put on by any competent authority, neither is there any evidence that they were ever ordered to be put on the train for taking down and bringing up men. On this occasion, the car did break loose for some reason, which is not disclosed, and did descend to the bottom and it did kill two persons. In respect of the first person killed no action was brought, as to the second person killed an action has been brought, and the responsibility can only be fixed upon some person whose

N. S.

S. C.
1914

MUIRHEAD
v.
INTER-COLONIAL COAL MINING CO.

Longley, J. (dissenting)

negligence is disclosed and whose negligence is of such relation as bears upon the company. It is attempted to fix the negligence on Malcolm Blue, because he had invented a certain contrivance which was fastened over the hooks and pulleys, but he occupied no position in respect to the men which made his conduct in any way responsible for negligence. Negligence is something which appears spontaneously and produces its natural and normal effect upon the consciousness of a man. There is no evidence of such negligence in this case. The man came to his end as the result of pure accident, for which no person can be responsible, and for which no person undertook to make himself responsible. I should think, therefore, the verdict in this case should be set aside.

Drysdale, J.

DRYSDALE, J.:—I concur in the result of the opinion read by Ritchie, J., but I desire to put my opinion upon the sole point that the manager is a superintendent within the meaning of the Employers' Liability Act, R.S.N.S. 1900, ch. 179.

I think, under the findings here, there can be no recovery at common law, and that no defect in the ways, works, etc., is shewn, but that, under the findings of the jury, the manager, as against whom negligence is found, is a superintendent under the Liability Act.

Ritchie, J.

RITCHIE, J.:—William B. Muirhead, a miner or workman, in the employ of the defendant company, was, while in such employ, killed by a runaway box or car on a slope in the colliery of the defendant company. The plaintiff is his widow and sole administratrix, and brings this action for the benefit of herself, and her five children, all of whom are under the age of twenty-one years.

The action was tried before Mr. Justice Meagher, with a jury. The plaintiff claims, under the Employers' Liability Act, [R.S.N.S. 1900, ch. 179] and also for damages at common law. The questions submitted to the jury and their answers are as follows:—

Q. 1. Was the death of W. B. Muirhead caused by the negligence of the defendant company? A. Yes.

Q. 2. If so, in what did such negligence consist? Answer fully? A. In not using the safety appliances which were available.

Q. 3. Did Muirhead's death occur by reason of the negligence of any of the employees of the defendant company? A. Yes.

Q. 4. If so, what was such negligence, and what particular employee, or employees were guilty of such negligence? A. Manager, in not ordering safety appliances to be used on occasions of this kind.

The damages were assessed by the trial Judge (by consent) at $1,500. In the view which I take of this case it is not neces-

sary to consider the question of common law liability. The doctrine of common employment is not to be considered, as I deal with the case entirely from the standpoint of the Employers' Liability Act.

An important question for adjudication is as to whether, or not, it was negligence on the part of the mine manager, Malcolm Blue, not to order the safety appliances to be used; this, of course, depends on the particular circumstances of this case. It sounds somewhat trite to say that negligence is the absence of reasonable care under the circumstances, but I am not aware that any better definition can be given.

The jury have found that Muirhead's death was caused by the absence of the safety appliances. This finding is in effect that the cars became uncoupled, hence the runaway, and that this could not have happened if the safety appliances had been used. I have carefully read the evidence, and in my opinion, it cannot be said that this inference of fact could not be drawn by reasonable men. I cannot say, on the evidence, that the jury have answered the 3rd and 4th questions in an unreasonable way. Muirhead and another man were killed by this runaway car. Hamen, a witness on behalf of the company, swears that "it happens every now and then that a car runs away on the slope." This could hardly happen "every now and then" without Blue knowing it, and it must have been obvious to him that if a car did run away, a serious accident might follow. It was known to him that the men were at work at the slope, and that the cars were running there without the safety hooks, and he also knew that there was nothing to prevent the cars becoming uncoupled if a car ran off the track, this is his own evidence. He stops short of admitting it, but I think he must have known that if there was uncoupling, a car might catch the man working below. He admits it would have been safer to use the safety hooks which were at hand and says the only reason they were not used was, that he never did use them. When men were riding on the rake, he says he used them, because the statute required it, and he admits that if men were working on the slope there would be just as much danger as in the box, if they had not time to get away. Muirhead, and the other man who was killed, had not time to get away, the evidence is clear about this. The slope was steep and the car coming very fast. Accidents had happened before in this mine from runaway cars on the slopes and Blue had knowledge of these accidents. He knew the plaintiff was in a position where his life would be in danger at any moment, he had under his hand an appliance which he knew would lessen, if not entirely remove, that danger, and he did not order it to be used, not for any good or sufficient

N. S.
S. C.
1914
MUIRHEAD v. INTERCOLONIAL COAL MINING CO.
Ritchie, J.

reason, but simply because he had not been in the habit of using it.

I agree with the jury that this was negligence. When a workman's life is in peril, and the manager of the work knows it, and has under his control something which if applied will remove, or materially lessen the danger, and there is no sufficient reason for not applying it, then, if in consequence of the non-application, the workman is killed, in my opinion the death has been caused by the negligence of the manager, because, if he had used reasonable care under the circumstances, the man would not have been killed.

The jury have found that not applying the safety hooks caused Muirhead's death. I cannot, on the evidence, say that they were wrong; on the contrary, I find ample ground in the evidence to support the conclusion arrived at by the jury.

The cars, as I have shewn by the quotation from the evidence of Hamen, went off the track "every now and then." I quote from the evidence of Blue as follows:—

Q. You knew that they were running cars right on the slope without any safeties? A. Yes.

Q. You knew that there was nothing to prevent them being uncoupled if a car ran off the track? A. Yes, they do come uncoupled.

Q. You knew if they came uncoupled the cars might come down on the men working below? A. I would not like to say that.

Q. You know if a car ran away it would catch the men working? A. It might stop.

Q. Do you stop or catch them? A. Yes.

Q. If it went far enough? A. Yes.

Q. If it was coming fast they would not have time to get out of the way and the manholes would be of no use. A. No.

Q. (BY HIS LORDSHIP):—Any material difference in the grade of the slope? A. About 300 feet; above the fall it was a little flatter.

Q. Would it make that coupling any safer to have a hood over it like the one here? A. Yes.

Q. It would be less liable to kill the men down below? A. If there were safeties on it would be less liable.

This evidence of Hamen and Blue makes the language of Mr. Justice Anglin in *Uylaki* v. *Dawson*, 6 O.W.R. 569 at 573, fit this case. I quote:—

The danger was obvious and constant; the means of averting it simple and apparent. In such circumstances to take the risk of occasioning the death or serious injury of human beings was unreasonable and unjustifiable.

It was urged that it was the custom in other mines to use the open hooks without any safety device and that therefore it was not negligence to refrain from using such device in this case. In *Ship Building Works* v. *Nuttall*, 119 Pa. 149 at 158, cited by Mr. Mellish, it is laid down that general use is the test of

negligence. I decline to follow this case. I do not say that "general use" is not an element, but I deny that it is the test; you must go to all the facts in each case to find out whether there was negligence or not. For instance, if this safety appliance had never been used anywhere, but the manager had it and knew that men were working on the slope, that they were likely to be killed without the appliance, that the danger would be removed by using it, he cannot take the position that he will risk their lives, and in the event of accident shelter himself from the charge of negligence under the doctrine prevailing in Pennsylvania, that "the test is general use."

If "general use" is to be the test, then employers of labour can be a law unto themselves; the fact that none of them use a safety device will be an answer to an action for negligence in not using it. This test does not prevail generally in the United States. In Thompson on Negligence, 1901, vol. 4, sec. 3989, it is said that the test is

> Not that others use like tools and machinery but to consider whether they are reasonably safe, and suitable for the work to be done and such as a reasonably careful man would use under like circumstances.

In *Uylaki* v. *Dawson*, 6 O.W.R. 569, the question of the use of safety hooks was involved. Mr. Justice Anglin, at 572, said:—

> There is probably sufficient evidence to justify the statement made on behalf of defendants that the use of safety hooks upon dumping buckets intended for the removal of excavated material is almost unknown. That dumping buckets similarly equipped are in common use for the conveyance of workmen up and down shafts such as that in which the accident happened is also a conclusion warranted by the evidence. But the proposition that such use of them is therefore proper, and is in no wise inconsistent with the duty owed by the employer to his workmen to take due care that the machinery and appliances furnished for the use of such employees in doing their work, are, having regard to the purposes for which and the mode in which they are to be used, such as do not expose them to unnecessary risk, is in my opinion, by no means a necessary conclusion for these premises.

In my opinion Blue was guilty of the negligence found by the jury.

Rule 36 of the Coal Mines Regulation Act was cited on behalf of the defendant company. It provides as follows:—

> In every mine in which men are raised or lowered in a shaft, there shall be attached to the cage used for that purpose, such safety appliances as may be agreed upon between the owner or manager of such mine and the inspector of mines.

It was contended this rule having been passed, and there being no rule requiring safety appliances in other cases, they

N. S.
S. C.
1914
MUIRHEAD v. INTERCOLONIAL COAL MINING CO.
Ritchie, J.

were excluded and need not be used. No authority was cited for this contention, and, in my opinion, it is not sound.

If a man has, under certain conditions, a good cause of action for negligence, because a safety device was not used, I cannot think that cause of action is taken away or does not arise because the statute provides that, under certain other conditions, the safety device must be used. The maxim that the express mention of one thing implies the exclusion of another is sometimes resorted to in the interpretation of deeds, wills or other written instruments, I do not think has any application here. In Maxwell on Statutes, 5th ed., p. 504, it is said:—

> Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases.

The negligence of Blue does not fasten liability upon the defendant company, unless he was a person in the service of the defendant company, having superintendence entrusted to him within the meaning of sec. 2, sub-sec. (*a*) of the Employers' Liability Act. It goes without saying that he was in the service of the defendant company and, in my opinion, it is clear that superintendence was entrusted to him. He was the manager appointed under the Coal Mines Regulation Act. The Act provides that "every mine shall be under the *control and daily supervision* of a manager." The interpretation part of the Act says: "'Manager' means the chief officer having the control and daily supervision of any mine."

The following appears in Blue's evidence:—

> Q. In regard to the box that was used that night of the accident, it was part of your duty to see about these boxes and get reports from the men who looked after them? A. Yes.

In view of Blue's position as manager, and of the evidence which I have quoted, I am unable to adopt the contention that he was not a person entrusted with superintendence.

I therefore hold that on this branch of the case the liability of the defendant company is established. It is not necessary, in the view I have taken, for me to decide (and therefore I refrain from deciding) that the defendant company are liable on the ground that there was a "defect in the condition or arrangement of the ways, works, machinery, plant, building or premises connected with, intended for or used in the business of the employers."

If the boxes, or cars, were going up and down the slope with

no safety appliance at a time when no men were on the slope who might be injured or killed, and the result of a car becoming uncoupled would only mean extra work, it might well be held that there was no defect in the condition or arrangement of the ways, works, etc., but I do not think it necessarily follows that there is no defect when men are on the slope and their lives in danger.

I think the appeal should be dismissed with costs.

N. S.
S. C.
1914
MUIRHEAD v. INTERCOLONIAL COAL MINING CO.

Appeal dismissed.

LAFOND v. LAFOND.

B.C.
S. C.
1914

British Columbia Supreme Court, Murphy, J. March 23, 1914.

1. WILLS (§ I A 3—15)—EXECUTION—REFERENCE IN CODICIL TO PRIOR WILL —INCORPORATING EXTRINSIC DOCUMENT.

Where there is a distinct reference in a duly proved codicil to a prior testamentary paper therein referred to as the "last will" of the testator and only one document of the kind is known, probate may be granted of both although the due execution of the prior will is not shewn, if the parol evidence satisfactorily proves that there is no doubt that it is the instrument referred to.

[*Allen* v. *Maddock*, 11 Moore P.C. 427, 14 Eng. R. 757, followed; see also *Barnes* v. *Crowe*, 1 Ves. Jr. 485; *Doe d. Williams* v. *Evans*, 1 Cr. & Mee. 42; *Re Heathcote*, L.R. 6 P.D. 31; *Ingoldby* v. *Ingoldby*, 4 N. of C. 493; *Smith's* case, 2 Curt. 796; *Re Seaman*, 6 N.S.R. 185; Theobald on Wills, 7th ed., 67.]

ACTION to establish an alleged will. Statement

Judgment was given for the plaintiff.

McPhillips, and *Wood*, for the proponant.

D. A. McDonald, for the other interests.

MURPHY, J.:—In this action I found at the trial that deceased had sufficient mental capacity to make a will. As to the execution, I would hesitate to hold, under the authorities, that I should not give effect to a presumption of valid execution. However that may be, I think the case clearly falls within *Allen* v. *Maddock*, 11 Moore P.C. 427, 14 Eng. R. 757. Murphy, J.

The codicil was legally executed and the will was clearly identified by parol evidence to be the document referred to specifically more than once in the codicil as the last will of the testator. I must decree that the will and codicil be admitted to probate. Costs of all parties will be paid out of the estate as the case, in my opinion, was one in which proof in solemn form was rightly insisted upon.

Judgment for plaintiff.

B. C.

S. C.

1914

BREITENSTEIN v. MUNSON.

British Columbia Supreme Court, Macdonald, J. March 14, 1914.

1. HUSBAND AND WIFE (§ II E—83)—CONVEYANCE BY HUSBAND TO WIFE —TRUST FOR SURVIVORSHIP—STATUTE OF FRAUDS.

The Statute of Frauds affords no defence to an action by the husband against the personal representative of his deceased wife to enforce an agreement made between the husband and wife that the survivor of them should become the owner of certain lands on his conveyance of same to her, where the wife on her part had at the same time made her will in his favour for the purpose of carrying out such agreement; such agreement is enforceable as against a later will made by the wife in contravention of the agreement.

[*Gordon* v. *Handford*, 16 Man. L.R. 292, referred to.]

Statement

TRIAL of action as to an alleged survivorship agreement as to lands conveyed by a husband to the wife.

W. A. Scott, and *Goodstone*, for the plaintiff.

Maitland, and *Hunter*, for the defendants.

Macdonald, J.

MACDONALD, J.:—In 1907, the plaintiff became possessed of a beneficial interest in lot 7, block 105, district lot 364A, city of Vancouver, and this was the only asset of any importance possessed at the time by the plaintiff.

Plaintiff is over 75 years of age, and was considerably older than his wife, Mattie Breitenstein, to whom he was married in 1903. It was agreed between them in 1907 that they should become jointly interested in this lot, with the right of survivorship. I was quite satisfied that this was the intention of the parties at the time, and to effect such object a solicitor was employed. He recollects the preparation and execution of the documents, which he considered would answer the purpose.

Plaintiff assigned to his wife his entire interest in the property, and she in turn made a will in his favour. A simpler and safer mode of conveying might have been adopted. While the husband was bound by his absolute assignment under seal, the wife might revoke her will and defeat the object of the family arrangement, or even without revocation, further assign the property to a *bonâ fide* purchaser. The property thus assigned to the wife was, at the time received by her, subject to a charge or trust in favour of the plaintiff. They became in equity, irrespective of the form of the documents, jointly interested in the property with right of survivorship.

The plaintiff, who was in receipt of good wages as a stone mason, managed the property, and made the further payments that were required to completely vest the title in the wife and comply with the terms of the agreement under which the property had been originally purchased. This situation continued until a sale subsequently took place to one Flowers.

It was sought at the trial to amend the statement of defence by setting up the Statute of Frauds, it being contended that the *North Western Salt Co.* v. *Electrolythic Alkali Co.* (1912), 107 L.T. 439, applied, and gave such right, even at such a late stage of the proceedings. I doubted the application of this decision as the facts were not similar to the present case, but following the practice of Mr. Justice Irving in *McNerhanie* v. *Archibald* (1898), 6 B.C.R. 260 at 262, I allowed the amendment, reserving the question of costs.

I do not think, however, that the Statute of Frauds affords any defence, in view of the finding already referred to.

The interest of the wife, having been acquired subject to the trust in favour of the plaintiff, it would be a fraud to now set up the Statute of Frauds as a cloak: see *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Gordon* v. *Handford* (1906), 16 Man. L.R. 292.

In 1909, the wife, in company with her daughter, Lilian Munson, one of the defendants, instructed the same solicitor who had acted in 1907 to draw a new will, by which the wife devised half her property to the plaintiff and half to such daughter. The solicitor states that he would not have drawn such a will had he recollected the previous arrangement, but forgetting what had taken place, the will was prepared and duly executed, and remained in his possession. At the same time the previous will was destroyed. The plaintiff contends that this second will was a fraud upon him and in breach of the arrangement under which he assigned the property to his wife.

Upon the death of the wife, Lilian Munson claimed half the interest in the estate, including an interest in what is known as lot 19, block 113, district lot 301, city of Vancouver, which had been acquired in the name of the plaintiff out of the proceeds of the sale to Flowers of lot 7.

If the property remained subject to the trust, or the right of survivorship in favour of plaintiff, then no interest in lot 7 or lot 19 passed under the will.

The only point, in my opinion, left for consideration is whether, either before the execution of the second will, or at any time thereafter, up to the death of the wife, the situation between the husband and wife had changed, or the arrangement had become so modified that she became entitled to devise half the property standing in her name to the defendant Munson.

It appears Lilian Munson shortly after a second marriage was invited to come from Alaska to visit her mother, who was practically an invalid. Her evidence tends to shew an arrangement by which her mother was to give her half the property at her death, and in the meantime she was to remain with her mother and assist in the general housework and usual domestic

B. C.
S. C.
1914
BREITENSTEIN v. MUNSON.
Macdonald, J.

arrangements. Now, if this arrangement was acceded to by the plaintiff, the step-father, in such a way as to amount to an agreement, the second will might become operative so as to confer an interest upon the daughter.

The plaintiff denies any such arrangement, and says that even the execution of the will was concealed from him until about six weeks before the death of his wife.

The solicitor who acted for all parties at the time thought that the plaintiff was incorrect in this, and that he had not become aware of the will until after the death of the wife. A close perusal of the evidence given by the daughter, Lilian Munson, does not shew any clear-cut bargain as to her services being recompensed by any disposition of the property. It should, however, be considered whether, by an application of the principle of estoppel, it might be successfully contended that the wife was entitled to deal with a half interest in the property and dispose of it to her daughter. Independent witnesses were called, and it is difficult to determine as between conflicting statements where the truth of the matter lies.

The principal witness on behalf of the plaintiff was John Graham, a real estate broker, and he says that the wife, in 1911, stated that she was "simply holding the property for Breitenstein," and that they "had an understanding that the one that lived the longest should inherit the property."

Mrs. Muir gave evidence to the contrary, which supported the contention of the defence, and says that on one occasion the wife in the presence of her husband stated that she "owned the property and was going to give Lily" (defendant Munson) "half of it to take care of her, and that she had to have somebody to do, and she wanted Lily to do this."

Defendant Munson shewed by her evidence that the making of the second will was not disclosed to the plaintiff at the time, and states that it was not until the spring of 1910 that her mother mentioned the new will. In reply to a question as to whether the plaintiff was present at the time, she answered in the affirmative, and voluntarily added the words "and of course he was angry." He further added that she (meaning the wife) "was a cheat."

Now, if the contention made by this defendant were correct, there would be no reason for the plaintiff becoming angry or accusing his wife of fraud. So that, even upon the statements of the defendant Munson, there was not an arrangement by which she was to receive half the property standing in the name of her mother in return for any services rendered or otherwise.

I think that the probabilities are in favour of there being no abandonment by the plaintiff of his right of survivorship. Instead of approving of the second will, he protested. Considering

B. C.
S. C.
1914
BREITENSTEIN v. MUNSON.
Macdonald, J.

the relationship of the parties, and the disparity in age, even if I gave full effect to this portion of the evidence, I do not think it was to be expected that the husband would take active steps to establish his interest in the lifetime of the wife. Unless defendant Munson can shew that her position was thereby altered she cannot complain. I feel quite satisfied that she would, in any event, have made her home with her mother. I am further impressed with the danger of supporting a change of situation between the husband and the wife dependent upon chance conversations recounted years after. Under the circumstances, I find the trust which existed continued up to the time of the death of the wife, and that the plaintiff thereupon became the sole owner of any interest possessed by the late Mattie Breitenstein in lot 7, and entitled to any purchase-money still payable in connection with the sale of such property. Plaintiff retains the entire ownership of lot 19. There will be judgment accordingly for the plaintiff with costs against defendant Munson.

A suit brought by defendant Munson against the plaintiff herein was, by order of the Court, directed to be tried at the same time as this action. The actual contest in such action was as to the ownership of the real property. It was admitted that there was no personal property to pass under the will. It may, however, be proved if parties interested so desire. As defendant was dilatory, if not negligent, in producing the will for probate, and invited litigation by his actions, I consider a proper disposition of the costs would be not to allow them to either party.

Judgment accordingly.

EMPIRE LIMESTONE CO. v. CARROLL.

ONT.
1914

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

[*Empire Limestone Co. v. Carroll*, 12 D.L.R. 841, affirmed.]

APPEAL (§ VII L 4—510)—*Master's report—Findings of fact.*]—Appeal by defendants from the judgment of Lennox, J., dismissing an appeal from a Master's report, *Empire Limestone Co. v. Carroll*, 12 D.L.R. 841, 4 O.W.N. 1579, 24 O.W.R. 862.

H. D. Gamble, K.C., for defendants, appellants.
W. M. German, K.C., for plaintiffs, respondents.

THE COURT dismissed the appeal.

Appeal dismissed.

REX v. SCHELLER.

SASK.

S. C.

1914

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 16, 1914.

1. WITNESSES (§ III—58)—CORROBORATION—CHARGE OF FORGERY—CR. CODE 1906, SEC. 1002.

The corroboration required by sec. 1002 of the Cr. Code 1906, on a charge of forgery, is additional evidence that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is otherwise sufficient.

[*R.* v. *Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227; and *R.* v. *Wakelyn*, 21 Can. Cr. Cas. 111, 10 D.L.R. 455, referred to.]

Statement

CROWN case reserved.

T. A. Colclough, K.C., for the Crown.
H. V. Bigelow, K.C., for the accused.

Haultain, C.J.

HAULTAIN, C.J., concurred in answering the question in the affirmative and affirming the conviction.

Newlands, J.

NEWLANDS, J.:—This was a prosecution for forgery, and the question reserved for the opinion of this Court by the trial Judge is: Was there sufficient corroboration as required by sec. 1002 of the Criminal Code?

The evidence of forgery was that the accused had four promissory notes given to him by one Ralph Jonat which he discounted in the Union Bank of Canada at Yorkton. While these notes were in the bank he agreed to sell them to R. F. Pachal. He then got copies of the notes from the bank on which it was proved he endorsed his own name and the name of his brother with his brother's consent. Upon these copies, when handed over to Pachal, was the name of Ralph Jonat as maker. Jonat swore that he never signed same. This evidence would, in my opinion, be sufficient to raise the presumption that the accused forged the name of Jonat to these notes before handing the same to Pachal and would be sufficient evidence on which a jury could convict him if it were not for section 1002 of the Criminal Code, which provides:—

> No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused; . . . (*e*) Forgery.

The above evidence, although given by more than one witness, does not fulfil the requirements of this section because it is all needed to prove the offence, and one part of it cannot be considered as corroborative of the other.

The only evidence given at the trial which could be considered corroborative evidence implicating the accused, leaving

SASK.

S. C.
1914

REX
v.
SCHELLER.

out of consideration the comparison of handwriting, was the evidence of Schram, the accountant, and Roberts, the manager, of the Union Bank of Canada at Yorkton, that the originals of the three alleged forged notes were at the time in the possession of the Union Bank as collateral security.

I am of the opinion that the fact that at the time the accused sold these notes, which are alleged to have been forged, to Pachal, the originals of them were in the Union Bank at Yorkton, where they had been placed by him as collateral security for a loan, is most material evidence implicating him, and as the two bank officials corroborate each other upon this point, we have what the statute requires, corroborative evidence of a material particular implicating the accused. I think the question submitted should be answered in the affirmative.

Newlands, J.

LAMONT, J.:—In this case the accused was charged with having forged the name of Ralph Jonat to certain promissory notes. On behalf of the Crown, evidence was put in shewing that in 1911 Ralph Jonat had purchased a farm from the accused under an agreement of sale, and that subsequently, in January, 1912, he took up the agreement and gave the accused four promissory notes for the amount remaining unpaid, which was something over $3,000. The accused took these notes, or three of them, to the Union Bank at Yorkton, and there pledged them as security for an advance. In February, 1913, the accused being in need of money arranged with one R. F. Pachal for the sale to him of the notes. When he went to the bank for the notes the bank refused to let him have them unless he paid up his indebtedness. He then asked the bank for a copy of the notes. The accountant made copies of the three notes in the bank, excepting that he did not copy the signatures thereto, and he gave these copies to the accused. The accused took them to Pachal, and when he handed them over they had thereon the name of Ralph Jonat as maker and the names of the accused and his brother as endorsers. Pachal bought the notes. Ralph Jonat swore that his name on the notes was not signed by him or with his authority. Both the original notes signed by Jonat and the copies thereof sold to Pachal were put in evidence. For the defence, the accused swore that, after he got the copies, he saw Jonat on the street and took him into his office, and that Jonat there signed his name to the notes. He says he then endorsed his own name thereon and that of his brother with his brother's consent, and turned the notes over to Pachal. The jury found the accused guilty; and the learned trial Judge reserved for the opinion of this Court the following question: "Was there sufficient corroboration as required by section 1002 of the Code?"

Lamont, J.

SASK.

S. C.
1914

REX
v.
SCHELLER.

Lamont, J.

Section 1002 provides that no person accused of any of the offences therein set forth, of which forgery is one, shall be convicted on the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. The evidence of Jonat denying his signature to the Pachal notes therefore requires corroboration. The corroboration necessary to satisfy the requirements of the statute is stated by the Court of Appeal of Ontario in *The King* v. *Daun*, 11 Can. Cr. Cas. 244 at 249, 12 O.L.R. 227, as follows:—

> What is required is corroboration in some material respect that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is sufficient. The corroboration required is not unlike that required in the case of accomplices. On this point Wightman, J., says, in *The Queen* v. *Boyes* (1861), 1 B. & S. 311 at 320: "It is not necessary that there should be corroborative evidence as to the very fact; it is enough that there shall be such as shall confirm the jury in the belief that the accomplice is speaking the truth.

The accused gave evidence on his own behalf and his evidence may be looked at for corroboration: *R.* v. *Wakelyn*, 10 D.L.R. 455, 21 Can. Cr. Cas. 111. That evidence shews that the accused obtained copies of the notes Ralph Jonat had given him from the accountant at the bank, and that these copies were in his possession until he turned them over to Pachal with Jonat's name thereon. This eliminates any question of Jonat's signature having been forged by any person other than the accused. If Jonat did not sign the notes, the accused must have signed Jonat's name or procured it to be signed, as he was the only person who had possession of the notes.

The accused, in his evidence, further admits that when he sold the notes to Pachal he had the notes Jonat had given him for the farm in the bank, that he was unable to lift them, and that he needed money. He also admits that later on, when Jonat found out that there were two sets of notes with his name thereon and came to see him about them, he told Jonat that the Pachal notes were only copies from the bank. I am of opinion the accused's statement to Jonat that the Pachal notes were only copies is corroboration of Jonat's evidence that he did not sign them. Why should the accused say they were only copies if they bore the real signature of Jonat? To my mind this was an admission by the accused that the notes were not genuine as far as Jonat was concerned, which would support Jonat's statement that he had never signed them. There was, therefore, sufficient corroborative evidence to satisfy the statute.

Conviction affirmed.

BARTHELS SHEWAN & CO. Ltd. v. PETERSON.

MAN.

K. B.

1914

Manitoba King's Bench, Macdonald, J. March 25, 1914.

1. SALE (§ IV—91)—BULK SALES—STATUTORY REQUIREMENTS—SALE OF HOTELKEEPER'S BUSINESS NOT INCLUDED.

An hotelkeeper operating under a license granted him under the Liquor License Act, R.S.M. 1913, ch. 117, restricting the conduct of his business and the place of sale of liquors by him is not a "trader" or "merchant" within the meaning of the Bulk Sales Act, R.S.M. 1913, ch. 23, so as to bring a bulk sale of the hotel equipment and stock within the requirements of that statute.

CASE submitted for the opinion of the Court upon a question of law. Statement

W. F. Hull, for the plaintiffs.

J. B. Coyne, for the defendants.

MACDONALD, J.:—This is a question of law submitted under rule 463, and the question arising in the action is: Does an hotelkeeper come within the Bulk Sales Act, ch. 23, R.S.M. 1913? Macdonald, J.

Section 7 of this Act provides that

> This Act shall only apply to sales by traders and merchants defined as follows: (*a*) persons who as their *ostensible occupation* buy and sell goods, wares and merchandise ordinarily the subject of trade and commerce; (*b*) commission merchants; (*c*) manufacturers.

Hotelkeepers, if at all, can come under sub-section (*a*) only. No doubt hotelkeepers buy and sell goods ordinarily the subject of trade and commerce, but does that bring them under the designation of "traders and merchants?"

A hotel is a house for entertaining strangers or travellers; an inn. Can the keeper of such be called a merchant or trader?

A "merchant" is described in the Oxford Dictionary as one whose occupation is the purchase and sale of marketable commodities for profit, but from an early period restricted to wholesale traders and especially to those having dealings with foreign countries.

In Scotland, the description has a less limited meaning, a peddling shop-keeper that sells a penny-worth of bread is a merchant. In the United States the description is applied to any dealer in merchandise, whether wholesale or retail, and hence equivalent to shopkeeper.

> No matter what opinion individuals may entertain regarding the expediency or morality of the liquor traffic, so long as the Government recognizes the sale of intoxicating liquors as lawful, anyone regularly carrying on business as a saloon-keeper is entitled to have his property in such liquors protected the same as other property; he is a liquor merchant and his liquors are his stock-in-trade: *Weil* v. *Nevitt*, 31 Pac. Rep. 487.

In *Jones* v. *Bone*, 23 L.T. (N.S.) 304, it was held that the

MAN.

K. B.
1914

BARTHELS, SHEWAN & CO. v. PETERSON.

Macdonald, J.

trade or calling of an hotel or tavern keeper, publican or beer shop-keeper or seller by retail of wine, beer, spirits, etc., is different from the sale by a grocer in the course of his business of wine and spirits in bottle:—

We sell wine and spirits only in quantities not less than a pint bottle; we do not sell by retail; we keep no bar; all we keep is a grocer's shop.

In *Pease* v. *Coats*, L.R. 2 Eq. 688, it was held that a covenant not to use a building as a public house did not prevent the covenanter from taking out a license to sell beer not to be drunk on the premises.

In *Saunderson* v. *Rowles*, 4 Burr. 2064, it was held that a victualler only exercises a calling (for it cannot be called a trade) by permission; by a license; and the object of his dealing is under a restraint. . . . He does not deal upon contracts as other traders do. What he buys is to a particular intent, for it is to spend in his house, and though he gets his living by it yet he does not trade at large *ad plurimum*.

Where a man buys and sells under a restraint and particular limitation, though it is for his livelihood, he is not a trader.

The business of the defendant is that of an hotelkeeper or innkeeper, and he is licensed under the Liquor License Act, R.S.M. 1913, ch. 117, under which Act he is surrounded by restrictions and limitations in the conduct of his business.

He is to provide bedrooms as shall be adequate to public requirements. The hotel must not form a part of or communicate by any entrance with any shop or store wherein goods and merchandise are kept for sale. This, it seems to me, excludes wines, beer and liquors from the category of goods and merchandise.

The hotel must be a well-appointed and sufficient eating house with the appliances for serving meals to travellers.

The description "hotelkeeper" is a well-known one in this country, and has a meaning distinct from that of a merchant or trader, and if the Legislature intended the Bulk Sales Act to extend to hotelkeepers, the Act would have been explicit.

In my opinion, each of the questions submitted must be answered in the negative.

Decision accordingly.

SOURIS SCHOOL DISTRICT No. 285 v. BULLOCK.

MAN.

K. B.

1914

Manitoba King's Bench, Macdonald, J. March 26, 1914.

1. ARBITRATION (§ I—3)—EXTENDING TIME FOR AWARD—LAPSE OF AGREED PERIOD.

An agreement of reference to arbitrators does not lapse because on the return of the first appointment the hearing was adjourned to a date beyond the time limit for making the award; and an extension of the latter may still be made by the court under the statutory powers conferred by sec. 11 of the Arbitration Act, R.S.M. 1913, ch. 9, on proper grounds being shewn.

[See *Canadian Northern Quebec R. Co.* v. *Naud*, 14 D.L.R. 307.]

Statement

MOTION to extend the time for making an award after the lapse of the time limited by the submission.

The motion was granted.

D. H. Laird, for the plaintiff.

A. T. Hawley, for the defendant.

Macdonald, J.

MACDONALD, J.:—This is an application by way of notice of motion for an order that the time limited by the agreement for reference to arbitration and for making and publishing the award in pursuance thereof may be enlarged until June 1, 1914.

The agreement for reference is dated January 8, 1913, and provides that the arbitrators make and publish their award in writing ready to be delivered to the parties or either of them on or before February 10, 1913, or any subsequent day to which the arbitrators shall from time to time by writing under their hands extend the time for making such award.

The arbitrators fixed a day in January, 1913, upon which the respective parties should appear and submit the matters in dispute. When this had been done, Mr. Matheson, the arbitrator appointed by the said Bullock, and owing to the absence from the country of the latter, asked for an enlargement of the hearing until Mr. Bullock's return. This request was acceded to and nothing further was done until the return of Mr. Bullock to Brandon.

At this time, the time fixed under the agreement for completing the award had expired, but, by mutual consent, the arbitrators fixed April 24, 1913, as the date for the hearing, but owing to the illness of Mr. Brydon, one of the arbitrators, it was again postponed until Thursday, May 8, as the said Brydon could not attend on that date, Thursday, May 22, was then agreed upon and all the parties attended on that date.

On this latter date, with the consent and in the presence of the said Bullock, by a memorandum in writing, the time was extended until June 1 for the making of the award, and on the said 22nd May the arbitrators viewed the building over

MAN.
K. B.
1914
SOURIS SCHOOL DISTRICT No. 285 v. BULLOCK.
Macdonald, J.

which the dispute arose, and heard witnesses called by both parties and several of the matters in dispute were investigated.

Upon all parties attending before the arbitrators to continue the submission on Friday, May 23, the said Bullock asked for an adjournment in order that he might consult counsel, and in compliance with his demand, the hearing was adjourned until Thursday, May 29. On this latter date the parties appeared before the arbitrators, the said Bullock being represented by counsel, who objected to the extension of time for making the award as having been improperly made after the time limited had expired, and thereafter the said Bullock refused to proceed further with the arbitration and withdrew.

Under sec. 11 of the Arbitration Act, R.S.M. 1913, ch. 9:—

> The time for making an award may from time to time be enlarged by order of the Court or a Judge whether the time for making the award has expired or not.

Under the circumstances stated, I do not agree with the contention of counsel opposing the motion that this is a parol submission and revocable at the will of either party, because of the time having expired under the agreement for the making of the award. I consider it rather in the light of keeping in force the written submission by consent of all parties interested. The delays in proceeding were mostly for the convenience and at the request of Mr. Bullock, and at his request on May 23, the time was extended and a written memorandum of the adjournment made by the arbitrators.

I think the arbitration is in the interest of all the parties, and that it should proceed, and I extend the time for making the award until the first day of June, 1914.

Extension granted.

CAN.
S. C.
1913

HOWARD (defendant, appellant) v. **GEORGE** (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 10, 1913.

1. BROKERS (§ II B—12)—REAL ESTATE BROKERS—COMMISSION—WRITTEN MEMORANDUM.

The written memorandum which, by Alberta Statutes, 6 Edw. VII. ch. 27, is necessary to support an action for a real estate agent's commission may consist of the owner's written offer to the agent to sell at a higher price than that which was eventually accepted, to which offer there was added an agreement to pay the agent a fixed percentage on the "purchase-price" by way of commission; such result will follow if the conduct of the parties shews that the words "purchase-price," as used in the offer, had not sole reference to the price mentioned in the offer, but related to that or any other sum which the owner might accept; the conduct of the parties in such case settling any doubt or ambiguity as to whether there was a mere option at the stated price, or a general retainer to sell.

[*George* v. *Howard* (*No.* 1), 4 D.L.R. 257, and *George* v. *Howard* (*No.* 2), 10 D.L.R. 498, affirmed on appeal; *Toulmin* v. *Millar*, 58 L.T. 96, and *Burchell* v. *Gowrie*, [1910] A.C. 614, referred to.]

CAN.
S. C.
1913
HOWARD v. GEORGE.

APPEAL from the judgment of the Supreme Court of Alberta, *George* v. *Howard*, 10 D.L.R. 498, affirming the judgment of Beck, J., at the trial, *George* v. *Howard*, 4 D.L.R. 257, maintaining the plaintiff's action with costs.

W. B. A. Ritchie, K.C., and *J. Leslie Jennison*, K.C., for the appellant.

Matthew Wilson, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE:—I am of opinion in this case that, on the facts in evidence, the trial Judge was fully justified in the conclusion that the purchaser was found by George and that the appellants availed themselves of his services in that regard, and also that the contract as to the commission of 5 per cent. subsisted up to the time the bargain was finally closed.

Under the terms of the agreement the respondent was entitled to his commission on the purchase-price which the vendor ultimately agreed to accept. The sum of $40,000 is mentioned, as Lord Watson says in the case of *Toulmin* v. *Millar*, 58 L.T. 96, merely as a basis of negotiations.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—The language of the agreement is somewhat ambiguous, but, in view of the conduct of the parties under it, I think the construction put upon the words "purchase-price" as meaning the actual price or sum at which the property was sold, one which can fairly be accepted as that within the contemplation of both parties when the memorandum was signed.

Idington, J.

IDINGTON, J.:—I am of the opinion that the document signed by the appellant and relied upon by the respondent was not a mere option to him to buy or sell at only $40,000, but a general retainer enlisting his services to sell the property in question for either said sum or such other sum as appellant accepted. It is capable of such construction and of being read as the Court of Appeal has read it. Such doubt as we might possibly have from its ambiguity has been settled by the conduct of the parties.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—Interpreting the memorandum in question by the light of the subsequent conduct of the parties (which one is entitled to do, because it is impossible to say that the memorandum is capable of only one necessarily exclusive construction) I think the respondent's agency was a general agency within the meaning of Lord Watson's language in *Toulmin* v. *Millar*, 58 L.T. 96, and that he is, consequently, entitled to recover. See *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614 at 626.

CAN.
S. C.
1913
HOWARD
v.
GEORGE.
Anglin, J.

ANGLIN, J.:—The trial Judge expressly accepted the evidence of the plaintiff. On his evidence, he found that the plaintiff had introduced the purchaser and brought about the sale. Those findings of fact are sufficiently supported. On the interpretation of the contract I agree with the Courts of Alberta. The plaintiff earned his commission, and he had a sufficient memorandum of his contract to meet the requirements of the Alberta statute.

The appeal, in my opinion, fails.

Brodeur, J.

BRODEUR, J.:—This is an appeal from a judgment of the Supreme Court of Alberta, confirming unanimously the judgment of the trial Judge.

The version of the facts, as given by the plaintiff, respondent, having been accepted by the two Courts below, it would be contrary to the jurisprudence of this Court to find differently. The appellant had given the respondent a letter that he would sell his property for $40,000, and had undertaken in that letter to pay him "5 per cent. commission on purchase-price." The respondent found a purchaser, put him in communication with the appellant, and the result was that the property was sold for $34,000. He is now suing for his commission on that sale. The appellant contends that he was bound to the payment of a commission on a sale of $40,000, and that, as no sale at that price was made, he owes nothing.

It is to be noted that the agreement provided for a commission not on the $40,000, but on the purchase price. The introduction of a purchaser who was willing to enter into negotiations and who closed later with the appellant entitled the plaintiff to recover. The obligation of the plaintiff was not to find a purchaser at a certain figure; but he was entitled to a commission on the purchase price, and this case is within the words of Lord Watson, in the House of Lords, in the case of *Toulmin* v. *Millar*, 58 L.T. 96, where he says:—

> When a proprietor with a view of selling his estate goes to an agent and requests him to find a purchaser, naming, at the same time, the sum which he is willing to accept, that will constitute a general employment; and, should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of those negotiations.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

CAMPBELL v. MEDICINE HAT GROCERY CO.

ALTA.

S. C. 1914

Alberta Supreme Court, Walsh, J. March 26, 1914.

1. EXECUTION (§ III—41)—CREDITORS' RELIEF ACT (ALTA.)—CONTESTATION OF CREDITOR'S CERTIFICATE.

Only the debtor can take advantage of mere irregularities in the proceedings taken by a creditor to rank upon the debtor's estate by the deposit with the sheriff of a court certificate obtained under sec. 9 of the Creditors' Relief Act, 1910, Alta., ch. 4; another creditor has the statutory right to contest the collocation upon the ground that the debt claimed is not really and in good faith due from the debtor, but, by analogy to the rule of collateral attack of a judgment, he cannot take advantage of another creditor's irregularities in procedure against the same debtor in matters which are directory only and not conditions precedent to the granting of a certificate of claim.

[*Re Secord* v. *Moxcat*, 12 O.L.R. 511, referred to and dictum approved.]

Statement

CONTESTATION of a claim made by a creditor under a certificate deposited under the Creditors' Relief Act 1910 (Alta.).

C. S. Blanchard, for the plaintiff.

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

Walsh, J.

WALSH, J.:—The plaintiff being a creditor of Friedman and Lewis, has procured from the clerk of the District Court and delivered to the sheriff a certificate under section 9 of the Creditors' Relief Act, [Alta. Stat. 1910, ch. 4]. The defendant is an execution creditor of the same debtor. The sheriff in his scheme of distribution recognizes the plaintiff's right to share under this certificate in the money realized by him. The defendant contests the right of the plaintiff to so share and this issue to determine such contest has been directed by the Judge of the District Court.

The defendant's objection to the plaintiff's right to share in this money is based upon the fact that many of the requirements of the Act were overlooked or disregarded by the plaintiff in the proceedings which resulted in the issue of the certificate in question. The principal of these are that the affidavit called for by sub-section 1 of section 7 of the Act was not made in duplicate, that the nature and particulars of the claim are not set out in the said affidavit with any regard to the requirements of form 2, that no duplicate affidavit of claim was filed with the clerk as required by sub-section 5 of section 8, what was filed being a copy of such affidavit, and that neither the certificate of the sheriff nor the affidavit required by sub-section 2 of section 7 was ever filed with the clerk. There are other objections of a minor character which it is not necessary to detail here, but they are all of a highly technical order.

ALTA.

S.C.

1914

CAMPBELL, WILSON & HORNE v. MEDICINE HAT GROCERY CO.

Walsh, J.

In my opinion, the defects of which the defendant complains are but irregularities, and the plaintiff's certificate cannot, simply by reason of them, be treated as a nullity. The most serious of them is the failure to file the certificate or affidavit required by sub-sec. 2 of sec. 7. I agree with the view expressed by Meredith, C.J., in *Re Secord* v. *Mowat*, 12 O.L.R. 511, at 512, although it is purely obiter, that there is nothing in the language of this sub-section (which is identical in all material respects with that of the Ontario Act there under consideration), to indicate that the filing of such certificate or affidavit is necessarily a condition precedent, but that it is merely directory. The other objections are of much less importance. None of them in any way prejudices either the defendant or the execution debtor. The issue of the certificate was a proceeding authorized by the Act. It is not something either forbidden by law or which could, under no circumstances, have been issued.

Being but irregularities, I think that they can only be taken advantage of by the party against whom the proceedings were directed, namely, the execution debtor, as that seems to be the well settled practice.

The Act does not enlarge the defendant's rights in this respect. He is given the right by section 10 to contest the claim, but sub-section 4 of that section shews that this right is limited to a contestation upon the ground that "the debt claimed is not really and in good faith due from the debtor to the claimant." The plaintiff became by virtue of the delivery to the sheriff of his certificate, in effect, an execution creditor under sub-section 2 of section 9. I think that the defendant's only right then was either to contest the claim under section 10 as it might have done even after the issue of the certificate, or to attack the certificate upon any ground such as fraud which has been open to it, if the plaintiff's claim had been founded upon a judgment. I think it is quite clear that if the plaintiff's claim was under a judgment, the defendant would have no right to question it simply because the rules of practice applicable to the issue or service of the writ of summons or the entry of judgment had not been rigidly followed. That is a right reserved to the judgment debtor and to him alone, and, by analogy, I think the right must be denied the defendant to take advantage of like departures from the provisions of the statute when the claim is made under a certificate.

There will, therefore, be judgment on the issue for the plaintiff. The order directing the issue provides that "the costs of and incidental to the application for this order and the costs in the said issue shall abide the event." I fancy that

this takes away from me any discretion on the question and for this reason I make no order as to costs. Until I noticed this clause in the order, I had intended to direct that the plaintiff should not have any costs either of the application or of the issue. The many irregularities of which its solicitors were guilty in the procuring of its certificate certainly invited this litigation, and it hardly seems right that, instead of being punished for their carelessness, they should actually profit by it, as they will profit by the payment to them of their costs.

Order accordingly.

STANDARD TRUSTS CO. v. HURST.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Haggart, JJ.A. March 30, 1914.

1. MORTGAGE (§ I B—17)—VALIDITY—AMOUNT OF DEBT—PAROL AGREEMENT FOR EXTRA INTEREST.

Although a parol agreement by the mortgagor after default to pay an increased rate of interest on a mortgage in consideration of an extension of time is under the Statute of Frauds insufficient to charge the extra interest upon the land, such an agreement is enforceable against the mortgagor personally.

Totten v. *Watson*, 17 Grant 233, and *Re Houston*, 2 O.R. 84, considered.]

2. MORTGAGE (§ I B—17)—STIPULATION AFTER DEFAULT FOR INCREASED INTEREST—INTEREST ACT (CAN.).

Sec. 8 of the Interest Act, R.S.C. 1906, ch. 120, inhibiting any stipulation by way of fine or penalty or rate of interest raising the rate on arrears of mortgage principal above that on principal not in arrear, is construed as having reference to covert or burdensome provisions of the mortgage as originally drawn and does not preclude a new contract by which a mortgagor in arrear agrees to pay an increased rate in consideration of an extension.

[Bell and Dunn on Mortgages 116 specially referred to.]

Statement

APPEAL from the judgment of a County Court. The defendant mortgaged to the plaintiffs certain real estate for $15,000, payable on the first of December, 1910, with interest at seven per cent. per annum. After maturity of the mortgage, when both principal and interest were in arrear and the plaintiffs pressing for payment, defendant verbally agreed with the plaintiffs' manager that, if plaintiffs did not press for payment the defendant would in future pay an additional one per cent. interest; being eight per cent. instead of seven per cent. as reserved in the mortgage. Subsequently the mortgage was paid off with interest at seven per cent., without prejudice to any remedy to enforce payment of interest of eight per cent. Plaintiffs brought this action to recover $285.85, being interest on the mortgage money at one per cent. per annum from the making of the agreement to pay the higher rate. The trial judgment was in favour of the plaintiffs for the full amount.

The appeal was dismissed.

MAN.

C. A.

1914

STANDARD TRUSTS CO. v. HURST.

Perdue, J.A.

B. L. Deacon, for defendants.
J. P. Foley, for the plaintiffs.

HOWELL, C.J.M., and RICHARDS, J.A., concurred in dismissing the appeal.

PERDUE, J.A.:—The defendants had executed a mortgage in favour of the plaintiffs for $15,000, bearing interest at the rate of seven per cent. per annum. The mortgage fell due on December 10, 1910, and the defendants were unable to meet it. The plaintiffs were willing to grant a renewal of the mortgage, but demanded eight per cent. interest from that time. The defendants in an interview with the plaintiffs' manager stated their unwillingness to renew the mortgage, as they expected to make a sale of the property soon, and felt that a renewal of the mortgage might interfere with the sale. The manager says it was then verbally agreed between the parties that

> the mortgage would run at eight per cent. until such time as they would have the sale effected without the necessity of renewing.

The defendants did not effect a sale of the property for nearly two years after this agreement was made. In the meantime they received demands from the plaintiffs for the payment of interest at eight per cent. per annum and they raised no objection to the rate charged. During this period of about two years the interest became very much in arrear, and the plaintiffs on several occasions pressed the defendants for payment. Several interviews appear to have taken place during this period between the plaintiffs' manager and the defendants or between the manager and one of them, and the defendants always agreed that eight per cent. was to be paid.

In September, 1912, the defendants desired to pay off the plaintiffs and obtain a discharge. They then objected to paying more than seven per cent. interest, this being the rate payable by the terms of the mortgage, both before and after maturity. It was arranged that the plaintiff should receive the amount of the mortgage money with interest calculated at seven per cent., and give a discharge of the mortgage, without prejudice to any remedy it might have in regard to enforcing the payment of interest at the rate of eight per cent. per annum. The present suit was then brought in the County Court to recover the sum of $285.85, being interest on the mortgage money at one per cent. per annum since the making of the agreement to pay the higher rate.

The learned County Court Judge has found in favour of the plaintiff and has entered judgment for the full amount claimed.

Two legal points are relied upon by the defendants on the appeal: (1) the Statute of Frauds; (2) the Interest Act, R.S.C. 1906, ch. 120, sec. 8.

If the plaintiff had sought to charge the land with the additional interest, the authorities shew that the Statute of Frauds would apply. In *Totten* v. *Watson*, 17 Grant 233, which was a case very similar to this, Spragge, C., held on the authority of *Ex parte Harper*, 19 Ves. 47, that a parol agreement to add two per cent. to the rate of interest reserved in a mortgage, in consideration of an extension of time, was insufficient to charge the extra interest upon the land. See also *Re Houston*, 2 O.R. 84. In the present case, however, it is not sought to charge the additional interest on the land. The suit is based upon a specific agreement that in consideration of an extension of time for payment of principal the defendants would pay one per cent. per annum in addition to what they were already bound to pay. The plaintiffs executed their part of the agreement by giving the additional time. This agreement is quite aside from the land or any interest in the land. I do not think, therefore, that the Statute of Frauds applies.

Section 8 of the Interest Act, R.S.C. 1906, ch. 120, is as follows:—

> No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear: provided that nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.

The above section and secs. 6 and 7 of the same Act were first passed in the year 1880: 43 Vict. ch. 42, secs. 1-4. At that time certain building societies and loan companies were in the habit of taking mortgages in which the principal and interest were repayable by monthly instalments, no rate of interest being mentioned, and fines or penalties were imposed for every default in payment. The result was that a high rate of interest was covered up in the instalments by which the mortgage moneys were repayable, and the exaction of the fines often imposed a crushing burden on the borrower. The statute was passed in order to correct this wrong.

It is clear that sec. 8 refers to the provisions of the mortgage as drawn up and executed between the parties. It prevents the imposition of a fine where any principal or interest becomes in arrear, and forbids the making of any stipulation for increased interest on any arrears, beyond the rate payable on principal not in arrear. But there is nothing in the section which prevents the parties from entering into a new contract by which the mortgagor who is in arrear in respect of payment agrees, in consideration of forbearance by the mortgagee, to pay an increased rate of interest. Contracts of this nature have been very frequent, and have been upheld by the Courts.

MAN.

C. A.

1914

STANDARD TRUSTS CO. v. HURST.

Perdue, J.A.

In *Brown* v. *Deacon*, 12 Grant 198, Mowat, V.-C., held, following *Alliance Bank* v. *Brown*, 10 Jur. N.S. 1121, that a sealed instrument may be varied in equity for valuable consideration by an agreement not under seal. He also held in that case that a written promise by a mortgagor, after default, to pay a higher rate of interest than that reserved by the mortgage, was binding, although the consideration by way of forbearance did not appear by the writing, but was inferred from the facts. In such a case there would be no difference between a written agreement and a verbal one. The contract is in fact a new one. It does not vary the old contract, but creates a new obligation on the part of the debtor in consideration of the forbearance by the creditor in respect of the breach of the old contract by the debtor. See Bell & Dunn on Mortgages, p. 116, where the same view is taken: so, also, Fisher on Mortgages, Can. ed., 932 (y).

In the present case the whole mortgage moneys were due under the terms of the mortgage when the agreement was made by defendants to pay an additional one per cent. on the debt in consideration of the mortgagee allowing the money to remain outstanding for the benefit of and at the request of the defendants. I think the judgment of the County Court Judge should be upheld and the appeal dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—On November 13, 1909, the defendants mortgaged certain real estate to the plaintiffs to secure the sum of $15,000, payable on December 1, 1910, with interest at seven per cent. per annum, payable half yearly. After the maturity of the mortgage, and when both principal and interest were in arrear and when the plaintiffs were pressing for payment, the defendants verbally agreed with the plaintiffs' manager that if the plaintiffs did not press for payment that the defendants would in future pay an additional one per cent., that is, eight per cent. instead of seven per cent. as reserved in the mortgage. There is no question to this being the understanding. And the plaintiffs did forbear pressing their claims for the time being.

The defendants have paid the principal and interest at seven per cent., but deny any liability as to the additional one per cent.

The defendants contend that this is a verbal agreement, and that it is a contract within the 4th section of the Statute of Frauds. It is a contract to pay a certain sum of money, that is, one per cent. on $15,000, and the consideration is the forbearance of the plaintiffs, the benefit of which the defendants received. It has no reference to the land and both parties seemed to recognize that fact by the payment and receipt of the $15,000 and seven per cent., which was clearly a charge on the land, and leaving the one per cent., which amounted to $285,85, to be decided in this County Court action.

The defendants further urged that the plaintiffs were attempt-

ing to vary a writing by a verbal contract. This verbal agreement was a subsequent, distinct, independent contract, relating to a distinct and different subject matter and made under different circumstances. When the verbal agreement was made, the mortgage had matured and the defendants were liable to be sued or to lose their interest in the lands. The simple fact that the relations between the parties are altered by this subsequent agreement is not sufficient to bring the case within the rule against varying a writing by a verbal agreement.

The further defence of the defendants under the Interest Act, ch. 120, sec. 8, R.S.C. 1906, raises a more serious question. The enactment, so far as it affects the matter before us, is in these words:—

> 8. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear.

The plaintiffs contend that the statute refers to a stipulation made at the time of the making of the mortgage; the defendants, that it is prohibitive of a stipulation made at any time. I can find no decided case, but as the contract in question is in all other respects unobjectionable and may be beneficial to one or to both parties, I would give it the narrower meaning and confine it to the original transaction.

The authors in Fisher on Mortgages and Bell & Dunn on Mortgages of Real Estate, in considering this enactment, intimate that a new bargain may be made, and an increased rate of interest may be contracted for in consideration of forbearance: See Fisher on Mortgages, Can. ed., p. 932 (y); Bell & Dunn on Mortgages of Real Estate, p. 116.

The appeal should be dismissed.

Appeal dismissed.

RAT PORTAGE LUMBER CO v. MARGULIUS.

MAN.
1914

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 17, 1914.

[*Rat Portage Lumber Co.* v. *Margulius*, 15 D.L.R. 577, affirmed.]

BILLS AND NOTES (§ IV A—87)—*Waiver of protest—Notice of dishonour.*]—Appeal from decision of Macdonald, J., *Rat Portage Lumber Co.* v. *Margulius*, 15 D.L.R. 577, 26 W.L.R. 765.

W. S. Morrisey, for defendant Jurundson, appellant.

E. Frith, for plaintiff, respondent.

THE COURT dismissed the appeal without calling on counsel for respondent.

B. C.

C. A.
1914

CHARLESON v. ROYAL STANDARD INVESTMENT CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. February 23, 1914.

1. CARRIERS (§ III D 4—425)—LIABILITY OF SHIPPER FOR FREIGHT CHARGES.

A contract by a carrier to transport by mule packs a quantity of freight, divisible in its nature, at a stipulated rate per item, will support an action for the freight charges pro rata, on the part delivered, where it does not appear that the parties contemplated the delivery of the complete consignment as a condition precedent to the recovery of any freight whatever, and the delay in delivery of the balance was not due to any fault of the carrier.

[*Ritchie* v. *Atkinson* (1808), 10 East 295, 103 Eng. R. 787, followed; *Spaight* v. *Farnworth* (1880), 5 Q.B.D. 115; *Brown* v. *Muckle* (1861), 7 U.C.L.J. (O.S.) 298; *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499, 37 L.J.C.P. 235, specially referred to.]

Statement

APPEAL from the judgment of Grant, County Judge, dismissing an action for freight. A counterclaim for damages for non-delivery had also been dismissed.

The appeal was allowed.

Burns, for the appellant, plaintiff.

R. M. Macdonald, for the respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendant employed the plaintiff, who is described as a merchant, but who it appears carried on the business of packing with a pack-train of mules, to transport a quantity of freight, consisting of pipes, connections, and other plant required in connection with defendants' mines at Jamieson Creek, at the rate of 22½ cents per pound.

In carrying out the said contract, by reason of the death of one of the mules on the trail, the defendant was obliged to leave one pack, consisting of 280 pounds of freight, on the trail. The balance of the freight, consisting of over 8,000 pounds, was duly delivered to and accepted by the defendant. It is alleged by defendant that plaintiff promised to bring in the said 280 pounds with as little delay as possible. This was at the close of the packing season, and the said pack was not brought in by plaintiff, but was afterwards brought in by Indians at defendants' instance, at the cost of $56.

The plaintiff brought this action for a balance of the freight, $672.67, which does not include freight on the pack left on the trail. Defendant contested the claim, and counterclaimed for damages for non-delivery of said pack, alleging that by reason of its non-delivery defendant was put to expense and loss in respect of work in connection with which the material was to be used.

Both the action and the counterclaim were dismissed, and both parties appealed.

The counterclaim was dismissed by the learned trial Judge because he thought the damages claimed were not proved except the said sum of $56, which he thought was not properly claimed in the pleadings.

The learned Judge thought that the contract was an entire contract, and that until plaintiff had delivered every item of the goods he could not bring an action for any part of the freight. He said that it was a contract to transport all the goods delivered to him for carriage. That is true in every case where the freight is delivered to the carrier unless the contract otherwise provides. That therefore cannot be the determining factor in ascertaining whether or not a carrier can in a case like the present, where a small part has not been delivered, claim *pro rata* for the part delivered.

In Addison on Contracts, 11th ed., 997, it is said:—

> If he (the shipper) agrees to pay by the bale or cask or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him.

In *Ritchie* v. *Atkinson* (1808), 10 East 295, 103 Eng. R. 787, it was held that the delivery of a complete cargo was not a condition precedent, but that a master might recover freight for a short cargo at a stipulated rate per ton, the freighter having his remedy in damages for such short delivery. Leblanc, J., said:—

> The question depends on the construction to be put upon this instrument, whether we can see from the whole of it that it was the intention of the parties that the delivery of the complete cargo should be a condition precedent to the recovery of any freight at all. This rule was laid down in one of the early cases, *Kingston* v. *Preston*, which has since been followed in others. Now, the delivery of the cargo was in its nature divisible, for it consisted of hemp and iron, the freight on which was to be paid for by the ton, according to a different rate of payment for the one and for the other, and, therefore, we cannot collect the intention of the parties to have been to make the delivery of a complete cargo a condition precedent to the payment of freight for any part which was delivered.
>
> The rule was laid down in *Boone* v. *Eyre*, and approved by this Court in *Campbell* v. *Jones*, and by the Court of Common Pleas in the *Duke of St. Albans* v. *Shore*, that where a covenant goes to the whole of the consideration on both sides there it is a condition precedent, but where it does not go to the whole, but only to a part, then each party must resort to his separate remedy for the breach of the contract by the other. Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight because the failure of bringing home one ton less than the full quantity of 400 tons would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to the injury suffered by the defendant.

And in *Spaight* v. *Farnworth* (1880), 5 Q.B.D. 115, Lord Bowen said:—

> If, on the other hand, less has been delivered than shipped, as in the case of goods lost on the way, then freight would be payable only on the quantity delivered.

See also *Brown* v. *Muckle* (1861), 7 U.C.L.J. (O.S.) 298.

I have quoted from *Ritchie* v. *Atkinson* (1808), 10 East 295,

B. C.
C. A.
1914
CHARLESON v. ROYAL STANDARD INVESTMENT CO.
Macdonald, C.J.A.

103 Eng. R. 787, at length, because I think the reasoning of it fits the present case. Moreover, the defendant accepted the freight notwithstanding the loss of the one pack.

I think there was evidence that the parties did not consider the contract indivisible, as on its face it is not.

At the time of delivery of the freight, less the one pack, defendant accepted it, and accepted the plaintiff's promise to bring in the missing pack. Defendant's attitude then was not that the missing pack must be brought in or no freight would be paid, because had that been the attitude defendant would not himself have procured the missing pack to be brought in by Indians.

The claim for special damages is another matter, and unless the shipper can hold back the freight as security for whatever sum (if any) he may be found entitled to in an action for such special damages—a right which he does not possess—then the freight ought to have been paid. Moreover, having failed to make out such special damage, as defendant did in this case, how can it justify the further withholding of the freight?

It appears that the cost of bringing in the 280 pounds was less than the freight deducted by the plaintiff on account thereof, hence defendants can claim no deduction for it.

The plaintiff should have his costs of the action and of this appeal.

Irving, J.A.

IRVING, J.A.:—I agree. The case of *Ritchie* v. *Atkinson* (1808), 10 East 295, 103 Eng. R. 787, seems in point. It is cited in Anson on Contracts, 1910 ed., p. 329, under the head "Divisible Promises."

The plaintiff should recover payment for what he has delivered. Defendant should have a remedy by way of deduction, or set-off, for the cost of bringing in the missing freight.

Martin, J.A.

MARTIN, J.A., concurred in allowing the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the County Court of Vancouver. The learned trial Judge (Grant, Co. J.) dismissed the action as well as the counterclaim. The plaintiff appeals from the judgment of the learned trial Judge dismissing the action, and the defendant company appeals from the judgment dismissing its counterclaim for damages.

The action is one brought for the carriage of goods, namely, 8,603 pounds of metal piping and connections used in hydraulic mining. It would appear that the contract was a verbal one entered into in July, 1912, and the agreed upon charge per pound was 22½ cents. The carriage was to be by pack train from Hazelton to Jansen Creek, a distance of 185 miles. It would not appear that it was brought to the knowledge of the plaintiff that there would be necessarily any special or other damage by reason of any

delay that might occur on the trip, and further it was apparently common ground that the trip would be the last of the season.

Apparently there was no delay in the pack train starting out on the trip, and all the goods would have been duly delivered were it not for the loss of a couple of mules on the trip, resulting in 280 pounds of the piping not being got in to the point of destination. It would appear that the piping left on the trail was brought in, in the spring of 1913, by the defendant company, and 20 cents a pound was paid to Indians for bringing it in to Jansen Creek as against the 22½ cents a pound agreed to be paid to the plaintiff.

The total amount for the carriage of the goods would be $1,935.67—that is, 8,603 pounds at 22½ cents per pound. Deducting 280 pounds (the goods left on the trail) at 22½ cents per pound—that is, $63, we have $1,872.67; but as $1,200 was paid to the plaintiff at the time the contract was entered into, only $672.67 remained due to the plaintiff, and that was the amount for which action was brought.

It is quite evident upon the facts that the counterclaim could not be supported, as even as to the goods in weight 280 pounds, it cost less to have them brought in than the plaintiff was to receive, and the plaintiff is not making any charge therefor; and as to the damages claimed, no evidence in my opinion was given to support any such claim, and in any event counsel for the defendant company at the trial seems to have abandoned same, being satisfied to have the action dismissed.

The question now is, was the learned trial Judge right in dismissing the action?

It would seem that there was acceptance by the defendant company of all the goods carried, all being delivered by the plaintiff save the piping, in amount 280 pounds, and that contention was acceded to by the learned trial Judge, that the plaintiff failing to deliver all the goods, was not entitled to recover for the carriage of any of them. This is not a case of the carriage of merchandise to be offered for sale, and any loss consequent upon a fallen market—no considerations of that kind arise, nor need determination. One way to test the matter would be to view the case in this way: Suppose the piping—the 280 pounds left on the trail—had been irretrievably lost, what would have been the damage? Further, would it be that no charges for the carriage of the goods delivered and accepted could be recovered? Upon the facts of this case, in my opinion, the damages could not have exceeded the cost of replacing the lost articles at Jansen Creek with interest at 5 per cent. on the amount until payment by way of compensation for delay. The authority for so stating the law may be found in *Collard* v. *S. E. R.*, 7 H. & N. 79, 30 L.J. Ex. 393; *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499, 37 L.J.C.P. 235.

It was held in the *Nettleship* case that in the absence of notice of the consequences which will ensue from a part of the goods

B. C.

C. A.

1914

CHARLESON v. ROYAL STANDARD INVESTMENT CO.

McPhillips, J.A.

shipped being lost, and of any contract, express or implied, to be answerable for such consequences, the shipper of such goods, or a part thereof being lost is, over and beyond the sum necessary to replace it, only entitled as for the delay to receive interest on the said sum till payment, even though the rest of the goods have been rendered useless till the portion lost was replaced. Bovill, C.J., in the above case, as reported in 37 L.J.C.P. 240, said:—

> The difficulty is as to the damages claimed for the delay in forwarding this machinery, which could not be replaced in British Columbia. Eleven months were consumed in getting similar machinery, and there was an additional claim because of the delay; the question is, are the plaintiffs entitled to recover damages for the delay, and, if so, on what principle? The present case is one of a carrier; not of a manufacturer. The liability of the defendant rests on the contract of carriage, and the extent of his liability depends on the obligation which he undertook by his contract. He ought not to be made liable beyond the risk which he undertook, *i.e.*, what he fairly and reasonably contemplated; and the risk must be one which he could fairly foresee and to which he assented, expressly or impliedly, in making the contract. No doubt, beyond the loss of the goods—*i.e.*, the mere value of the lost goods—he is responsible for the damage arising from his delay in delivery; and then arises the question as to the principle on which this is to be assessed. The compensation can only be for delay during such reasonable time as was necessary to replace the lost articles.

Now, the case we have before us is that of the carrier, and some of the goods were delivered and some not, but eventually all got to their destination; there being no evidence sufficient in law to establish any damages, yet it is urged that by reason of this nothing can be recovered for the goods carried and delivered by the plaintiff to the defendant company.

We find Bovill, C.J., further saying, at p. 240:—

> Here, no doubt, the whole machinery was rendered useless by the loss of the portion which was missing; but where these consequences contemplated by the defendant, or did he consider he was to be liable for such consequences?
>
> . . . . . .
>
> Again, suppose all the machinery had been lost, would the plaintiff be entitled to claim the whole value and also the profit which might have accrued if it had been duly carried and delivered? Where is the authority for saying that, when goods are lost, any such principle of compensation applies?

We find Willes, J., in the same case, saying, at p. 241:—

> I am of the same opinion. These cases are difficult to deal with. They begin with a case about two centuries ago, where a man who was going to be married had his horse pricked by a blacksmith and lamed, whereby he arrived late and lost his marriage; in which case, according to the legal notions of that time, the plaintiff was held to be entitled to recover damages for losing his marriage. We shall get into the same absurdity, unless we apply some common sense to restrain the extent to which a man may be liable because of a breach of contract as to a chattel of small value.

The civil lawyers dealt with the matter precisely by providing that, in the absence of fraud, no damages for breach of a contract as to a specific chattel shall be recoverable beyond double the value of the chattel. This positive rule of the Roman law was not, however, introduced into France, where, as is pointed out by Pothier, the damages are under the equitable control of the Judge. What, then, ought to be the rule? I am inclined to take a narrow view and say that a carrier ought not to be obliged to bear the risk of the bailor losing a benefit where he is not paid for it; and, as the ten guineas freight paid for the two and a half tons in this case was the ordinary freight, and the contract was on the ordinary terms for the ordinary liability, we ought not to arrive at a conclusion which would fix the shipowner with further liability, so that, if the goods by the default of the shipowner, do not arrive, he is to be answerable to the plaintiff for all profits the mill would have gained if it were built and successful and had no rivals. If this matter had been brought to the shipowner's knowledge, not as mere information but as the basis of liability, he would have rejected the contract, and it is absurd to contend that mere knowledge that the chattel is to be used in a specific manner is to fix the carrier, when, if it had been suggested he was to be responsible, he would have rejected the liability if he had a choice; and if he was a common carrier, he could not even choose. This leads to the conclusion that mere knowledge of the specific use to which the chattel is to be applied is not to increase the carrier's liability, but that there must be knowledge under such circumstances that he knows the other party intends him to be liable for the special consequences, and whether we are to say that the liability ought to be expressed in the contract, or that there should be knowledge and acceptance of the liability, bare knowledge is not enough. There must be enough to satisfy a jury that he intended to undertake a special responsibility. The knowledge is to be brought home to him under circumstances in which he knows the other contracting party reasonably expects him to be liable.

Upon the facts, as respects the present case, it is impossible to hold that the plaintiff had brought home to him the possible liability for loss or delay in making delivery of this piping, and in the charge made there is nothing to indicate the acceptance of any unusual liability. The pack was a heavy one, and the piping was unwieldy, and the plaintiff apparently the only packer with mules heavy and strong enough to handle the shipment.

In considering a case of this nature, the Court cannot remain unmindful of the conditions existing in the far northern section of the province, where goods have to be brought into the interior by pack train. Here we have a heavy shipment, the plaintiff in his evidence, at pp. 9 and 10, said:—

> It was a six weeks' trip, but again I am not absolutely positive, as I have not got the date of their return. It was the hardest load ever taken out of Hazelton. Mr. Fraser (Mr. Fraser is the manager of the defendant company) had a train of his own that he brought up there; they could not have touched that pack.
>
> Q. 13. Why? A. Because mine was the only train strong enough; a piece of, say, 450 pounds is a pretty big load for a mule.

In view of the facts as we have them before us, it seems amply clear that the plaintiff is entitled to succeed upon his claim for the

B. C.
C. A.
1914
CHARLESON v. ROYAL STANDARD INVESTMENT CO.
McPhillips, J.A.

carriage of the goods upon the terms of the agreement entered into, namely, at 22½ cents per pound, and is entitled to judgment for the amount sued for, being the balance due to him—in amount, $672.67.

That accidents will take place by this means of carriage, and that the delay will be of longer duration in making delivery, is quite understandable. The defendant company did rightly in proceeding to recover the lost goods, and apparently did so at a less cost per pound than that agreed to be paid to the plaintiff, and the defendant company do not establish any damages against the plaintiff.

The contract was no doubt to carry in a reasonable time, and that means with reference to all the circumstances which would include the state of the trail, the season of the year, the remoteness of the territory to be traversed, and all the consequent vicissitudes, the special nature of the goods, and the method of carriage of the same.

It follows that in my opinion the appeal of the plaintiff should be allowed, and that the judgment of the learned trial Judge dismissing the action be set aside, and judgment be entered for the plaintiff for the amount sued for, and that the appeal of the defendant company from the judgment of the learned trial Judge, dismissing the counterclaim of the defendant company, be dismissed.

Appeal allowed.

SASK.
S. C.
1914

BETTGER v. TURNER.

Saskatchewan Supreme Court, Newlands, Lamont, and Elwood, JJ. March 16, 1914.

1. FIRES (§ I—6)—FROM THRESHING ENGINE—PRAIRIE FIRES ACT (SASK.)—NEGLIGENCE.

Failure by the person in charge of a threshing engine to extinguish the fires drawn from the engine, as required by the Prairie Fires Act, R.S.S. 1909, ch. 129, constitutes negligence and renders such person liable for the damage done by the burning of a field of wheat to which the fire spread.

2. DAMAGES (§ III K 2—215)—INJURY TO CROPS—FIRE—MEASURE OF DAMAGES—GENERAL DAMAGES.

Where the negligence of the defendant in spreading fire contrary to the Prairie Fires Act, R.S.S. 1909, ch. 129, destroyed a certain acreage of wheat which would have yielded a certain quantity of which the value is proved, the special damages allowable therefor should not be supplemented by an additional sum as general damages.

Statement

APPEAL by the defendants from the judgment of the District Court in favour of the plaintiff for damages by spreading fire contrary to the Prairie Fires Act (Sask.)

The judgment below was varied.

T. D. Brown, for the appellants.

N. Craig, for the respondent.

SASK.

S. C.
1914

BETTGER
v.
TURNER.

Elwood, J.

The judgment of the Court was delivered by

ELWOOD, J.:—There was, in my opinion, sufficient evidence to justify the learned District Court Judge in finding that the fire was started from ashes drawn from the defendant's threshing engine. The defendants failed to extinguish the fire in these ashes, as required by the Prairie Fires Act, R.S.S. 1909, ch. 129, and this failure, in my opinion, constituted negligence on their part, and rendered them liable for the consequences of their negligence. The evidence of the plaintiff was that he had had destroyed by the fire six acres of wheat which would have yielded 35 bushels to the acre, and that this wheat would have sold for 82 cents a bushel. There was no evidence of what the cost of threshing or marketing this wheat would be.

The learned District Court Judge allowed the plaintiff as special damages for loss of six acres of wheat at 35 bushels to the acre, at 82 cents a bushel, $172.20, and also $50 for general damages. The plaintiff is clearly not entitled to general damages. I would reduce the special damages to $123.

The defendants, in their notice of appeal, did not specifically ask to have the damages reduced, and they have succeeded in having the damages reduced on grounds not stated in their notice of appeal. I would, therefore, not allow them any costs of the appeal. If the appellants have been obliged to pay the respondent or the sheriff more than $123, exclusive of costs, the sum so overpaid shall be refunded to the appellants, and if necessary execution issue to them against the respondent for the amount so overpaid.

Judgment below varied.

GRAHAM v. GRAHAM.

MAN.

K. B.
1914

Manitoba King's Bench, Trial before Macdonald, J. March 2, 1914.

PUBLIC LANDS (§II—21)—*Grant to South African Volunteer—Sale of.*]—MACDONALD, J.:—Action brought by a son against his father for the price of a South African volunteer land certificate issued by the Government of Canada to the plaintiff, and alleged by the latter to have been by him sold to his father, the defendant. Within two days after the plaintiff's return from South Africa, being about December 12, 1912, the plaintiff, defendant and one Evans being present at the defendant's house, a conversation took place about the scrip. The plaintiff says that defendant asked what he was going to do with his scrip, to which the son replied that he would sell it. The father then said, "If you put it on the market you can get only $1,200, and a man can take up the land and make three times that much out of it," and, upon the son replying that he knew nothing about

MAN.

K. B.
1914

GRAHAM
v.
GRAHAM.

Macdonald, J.

farming, the father said, "If you do not want it, I will take it." The father modifies this slightly. The conversation, as he states it, being that he told his son the time was nearly up and that he had better do something. The son said he wanted to sell and the father replied, "You can get but little for it now," and, upon the son saying he had no money, the father said, "I have some and if you give it to me I will locate it for you." The father further stated that "in the summer you could get $1,000 or perhaps $1,200, but now I do not think you can sell at all." After this conversation took place, the son went to Minnedosa, and had papers made out appointing his father as his substitute, and upon his return home advised his father of what he had done and within two weeks afterwards the defendant received the papers acknowledging him as his son's substitute. Evans, the third person present at the conversation about the scrip, says that the defendant asked his son what he was going to do about the scrip, and the son replied that he wanted to sell it, and that the defendant then said, "You had better let me have it, as time is drawing near." Something was said about value, but what it was this witness does not remember. Arthur Kingdon accompanied the plaintiff to Minnedosa, when he signed the papers nominating his father as his substitute and returned home with him. The conversation between them was principally about the scrip, and the plaintiff told him they were all going to homestead together, and get a house built in the centre and live together. There was no reference to any sale of the scrip. Five quarter-sections were mentioned for the three of them, father and two sons, and as they could get but three quarters as homesteads, the half-section for scrip would be necessary to make up the five. The plaintiff also said that they would buy a gasoline engine and he could run it. It is admitted that the selling market value of the scrip at the time of the transfer from the son to the father was $760, although the selling value was unknown to the parties at the time, and I think the father's evidence of the conversation on this point at the time of arranging for the transfer is the most acceptable.

Before leaving South Africa the plaintiff sent his father a form signed by him, appointing the latter his substitute, expecting him to select land for him, the plaintiff; but, owing to some irregularity in the form, it was rejected. In June, 1913, the defendant went to Saskatchewan to try and locate, but did not see any land that suited. On his return he had a conversation with the plaintiff, and the latter expressed himself as anxious that they should return to Saskatchewan and locate, and each take up a homestead.

The plaintiff did demand payment for the scrip, but the date is indefinite. I take it it was after June, 1913, when the plaintiff expressed a desire to locate the land. When the demand was made, the father repudiated any liability and denied having

purchased, claiming always that he was going to locate for the son. It is urged on behalf of the latter that, under the Volunteer Bounty Act, this the father could not do, as under section (*c*), "Substitutes" (ex. 4):—

> When an assignment has been accepted and registered, the person in whose favour the assignment was made becomes the substitute of the volunteer, and is entitled to make entry, etc.

And section (*a*), "Settlement Duties," every applicant for entry is required to make a sworn declaration that the application is made for his

> exclusive use and benefit, and neither directly nor indirectly for the use or benefit of any other person or persons whomsoever.

The plaintiff, therefore, claims that the defendant could not take the scrip as trustee for him, and urges this fact as corroborative of his contention that there was a sale, although he admits that there was no price agreed upon and no agreement other than could be implied from the conversation between them as stated. I am unable to come to a conclusion that there was any agreement by the defendant to purchase, and that, so far as the latter was concerned, his intention was to locate the land and the son to have the full benefit of it, and, although an agreement to that effect would be void as contrary to law, yet there was no intention on his part to commit any wrong. The scrip is still the property of the son, and any advantage that may accrue from it must be for his benefit.

I dismiss the action with costs.

H. F. Maulson, for the plaintiff.
G. A. Eakins, for the defendant.

Action dismissed.

Re BLAYLOCK, a solicitor.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck, and Simmons, JJ. March 30, 1914.

1. SOLICITORS (§ I B—11)—STRIKING OFF—GROUNDS FOR—SECRET PROFIT ON REALTY SALE.

Where a solicitor, holding an option to purchase lands from a third party, conceals such option from the client whom he persuades to purchase the lands direct from the owner at an increase over the option price, under a secret arrangement with the latter whereby the solicitor is paid the difference on the completion of such sale, in carrying out which he had accepted the professional duty of looking after the client's interests, a case of professional misconduct is shewn which warrants the suspension of the solicitor's certificate to practise, or in a proper case, to strike his name from the rolls, although the client had recovered from the solicitor the excess in the price.

2. SOLICITORS (§ I B—12)—STRIKING OFF THE ROLLS—MISCONDUCT.

On applications to strike a solicitor off the rolls, the court has to consider the respective rights of (*a*) the solicitor himself, (*b*) his client, (*c*) his profession.

[*Re Pyke* (1865), 34 L.J.Q.B. 121, applied.]

ALTA.

S.C.

1914

RE BLAYLOCK.

APPLICATION to strike the name of a solicitor from the rolls. The application was refused, but a renewal of his certificate was prohibited, SCOTT, and SIMMONS, JJ., concurring in the result.

R. B. Bennett, K.C., and *Chas. F. Adams*, for the Alberta Law Society, applicant.

A. H. Clarke, K.C., for the solicitor, respondent.

Harvey, C.J.

The judgment of the Court was delivered by HARVEY, C.J.:—In an action tried before my brother Scott in 1909 in which one Amphlett was plaintiff and the solicitor was defendant, certain facts were established upon which this application is now based.

It appeared that while crossing the Atlantic together Blaylock became acquainted and friendly with Amphlett, an Englishman on his way from England to British Columbia to purchase a fruit farm; that Blaylock persuaded him to come to Calgary, pointing out that it was a good place for investment, that he particularly mentioned one property which he said would be a good investment at $65,000, at which price he said it could be purchased if not already sold. Some time prior to this the solicitor had had an option to purchase this property for $55,000, and two or three days after their arrival in Calgary he procured a renewal of this option for one day, and in the meantime succeeded in persuading Amphlett to purchase it for the sum of $65,000, of which he received $10,000 from the vendor. Blaylock admitted that he carefully concealed from Amphlett the fact that he held an option and that if he had told Amphlett he was getting $10,000 out of the purchase Amphlett would not have bought the property. The learned Judge who heard all the defendant had to say on his behalf found that he was solicitor for Amphlett, who relied on him to look after his interests, and gave judgment in favour of Amphlett for the $10,000. The judgment was not appealed against, and it is stated that the $10,000 has been paid.

It appears to me that there can be no two opinions as to the correctness of the view of the learned trial Judge that this was conduct unbecoming a solicitor that cannot be too strongly condemned.

At the time of the trial Blaylock was residing in England, and apparently has been residing there ever since. It was stated on behalf of the Law Society that he has not taken out his annual certificate for several years. This application was first mentioned to this Court in September, 1912, and finally was ready for argument in December, 1913.

Mr. Bennett, K.C., who was counsel for Mr. Amphlett on the trial in 1909, and who is a bencher of the Law Society, appeared on this application with the Law Society's regular counsel, and alone argued the case against the solicitor. During his argument he made some reference to the fact that some members of the Court had some time previously intimated to the Law Society

the advisability of considering whether the proceedings should be pushed further. In view of this fact it is perhaps desirable to point out clearly what the proper purpose of these proceedings should be.

In *Re Pyke* (1865), 34 L.J.Q.B. 121 at 123, Cockburn, C.J., in delivering the judgment of the Court in an application for reinstatement, said:—

> On applications to strike an attorney off the roll, or to re-admit an attorney under peculiar circumstances, we ought to bear in mind that it is not with regard to the individual himself or the punishment that he may have deservedly brought on himself that the circumstances are to be inquired into; we have a duty to perform to the suitors of the Court, and not only to the suitors of the Court, but to the profession of the law, by taking care that those permitted to practise in it are persons on whose integrity and honour reliance can be placed.

The same principle is exemplified in other cases where a solicitor has been struck off notwithstanding that he has been punished by imprisonment or otherwise for the offence in respect of which he is struck off.

Inasmuch as the solicitor in the present case is not practising and has not been practising for several years and apparently has no intention of again practising his profession, it being within the knowledge of the members of the Bench referred to and of the Law Society that he was supposed to be in ill-health and perhaps dying, it is hard to see in what way the interests of suitors or the profession over which this Court had any jurisdiction could be in any way benefited by the prosecution of the proceedings, though it can be seen that much suffering might be caused to the innocent friends and relatives of a possibly dying man.

Mr. Bennett states that he will be satisfied with an order directing the Law Society not to renew the solicitor's certificate.

It is quite apparent that if an application had been made at any time for a renewal of the certificate, the Society could have then proceeded with the application and withheld the certificate in the meantime. The Society has, however, seen fit to push the proceedings whether by reason of a misconception of what I conceive to be its duty or to enable a person who has been wronged to be avenged, and it becomes necessary for the Court to make the order which ought to be made.

If no further certificate is permitted to be issued all the persons who are entitled to be considered would appear to be amply protected, and there seems no good reason why anything more than that should be necessary. There should be an order therefore to that effect.

Order against renewal of certificate.

CAN.

S. C. 1914

DORAN v. JEWELL.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 3, 1914.

1. APPEAL (§ II A 2—40)—TO SUPREME COURT (CAN.)—JURISDICTION—SUPREME COURT AMENDMENT ACT (CAN.), 1913—PRIOR ACTIONS.

The statute 3-4 Geo. V. (Can.) ch. 51 amending the Supreme Court Act, R.S.C. 1906, ch. 139, does not apply to enlarge the right of appeal from a judgment for the plaintiff directing a reference as to amount on which a report is still to be made by the referee, although such judgment determines in part a substantial right, and is, consequently, declared to be a "final judgment" within the statutory definition of the amending statute, if the action were begun prior to the amendment, but the judgment appealed from was subsequent thereto.

[*Hyde* v. *Lindsay*, 29 Can. S.C.R. 99, and *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, followed; *Williams* v. *Irvine*, 22 Can. S.C.R. 108, referred to; *Jewell* v. *Doran*, 14 D.L.R. 523, appeal disallowed.]

Statement

MOTION referred to the Court by the registrar for an order to have the jurisdiction of the Court to hear the appeal affirmed.

The action was to obtain possession of goods or to recover their value. In the Court of first instance judgment was given for the plaintiff with a reference to ascertain the value of the goods and report: *Jewell* v. *Doran*, 12 D.L.R. 839, 4 O.W.N. 1581. This judgment was affirmed with a variation by the Appellate Division: *Jewell* v. *Doran*, 14 D.L.R. 523, 5 O.W.N. 303. Under the jurisprudence no appeal would lie to the Supreme Court of Canada unless the amendment to the Supreme Court Act, 3-4 Geo. V. (Can.) ch. 51, which came into force on June 6, 1913, applied to the case. The judgment of the trial Judge was delivered on July 4, 1913, and that of the Appellate Division on November 21, 1913, but the action was commenced before the Act came into force.

W. L. Scott, for the motion, referred to *Couture* v. *Bouchard*, 21 Can. S.C.R. 281, and attempted to distinguish *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369.

Caldwell, contra, cited *Williams* v. *Irvine*, 22 Can. S.C.R., 108, *Hyde* v. *Lindsay*, 29 Can. S.C.R. 99; *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369.

Sir Charles Fitzpatrick, C.J. Davies, J.

FITZPATRICK, C.J., and DAVIES, J., were of opinion that the motion should be refused.

Idington, J.

IDINGTON, J.:—Having regard to the principles upon which this Court proceeded in the case of *Hyde* v. *Lindsay*, 29 Can. S.C.R. 99, and other cases cited therein, and the Judicial Committee of the Privy Council in the case of *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, I do not think this motion should succeed.

Duff, J.

DUFF, J.:—I should refuse this motion.

CAN.

S. C.
1914

DORAN
v.
JEWELL.

Brodeur, J.

ANGLIN, J.:—This motion is concluded adversely to the appellant by the authority of *Williams* v. *Irvine*, 22 Can. S.C.R. 108, and *Hyde* v. *Lindsay*, 29 Can. S.C.R. 99. See, too, *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369.

BRODEUR, J.:—This is an application to affirm the jurisdiction of this Court.

The whole point is whether the amendment of 1913 to the Supreme Court Act as to final judgments applies to a case in which the action began prior to the amendment, but where the judgment appealed against was rendered after the passing of the amendment.

That amendment has virtually created a right of appeal which did not exist before. This Court had decided in those last years that judgments ordering a reference were not final judgments and could not be appealed: *Clarke* v. *Goodall*, 44 Can. S.C.R. 284; *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616. The Parliament at its last session declared that those judgments could be brought before this Court.

I would have been inclined to think that the right of appeal should be determined by the law in force at the time of the judgment and not by the date of the action. However, a contrary jurisprudence of this Court exists: see *Hyde* v. *Lindsay*, 29 Can. S.C.R. 99; *Williams* v. *Irvine*, 22 Can. S.C.R. 108; *Mitchell* v. *Trenholme*, 22 Can. S.C.R. 333; and I am bound by it.

The motion should be dismissed.

Motion dismissed with costs.

WILCOX v. WILCOX.

MAN.

C. A.
1914

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 16, 1914.

1. EVIDENCE (§ II E 3—156)—ABSENCE FOR SIXTEEN YEARS—PRESUMPTION OF DEATH, HOW LIMITED.

Death may not be presumed after an absence of 16 years, or even longer, if the facts shew that the missing person would not be likely to communicate with relatives or friends.

[*Wilcox* v. *Wilcox*, 14 D.L.R. 1, reversed; *Bowden* v. *Henderson*, 2 Sm. & G. 360, 65 Eng. R. 436; and *Watson* v. *England*, 14 Sim. 28, 60 Eng. R. 266, applied.]

2. JUDGMENT (§ IV—220)—VALIDITY OF MARRIAGE.

Foreign decrees of nullity of marriage will be recognized as fully as will foreign decrees of divorce, when such nullity is held to have arisen because of bigamy; and a foreign judgment of annulment on the ground of bigamy in an action between parties both subject to the foreign jurisdiction is admissible to prove want of consideration of a transfer of property in Canada made in consideration of the annulled marriage which took place in Canada.

[*Wilcox* v. *Wilcox*, 14 D.L.R. 1, reversed.]

MAN.

C. A.

1914

WILCOX v. WILCOX.

3. EVIDENCE (§IV E—411) — FOREIGN JUDGMENTS — EFFECT OF APPEAL PENDING IN THE FOREIGN JURISDICTION.

The fact that the suit in which the foreign judgment given in evidence was rendered, is still pending by way of appeal to a higher Court in the foreign jurisdiction, does not make the decision less conclusive as evidence between the parties to it while it stands.

[*Wilcox* v. *Wilcox*, 14 D.L.R. 1, reversed; *Houcland* v. *Codd*, 9 Man. L.R. 435; *Scott* v. *Pilkington*, 2 B. & S. 11, 121 Eng. R. 978, applied.]

Statement

APPEAL from decision of Metcalfe, J., *Wilcox* v. *Wilcox*, 14 D.L.R. 1, 25 W.L.R. 489.

The appeal was allowed.

J. F. Kilgour, for defendant, appellant.

H. E. Henderson, K.C., for plaintiff, respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—I agree with my brothers Richards and Cameron in the conclusion of fact arrived at by them in their reasons for judgment, and that the marriage between the parties is a nullity.

The defendant did not disclose to the plaintiff anything respecting the first marriage, or that there ever was such a marriage ceremony. She had frequently asked for a conveyance of the property, and had always been refused, but was promised it as soon as they became husband and wife. The marriage has become null and void according to the law of their domicile. They came to Canada for the sole purpose of being married, intending to return again at once to their real domicile. The plaintiff is not, and, according to the judgment pronounced in the domicile, never was, her husband. By suppression of the defendant the plaintiff knew nothing of the former marriage. By pretending she was capable of entering into the marriage ceremony with the plaintiff, the defendant obtained a conveyance of the land in question. I think the conveyance must be set aside.

The appeal is allowed with costs, and the plaintiff must have the costs of the trial.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff and defendant resided, and were domiciled, in California. They went through a marriage ceremony at Victoria, British Columbia, according to the law of British Columbia. At once, after the marriage ceremony was performed, the plaintiff conveyed to the defendant certain property at Souris in Manitoba, which property he had previously promised to convey to her on her becoming his wife. Other than the marriage there was no consideration for the conveyance. This action was brought to set aside that conveyance, and the only ground which need be considered is whether the defendant did in fact become the plaintiff's wife.

The learned trial Judge held that the conveyance was exe-

cuted in consideration of the marriage, and thought he ought not to set it aside while the marriage stood.

The defendant, about 17 years before her marriage to the plaintiff, was married to one Broberg, and there is no evidence that for at least 16 years prior to the marriage she had not heard from him. She testifies to having made inquiries and being told that he was dead, and also to having heard from him once or twice within the first year after the marriage. She only lived with him a few days after the ceremony.

I may say that the defendant's testimony stamps her, in my mind, as an utterly unreliable person, and I think no credence whatever should be placed on her statement as to inquiring and finding that he was dead, or as to her having heard from him after the separation. They separated under circumstances which made it extremely improbable that he would ever communicate with her in any way whatever, thereafter. His occupation was that of an electric lineman, one which may be described as a wandering occupation like that of a telegraph operator.

After this action was begun the plaintiff obtained a decree in a Court of competent jurisdiction in California declaring that Broberg was alive at the time of the marriage between the plaintiff and defendant and declaring such marriage, on that account, to be a nullity.

During the trial the plaintiff's counsel asked leave to amend and submitted, as the proposed amendment, an allegation of the action in California and of the judgment there, pronouncing the marriage a nullity.

The learned trial Judge held, as to the evidence of lapse of time, that the presumption was that Broberg was dead at the time of the second marriage.

He further held that he could not consider the California decree of nullity of the marriage because of its having been pronounced after this action had commenced, citing, as an authority, *Spetou* v. *Gilmour*, 14 Man. L.R. 706, and the cases there cited.

The cases as to presumption of death are, to my mind, very unsatisfactory to arrive at any general conclusion from, but I think that the law, in a case such as this, is that laid down in *Bowden* v. *Henderson*, 2 Sm. & G. 360, 65 Eng. R. 436, and *Watson* v. *England*, 14 Sim. 28, 60 Eng. R. 266. Those cases hold that death will not be presumed during a much greater period than 17 years, if the facts shew that the missing person would be unlikely to in any way communicate with relatives or friends.

Now, we know nothing of Broberg's people, and the only person that we can find to whom a communication might be made, is the defendant; and the evidence seems to me to shew,

MAN.

C. A.

1914

WILCOX v. WILCOX.

Richards, J.A.

as stated above, that, beyond all reasonable doubt, it was extremely unlikely he would communicate with her.

As to the second question, that of the judgment of nullity pronounced in California, I think the learned Judge was perhaps misled by the attempt of the plaintiff to plead that. It is not a matter of relief, but rather a matter of evidence. Its object is to prove that the marriage was a nullity, and, whether pronounced before, or after, the beginning of this suit, seems to me immaterial.

The case of *Spetan* v. *Gilmour*, 14 Man. L.R. 706, and the authorities there cited, refer, not to matters of evidence, but to the right to plead causes of action arising after the commencement of the suit. They are, therefore, to my mind, inapplicable, and I am of opinion that the learned trial Judge should have considered the decree.

It seems to be distinctly laid down that, while English Courts will not pay respect to foreign decrees of nullity as to marriages contracted in England, where that nullity has been held to arise because of some informality under the law of the domicile, which informality has not been complied with, yet they will recognize such decrees as fully as they will decrees of divorce, when the nullity is held to have arisen because of physical incapacity, or bigamy, and that such judgments, when pronounced because of bigamy, will be respected in the Courts of all countries where monogamy is enforced by the law of the land.

Some of these decisions seem to say that the test of jurisdiction in the foreign country is that of residence, and others that of domicile. Either will be sufficient in this case, as the parties were both resident and domiciled in California.

In Piggott on Foreign Judgments, 3rd ed., vol. 2, p. 210, the learned author says:—

> It may, I think, be assumed that the Courts of the place of residence, even temporary, of the respondent would be competent to entertain the petition in either case (he is referring to cases of suits for nullity because of former marriage or impotence); for if the case is one which demands immediate relief these Courts are specially indicated as being proper to give that relief . . . It may be assumed that redress is given all the world over, both for bigamy and impotence.

I am fully of opinion, therefore, that the learned Judge should have considered the decree of the California Court as conclusive evidence that the marriage was a nullity.

It has been shewn to us that the California decree is under appeal to a higher Court, and that that appeal has not yet been decided. That does not in any way make that decision less conclusive while it stands: see *Howland* v. *Codd*, 9 Man. L.R. 435; and *Scott* v. *Pilkington*, 2 B. & S. 11, 121 Eng. R. 978.

In my opinion, the learned Judge should have held, both on the evidence in this case, apart from the California judgment,

and on the California judgment, that the marriage has been proved to be a nullity because of bigamy on the part of the defendant, her husband Broberg being presumed to be still alive at the time of her marriage with the plaintiff.

I would allow the appeal, with costs, and set aside the judgment in the Court below, and order a re-conveyance of the land in question from the defendant to the plaintiff, or an order vesting the land in the plaintiff as to all the defendant's title and interest therein. The plaintiff to recover against the defendant his costs in the Court below.

Richards, J.A.

PERDUE, J.A.:—The decision in this case hinges upon the presumption that is to be applied either for or against the continued existence of the life of Broberg, the defendant's first husband. The conveyance that it attacked was made by the plaintiff in favour of the defendant in the belief, and on her assurance, that she was his lawful wife. If he was deceived in this, and she was not his wife but was in fact the wife of another man, then the conveyance was obtained from him by fraud and should not be permitted to stand.

Perdue, J.A.

The defendant had not heard from Broberg for about sixteen years. The two had separated under circumstances which rendered it unlikely that they would communicate with each other thereafter. It does not appear that Broberg had friends who would likely be in receipt of intelligence concerning him, or that he had a home which it would be reasonable for him to visit. A person in his position in life might very easily drift away to a distant state or country and his whereabouts remain unknown to his wife, he having no wish to communicate with her or she with him. In such a case the presumption of death after seven years' absence and non-receipt of intelligence does not arise: *Bowden* v. *Henderson*, 2 Sm. & G. 360, 65 Eng. R. 436. Upon the other hand, there is a presumption in favour of the continuance of life, and, in the case of a man of Broberg's age at the time of his marriage, this presumption will, in the absence of evidence to displace it, extend over a period of time as long as, or longer than, that which has elapsed in this case: Taylor on Evidence, 10th ed., secs. 198-200. The burden of proving that Broberg was dead lay, in the first place, upon the defendant: *Wilson* v. *Hodges*, 2 East 312, 102 Eng. R. 388. The evidence she adduces simply amounts to shewing that she had not heard of him for a number of years, while the fact is that she was not likely to hear from him if he were alive. In such circumstances, I do not think the Court is justified in presuming that Broberg was dead at the time when the plaintiff and defendant went through the form of marriage.

The parties to this suit are both domiciled in California, and

MAN.
C. A.
1914
WILCOX
v.
WILCOX.
Perdue, J.A.

a judgment has been pronounced in that state in a suit between them, declaring the marriage a nullity. As long as that judgment stands, the plaintiff is deprived of marital rights in respect of the defendant. That is, he is in the country where the parties are domiciled deprived of those rights which formed the consideration for the conveyance now impeached. Although that judgment is now in appeal, this Court may give to it any effect or consideration to which it would be entitled if there were no appeal pending: Dicey, Conflict of Laws, 2nd ed., 413; *Scott* v. *Pilkington*, 2 B. & S. 11, 41, 121 Eng. R. 978, 989.

I think that the defendant failed to rebut the presumption that her first husband was still alive. I am also of opinion that the judgment pronounced between the parties in the country of their domicile declaring that they are not husband and wife must be taken by this Court as binding upon them: Piggott on Foreign Judgments, 3rd ed., vol. 2, p. 210; *Johnson* v. *Cooke*, [1898] 2 Ir. R. 130.

I think the appeal should be allowed with costs, and that the defendant should be ordered to re-convey the land. The plaintiff is also entitled to the costs in the Court of King's Bench.

Cameron, J.A.

CAMERON, J.A.:—The principal matter dealt with on the argument of this appeal was whether the finding of the learned trial Judge that Broberg was not alive at the time of the defendant's marriage to the plaintiff was in accordance with the law and the evidence. The defendant married Broberg in 1893, at St. Paul in the state of Minnesota. Immediately thereafter they went to Winnebago in the same state. After living with him a few days the defendant left her husband and went to Philadelphia to live with her mother. Afterwards she married one Lehmann at New York city in 1899 or 1900. Lehmann was a Pennsylvania farmer and they lived for two or three years on a farm in that state. Lehmann died before the defendant's marriage to the plaintiff, which took place at Victoria, B. C., in June, 1910.

The defendant, on examination-in-chief, says she heard from Broberg once or twice within a year after leaving him; that her letters to him came back unopened; and that she sent parties to Winnebago to make inquiry about him, for which she paid $500. She also went there herself and "the man at the station" told her Broberg was dead. She has not heard of him since. She says that Broberg knew where she lived in Philadelphia, and that before marrying Lehmann she consulted three Judges.

On cross-examination, she states that she made inquiries as to Broberg being alive or dead because he was a lineman and hundreds get killed by overhead wires.

The plaintiff, it appears, employed detectives to find Broberg, but without result: p. 48.

An action was brought in the Superior Courts of the State of California by the plaintiff against the defendant to annul the marriage and to set aside the conveyance to her of certain property at Long Beach in that state. In this he was successful, and the judgment of the California Courts containing elaborate findings of fact and conclusions of law was offered in evidence. The Court, finding as a fact that Broberg was still living, annulled the marriage between the plaintiff and the defendant and set aside the conveyance.

If this were an action for divorce or for annulment of marriage (provided that such an action were maintainable under our law) it would appear to result from the English authorities that such an action would not lie because the California decree would be effective. It is true that the English Courts do not look upon the decree of a foreign Court declaring a marriage null and void as being on the same footing as a decree for the dissolution of marriage, in which case "a divorce granted by the Court of the country of domicile is recognized as valid. The English Courts do not look upon it (a decree declaring a marriage null and void) as in the nature of a judgment *in rem* and so conclusive and binding outside the jurisdiction of the Court which pronounces it:" Halsbury, Laws of England, vol. 6, p. 271, following Lord Stowell in *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294, there quoted. The English Courts further assume jurisdiction in cases of marriage celebrated in England. But where the question is as to the formal validity of a marriage celebrated abroad, the decision of the Court of the country in which it was celebrated would weigh materially with the English Court, but would not be binding. And so much the more would the English Courts hold themselves not bound by such a decree annulling a marriage not celebrated in the jurisdiction of that Court. But a decree of a foreign Court declaring a marriage null and void by reason of the physical incapacity of one of the parties is apparently recognized as binding if the parties were (as here) domiciled in the foreign country: Halsbury, vol. 6, 272; *Turner* v. *Thompson*, 13 P.D. 37.

In *Ogden* v. *Ogden*, [1908] P. 46, an Englishwoman domiciled in England married in England a domiciled Frenchman. Subsequently the French Court annulled the marriage on the ground that the consent of the husband's parents had not been obtained. The English Court refused to recognize the validity of the French decree and a subsequent marriage of the Englishwoman was held bigamous. In the judgment in *Ogden* v. *Ogden*, [1908] P. 46, and on the authorities there referred to, it appears that the above rule as to decrees of a foreign country on account of physical incapacity extends to cases of personal incapacity

MAN.
C. A.
1914
WILCOX
v.
WILCOX.
Cameron, J.A.

to enter into the marriage contract such as marriages involving polygamy and incest: pp. 70, 73, 80.

If this view of the law be correct then it follows that the California decree pronounced by a Court where the parties were domiciled within its jurisdiction, and in a proceeding in which they participated, has some validity here. It declares the marriage null and void and states the ground of the declaration, that is to say, that Broberg was at the time of the marriage between the parties to this action still living. The California decree is not decisive of the issues here, where it is merely sought to set aside a conveyance. But it is surely evidence that the marriage has been annulled, and it seems to me it must be considered evidence to some degree of the fact of Broberg's continued existence.

> The presumption of life will, however, certainly on the one hand continue for a period exceeding half a century, unless proof be given either that the party has not been heard of by those persons who would naturally have heard of him had he been alive, or, at least, that search has been ineffectually made to find him. On the other hand, if evidence be furnished of a person's continuous unexplained absence from home, and of the non-receipt of intelligence concerning him, after the lapse of seven years the presumption of life ceases, and the burthen of proof is devolved on the party denying the death: Taylor on Evidence, 10th ed., 200.

The general presumption of law favours Broberg's continued existence up to this time. To rebut that has evidence been given of his continuous absence from home and of the non-receipt of intelligence concerning him? The circumstances stated by the defendant preclude the idea of Broberg and herself having possessed a "home" at all in the sense in which that term is used in the English cases. As already stated, the defendant abandoned Broberg a few days after their ill-fated and hasty union. She heard from him within a year, but not afterwards. She gave him no indication of an intention to live with him again; on the contrary, her actions plainly indicated the opposite. It was, therefore, hardly probable that Broberg would continue to attempt to communicate with her. The presumption of death does not arise where the probability of intelligence being received is rebutted by circumstances: *Bowden* v. *Henderson*, 2 Sm. & G. 360, 65 Eng. R. 436. It cannot be said that, in such circumstances, the defendant would naturally have heard from Broberg. And it is difficult to attach importance to the inquiries she alleges she made with reference to him, or to the fact that the plaintiff employed detectives to inquire without result. Broberg would, apparently, be leading a wandering life in pursuit of his occupation.

In *Watson* v. *England*, 14 Sim. 28, 60 Eng. R. 266, it was held in 1844, that a girl who had left home in 1810, and had last been

heard from in 1814, stating she was going abroad, ought not to be presumed to be dead. The circumstances were such that she would not likely be heard from if alive.

The law is thus stated in 13 Halsbury, 500:—

> As to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead.

Further, at p. 502:—

> The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion: and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends: *Watson* v. *England*, and *Bowden* v. *Henderson*, 2 Sm. & G. 360. More recent decisions, however, appear to throw doubt on this restriction,

referring to *Williams* v. *Scottish Widows, etc.*, 52 J.P. 471, a case not accessible to us, and *Wills* v. *Palmer* (1904), 53 W.R. 169, mentioned by counsel. But the latter case simply affirms a statement of the law in *Re Phene's Trust*, L.R. 5 Ch. 139, that the law presumes a person to be dead who has not been heard of for seven years, which is in a general way correct, but it is surely of importance to know the parties by whom no information has been received, and the relations of such parties to the absentee.

It seems to me that it is impossible to apply to a case of this kind the law applicable in cases of legatees and heirs who have not been heard from by members of their families for a long period. In those cases the parties coming before the Court are usually precisely those who in ordinary course would hear from the absentee if alive. But that is not at all this case. The defendant married Broberg on the shortest possible acquaintance, scarcely knowing the man. She left him after a few days of unhappy married life. He did write her as she says for a year or so, but it cannot be said that he would naturally continue to do so. To him the alliance probably appeared merely a temporary affair, and for him its legal consequences had, in all probability, no importance whatever.

The cases that are more in point are those on the criminal side: *R.* v. *Willshire*, 6 Q.B.D. 366, 14 Cox, C.C. 541; and *R.* v. *Jones*, 15 Cox 284.

I think the defence has not shewn adequate evidence to rebut the presumption that Broberg was still living. Her marriage with Lehmann is no doubt a circumstance to be considered, but it does not appear to me to be entitled to much consideration. She married Lehmann in 1899 or 1900. Unless she had more information then than she gave at the trial of this action that

MAN.

C. A.
1914

WILCOX
v.
WILCOX.

Cameron, J.A.

union might well have been held bigamous under our law. The other circumstances detailed, on careful examination, cannot be considered as having any real importance in determining this issue. On the whole, my conclusion is that Broberg must be held to have been living at the date of the marriage in Victoria. This is in accordance with and supported by the judgment of the California Court, to which, in my opinion, material weight must be attached.

In my opinion, the appeal must be allowed.

Haggart, J.A.

HAGGART, J.A., concurred.

Appeal allowed.

N. S.

S. C.
1914

REX v. COUNTY JUDGE'S CRIMINAL COURT.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Longley, Drysdale, and Ritchie, JJ. March 14, 1914.

1. CRIMINAL LAW (§ II A—49)—SPEEDY TRIAL PROCEDURE—ELECTING TRIAL WITHOUT JURY—EFFECT OF INDICTMENT.

A person sent up for trial for an indictable offence within the scope of the speedy trials clauses of the Criminal Code and against whom, while out on bail allowed by the magistrate, a true bill is found by the grand jury on the same charge, is entitled, on being taken into custody under a bench warrant in respect of such indictment, to the benefit of the speedy trials clauses and to elect thereunder for trial without a jury before the county court judge's criminal court if he has not pleaded to the indictment; and a mandamus will lie to the latter court to enforce such right where the county judge before whom the prisoner was brought had ruled that he had no jurisdiction because of the indictment to permit the accused to elect for trial without a jury.

[*R.* v. *Sovereen*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, distinguished; *R.* v. *Wener*, 6 Can. Cr. Cas. 406; and *R.* v. *Komiensky*, 6 Can. Cr. Cas. 528, discussed; *R.* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, approved.]

Statement

MOTION for a writ of mandamus, or for an order in the nature of a mandamus, to the County Court Judge's Criminal Court of Halifax, to proceed on the criminal charge against the relator Daniel Walsh, so as to permit of his election of speedy trial under sec. 827 of the Criminal Code 1906, as amended in 1909.

A mandamus was ordered.

On June 16, 1913, the relator was sent up for trial by the stipendiary magistrate of the city of Halifax on a charge of indecent assault. At the October sittings, 1913, of the Court, sitting for the disposal of criminal business, the relator was indicted by the grand jury for the county of Halifax for said offence, and not being then in the county a bench warrant was issued for his arrest. On March 3, 1914, the relator was arrested by the sheriff of the county of Halifax on said bench

warrant, who thereupon notified the Judge of the County Court Judge's Criminal Court under sec. 826 of the Criminal Code that the relator was then in custody under said warrant, and the relator was thereupon brought before said Judge and by his counsel expressed his wish to be tried before said Judge on said charge, but the said Judge declined to allow the relator to elect to be tried before him on the ground that he had no jurisdiction to try the relator for said offence, and recommitted him under said bench warrant to the county jail of the county of Halifax.

Statement

The Court, sitting *in banco*, was now moved on behalf of the relator for a writ of mandamus, or alternatively, for an order in the nature of a mandamus under Crown rule 70, commanding the Judge of the County Court Judge's Criminal Court at Halifax or said Court upon the relator being brought before him to proceed under sec. 827 (*a*) and (*b*) of the Criminal Code 1906, by stating to the relator the offence with which he was charged and that he had the option to be forthwith tried before said Judge without the intervention of a jury, and the relator consenting thereto, to proceed according to law to try the relator for the offence charged.

J. J. Power, K.C., for the relator.

A. G. Morrison, K.C., for the Attorney-General of Nova Scotia.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an application for a writ of mandamus under Crown rule 70, commanding the Judge of the County Court Judge's Criminal Court to proceed as regards Daniel Walsh under secs. 827 (*a*) and (*b*) for the offence with which he is charged.

The facts are, briefly, that the accused was sent up for trial by the stipendiary magistrate of the city of Halifax for indecently assaulting one Pearl Connors in March, 1913, and was admitted to bail. At the October sittings of the Supreme Court for criminal trials the accused was indicted by the grand jury for the offence. A bench warrant was issued under which he was arrested, and committed to the common jail. The sheriff duly notified the Judge and the accused was brought before him, and expressed his wish to elect to be tried before him on the charge contained in the indictment, but the Judge declined to let him elect on the ground that he had no jurisdiction to try him.

The reason, as I understand, of the learned Judge below was that after an indictment found on the charge, it was not competent for the prisoner to elect to be tried before him. All proceedings in reference to the trial of criminal offences before the County Court Judge are prescribed in secs. 825, 826, 827

N. S.
S. C.
1914
REX
v.
COUNTY JUDGE'S CRIMINAL COURT.

and 828 of the Criminal Code as amended by ch. 9 Acts of 1909.

I have had some difficulty in arriving at the same conclusion as my brethren in this matter; in fact, I have even still some doubt. I, however, concur in the result, as I am unable to give any meaning to the language used in sec. 825, sub-sec. 4, "*or who is otherwise in custody awaiting trial on the charge shall be* deemed committed for trial within the meaning of this section," if it does not cover the case of the accused here.

Sir Charles Townshend, C.J.

He is in custody awaiting trial on the charge in the indictment. He has, therefore, the right of election, unless the fact that he has been arrested under a bench warrant founded on this indictment makes a difference, and I was at first inclined to think it did. On further consideration, however, I incline to the view that the words already cited must apply to even this case of a man so indicted, and in custody awaiting trial, literally speaking there can be no doubt they do. I am further led to this view by sec. 828 (sub-sec. 2) giving a prisoner the right of re-election (which is not this case) where the words used are "at any time before such trial has commenced, and whether an indictment has been preferred against him or not." The word "trial" which is here used I think in the sense of the trial before the jury after it has been commenced, and the word "preferred" must be understood in the sense of found, as no trial in the Supreme Court could be commenced before a jury until indictment found. *Vide United States* v. *Curtis*, 4 Mason 238. It seems reasonable to infer from this that if he can re-elect after indictment found, he should have, and must have, the same right when he has made no election at all.

I should have felt disposed to follow the case of *Rex* v. *Sovereen*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, in which the Court of Appeal of Ontario decided the other way, but the facts and position of the accused are not the same, but I agree with what all the Judges in that case said except that they do not appear to have considered sec. 825, sub-sec. 4, or, possibly, it was not brought to their attention. However that may be, I have not been able to discover any other meaning than that contended for by counsel for the prisoner.

The writ of mandamus must go to the County Court Judge.

Graham, E.J.

GRAHAM, E.J.:—This is an application for a mandamus to require the County Court Judge to hold a Court to give the relator an opportunity to consent to a trial before him under the speedy trials provisions of the Criminal Code.

By section 825 of the Criminal Code [as amended by ch. 9 of the Acts of 1909] it is provided:—

Every person committed to gaol for trial on a charge of being guilty

of any of the offences which are mentioned in section 582 . . . may, with his own consent be tried in any province of Canada and if convicted, sentenced by the Judge.

(3) Such trial shall be had, under and according to the provisions of this Part out of sessions and out of the regular term or sittings of the Court, and whether the Court, before which, but for such consent, the said person would be *triable for the offence charged or the grand jury thereof is, or is not then in session.*

(4) A person, who has been bound over by a justice, or justices, under the provisions of section 696, and has been surrendered by his sureties and is in custody on the charge, or who is otherwise in custody awaiting trial on the charge, shall be deemed to be *committed for trial* within the meaning of the section.

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

Section 828, sub-section 2 is as follows:—

Any person who has elected to be tried by a jury may, notwithstanding such election, at any time before such trial has commenced and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and Judge, etc., to proceed. . . . Provided that if an indictment has been preferred against the person, the consent of the prosecuting officer shall be necessary to a re-election.

In this case, the relator, after a preliminary investigation on a charge of indecently assaulting a female, was bound over by a justice under section 626, that is to say, he was not committed for trial, but bound over to appear for trial. He was bailed, he was not surrendered by his sureties but an indictment was preferred against him before the grand jury and a bench warrant was issued by a Judge for his arrest as he had not appeared on his recognizance, and he is in custody awaiting trial on the charge laid against him, not a different charge. The case is, I think, clearly within the terms of sub-section 4. I think there is no difference in effect between the case of sureties rendering a defendant under a warrant (sec. 703) and the case of an arrest under a bench warrant. One is kindred to the other, and the words "or otherwise" ought to be held to cover this case.

The legislature contemplated a detention on some kind of fresh proceeds upon the original charge. There is no magic about a bench warrant, it does not make the charge a different one nor does an indictment for the same charge. A justice of the peace may issue a bench warrant.

The only question is whether, after an indictment returned,

N. S.
S. C.
1914
REX
v.
COUNTY JUDGE'S CRIMINAL COURT.
Graham, E.J.

a prisoner may elect to be tried without a jury. The counsel for the Judge relies upon *Rex* v. *Sovereen*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, 26 O.L.R. 16, and, of course, I would follow such a decision if it was in point. But there the original charge and proceedings on the prosecution before the justice had been abandoned, the indictment was not preferred at the instance of the person bound over to prosecute; the Crown proceeded by indictment on another charge by the consent of the Judge under section 873 of the Code. Therefore, the defendant was not awaiting his trial on the original "charge," and the section 825, sub-section 4, did not apply to that case, and was not referred to by the learned Judges in their opinions.

Maclaren, J., 4 D.L.R. 357, 20 Can. Cr. Cas. 108, says:—

It is true that there was in this case a preliminary examination before a magistrate and the prisoner was *committed for trial.*

(That of itself displaced the application of sub-section 4 which applies to a case in which the defendant was not committed but only held to bail). He continues:—

But this was not followed up by an indictment based upon the charge for which he was committed, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice as might have been done under the provisions of section 871 of the Criminal Code. . . . The fact is, that the depositions and the committal were both ignored and were not followed by the person bound over to prosecute, if there was such a person, or by the County Crown Attorney. Instead of this, the County Crown Attorney, under section 873, obtained the written consent of the Judge to prefer the indictment set out in the reserved case on which a true bill was returned by the grand jury and on which the petty jury returned a verdict of guilty. . . . In the circumstances we must, I think, assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate as in either of these events the County Crown Attorney would not, under section 871, have needed the consent of the Judge to prefer the indictment.

Then he cites a passage from Wurtele, J., in *The King* v. *Wener*, 6 Can. Cr. Cas. 406, and proceeds:—

As stated above, the indictment in this case did not originate with, and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge and the Code does not provide for a trial before a Judge without a jury in such a case.

Then follows an obiter dictum:—

But even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, I am of opinion that he should have elected before the true bill was found by the grand jury.

Later he quotes from Wurtele, J., in *The King* v. *Wener*, 6

Can. Cr. Cas. 406, and *The King* v. *Komiensky*, 6 Can. Cr. Cas. 528, in support of this view.

This appears also to have been the opinion of Moss, C.J.O. As to the other Judges, Garrow, J.A., and Latchford, J., concurred in the opinion generally not necessarily supporting the dictum, and Magee, J.A., dissented on this point.

It is upon this view, namely, that on an indictment returned, though not pleaded to, the prisoner's right to exercise his option to be tried without a jury, is cut off.

Of course, it is only with the deepest respect, that I venture not to follow this dictum, but my own opinion more closely coincides with that of Howell, C.J.A., in *Rex* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, and *Rex* v. *Foulkes*, 13 Can. Cr. Cas. 370, 17 Man. L.R. 613, considered cases, and that of Magee, J.A., in the dissenting opinion, rather than that of Wurtele, J., in the cases just cited. In both of those cases the defendant had pleaded to the indictment before it was sought to elect in favour of a trial in the other Court. Therefore anything said as to an indictment found, but not pleaded to, was *obiter*.

Mr. Justice Wurtele's reporter puts it thus, in *Wener's* case, [6 Can. Cr. Cas., headnote 2, p. 406]:—

2. If an accused party *neglects* to take the necessary steps to elect in favour of a speedy trial without a jury in the special Court for speedy trials, *before he has pleaded to an indictment preferred* by leave of the Judge of a jury Court, *his plea to such indictment* will conclude him from electing against a jury trial.*

But, in the opinion, I admit the Judge seems to have dealt with the case of an indictment returned, and in the case of *King* v. *Komiensky*, 6 Can. Cr. Cas. 524, at 528, the same learned Judge, although he had dealt with the case of an indictment returned, says, and it was all that was necessary for him to say in either case:—

As I have already stated, when an indictment has been found and *pleaded to*, the accused's plea fixes conclusively the tribunal and the mode of trial.

And again, page 529:—

It surely was never intended that after an indictment has been found, after the accused has been arraigned and has pleaded to the indictment, and when the Court is in session ready to proceed to his trial, the accused could arbitrarily remove the case from the Court seised with it and having competent jurisdiction, to another Court.

*EDITOR'S NOTE:—The editor of the Canadian Criminal Cases states that this headnote was approved of by the late Mr. Justice Würtele. It may further be noted that the preliminary enquiry was before a Judge of the Sessions of the Peace having jurisdiction also under the speedy trials clauses so that the accused had an opportunity of then stating his election.

N.S.
S. C.
1914
REX
v.
COUNTY JUDGE'S CRIMINAL COURT.
Graham, E.J.

In the *Thompson* case, [*R.* v. *Thompson*, 14 Can. Cr. Cas. 27], Howell, C.J.A., held that

The right of an accused person bound over by the magistrate at the preliminary hearing to appear and take his trial at the assizes, to elect under section 825 of the Criminal Code to be tried by a Judge without a jury, may be exercised even after the finding of a true bill by the grand jury on an indictment upon the same charge preferred by the Crown at the next assizes, if such election is made before plea to the indictment.

He distinguishes the *Komiensky* case, 6 Can. Cr. Cas. 524. He says:—

Of course, if the accused person pleaded to the indictment, it might well be said that he has elected his forum and cannot now elect to be tried without a jury, unless, perhaps, as provided for in section 828.

First, in my opinion, the provisions of the Act already quoted, and other provisions, point to the conclusion that a prisoner, the conditions of a charge and depositions and a committal, or an awaiting trial thereon, whether in custody or on bail, being present, has a right, at some time or another, to exercise the option of being tried with or without a jury.

The word "may" in the first sub-section of section 825, read in the light of the other provisions, seems to me to create a duty on the part of the official to afford a prisoner the opportunity to exercise this option.

Take sub-section 5; why is express provision made that the Attorney-General may, when the offence has attached to it a punishment exceeding five years, require the charge to be tried by a jury, and even if the prisoner has formally made his election, if, as is contended, the Attorney-General may require it in any kind of a case?

Then look at the mandatory provisions. Take sub-section 6. If the prisoner, even if he is at large under bail, may notify the sheriff that he desires to make his election, and the sheriff *shall* notify the Judge, and sub-sec. 7:—

In such case, the Judge, having fixed the time when and the place where the accused shall make his election, the sheriff *shall* notify the accused thereof and the accused shall attend at the time and place so fixed and the subsequent proceedings shall be the same as in other cases under this Part.

Then sec. 826:—

Every sheriff *shall*, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial (here read in the definition in sub-sec. 4 of sec. 825, "who is otherwise in custody awaiting trial on the charge" for the words committed for trial are extended to that case), notify the Judge, etc., whereupon, with as little delay as possible, the Judge *shall* cause the prisoner to be brought before him.

N. S.

S. C.
1914

REX
v.
COUNTY
JUDGE'S
CRIMINAL
COURT.

Graham, E.J.

Sec. 827 says, [in effect]:—

The Judge, having first obtained the depositions, etc., *shall* state to the prisoner (*a*) the offence; (*b*) that he has the option to be tried forthwith before a Judge without a jury or be tried in the ordinary way.

Then, no doubt, someone started the contention that the object of these provisions were merely to give a speedy trial, and if the prisoner could have a trial as speedily in the jury Court as under these provisions, the prisoner was not to have the option. But Parliament by amendment intervened, 1875, ch. 45, sec. 2, now Cr. Code 825, sub-sec. 3, and said:—

"Whether the jury Court or the grand jury thereof is, or is not, then in session."

Then if these provisions are mandatory and the prisoner has the right to exercise the option, when may the Attorney-General override that option or prevent its exercise and try the prisoner with a jury? We have the expression of one thing, viz., when the offence has attached to it a punishment exceeding five years. The usual implication follows. Is the Attorney-General to have the option in all cases and by procuring an *ex parte* indictment (it usually is *ex parte* and without notice) deprive a defendant of the right to exercise the option? Surely there is not to be a race about it between him and the prisoner, each one trying for the first step in his favoured Court. The grand jury may, as these provisions shew, be then sitting, and the prisoner would be too heavily handicapped.

Why is the return of the indictment to mark the line beyond which there can be no election? It is not at that stage that the Supreme Court becomes "seised of jurisdiction" or "seised with the prosecution." It is long before that seised with jurisdiction and with the prosecution; proceedings before the grand jury take place in that Court, and many other proceedings may be taken there before that period. I do not know why Wurtele, J., adopted that as the line.

It is not as if there were two Courts which had concurrent jurisdiction. Of course, then, proceedings would go on in the one in which they were first commenced. It is the case of a transfer or removal of the case from the Supreme Court to the County Court Judge, and that happens when the defendant has exercised his option and I suppose, when in pursuance of the election, the papers are sent to the other Court. That would happen in the case of a removal by a writ of *certiorari*. The statute expressly draws no such line as to the return of the indictment. The defendant must have the opportunity to elect. The officials are rigidly charged with the duty of notifying the Judge so that the defendant may have that opportunity. How can a defendant be said to have neglected, or to have

N. S.

S. C. 1914

REX v. COUNTY JUDGE'S CRIMINAL COURT.

Graham, E.J.

waived his right or to have deprived himself of the opportunity to exercise his option when there was not afforded to him an opportunity to elect? Why should the moment when an indictment has been returned behind his back mark the limit? But, on the other hand, when he pleads to an indictment, then he may be held to have waived his right to exercise the option. That is his first voluntary act. One cannot waive a right without knowledge or intention or *nolens volens*.

The reporter in *Wener's* case, [6 Can. Cr. Cas. 406] thought neglect had something to do with it. Therefore I agree with the judgment of Howell, C.J.A., and not with Wurtele, J., when he says in *Wener's* case, 6 Can. Cr. Cas. 406:—

> If no election has been made before an *indictment is returned* founded on the facts or evidence disclosed by the depositions taken at the preliminary enquiry, the accused has no statutory right to demand a trial before a Judge of sessions without a jury and avoid a trial on the indictment, but if an accused has elected for a speedy trial before a bill of indictment has been preferred, he cannot be deprived of that right.

Again recurring to section 828, sub-sec. 2. Why would Parliament provide for the opportunity of re-election, after an election in favour of the jury Court has been made, although an indictment has been preferred, and not for election in the first instance although an indictment has been preferred, unless it thought that the case was covered by the other provisions already made and it was unnecessary to enumerate that case? Why deal with an extreme case when the election had been made and the tribunal with the jury fixed, unless an intermediate case was included? There could not well be a contingency unforeseen by Parliament. That was a case likely to happen much more frequently than the other. I refer to Endlich on the Interpretation of Statutes, sec. 19. I think the leaning ought to be against the idea of a *casus omissus*.

When Parliament did draw the line of exercising the option as it does in sec. 828, sub-sec. 2 (the re-election provision), it provided that he may exercise "the election at any time before such trial has commenced." When does a trial commence? Story, J., in *United States* v. *Curtis*, 4 Mason 232 at 236, says:—

> Now, in the sense of the common law the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding and, until the party has pleaded, it cannot be ascertained whether there will be any trial or not. The elementary books are full to this purpose.

Mr. Justice Blackstone, in the passage cited at the bar (which is a mere transcript from Lord Hale), says:—

> To arraign is nothing else but to call the prisoner to the bar of the Court to answer the matter charged upon him by the indictment. If, upon the arraignment, the prisoner pleads guilty, there can be no trial at

all, for there remains no fact to be tried. . . . Indeed the very forms of the proceeding upon the arraignment are so complete evidence of the legal meaning of a trial, that of themselves, they are decisive. When the prisoner, upon his arraignment pleads not guilty, he is then asked how he will be tried, and the response in case of a trial by jury is that he will be tried by God and his country. "When therefore," says Mr. Justice Blackstone, "a prisoner, on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors," etc.

So Lord Hale says: "After the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is the trial of the offender. The very form, too, of calling the prisoner when he is to be put on his trial by the jury shew the legal sense of the terms. He is then told by the clerk, in the language of the law, that he is now set at the bar to be tried and he is to make his challenge, before the jurors are sworn," In short, so far as authorities or reasoning or forms go, there can be no legal doubt that, by the term "trial," is generally intended in the law, the actual trial of the prisoner by jury.

The word "preferred" in that provision simply means prosecuted, or carried on or found: *The Queen* v. *Pembridge*, 3 Q.B. 901.

We still use these very forms mentioned by Story, J., in criminal cases in Nova Scotia, and we could not very well tell a defendant "it is too late to elect now the trial has commenced" (he may have been arraigned several days before) when the forms before the Court to be addressed to the prisoner proclaim that it has not yet commenced. Why allow the defendant the right to elect up to the time of the commencement of the trial in one case and in the other cut off the right because an indictment has been returned?

I am not quite able to appreciate the argument that giving a defendant the right to elect up to that time, *i.e.*, after indictment returned, will increase trouble and expense going on before the grand jury. If he may elect up to the moment before the return of the indictment to what appreciable extent is the trouble and expense increased by giving him the right to do it after the return of the indictment?

Parliament did not consider that additional trouble and expense in the re-election provision which gives the defendant the right to elect up to the time of the commencement of the trial.

Maclaren, J.A., in *Rex* v. *Sovereen*, 20 Can. Cr. Cas. 103 at 110, 4 D.L.R. 356 at 361, thinks that

> Unless the opinion of Würtele, J., is upheld, speedy trials would become a misnomer and the provision would be defeated, in fact converted into machinery to retard and delay.

That result does not happen in this province. Under the statute, the sheriff has twenty-four hours after the moment of

N. S.

S. C. 1914

REX v. COUNTY JUDGE'S CRIMINAL COURT.

Graham, E.J.

the custody to notify the Judge and the Judge must cause the prisoner to be brought before him "with as little delay as possible." The prisoner has nothing to say about it, except, of course, to ask for adjournment as he may do in the other Court, or in any Court. Parliament did not seem to be impressed with that view when it passed section 828, which gives the prisoner a chance to make another double.

Even when the defendant is out on bail, 825, sub-sec. 6, and has the initiation of the proceedings for a trial without a jury by notifying the sheriff and does not notify him there will be no greater delay except by several days than in the ordinary case of a jury trial. The defendant is brought in to plead to the indictment, he must plead or exercise his option to go to the other Court, and being necessarily then in custody, the sheriff has twenty-four hours to notify the Judge and so on.

I am not very familiar with the possible turnings of a prisoner, but in this province when the Court for criminal cases sits only twice a year in each county the speedy trials provisions seem to work well.

The counsel for the Judge asks what becomes of the indictment if he may elect then. I ask what becomes of the indictment in the case of re-election under section 828? What becomes of the indictment in any case where several are found and a trial and conviction upon one of them only? The case of *Rex* v. *Burke*, 24 O.R. 64, shews what becomes of the indictment.

Of course, I can only speak with the deepest respect of anything said by the learned Judges I have named in this opinion, and must be understood in that sense.

I think the County Court Judge has jurisdiction, the prisoner consenting, to try this case without a jury, therefore that the mandamus must go, of course, without costs.

Longley, J.

LONGLEY, J., concurred in allowing the application.

Drysdale, J.

DRYSDALE, J.:—This motion demands I think and only requires a proper interpretation of the words in sub-section 4 of sec. 825 of the Criminal Code reading as follows. "Who is otherwise in custody awaiting trial on the charge."

It seems to me that the policy of the Legislature has been to extend in the first instance the right of speedy trial to all cases where jurisdiction is conferred upon the County Court Judge, that is to say, the various amendments indicate a legislative intention to confer the right of election upon all persons charged with those offences which come within the powers of the County Court Judge, no matter how the person charged

is held. I am of opinion that when sub-section 4 enacted that when a person has been surrendered by his sureties and is in custody on the charge or who is otherwise in custody awaiting trial on the charge, it was intended that a case of the kind at bar should be covered, in other words, that a situation such as presented in this motion was intended to be provided for and that the County Court Judge has jurisdiction in the premises.

RITCHIE, J.:—This is an application for a mandamus to require the learned Judge of the County Court to proceed in regard to the charge against Walsh under section 827 of the Criminal Code.

The Judge has declined to proceed and his view finds support in the remarks of the late Chief Justice Moss and Mr. Justice Maclaren, in the case of *The King* v. *Sovereen*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356. The facts of that case, however, make it clearly distinguishable from this case. In this case Walsh is in custody awaiting trial on the charge. Sovereen was not in custody awaiting trial on the charge, Mr. Justice Maclaren, [20 Can. Cr. Cas. 109], says:—

> As stated above, the indictment in this case did not originate with and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge, and the Code does not provide for a trial before a Judge without a jury in such a case.

Sovereen was committed for trial, admitted to bail and appeared for trial in accordance with his recognizances. Then an indictment, not based upon the charge on which he was committed, was preferred against him by the consent in writing of the Judge.

Walsh was put upon his trial under section 696 of the Code on a charge of indecent assault, he was admitted to bail by the stipendiary magistrate, in his absence an indictment was found against him by the grand jury, a bench warrant was issued against him under which he was arrested and is now in custody awaiting trial on the charge.

When the Speedy Trials Act was first passed, as soon as the Supreme Court was in session, the prisoner's right of election was gone and he was bound to take his trial before a jury, and, as the law originally stood, the person accused of crime, if admitted to bail, had no right of election, but, since the Act was passed, "the march of legislation" (to use the words of Chief Justice Howell of Manitoba in *R.* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, has been steadily in the direction of enlargement of the right of election.

I have grave doubt as to whether or not this tendency is in the best interests of the administration of the criminal law,

N. S.
S. C.
1914
REX
v.
COUNTY JUDGE'S CRIMINAL COURT.
Ritchie, J.

but that is for Parliament, and not for me. My duty is to ascertain to the best of my ability the intention of the statute and give effect to it.

The trend of legislation is very clearly shewn by sub-sec. 2 of sec. 828 of the Code, which is as follows:—

> Any prisoner who has elected to be tried by jury may, notwithstanding such election, *at any time before such trial has commenced*, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall be thereupon the duty of the sheriff and Judge or prosecuting officer to proceed as directed by sec. 826.

This section provides that re-election may be made after an indictment has been preferred and I think also after it has been found, because it may be after indictment preferred, and *at any time* before the trial has commenced.

There is, of course, an intervening time between the finding of the indictment and the commencement of the trial; the trial cannot commence until after the prisoner has pleaded, and the re-election may be at any time before the commencement of the trial. This right of re-election after indictment found, is, to my mind, a very clear intimation as to what the policy of the legislation is.

In this case, Walsh has not, as yet, elected at all. The contention for the Crown, is that he cannot do so after indictment found, that the Judge under the Speedy Trials Act would have no jurisdiction. If this contention is adopted, the result is a curious one. A man, as I have pointed out, can re-elect after indictment found, but he cannot elect. I think it is very difficult to come to the conclusion that this is intended by the statute.

In my opinion Walsh has the right now to elect. This view is supported by Chief Justice Howell of Manitoba in *The King* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608.

Sub-sections 3 and 4 of section 825 of the Code are as follows:—

> 3. Such trial shall be had under and according to the provisions of this Part out of sessions and out of the regular term or sittings of the Court, and whether the Court before which, but for such consent, the said person would be triable for the offence charged or the grand jury thereof, is or is not *then* in session.
>
> 4. A person who has been bound over by a justice or justices under the provisions of sec. 696, and has been surrendered by his sureties, and is in custody on the charge, *or who is otherwise in custody awaiting trial on the charge* shall be deemed to be committed for trial within the meaning of this section.

By the section, every person committed for trial of certain offences, of which indecent assault is one, may, with his own consent, be tried under the Speedy Trials Act.

Chief Justice Howell expresses the opinion that sub-section 3 cannot be read to mean that a man cannot elect while the Court is in session but may be tried while the Court is in session. I fully appreciate this view, but, in my opinion, sub-section 4 makes the matter clear.

Walsh has been bound over under section 696, he has not been surrendered by his sureties, but he is "otherwise in custody awaiting trial on the charge."

With very great respect for the opinions of those who hold a different view, I think the statute has in clear and distinct language given this man, who is now in custody awaiting trial the right to elect. I would escape from this conclusion if I could, but I cannot, as it seems to me, do so without disregarding the language of sub-section 4.

In my opinion, the accused person Walsh is within its terms, and therefore has the right of election.

Mandamus ordered.

GUENARD v. COE.

Alberta Supreme Court, Beck, J., January 16, 1914.

1. JUDGMENT (§ II D 8—147)—CONCLUSIVENESS—WAGES CLAIM AGAINST COMPANY—DIRECTORS' PERSONAL LIABILITY.

The judgment against the company sued for a labourer's wages and for payment of which the directors are made personally liable under the Companies Ordinance, ch. 61, in force in Alberta, is conclusive as against the directors in a subsequent action against them personally to enforce the statutory liability upon questions raised in the company's defence as to the plaintiff's status and as to whether the indebtedness was for "wages"; and such questions cannot be again pleaded by the directors in the second action unless fraud is alleged as regards the adverse findings in the first action.

2. PLEADING (§ III A—303)—DENIALS—PARTICULARITY.

A paragraph of a defence which, without stating any facts, says that the defendants are not and have not become liable under the ordinance or statute upon which the plaintiff's claim is based, is not permissible under the Alberta practice rules and will be struck out.

3. PLEADING (§ VII A—365)—FORM—OBJECTION THAT NO CAUSE OF ACTION.

In an action to enforce personal liability of company directors for workmen's wages, a general objection in the defence that the plaintiff's claim discloses no cause of action, will be struck out under Alberta practice rule 149, unless it expressly states the point of law involved.

[See Annotation on Defence in lieu of Demurrer, at end of this case.]

4. EXECUTION (§ I—7)—RETURN OF SHERIFF—COLLATERAL ATTACK—COMPANY AND DIRECTORS.

A labourer with an unsatisfied judgment for wages against a company in Alberta is entitled to invoke the personal remedy against the directors which the Companies Ordinance, 1901, ch. 61, provides, on obtaining *bonâ fide* the sheriff's return that the execution against the company cannot be realized upon; and the propriety of the sheriff's return can be questioned in a subsequent action against the directors only for fraud or collusion.

ALTA.

1914

S. C.

GUENARD v. COE.

Beck, J.

MOTION to strike out certain paragraphs of the defence. The motion was granted.

A. C. Grant, for the plaintiff.

G. B. Henwood, for the defendants.

BECK, J.:—This is a motion to strike out certain paragraphs of the defence.

This is one of 22 actions brought in the District Court of Wetaskiwin by different plaintiffs against the same defendant. The several plaintiffs recovered judgments after trial against the Bawlf Collieries Limited, a joint stock company. The statement of claim in each case alleged an indebtedness by the company to the plaintiff for wages earned as a labourer between certain specified dates and these 22 actions are brought by the plaintiffs as execution creditors against the defendants as directors of the company under the provisions of section 54 of the Companies Ordinance ch. 61, of 1901, which reads as follows:—

> The directors of a company shall be jointly and severally liable to the clerks, labourers, servants and apprentices thereof for all debts not exceeding six months' wages due for services performed for the company whilst they are such directors respectively; but no director shall be liable to an action therefor unless the company is sued therefor within one year after the debt becomes due nor unless such director is sued therefor within one year from the time when he ceased to be such director nor unless an execution against the company is returned unsatisfied in whole or in part; and the amount unsatisfied on such execution shall be the amount recoverable with costs from the directors.

Some time ago an application was made before me in Chambers to consolidate these actions. I then made several suggestions as to the form of the order, one of them being that one of the actions should be transferred to this Court as a test action and the remainder stayed. No formal order was taken out, but the parties appear to have adopted this suggestion and my order may now be deemed to have taken that form, *i.e.*, in brief, that the present action be deemed a test action by the result of which unless a Judge shall otherwise order the parties to the 21 other actions, which are stayed in the meantime, will be bound; all the several plaintiffs being liable to the defendants for any costs which the plaintiff in this action shall be ordered to pay and liable as between themselves in proportion to the amounts of their respective judgments; with the liberty to any party to apply.

The reason for the foregoing order was to enable some questions of law to be determined conveniently and inexpensively before the trial and perhaps as a result of the determination to avoid the bringing of many witnesses to the trial.

The questions of law are all involved in the question to what

extent is the judgment against the company conclusive as against the defendants. The proceedings themselves shew that the requirements as to time for bringing the actions against the company and the directors have been observed. It is contended for the plaintiff that he is entitled to judgment against the defendants upon proof:—

(1) Of the judgment against the company.

(2) Of the pleadings in the action against the company whereby it appears that the judgment was recovered for wages, not exceeding six months' wages owing by the company to the plaintiff as a labourer during a certain specified period.

(3) Of the defendants being directors during the periods specified.

(4) Of the return of an execution against the company unsatisfied.

It is contended on behalf of the defendants that the judgment in the action against the company is not conclusive against the defendants on the question of the plaintiff being a labourer, the indebtedness being for wages, and the wages being earned during the period alleged and they raise these questions in their statement of defence.

By the common law, a judgment against an incorporated company can be executed only against the property of the company, in order, however, to give creditors, or creditors of a certain preferred class, a more extensive remedy than they would have at common law upon a judgment obtained against a company, Parliament from time to time rendered such judgment enforceable against the individual members of the company or the directors or some of them (see Lindley on Companies, 6th ed., pp. 390 *et seq.*) where the various English statutes to this effect are dealt with.

In those cases in which a judgment against a company was sought to be enforced against a shareholder a *scire facias* was a necessary preliminary, unless there was some statutory enactment to the contrary, and a provision that execution should not issue without leave obtained by motion in open court was not sufficient to dispense with a *sci. fa.*

(Lindley, p. 409.)

The old learning on *sci. fa.* will be found in such books as Bacon's Abridgement or Tidd's Practice and a summary of the present practice in the Enc. Laws of Eng., 2nd ed.: tit. *Scire Facias*, and Lindley's Company Law.

I should think that in cases like the present the practice of issuing a *sci. fa.* is in England superseded by O. 42, rule 23, which amongst other things provides that where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company or against a public officer or other person representing such company the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly,

ALTA.
S. C.
1914
GUENARD
v.
COE.
Beck, J.

and perhaps our corresponding rule 349 would authorize such a motion as an alternative to an action to establish the liability—that is, the right to execution—under the section of the Companies Ordinance in question here.

In Lindley, Company Law, 6th ed. at 412, it is said:—

> Except where judgment has been obtained by fraud, the validity of a judgment which has been recovered against a company or its public officer cannot be impeached by a shareholder who is proceeded against by *sci. fa.* for, excepting in cases of fraud, nothing is admissible as a defence to a *sci. fa.* which might have been relied on as a defence to the action on the judgment in which the *sci. fa.* issues. The judgment is conclusive and nothing can be set up as a defence to a *sci. fa.* upon it, except some matter which is consistent with the validity of the judgment itself.

A number of authorities are cited for these propositions and they are no doubt a correct statement of the law.

None of the English statutory provisions I think restrict the liability of the shareholders to a class of debts falling under a particular description, so that as far as I can ascertain the precise point before me has not been decided in England; nor although there are statutory provisions in other provinces of the Dominion similar to ours, can I find that there are any decisions upon them by the Courts of any of the provinces. Whether or not the procedure by way of motion under our rule 349, or by way of *sci. fa.* might be adopted instead of an action to enforce the liability of directors under section 54 of the Companies Ordinance, the procedure, whatever it be, is, I think, an analogous method to which the same principles are to be applied. The judgment must be deemed conclusive, except where fraud is alleged, as to all things which might have been contested in the action against the company. The precise character and particulars of the debt are such things and I think they are concluded by the judgment.

For the reasons given I order that the following paragraphs of the defence of the defendants Coe, Eggan, Thompson and MacEachern be struck out, namely, those:—

> (1) Denying that the plaintiff was employed by the company.
>
> (2) Denying that he was employed as a labourer.
>
> (3) Denying that he was employed during the period of time alleged in the statement of claim against the company.
>
> (4) Denying that his remuneration was by way of wages.
>
> (5) And the paragraph alleging that the plaintiff had been paid his claim before judgment against the company.

This covers paragraphs 1, 2, 4 and 6. I order paragraph 5 to be struck out as being bad in law. It alleges that these defendants were not parties to the action and had no knowledge of it. They could not have been made parties; and the effect of the Ordinance is that they are bound by the judgment even if they

had no knowledge of it, provided fraud is not alleged and proved. I order paragraph 10 to be struck out. It says the defendants are not and have not become liable for the plaintiff's claim under the Ordinance. This is an allegation of a conclusion of law only. It states no facts. It is clearly bad. I also order paragraph 11 to be struck out. It says the defendants will object that the plaintiff's claim discloses no cause of action as against them. No grounds are suggested. One or more "points of law" must be stated (rule 149).

There remain the following defences:—

(1) Paragraph 3, that the defendants were not then directors.

(2) Paragraph 7, that no execution was issued against the company.

(3) Paragraph 8, that the execution was not returned unsatisfied.

(4) Paragraph 9, that the execution was improperly returned inasmuch as the company is and was possessed of goods more than sufficient to satisfy the plaintiff's claim.

Paragraphs 3, 7 and 8 undoubtedly allege matter which may properly be set up by way of defence. As to paragraph 9, in my opinion the propriety of the sheriff's return to the execution can be questioned only for fraud or collusion. It is true that under one of the English statutory provisions more is required, but the burden placed on the plaintiff is to shew that "there cannot be found sufficient whereon to levy such execution." (See Lindley, Company Law, 6th ed., p. 405.) The burden placed on the plaintiff under the Ordinance is to obtain a return of the execution that it is unsatisfied in whole or in part. If the plaintiff obtains such a return *bonâ fide*, I think he sustains the whole burden imposed upon him. I therefore order that paragraph 9 be struck out.

The plaintiff will have costs in any event.

Motion granted.

Annotation—Pleading (§ VII—360)—Objection that no cause of action shewn—Defence in lieu of demurrer.

Annotation

Demurrers.

Under the English judicature system of pleading now adopted with slight variations in the English-speaking provinces of Canada, the process of demurrer is abolished. The primary object of the abolition was to do away with the judicial consideration made necessary on the argument of demurrers, of points which turned out to be foreign to the real rights of the parties as disclosed by the evidence on the eventual hearing with witnesses. The demurrer system encouraged the raising of points of law in advance of the trial, wherever it could be anticipated as even probable that a finding might eventually be secured to which the point of law might be applied. The present practice tends to the saving of judicial time and energy by reserving until after the facts have been found by a jury or by a judge acting as a jury, the consideration of points of law, and thus eliminates those points which do not apply to the findings of fact. The former demurrer seldom disposed of a case, as the practice was to give

ALTA.

Annotation

Demurrers.

Annotation (*continued*)—Pleading (§ VII—360)—Objection that no cause of action shewn—Defence in lieu of demurrer.

leave to plead on payment of costs, where the demurrer was overruled. Successive demurrers against lax pleadings were encouraged and it was necessary for the opposing party to continue to file successive demurrers until the pleader had pleaded every essential whereof proof could be demanded. This practice raised a keen battle of wits as between the opposing counsel with commensurate additional costs to the litigants without substantially aiding in the ultimate decision of the merits.

Under the Judicature system the place of the demurrer was not taken by any one defined alternative. The merits of the demurrer as a means of disposing of admittedly controlling points of law which would settle the whole matter in question or at least of some distinct cause of action were not lost sight of. The defendant was accorded, by the Judicature practice rules, the privilege of expressly raising such points of law in his "statement of defence." This latter document became, therefore, more than a record of the "pleas" or "answers" to the plaintiff's demand. A discretion was then vested in the court to decide whether the point of law raised in answer had better be decided before the trial or not. *Bristol* v. *Kennedy*, 8 D.L.R. 750; *Robinson* v. *Fenner* (1912), 106 L.T. 722. The question of law might apply only to a part of the plaintiff's claim where the claim was divisible in its character. Only if in the opinion of the Court the decision of the point of law would substantially dispose of a distinct cause of action or of defence or counterclaim, etc., was the preliminary argument of same directed.

If it be fairly open to argument whether a pleading discloses a good cause of action or answer the question should be raised as a point of law by the pleadings, and not by a motion to strike out: *McEwen* v. *N. W. Coal and Nav. Co.*, 1 Terr. L.R. 203.

If the statement of claim is so loosely framed that it can readily be decided to be insufficient by the master or referee on the hearing of an interlocutory application, on the ground that no *reasonable* cause of action is disclosed, a summary motion to strike out the statement of claim would be in order. *Boardman* v. *Handley*, 4 Terr. L.R. 266; *Griffith* v. *London & St. Katharine Docks Co.*, 13 Q.B.D. 26. So if a part of the claim be of matter tending to prejudice, embarrass or delay the fair trial of the action, a summary motion will lie to strike out the objectionable portions: *Leonard* v. *Sweet*, 33 N.S.R. 197.

Where the court sees that a substantial case is presented, it will decline to strike out a pleading, but where the court is satisfied that the case presented cannot succeed in point of law, it should end the litigation by striking out the claim: *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489; *Goodson* v. *Grierson*, [1908] 1 K.B. 761; *Woods* v. *Lyttleton* (1909), 25 Times L.R. 665.

But the claim must stand if it discloses some ground of action, although one not likely to succeed at the trial. *Boaler* v. *Holder*, 54 L.T. 298. On a motion to strike out a claim on the ground that no reasonable cause of action is disclosed, the court is not concerned with the strength or weakness of the plaintiff's case or whether he will eventually succeed or not, so long as it is satisfied that the statement of claim discloses "some cause of

Annotation (*continued*)—Pleading (§ VII—360)—Objection that no cause of action shewn—Defence in lieu of demurrer.

ALTA.

Annotation

Demurrers.

action shewing some reasonable likelihood of success." Per Farrell, L.M. in *Voorhees* v. *Holland* (1909), 9 W.L.R. 687 (Sask.).

Under the Judicature Acts practice, the court in considering the case in proceedings which take the place of the former demurrer, may have more regard to the reasonableness or unreasonableness of the claim or defence attacked, and is not bound to regard the pleadings with the same strictness as under the old practice of demurrer: *Dadswell* v. *Jacobs*, 34 Ch.D. 278; *Bank of Hamilton* v. *George*, 16 P.R. (Ont.) 418.

Allegations in a statement of claim are not necessarily embarrassing by reason of their unnecessarily anticipating a possible defence: *Vancouver Land & Securities Co.* v. *McKinnell*, 5 Terr. L.R. 27.

The motion to strike out an entire claim as not disclosing any reasonable cause of action applies only where the pleading is obviously bad: *Brophy* v. *Royal Victoria Life Assce. Co.*, 2 O.L.R. 651; *Attorney-General* v. *London & N. W. R. Co.*, [1892] 3 Ch. 274; *Kellaway* v. *Bury* (1892), 66 L.T. N.S. 599; *Hubbuck* v. *Wilkinson*, [1899] 1 Q.B. 86; *Worthington* v. *Belton* (1902), 19 Times L.R. 438.

A co-defendant against whom no cause of action was shewn was ordered to be struck out of the proceedings with costs. *Amos* v. *Herne Bay Co.*, 54 L.T. 264. The defendant should not plead to a hypothetical case which may never arise and could arise only on an amended statement of claim. *Fulford* v. *Wallace*, 1 O.L.R. 278. For this reason it was held, in a slander action, that the defendant was not at liberty to allege by way of defence that the words actually spoken were different from those charged in the statement of claim and to plead as to those other words something by way of answer or in mitigation of damages. *Fulford* v. *Wallace*, 1 O.L.R. 278; *Rassam* v. *Budge*, [1893] 1 Q.B. 571.

Where the objection in point of law as to the whole action is not of that clear character as to justify a motion to strike out the statement of claim on the ground that there is no reasonable cause of action disclosed therein, the defendant is still under a duty to plead any subject which might take the plaintiff by surprise unless expressly raised. While there has been some difference of opinion as to the necessity of stating on the ground of "surprise" a mere conclusion of law, the better practice is to place the objection on the pleading (statement of defence) not only as a fair notice to the plaintiff, but so that the entire case may appear on the "record of pleadings" which the trial judge has before him at the hearing.

Whatever further may be required in the way of specifying the point of law under local practice rules in the event of the case being heard upon a preliminary question of law, the weight of authority seems clearly to support, as a part of the record of pleadings in a purely equitable action, a general objection raised in the statement of defence that the statement of claim as a whole does not disclose any cause of action. The defendant having placed such an objection on the record has given his opponent notice that, while pleading in particular to the various allegations of the plaintiff, he, the defendant, will claim at the trial that the statement of claim cannot be supported upon any hypothesis of law as a basis of liability against the defendant, even if the plaintiff should be able to prove all he has alleged. In such cases it would seem that the general objection to

ALTA.

Annotation

Demurrers.

Annotation (*continued*)—Pleading (§ VII—360)—Objection that no cause of action shewn—Defence in lieu of demurrer.

the statement of claim is in itself a "point of law." *Burrows* v. *Rhodes*, [1899] 1 Q.B. 818.

There is, however, the authority of Wetmore, J., in *Yorkton Printing Co.* v. *Magee*, 7 Terr. L.R. 54, reaffirmed by the same judge in *Smith* v. *C. P. R.*, 7 Terr. L.R. 56 (the latter an employee's action for personal injuries), that the defendant cannot retain in his statement of defence a paragraph stating that he would "object at the trial that the statement of claim was not sufficient in point of law to sustain the action."

The English case of *Bidder* v. *McLean*, 20 Ch.D. 512, cited by Wetmore, J., does not appear to advance the proposition which that learned judge laid down. As stated by Wetmore, J., the objection in law in *Bidder* v. *McLean* was made in a somewhat general manner. It was, in fact, a general demurrer before the abolition of demurrers, in an action for a declaration of trust founded upon a complicated statement of facts. The Court of Appeal held that a general demurrer by one defendant on the ground that the facts alleged in the statement of claim "do not shew any cause of action to which effect can be given as against this defendant," was sufficient, although not admitting that the rule would be of universal application.

If the defendant to a merely equitable demand desires to place in his defence an objection in the nature of the former general demurrer for want of equity, it seems appropriate that he should do so by a clause to the effect that the allegations in the plaintiff's statement of claim do not disclose any cause of action. *Cobb* v. *Great Western*, 37 Sol. Jour. 196; *Thioden* v. *Tindall*, 65 L.T. 343; *Salaman* v. *Warner*, [1891] 1 Q.B. 734.

If, however, a specific ground can be alleged by the objecting party, he should state the ground. Odgers on Pleading, 7th ed., p. 450, gives examples in the defence of slander actions as follows:—

(a) "The defendant will object that the said words are not actionable without proof of special damage and that none is alleged."

(b) "That the special damage alleged is too remote and is not sufficient in law to sustain the action."

(c) "The defendant will object that the said words, taken either by themselves or with any innuendo of which they are capable, are not actionable without proof of special damage, and that none is alleged."

Referring to the English Rules, Order XXV., rule 2, Odgers says:—

"No one is bound to take an objection in point of law; the rule (Order XXV. r. 2) merely says that he shall be *entitled* to raise it by his pleading. At the trial he may urge any point of law he likes, whether raised on the pleadings or not. This was decided on June 10th, 1886, by a Divisional Court (Day, and Wills, JJ.) in the case of *MacDougall* v. *Knight et al.* (Eng.) (not reported on this point). And it was also the law under the former system. (Per Lindley, J., in *Stokes* v. *Grant*, 4 C.P. D. at p. 28.) But if either party desires to have any point of law set down for hearing, and disposed of before the trial under the latter part of rule 2, he should raise it in his pleading by an objection in point of law. And having regard to the words of Order XXV. r. 3, it is clearly worth while to raise on the pleadings any point of law which will substantially dispose of the whole action, as in *Mayor, etc. of Manchester* v. *Williams*, [1891] 1 Q.B. 94." Odgers on Pleading, 7th ed., 169.

HARTNEY v. BOULTON.

SASK.

S. C.
1914

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Elwood, JJ. March 16, 1914.

1. TRIAL (§ I C—12)—RECEPTION OF EVIDENCE ON COUNTERCLAIM—ORDER OF PROOF.

On the trial of an action in replevin for possession of an automobile and a counterclaim for the cost of repairs, the circumstance that the plaintiff in giving testimony on the claim incidentally gave some evidence as to the counterclaim does not disentitle the plaintiff, after the evidence on the part of the defendant in proof of the counterclaim is put in, to give testimony in answer thereto; and the trial Judge's refusal to permit such further evidence is error constituting ground for a new trial on the counterclaim.

Statement

APPEAL by the plaintiff from the judgment of the District Court in favour of the defendant in an action to replevy an automobile alleged to be wrongfully detained as upon a lien (*a*) for repairs, (*b*) for storage.

The appeal was allowed, with judgment for the plaintiff upon replevin, and a new trial ordered as to the counterclaim.

Russell Hartney, for appellant.

P. E. Mackenzie, K.C., for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The evidence in this case shewed that the automobile for which replevin was brought was the property of the plaintiff, and he was entitled to its possession. It was claimed on the part of the defendant that the defendant was entitled to retain it for a lien (*a*) for repairs, (*b*) for storage. It was admitted on argument that the defendant was not entitled to any lien for storage. The amount claimed for repairs was $77.70, and evidence was admitted at the trial, without objection, that, prior to the commencement of this action, the plaintiff had tendered to the defendant the above sum of $77.70, and the defendant had refused to accept it, or rather had directed the plaintiff to see the defendant's solicitor. The reply to the statement of defence did not plead this tender, but the allegation of the defendant that he was entitled to detain the automobile until the charges for repairs were paid was traversed by the joinder of issue. In any event, at the trial evidence was received on the part of the plaintiff proving the tender. It was argued on behalf of the defendant that the tender was not refused. I am of opinion that what took place between the plaintiff and the defendant amounted to a refusal, and that the defendant had no right to detain the automobile, and the plaintiff is entitled to a judgment for the return to him of the automobile. So far as the counterclaim is concerned, evidence had been given on the part of the defendant proving the counterclaim, and some

SASK.

S. C.
1914

HARTNEY
v.
BOULTON.

Elwood, J.

evidence given on the part of the plaintiff as to the counterclaim, when the plaintiff's counsel requested to be allowed to call the plaintiff as a witness on his own behalf. He had already given evidence on his own behalf on the claim. The learned district Judge refused to allow him to testify on his own behalf. I am of the opinion that he was incorrect in this; that the mere fact that he had given evidence on his own behalf on the claim, and that possibly incidentally some evidence had been given which could apply to the counterclaim, did not deprive the plaintiff of the right to testify with respect to the counterclaim after the defendant had closed his case on the counterclaim.

The result, in my opinion, is that there should be judgment for the plaintiff for the return to him of the automobile in question, with the costs of the action; that there should be a new trial of the counterclaim; and that the defendant should pay to the plaintiff the costs of the abortive trial of the counterclaim, and should also pay to the plaintiff his costs of this appeal. If the plaintiff has been obliged to pay to the defendant or the sheriff any moneys in consequence of the judgment appealed from, those moneys should be refunded to the plaintiff, and if necessary execution issue to the plaintiff against the defendant for any amount so paid.

Appeal allowed; new trial on counterclaim.

SASK.

S. C.
1914

MATTHEWS v. HEINTZMAN & CO.

Saskatchewan Supreme Court, Haultain, C.J., Newlands and Elwood, JJ. March 16, 1914.

1. DAMAGES (§ III J—202)—TAKING OR DETENTION OF PERSONAL PROPERTY —MEASURE OF DAMAGES.

Where the seller of a piano on deferred payments unlawfully seized and re-took possession of the piano under the mistaken impression that the contract of sale authorized him so to do on default, the measure of damages for the wrongful detention of same for some months under such seizure and until the return of the piano to the purchaser, is the amount for which the plaintiff could have rented another piano of the kind during the period, and a claim for "damage to credit and reputation" because of the seizure cannot be allowed.

2. SET-OFF AND COUNTERCLAIM (§ I A—2) — ILLEGAL SEIZURE — COUNTERCLAIM FOR DEBT.

A defendant may be allowed by way of counterclaim all amounts due from the plaintiff to him at the date of the counterclaim, including overdue instalments of the purchase-price of goods returned to the plaintiff and accepted by him after action brought by the plaintiff for illegal seizure thereof.

Statement

APPEAL by the defendants from the judgment of the District Court in favour of the plaintiff in an action in damages for alleged wrongful seizure and retaking possession of a piano on default of payment of the purchase instalments thereon.

The appeal was allowed by reducing the plaintiff's damages and allowing the counterclaim which had been dismissed at the trial.

F. W. Turnbull, for appellant.
C. J. Lennox, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The plaintiff purchased a piano from the defendant in June, 1911, for the price of $300, payable according to the terms of a written agreement in that behalf. The piano was delivered to the plaintiff on June 3, 1911. On December 23, 1911, the defendant retook the piano under the mistaken idea that the agreement for sale contained the usual provision for seizure and sale in case of default being made in any of the payments agreed upon. On September 12, 1912, the plaintiff commenced this action, in which he claims

(*a*) The return of the piano;
(*b*) $80 damages for the loss of use of piano for eight months;
(*c*) $120 damages to the plaintiff's credit and reputation;
(*d*) Costs;
(*e*) Further and other relief.

On October 10, 1911, the defendant company filed its statement of defence, in which it admits an unlawful seizure, alleges the return of the piano to the plaintiff since the commencement of the action, and pays $50 into Court as sufficient to compensate the plaintiff for his loss of the piano during the period of detention, at the same time denying any damages. The statement of defence also raises the legal objection of remoteness to the claim for $120 damages. The defendant also counterclaims as follows:—

8. That its claim against the plaintiff is for the sum of $140, being unpaid monthly instalments of money agreed to be paid the plaintiff by the defendant for the piano mentioned in the statement of claim under the terms of a written agreement between the plaintiff and defendant dated June 1, 1911; and for the further sum of $6.02 for interest at the rate of 8 per cent. per annum on said instalments since same became due and payable and agreed to be paid by said written agreement. . . . Total amount due at this date, $146.02.

The defendant asks:—

(*a*) That the plaintiff's damage be assessed by this Honourable Court or by an officer of the Court or such other person as this Honourable Court may be pleased to order.

The case came on for trial, and the learned District Court Judge, who tried the case, gave judgment in favour of the plaintiff, as follows:—

I think the plaintiff's claim of $500 damages for the loss of a piano for some months is too ridiculous to consider seriously. After consider-

SASK.

S. C.

1914

MATTHEWS v. HEINTZMAN & CO.

Haultain, C.J.

ing the evidence, I have come to the conclusion that the piano, having been returned, $130, which amount I do allow, will recompense the plaintiff for the damages suffered. In allowing the plaintiff $130 I include in this amount $5 per month damages for the loss of the use of the piano, and $75 general damages. The defence shews that the plaintiff could have obtained another piano at $5 per month to take the place of the one the defendant seized. In the counterclaim it was proven at the trial that the defendant seized the piano in December, 1911, and returned it in October, 1912. The action was brought in September, 1912. As the piano was wrongfully seized, I do not see how the defendant could possibly expect to make the plaintiff pay for it whilst it was wrongfully in their possession, and when the plaintiff had no use of it. I therefore dismiss the counterclaim, but without costs. Plaintiff is, of course, entitled to costs in the action.

The defendant now appeals from that judgment.

The learned Judge is clearly wrong in allowing anything for "general damages." There is no claim for general damages, and the claim for damage to credit and reputation cannot, of course, be entertained. The only thing left to decide on this point is the amount to be allowed to the plaintiff for loss of the use of the piano. There is uncontradicted evidence that the plaintiff could have obtained another piano for $5 or $6 a month. He was deprived of the use of his piano for about nine months and nineteen days. He should, therefore, be allowed $60 damages for that item.

As to the counterclaim, I think that the defendant was entitled to recover on it. The plaintiff acquiesced in the return of the piano, and will be paid damages for the loss of its use, and is therefore liable to the defendant for all amounts due for the piano at the date of the counterclaim. The counterclaim will, therefore, be allowed, to the amount of $130, being the amounts payable under the agreement up to October 1, 1912, less $45 shewn to have been paid by the plaintiff. The defendant is also entitled to interest at the rate of six per cent. per annum on each instalment from the date such instalment became due until judgment, the first instalment to bear interest being that due on the 1st September, 1911.

The result therefore, is that the judgment on the main action in favour of the plaintiff is reduced to $60, and the judgment on the counterclaim is reversed, and the defendant will have judgment on the counterclaim for $130 and interest and the costs of the counterclaim. The plaintiff will pay the defendant's costs of this appeal.

As the piano was not returned until after delivery of the defence to counterclaim, the plaintiff will be allowed all costs incidental to preparing, filing and serving his defence to the counterclaim.

Appeal allowed.

KIDD v. DOCHERTY.

SASK.

S. C. 1914

Saskatchewan Supreme Court, Newlands, Lamont, and Elwood, JJ. March 16, 1914.

1. SALE (§ I B—9)—PASSING OF TITLE—DELIVERY—SUFFICIENCY—ASCERTAINMENT.

Under the provisions of sec. 18 of the Sale of Goods Act, R.S.S. 1909, ch. 147, a buyer for value of one-half of the grain to be grown on the seller's land is not, as against execution creditors, vested with any property in such grain until his portion shall have been ascertained by a division and setting aside of the specific portion which the buyer is to receive.

[*Robinson* v. *Lott*, 2 S.L.R. 276, referred to.]

Statement

APPEAL in an interpleader issue from the judgment of the District Court for Moosomin in favour of the claimant.

The appeal was allowed.

D. Mundell, for the execution creditors (appellants).

T. D. Brown, for the respondent.

Newlands, J.

NEWLANDS, J.:—Apart from the agreement of sale in this case, the vendor Webb would have no claim upon the crop grown by the purchaser of the land, Docherty.

The provision in the agreement of sale which it is contended gives the claimant Webb such an interest in the crop that that interest cannot be seized by the creditors of Docherty under their execution is as follows:—

And it is further agreed between the parties hereto that all crops to be grown on said land, to the extent of one half thereof, shall until said principal and interest are fully paid and satisfied be and remain the property of said party of the first part, who, however, shall not be accountable for any loss or damage thereto prior to the same being actually delivered to him, or to his order.

Section 17 of the Chattel Mortgage Act, R.S.S. 1909, ch. 144, says:—

No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as a security, shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop, or crop to be grown in future in whole or in part, be valid except the same be made, executed, or created as a security for the purchase price and interest thereon of seed grain.

This clause, in my opinion, makes the above recited clause in the agreement of sale invalid, and the vendor of the land, Webb, the claimant in this case, would have no interest in the crop unless he acquired same after it was cut. If he did acquire such an interest after the same was cut, the evidence shews that there was no actual and continued change of pos-

SASK.

S. C.

1914

KIDD v. DOCHERTY.

Lamont, J.

session, and therefore it would be void against creditors under sec. 11 of said Act.

LAMONT, J.:—This is an appeal in an interpleader matter from the decision of the Judge of the District Court for the judicial district of Moosomin. The facts are as follows:—

By an agreement in writing bearing date May 3, A.D. 1909, H. W. Webb, the claimant herein, agreed to sell to Hugh Docherty, and the said Docherty agreed to purchase, the north half of 28-15-3, west of the 1st meridian, for eight thousand dollars, said sum, with interest at 7½ per cent., to be paid by the delivery to the said Webb at the elevator at Rocanville of one half of the crop grown upon the land each year until the proceeds of said half crop at current market prices paid off the said sum and interest. The agreement contained the following clause:—

> And it is further agreed between the parties hereto, that all crop to be grown on said land to the extent of one-half thereof shall, until said principal and interest are fully paid and satisfied, be and remain the property of the said party of the first part.

It also provided that until default was made in payment Docherty had the right to occupy and enjoy the land. Docherty went into possession and farmed the land. On May 6, 1913, a writ of execution for $303.84 against the goods of Hugh Docherty was, at the instance of the above-named plaintiffs, placed in the hands of the sheriff of the said judicial district with instructions to levy the amount thereof out of Docherty's goods. On the same date a further writ against the goods of the said Hugh Docherty and one George Docherty was also placed in the sheriff's hands. On September 11, 1913, the sheriff through his bailiff seized or purported to seize under said executions "a one-half interest in one hundred acres of wheat and thirty acres of oats in stook on said land," and on November 26 following, he made a further seizure of the whole of the wheat, oats and barley in bins on the said land. On becoming aware of this seizure, Webb claimed one half of the grain upon the land as owner thereof under his agreement with Docherty. This claim the execution creditors disputed. The sheriff obtained an interpleader order, and the matter was tried before the Judge of the District Court. As against the first seizure, Webb contended that as against his share of the grain it was wholly bad, in that it only purported to seize the half share of the execution debtor, and as regards the seizure of November 26, he contended that prior to that seizure Docherty and himself had divided the grain, and that it had been agreed that all the wheat in a certain granary should belong to him under his agreement as his share of the wheat grown upon the land. The

learned Judge found on the evidence that the grain had been divided, and that the wheat in this particular granary belonged to the claimant, and he gave judgment in his favour. From that judgment this appeal is now taken.

The first question to be determined is, in whom was the property in the grain grown on the land vested before the division between Webb and Docherty took place? In *Robinson* v. *Lott*, 2 S.L.R. 276, this Court held that where an owner of land leased it to a tenant reserving to himself as rent a share of all the crops grown upon the land, the whole property in the crop was vested in the tenant until the grain was divided and the landlord's share set apart for him. Does the same rule apply where the person growing the grain was not a tenant but a purchaser of the land under an agreement of sale in which he covenants and agrees that the property in one half of the crop grown on the land shall be in the vendor? I am of opinion that it does. I can see no difference in principle as to the passing of the property in the grain between the position of a vendor reserving to himself a share of the crop to be applied on the purchase-money and a lessor reserving a share of the crop as rent. In both cases the person putting in the crop has an interest in the land and the right to the possession thereof, which *primâ facie* raises the presumption that he is putting in the crop for himself and not as the servant or agent of the vendor or lessor. In any case I am of the opinion that the right of a vendor reserving to himself the property in "one-half of the grain grown on the land cannot be a higher right than if he had entered into an agreement with the purchaser for the purchase of one-half of the future crop to be grown on the land. In such a case, before any property in the future crop would pass the crop must come into existence and be divided so that the purchaser's half could be capable of identification. The law upon this point was stated by Lord Macnaghten in *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523 at 543, as follows:—

> It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

In Halsbury's Laws of England, vol. 25, art. 304, the learned author says:—

> 304. Where there is a contract purporting to be a present sale of future goods, and, when the goods come into existence or are acquired,

SASK.

S. C.
1914

KIDD
v.
DOCHERTY.

LAMONT, J.

the seller delivers them to the buyer or otherwise appropriates them to him, or the buyer takes possession of them by the authority, given by the terms of the contract or subsequently thereto, of the seller, the property in the goods is thereupon transferred to the buyer. Where, however, the future goods are such as have, at the date of the contract, a potential existence, the property in them is *primâ facie* transferred to the buyer when they come into existence, so as to be capable of identification, without any further act of appropriation.

Even if we treat the agreement between Webb and Docherty as giving Webb all the rights of a purchaser for value of one half of the grain to be grown on the land sold, no property in Webb's half could pass to him until the grain comprising that half had been ascertained (Sale of Goods Act, R.S.S. 1909, ch. 147, sec. 18), and it was impossible to ascertain it until the crop was divided and a specific portion thereof set aside as his share. Until that was done, Webb's grain could not be identified. I am, therefore, of opinion that, until the time when Webb and Docherty made the division no property in the grain passed to Webb.

The property in the grain in dispute being in Docherty at the time of the division between himself and Webb, could that division pass any title to the grain set aside as Webb's share free from the execution?

Rule 478 is as follows:—

> Except as hereinafter mentioned every writ of execution against goods and chattels shall at and from the time of its delivery to the sheriff to be executed bind all the goods and chattels or any interest in all the goods and chattels of the judgment debtor within the judicial district of the said sheriff, and shall take priority to any chattel mortgage, bill of sale or assignment for the benefit of all or any of the creditors of the judgment debtor, executed by him after the receipt by the sheriff of such writ of execution or which by virtue of the provisions of the Bills of Sales Act has not taken effect prior to such receipt as against the creditor or creditors' interest under the execution, but shall not take priority to a *bonâ fide* sale by the judgment debtor, followed by an actual and continued change of possession of any of his goods and chattels without actual notice to the purchaser that such writ is in the hands of the sheriff of the judicial district wherein the said judgment debtor resides, or carries on business.

Under this rule the writs of execution bound all the goods and chattels of Docherty from May 6, 1913, when they were placed in the sheriff's hands. The crop grown on the land subsequent thereto, being the property of the debtor Docherty, would be bound by the execution as the same came into existence: Halsbury's Laws of England, vol. 14, p. 45; *Roberts* v. *Gray*, 17 W.L.R. 277; although they could not be sold by the sheriff until they were harvested: rule 485. And it would remain bound so long as the executions continued to be valid

writs in the sheriff's hands and unsatisfied. The only way by which the grain thus bound can be freed from the executions is in case a sale is made of it to a *bonâ fide* purchaser for value who has no knowledge of the executions being in the sheriff's hands, followed by an actual and continued change of possession of the grain sold. It is admitted in this case that there was no change of possession. The grain in question was not removed from the granary in which it was placed at the threshing. It was always, so far as the public could see, still in the possession and under the control of the debtor. The grain being the property of the execution debtor and being bound by the execution prior to the time when Webb claims to have obtained property in it, the division of the grain between Webb and Docherty could not displace the execution nor free the grain from it. The claim of the execution creditors, therefore, must prevail. The appeal, in my opinion, should be allowed with costs, the judgment of the Court below set aside, and judgment entered barring the claim of the claimant, with costs, including the costs payable by the plaintiffs to the sheriff.

SASK.
S. C.
1914
KIDD
v.
DOCHERTY.
Lamont, J.

ELWOOD, J., concurred in allowing the appeal. Elwood, J.

Appeal allowed.

KERN v. TAMBLYN.

SASK.
S. C.
1914

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Elwood, JJ. March 16, 1914.

1. BILLS AND NOTES (§ V A 2—118)—NOTE PROCURED BY FRAUD—ONUS ON ENDORSEE.

Where the promissory note is shewn to have been obtained by fraud, the plaintiff, claiming as endorsee, must prove that before its maturity he, in good faith, gave valuable consideration therefor.

[Falconbridge on Banking and Bills of Exchange, 2nd ed., 458, referred to.]

Statement

APPEAL by the defendant from the trial judgment of the District Court in favour of the plaintiff in an action upon a promissory note.

The appeal was allowed, and judgment entered for defendant on the ground of fraud attaching to the note.

P. E. Mackenzie, K.C., for the appellant.

W. H. B. Spotton, for the respondent.

The judgment of the Court was delivered by

LAMONT, J.:—This action is brought on a promissory note for $200 made by the defendant on June 10, 1912, in favour of the Farmers' Steel & Wire Co. Ltd., and endorsed in the name of the company by its officers to the plaintiff. The defendant re- Lamont, J.

SASK.

S. C.
1914

KERN
v.
TAMBLYN.

Lamont, J.

fuses payment on the ground that the note was obtained from him by misrepresentation and fraud in the first place, and that the plaintiff is not a holder thereof for value. The evidence establishes that the defendant was induced to sign the note, which was given for stock in the company, on the representation of the company's agent that the company owned a coal mine at Lethbridge beside or near the Galt Coal mine, and that the defendant and other shareholders would get coal for $6.40 per ton, and also that the company would, by August, 1912, erect a warehouse at Delisle, at which the plaintiff could obtain such coal. The company did not erect any warehouse at Delisle. For some unaccountable reason the officers of the company were not questioned as to the ownership by the company of the coal mine, but evidence was put in by the defence that subsequent to the signing of the note the acting-manager of the company, when asked where the coal mine was, replied, "That is all news to me; I didn't know that we owned any coal mines." And in January, 1913, when the manager of the company was told that Williams, the agent who got the notes signed, had stated that the company had coal mines and an option on an oil well, replied that they did not know anything about either, and that the company had no coal mines. The learned trial Judge found the representations to have been made and to have induced the contract; but as the officers of the company were not asked if the company owned a coal mine in July, 1912, when such representations were made, he hesitated at holding that the admissions of the manager and acting manager were sufficient to justify a finding that the company had no coal mines in July of that year. I have no such hesitation. In my opinion, the proper inference to be drawn from the statement of the manager is, not that the company had a coal mine in July and had disposed of it by the time he made the statement, but rather that the company never owned a coal mine at all. The representation which induced the contract was therefore false. If Williams, in making the statement, had information to that effect from the directors of the company, such information was false to their knowledge. If he had no information on the subject at all, he could not have had any honest belief in the truth of his statement. In my opinion, therefore, the note was obtained by fraudulent misrepresentation.

The note having been obtained by fraud, the onus is upon the plaintiff to prove that he in good faith gave valuable consideration therefor: sec. 58, sub-sec. 2, Bills of Exchange Act, R.S.C. 1906, ch. 119; Falconbridge, Banking and Bills of Exchange, 2nd ed., 458. Has he discharged that onus? He obtained the note under the following circumstances. In July or August he was asked to buy some $30,000 worth of notes given by farmers to the company. After consultation with his solicitors he refused.

SASK.

S. C. 1914

KERN v. TAMBLYN.

Lamont, J.

Then, in September or October, one McEwan, who was a director of the company, came to the plaintiff with an agreement of sale on a section of land sold by him to one Beveridge, who was the secretary-treasurer of the company. McEwan requested the plaintiff to purchase his equity in the agreement. That equity amounted to $27,000. The land, according to the agreement, was sold at $48,000, of which $12,500 had been paid, and on the land there was a mortgage of $8,500. The plaintiff says he refused to purchase the agreement unless McEwan would give him security that Beveridge would pay the balance due. McEwan agreed to give as security some other agreements of the value of $18,000, and notes held by the company to the value of over $25,000. The plaintiff agreed to purchase McEwan's equity at $23,000, and by an indenture dated October 17, 1912, McEwan assigned to him all his right, title and interest in the agreement for sale and in the land. Two weeks later, namely, on October 31, 1912, the plaintiff obtained the following document:—

To John Henry Kern, Senior, Moose Jaw, Sask. Dear Sir,—In consideration of your purchasing from Austin Eber McEwan a certain agreement of sale between him and Archibald G. Beveridge for section one (1), township ten (10), range seventeen (17), west of the second meridian, Saskatchewan, we hereby assign to you as security for the due payment by the said Archibald G. Beveridge of the moneys owing under the said agreement of sale, the promissory notes, a list of which is attached hereto.

Without prejudice to your rights as holder of these notes as against us or the makers, we may engage any bank, firm, person or corporation to collect the amount of these notes and pay over the same to you, less collection charges not to exceed ten per cent., and such moneys paid over to you are to be applied upon the purchase-price under the said agreement, although the same may not be due, and, upon receipt of the amount due upon any note, less collection charges aforesaid, you are authorized to deliver up such note to the maker. It is distinctly understood, however, that you assume no responsibility in connection with such collections, and that, until you have received payment of any note, less collection charges, aforesaid, you shall be entitled to collect the whole amount of such note from the maker or endorser.

Should the whole of the said purchase-price with interest and charges not be paid in full when due, you may retain, as owner, the balance of the above-mentioned notes uncollected at their market value, giving credit upon the money then due under said agreement, or in your discretion may dispose of the said notes, or any part thereof, in such manner as you may deem fit, without notice, protest or other proceeding, and may appropriate the proceeds thereof towards repayment of the amount due.

These powers shall apply equally to any other security substituted for the foregoing with your consent.

FARMERS STEEL & WIRE CO. LTD.,
A. A. French, Vice-president.
A. C. Beveridge, Sec.-treasurer.

Dated the 31st day of October, 1912.

SASK.
S.C.
1914
KERN
v.
TAMBLYN.
Lamont, J.

Then follows a schedule of notes, including the defendant's, totalling in all something over $25,000. The plaintiff says he made no inquiry as to the standing of the company or the right of its officers to pledge the assets of the company to secure the private debt of Beveridge. There is no explanation by him as to how he came to take an assignment of the notes two weeks after the assignment of the agreement of sale. *Primâ facie* he took the assignment of the McEwan agreement without obtaining at the time an assignment of the notes, which he knew to be the company's property. Nor do I find any evidence that he relied upon the notes as collateral security, or that he did not or would not have concluded the deal relying only on his other security. He paid $23,000 for an agreement of sale on which $27,000 was unpaid. He took collateral agreements amounting to $18,000, and then two weeks afterwards took an assignment of the company's notes. A perusal of his whole evidence leads me to the conclusion that, with the land and the $18,000 collateral agreement, he felt safe, and if he received payment for the notes it would make him doubly secure. Nowhere does he shew he would not have paid over the money just the same, even if he had not received an assignment of the notes. Under these circumstances, and in view of the fact that the assignment was taken two weeks after he bought the agreement for sale, I am of opinion that the plaintiff has not discharged the onus resting on him of shewing that he gave value for these notes. Furthermore, I am satisfied the whole transaction was a fraudulent one. The plaintiff knew the notes were the company's property, and to ask us to believe that he, a business man, had any honest conviction that McEwan could pledge the company's property for Beveridge's private debt, is to place too great a strain on our credulity. I agree with the learned District Court Judge when he says he has "no doubt that the whole thing was a fraud from start to finish, designed by designing men to swindle the farmers," and I think such fraud is sufficiently established.

The appeal, in my opinion, should be allowed with costs, the judgment of the Court below set aside, and judgment entered for the defendant with costs.

Appeal allowed.

WALTON v. FERGUSON.

ALTA.

S.C.
1914

Alberta Supreme Court, Harvey, C.J., Stuart, and Beck, JJ.
March 30, 1914.

1. ASSIGNMENTS (§ III—28)—EQUITIES AND SET-OFFS—DIMINUTION OF PRICE BY PARTIAL FAILURE OF CONSIDERATION.

As against the assignee of a mortgage taking with notice and subject to all equities, an allowance may be ordered by way of diminution of the purchase price which the mortgage secures, for the mortgagee's failure to supply the use of certain farm equipment which the mortgagee as vendor to the mortgagor had undertaken to do as one of the considerations for the agreement of exchange mentioned in the mortgage, or, in the alternative, for damages for breach of contract.

Statement

APPEAL from the trial judgment in an action by the assignee of a mortgage given as security for the enforcement of an exchange.

The appeal was allowed and the case sent back for retrial only on questions of the amount of damages to set-off against the mortgage or the amount of diminution of the purchase price as compensation to defendant for the mortgagee's failure to supply the use of an engine and plow.

A. A. McGillivray, and *J. M. Oldham*, for the plaintiff, appellant.

A. H. Clarke, K.C., and *E. V. Robertson*, for the defendant, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—In my opinion this appeal must be allowed. The plaintiff is the transferee of a mortgage given by the defendant in favour of one Staffen and sues to enforce the mortgage. The mortgage contains a clause declaring it to be given to protect the rights of the parties under a contemporaneous written agreement between them for the exchange of a number of properties, both chattel and real, the latter being some of them farm properties, in which agreement a balance payable in money by the defendant to Staffen had been arrived at. The agreement did not specify the terms of payment of this balance, but it was left to be inserted in the mortgage. From this it is clear that the assignee of the mortgage took, subject to all equities, and that the action must be treated as in substance an action to recover the balance of the purchase price.

The defence raised was that the agreement contained a clause whereby Staffen agreed to permit the defendant to have the use of an engine and plow in which Staffen owned a half interest jointly with one Haynes, for the purpose of putting in her spring crop, that she had been refused the use of it and was therefore not liable to pay the mortgage. There was a counterclaim, but this was only for rescission of the mortgage.

ALTA.

S. C.
1914

WALTON
v.
FERGUSON.

Stuart, J.

At the trial, evidence was adduced by both parties to shew whether or not the refusal of the use of the machine had been wrongful. The plaintiff was entitled to do this so as to be in a position to argue that even if a wrongful refusal constituted a good defence as pleaded, there was in fact no wrongful refusal. The defendant gave evidence as to the amount of damages suffered by her in consequence of the refusal. The plaintiff did not object to this but did not cross-examine, and brought no rebuttal evidence on the subject. The learned trial Judge gave a judgment allowing the defendant an amount of damages equal to the first instalment on the mortgage. There had been no application to amend the pleadings.

In my opinion, it was not possible, upon the pleadings, for the defendant to get a judgment for damages and I think there was nothing in the plaintiff's conduct of the case which would preclude him from objecting to an amendment at that stage. He did nothing more than adduce evidence as to the refusal to deliver the machine which had been pleaded as a complete defence. It is clear that it could not constitute a good defence. I do not attach much importance to the suggestion that the implied agreement was that the first payment was to be made out of the crop. No doubt that was the *expectation*, but expectation is not agreement. The obligation to pay would clearly have remained even if there had been no difficulty about the engine but only a poor season and no crop on account of weather conditions. Although the refusal to deliver the machine was not a good defence to the claim, I think it was possible, even under the defence as it stood, to ask for a diminution of the purchase price as compensation for the failure to deliver the engine. If some of the cows or the harness mentioned in the agreement on which no value was placed had not been delivered I think the defendant could have pleaded as a defence that she had not got them and ask not for complete release from her covenant to pay but for a deduction of their fixed value from the purchase price. So here, the value to the defendant of the use of the machine which was part of the property agreed to be delivered could, I think, have been given in diminution of the purchase price. But the case was not dealt with in that way, but either as a case of an absolute defence by reason of the refusal or as a counterclaim for damages which was not pleaded. In either view, I think there was a mis-trial.

I agree entirely, however, with the view taken by the trial Judge that there was a wrongful refusal to deliver the engine. The defendant had no agreement with Haynes. His agreement was with Staffen, and the obligation rested upon Staffen to see that the defendant got the use of the machine. If Haynes

raised improper difficulties and demanded too much for the repairs and also in advance of the time they were to be paid for, as he did, it was Staffen's duty to arrange the difficulty with his co-owner as best he could and secure the use of the machine for the defendant. Instead of doing that he actually encouraged Haynes in his improper course. I think it is clear that Staffen was liable in damages and that although he was not a party, these damages could be set off against the plaintiff's claim. Moreover, I think the measure of damages was not the amount, $35, which Haynes demanded in excess of the defendant's offer. If Staffen had refused to deliver some of the cows or harness except on payment of $10 more, for which there was no justification, certainly the defendant would have been right in refusing to pay that sum, doing without the cows or harness, and asking that their fixed value be deducted from the price or, in form, counterclaim for damages for non-delivery of which the measure would be the value of the chattels. So here I do not think the defendant was bound to submit to pay the extra sum unjustly demanded and then seek to recover it as damages.

There is no question that the defendant did intend to raise in some form the question of her rights in consequence of the refusal to deliver the machine, and although I think the judgment below cannot stand, I do not think we should merely order judgment to be entered for the plaintiff. I think all matters in dispute should be settled in this action before it is ended, and that the case should be sent back, upon terms, for that purpose. There are two possible courses open to us in view of what I have said. The first would be to order a reference to the clerk to ascertain the amount due on the mortgage and to ascertain the value of the use of the engine and to deduct this from the amount due. The other would be to allow judgment to be entered on the certificate of the clerk as to the amount due and to permit an amendment of the counterclaim so as to raise a claim for damages and to direct an assessment of them. If there is any essential difference between these courses, I think it would be due to the possibility of one or the other narrowing somewhat the rights of the defendant and therefore, as the case must go back in any case, I think both grounds should be left open. The liability of Staffen for damages and to make compensation as well as the defendant's liability for the amount secured by the mortgage should be treated as settled by our present judgment. There was a clear and well understood contest on the trial between the parties on these points, and there is no reason for re-opening them. It is true Staffen was not formally a party but he was really represented

ALTA.
S. C.
1914
WALTON
v.
FERGUSON.
Stuart, J.

by the plaintiff and he had every opportunity of giving his account of the matter; everything bearing upon it was evidently brought out and there can be nothing new to be told.

I may add that another reason for sending the case back lies in the insufficient evidence whereon to base a true estimate of the damages. There was no evidence of the cost of seeding, or of harvesting, threshing and marketing. This evidence is in any case necessary before an estimate can be made. The case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, shews that uncertainty is not an insuperable obstacle in assessing damages.

The appeal should be allowed with costs and the defendant should be allowed to amend her pleadings so as to make a claim for damages and for compensation, and the case should go back for trial merely to ascertain the proper amount of damages or compensation, and when these are ascertained the amount should be set off against the amount *primâ facie* due on the mortgage which is only a matter of calculation, and judgment then entered accordingly. The costs of the first trial should also be paid by the defendant in any event. The general costs of the action and of the second trial should be in the discretion of the Judge at the second trial.

Appeal allowed.

ALTA.
S. C.
1914

REX v. CRUIKSHANKS.

Alberta Supreme Court, Harvey, C.J., Beck, and Simmons, JJ. March 30, 1914.

1. JUSTICE OF THE PEACE (§ III—10)—JURISDICTION—SITTING AT REQUEST OF ANOTHER JUSTICE.

The exclusive jurisdiction which by Alberta Statutes 1907, ch. 5, is to attach to the first justice of the peace taking cognizance of the case is sufficiently displaced within the exception authorizing another justice to act on request, where the justice taking the information did so at the request of the trial justice accompanied by the latter's intimation that he himself would conduct the trial; acquiescence in such proposition is equivalent to a counter-request by the justice taking the information that the other justice should take the trial.

2. DENTISTS (§ I—6)—UNLAWFUL PRACTICE — MECHANICAL DENTISTRY — LICENSE.

Taking impressions of the gums and filling teeth as a business, constitutes a practice of dentistry which, in Alberta, can be done for hire and gain only by a licentiate under the Dental Association Act, Alta. 1906, ch. 22.

3. DENTISTS (§ I—6)—UNLAWFUL PRACTICE—SEVERAL ATTENDANCES ON ONE PERSON.

While a single act does not constitute a "practising" of a profession or trade, the practice of the profession of dentistry is shewn by services for only one customer on different dates, *ex. gr.* the taking impressions of the gums and fitting the plates for artificial teeth.

[As to proving more than a single act in infringement of licensing statutes against "practising" a profession, see also *R.* v. *Lee*, 4 Can. Cr. Cas. 416; *R.* v. *Whelan*, 4 Can. Cr. Cas. 277; *R.* v. *Raffenberg*, 15 Can. Cr. Cas. 297; *R.* v. *Armstrong*, 18 Can. Cr. Cas. 72.]

ALTA.

S. C.
1914

REX
v.
CRUIK-
SHANKS.

MOTION to quash two summary convictions for unlawful practice of dentistry in breach of the Dental Association Act (Alta.)

J. M. Carson, for the respondent, Crown.

J. McKinley Cameron, for the appellant, accused.

The judgment of the Court was delivered by

SIMMONS, J.:—Counsel have agreed that this application may be treated as an appeal from the decision of Mr. Justice Stuart, who dismissed an application by way of certiorari to quash two convictions made by police magistrate Sanders against the defendant for practising dentistry contrary to the provisions of the Dental Association Act (Alta.) 1906, ch. 22, or in the alternative as an application *de novo* to this Court to quash these convictions. Counsel also agreed that the questions of law involved should be decided upon the following material: the information and complaint and conviction in each case and an affidavit of police magistrate Sanders, and that the contents of these documents shall be treated as the material facts.

Simmons, J.

The information on the first charge is as follows:—

That J. R. Cruikshanks of Calgary, a person not holding a valid certificate of license to practise dentistry under the Dental Association Act of the Province of Alberta, and not duly registered under said Act, did on June 1, 1913, and July 5, 1913, practise the profession of dentistry for hire and gain, at Calgary in the province of Alberta, contrary to the said Dental Association Act of the Province of Alberta, by taking an impression in a soft substance of the upper gums of the mouth of Annie Mason and making therefrom a plate and set of artificial teeth for and to fit the upper gums of the said Annie Mason on June 1, 1913, for money, and by treating and filling a tooth of one Charles A. Brown on July 5, 1913, for money.

The second information is dated July 31, 1913, and charges the defendant

that on the 25th, 26th, 28th, 29th and 30th days of July, 1913, he took impressions in a soft substance of the gums of one Elizabeth Fletcher and made therefrom two plates and a set of artificial teeth for the sum of $45, of which $5 was paid by her to the defendant.

Four grounds of appeal are raised by the applicant:—

1. The acts alleged do not constitute the practice of dentistry.

2. A single act does not constitute the practice of dentistry.

3. Priority of jurisdiction in the magistrate who received the information excluded the jurisdiction of police magistrate Saunders, who tried the actions.

4. Magistrate wrongfully received evidence of the first conviction before convicting on the second charge.

Dealing with the third question first the appellants rely on the statute ch. 5 of 1907, sec. 9, amending the Act respecting

ALTA.

S. C.

1914

REX v. CRUIKSHANKS.

Simmons, J.

Police Magistrates and Justices of the Peace, which is as follows:—

Jurisdiction in any particular case shall exclusively attach in the first justice of the peace, or where more than one justice is required the first justices to the required number duly authorized who has or have possession and cognizance of the fact: Provided, that at the request of any such justice or at the unanimous request of any such justices where more than one justice is required, any other justice or justices may take part in any case.

Section 9, sub-sec. (5), of ch. 13 of 1906, an Act respecting Police Magistrates and Justices of the Peace, is as follows:—

It shall not be necessary for the police magistrate or justice who acts before or after the hearing to be the police magistrate or justice or one of the justices by whom the case is to be or was heard and determined.

It is contended that the effect of the amendment of 1907 is to repeal sub-sec. (5) of sec. 9 of ch. 13, 1906. I do not consider it necessary to decide that matter.

In the magistrate's affidavit it is set out that, in the case of the second information, the informant appeared before him and the magistrate requested J. R. Royce, a justice of the peace residing in Calgary, to take and receive the information and complaint of the said Mason, and he, the said Sanders, informed Royce that he, Sanders, would hear the evidence and conduct the hearing and take sole charge of the balance of the case, all of which the said Royce acquiesced in and agreed to. I am of the opinion that the acquiescence of Royce was equivalent to a counter-request that the magistrate Sanders would take charge of the hearing. It is convenient to dispose of grounds (1) and (2) together.

Dentistry is defined:—

A special departure of medical science embracing the structure, function and therapeutics of the mouth and contained organs, specifically the teeth, with their surgical and prosthetic treatment. (Encyclopaedia Britannica).

The science of dentistry, like many others, has advanced in later times, especially in the direction of preserving and repairing teeth and in substituting artificial teeth, and we are entitled to take cognizance of what is common knowledge in this regard. It is contended that the manufacture and supplying of artificial teeth is a mechanical trade and does not come within the term "practice of dentistry." There may be a good deal of force in this argument in so far as it applies to the manufacture of artificial teeth, but the taking of impressions of the gums and the connecting of these teeth in plates to fit the gums and filling teeth are not acts which it can be said are not included in the term "practice of dentistry." The preamble of the Act recites:—

Whereas . . . it is expedient for the protection of the public that a certain standard of qualification should be required of each practitioner of said profession, etc.

I apprehend that the legislature considered it necessary that a certain standard of qualification was necessary before any one should be allowed to perform surgical or prosthetic work upon the mouth in relation to the teeth. Common knowledge informs us that these acts constitute what it generally accepted as within the term practice of dentistry, and one who takes impressions of the gums and who fills teeth is such a person as the legislature must have contemplated when it enacted that a certain standard of professional knowledge was necessary in the public interest. On the other ground, that a single act does not constitute an offence, the appellant fails upon the facts. There is no doubt that the law does not contemplate a single act as constituting the practice of a profession or trade: *Apothecaries Co. v. Jones*, [1893] 1 Q.B. 89 at 95.

The first information relates to acts performed for two different persons on different days. The information of July 8 charges two specific acts of practice at different dates upon different persons, so that it cannot be contended there was only a single act. The information might more properly have charged the defendant with practising dentistry within the period of the first and second acts, and the specific acts which now appear upon the information would have constituted the evidence of the practising, but no objection has been taken on this ground. The second information relates to specific acts performed for one person at different dates, and the same remarks would apply as to the form of the information. The fact that the work was all done for one person can not bring them within the description of a single act.

The grounds raised under No. (4) are very important. Sections 851 and 963 of the Code provide for the form of indictment and procedure in the case of a person charged with an offence for which a greater punishment may be inflicted by reason of such previous conviction. The indictment must state that the offender was at a certain time and place convicted of an indictable offence or offences (851 Code). Under sec. 963 Cr. Code, the defendant shall be arraigned in the first instance upon so much only of the indictment as relates to the subsequent offence, and if he pleads not guilty the trial proceeds upon the subsequent offence, and, if convicted, the defendant then is asked if he was previously convicted, and if he does not admit it the jury shall then be charged to inquire as to such previous conviction. Provisions having the same effect are in the Canada Temperance Act and the Liquor License Acts of the different provinces. Na such provision is in the Dental Act. Part 15

ALTA.

S. C.
1914

REX
v.
CRUIK-
SHANKS.

of the Code relating to summary convictions contains no such provision, and secs. 851 and 963 of the Code apply to indictable offences only. It was, therefore, necessary that the prosecutor should allege and also prove the first conviction as part of his case before conviction of the subsequent offence.

The application should be dismissed with costs.

MAN.

K. B.
1914

GUNN v. HUDSON'S BAY CO.

Manitoba King's Bench, Macdonald, J. April 3, 1914.

1. ARBITRATION (§ IV—40)—SUBMISSION—STIPULATION FOR—STAY OF ACTION.

A stay of proceedings in an action may be had under the Arbitration Act, R.S.M. 1913, ch. 9, where the original contract between the parties definitely stipulates for submission to arbitration in a dispute such as that in respect of which the action is brought.

Statement

APPEAL from the order of the Referee staying proceedings under the Manitoba Arbitration Act, R.S.M. 1913, ch. 9, in an action under a building contract.

The appeal was dismissed.

E. P. Garland, for the plaintiff.

S. J. Rothwell, for the defendant.

Macdonald, J.

MACDONALD, J.:—Appeal from the order of the referee staying proceedings under the provisions of the Arbitration Act, ch. 9, R.S.M. 1913, on the ground that the matters in question are matters which by the agreement referred to in the statement of claim were to be referred to arbitration.

The agreement mentioned provides that the plaintiffs should erect for the defendant a store in the town of Yorkton. It further provides that final payment shall be made within twenty days after the contractor has substantially fulfilled his contract, but upon the issue of a final certificate by the architect that the works are completed and the last payment due under this contract and indicating the amount thereof or state in writing in what respects the works are incomplete and his decision shall be final, subject to arbitration as in the contract provided.

Article 3 of the contract provides that no alteration shall be made in the works except upon written or verbal order of the architect, and in case of dissent as to the value of the work the same shall be referred to arbitration.

Article 12 provides for the appointment of arbitrators.

A dispute has arisen as to the value of the alterations made in the works and the plaintiff must abide by his agreement to arbitrate. The appeal must be dismissed with costs.

Appeal dismissed.

SHEARER v. CANADIAN COLLIERIES.

B. C.

C. A.
1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. MASTER AND SERVANT (§ II B—143)—ASSUMPTION OF RISK—COMMON LAW LIABILITY—MACHINERY—ENGINE PACKING.

Where the machinery of a plant is in such a state of repair that no more than ordinary care and attention are required to keep it safe, the master satisfies his common law liability if he places competent persons in charge and sees that adequate materials are kept on hand for use by them in keeping the machinery and plant in a safe condition; and he will not be liable at common law for injuries to an employee attributable to a fellow-servant's neglect to use the materials provided (*ex. gr.* engine packing), although there may be a restricted liability under an employers' liability law.

[*Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, distinguished; *Ragotte* v. *Canadian Pacific R. Co.*, 5 Man. L.R. 297, 365; *Matthews* v. *Hamilton Powder Co.*, 14 A.R. (Ont.) 261; *Wood* v. *Canadian Pacific R. Co.*, 6 B.C.R. 561, 30 Can. S.C.R. 110, specially referred to; see also *Scott* v. *Toronto University*, 10 D.L.R. 154, 4 O.W.N. 994.]

Statement

APPEAL from the judgment of Morrison, J., in an action based both on the Employers' Liability Act and at common law, awarding the plaintiff damages in excess of the damages recoverable under the Act. The question involved was whether there was any liability, apart from the Act, to justify the excess.

The appeal was allowed and a new trial granted, IRVING, J.A., dissenting.

Davis, K.C., for the appellant.

Deacon (*Wilson* with him), for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—After perusing the evidence I am convinced that the plaintiff failed to make out a case at common law. This conclusion is based very largely on his own evidence and that of his witnesses, and not so much on conflicting testimony as between the plaintiff's witnesses and the defendants. In fact there is no real conflict in this issue.

The pumping engine in question appears to have been of the usual type, and when kept in proper adjustment and repair not to have been defective. Like all engines and pumps, it required packing from time to time to keep it in efficient working order, and on the night in question I think it is apparent from the evidence, that it was not then in efficient working order. As a result, the plaintiff was injured in attempting to start the engine.

There is quite sufficient evidence to support the jury's conclusion that plaintiff was not guilty of contributory negligence in doing this, and that he did it in response to the orders of the person having superintendence over him. This being so,

B. C.

C. A.

1914

SHEARER v. CANADIAN COLLIERIES.

Macdonald, C.J.A.

the plaintiff though not entitled to succeed at common law, was, in my opinion, entitled to succeed under the Employers' Liability Act. The verdict, however, is admittedly a common law verdict, being for a much larger sum than could have been given under the Act.

The case will, therefore, have to go back for re-trial, so that the damages may be assessed on a proper basis unless the parties can agree upon the amount which ought to have been awarded by the jury had they awarded them under the Act.

The appeal should, therefore, be allowed, and a new trial ordered.

Irving, J.A. (dissenting)

IRVING, J.A. (dissenting):—The plaintiff was injured by the unexpected starting of the pump which was out of order, and which the plaintiff was trying to start in an unusual manner. The amount of damages awarded can only be awarded if the action can be sustained at common law. If the case is only maintainable by virtue of the Employers' Liability Act, the amount awarded cannot be reached.

The action, according to the statement of claim, proceeded on a common law basis, and also under the Employers' Liability Act. At the close of the plaintiff's case there was no request to withdraw the question of common law liability. In my opinion, the plaintiff established a *primâ facie* case at common law when he shewed (*a*) that he, the fire boss, was called upon to start the pump, in the event of its stopping during the absence of the pumpman, who was familiar with the extraordinary methods required to set it going; (*b*) that these extraordinary methods involved a certain amount of danger to a person having to resort to them; (*c*) that its defective condition had existed for weeks; and (*d*) repairs were not being made by the pumpman.

The negligence of the defendants was their neglect to remedy the defects which either might have been in the drum valve (p. 147) and could not be stopped by packing by the pumpman, or which that man, McFarland, was incapable of doing with the ordinary material supplied to him. There was no evidence by McFarland as to the pump, nor from anyone as to his incompetency. The jury had then before them a competent man, supplied with proper material, and yet, nevertheless, this defective state of affairs was allowed to exist for weeks. Now, when an amateur mechanic—such as the plaintiff was—is required to start this pump going whenever it failed to work, I think we have evidence of a defective system.

The Judge's charge made no reference to the difference between the two classes of action, until the direction as to damages was given. The learned Judge referred to an allowance

to be made for pain and suffering. In that connection, the defendant's counsel suggested that the damages should be limited to what could be recovered under the Employers' Liability Act. There was no objection to the jury considering this case as a case at common law. The argument put before us is that the condition of the pump was one which arose out of its daily or ordinary use, and which could be remedied by the use of packing (which it said was supplied) by the ordinary pumpman (who, it said, was in attendance that night). On these points we have no express findings. Where a case at common law is made out by the plaintiff, and evidence to displace that case is gone into, and the whole submitted to the jury, without objection, I think we should not be asked to re-try the matter.

The defendants, if entitled to anything, are entitled to a new trial on the ground of misdirection or non-direction amounting to misdirection, but that point is not open to them.

Martin, J.A.

MARTIN, J.A.:—After a careful perusal of the appeal book I can only reach the conclusion that there was not sufficient evidence to go to the jury in support of the contention that this pump had fallen into such a dilapidated state that the defect in it

> was . . . one arising from (its) general worn-out condition and from the fact that it had lived its life,

to quote from the language used by Davies, J., in *Canada Woollen Mills* v. *Traplin* (1904), 35 Can. S.C.R. 424 at 434, and which is relied upon, and, in the circumstances, unless this contention can be sustained, the verdict at common law cannot stand.

It is desirable to add that the fact that the jury did not answer the questions submitted to them by the learned trial Judge, Mr. Justice Morrison, has added to the difficulty in deciding this matter. It is true that he did nominally submit questions to the jury, but, in so doing, he made these observations, as reported at p. 155 of the appeal book:—

> Now, gentlemen, of course, you need not answer these questions. You may bring in a verdict, say for the defendant, if you think the plaintiff is not entitled, or for the plaintiff, however, if for the plaintiff; say, for the plaintiff so much, just a general verdict. You have nothing to do with the costs. I say it is not necessary for you to answer these questions, you may if you desire.

The jury rightly took the view that this was really an invitation to disregard them, which appears from the apt reply of the foreman, who, after announcing a general verdict in favour of the plaintiff for $7,500, said, in answer to an inquiry about the questions: "We did not bring them in, we tore them up."

B. C.

C. A.
1914

SHEARER
v.
CANADIAN
COLLIERIES.

Martin, J.A.

It is to be regretted, in the interest of litigants, because it is in their interests that their rights should be correctly and expeditiously determined, that, after repeated statements in reported and unreported judgments of this Court, *e.g.*, *Andrews* v. *B.C. Electric R. Co.*, 18 B.C.R. 25; *Armishaw* v. *British Columbia Electric R. Co.* (1913), 14 D.L.R. 393, 18 B.C.R. 152; *McElmon* v. *B.C. Elec. R. Co.* (1913), 12 D.L.R. 675; and *Cook* v. *Newport Timber Co.*, infra, largely based on views expressed in the Supreme Court of Canada cited in *Guthrie* v. *Huntting* (1910), 15 B.C.R. 471, as to the proper course to be adopted in questions in negligence cases, some trial Judges continue to deprive us of the assistance we are entitled to expect from them in this respect in the discharge of our appellate duty. The last unreported case wherein we drew attention to this matter was in *Cook* v. *Newport Timber Co.*, decided last Term on the 29th of November, 1913, wherein the same learned Judge who decided the case at bar, gave, as appears by the report on p. 197 of the appeal book, the following direction to the jury in the point:—

> Now, as to the questions, I will leave questions to you, but it is not necessary for you to answer them. You need not have any regard as to the trouble that Courts of appeal and other Courts have in struggling with your verdict and don't hesitate to come to any conclusion you see fit, and answer the questions or not as you see fit. You haven't anything to do with the subsequent course of the proceedings.

With all due respect, I feel at last constrained to say, since the difficulty is being made so often, that the cases above cited shew, and some of them expressly declare that this is not a proper conception of the duty of the Judge or the jury to the litigants or to this Court, and the jury should not be thus discouraged from, but encouraged in, answering questions; my long and profitable experience on this encouragement is mentioned in *Guthrie* v. *Huntting*, 15 B.C.R. 451. And if the answers should be inconclusive or indefinite, the long established, simple and effective course should be followed of sending the jury back to make their meaning plain: *cf.*, *Rayfield* v. *B. C. Electric R. Co.*, 14 B.C.R. 361, which course is also adopted in Ontario; *cf. Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121, wherein it was said, page 125:—

> It is much to be regretted that the jury were not required to give more definite and understandable answers to questions six and eight; the failure to do that makes the delay, cost and worry of another trial unavoidable.

The appeal, I think, should be allowed, and a new trial ordered, which is necessary because the judgment as entered for $7,500 is based only upon a liability at common law, and though a liability under the Employers' Liability Act is ad-

mitted, yet the usual course of taking a finding of alternative damages under that Act, so as to avoid a new trial, was unfortunately not followed.

GALLIHER, J.A.:—I agree that the appeal should be allowed. I do not think the facts of the case bring it within the jurisdiction of the Supreme Court of Canada case, *Canada Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424. I regret that the jury did not see fit to bring in an alternative finding as to damages under the Employers' Liability Act, which would have prevented the costs of a new trial here. I have no other course but to send it back for a new trial. Galliher, J.A.

McPHILLIPS, J.A.:—This is an appeal in a negligence action from the judgment entered by Mr. Justice Morrison upon a general verdict of the jury finding in favour of the plaintiff, and for $7,500 damages. Questions were submitted to the jury, but were unanswered. McPhillips, J.A.

The case comes before the Court of Appeal, in my opinion, in a most unsatisfactory way. The questions should have been answered, and whilst it is true, under the practice, the jury may bring in a general verdict, yet in a case where it is questionable whether there is liability at common law it is all the more important that questions should be answered. It will become a serious matter for consideration for the law-making authority as to whether or not in the interests of justice it should not be obligatory upon a jury to answer questions directed to the specific acts of negligence charged, and where the Employers' Liability Act is invoked—questions directed to those facts which are necessary to be found— without which the workman cannot recover, that is, the Employers' Liability Act, whilst imposing a liability which would not be upon the employer at common law, only imposes it with the necessary facts being found in favour of the workman.

In my opinion it is a most unsatisfactory condition of things to have an action go to trial with a large amount of evidence adduced, and a general verdict found, leaving it to the Court of Appeal to sift that evidence and to determine whether the jury were entitled to find at common law or only under the Employers' Liability Act, especially when invariably there are disputed questions of fact which vitally affect the question as to whether there is or is not liability at common law or under the Employers' Liability Act.

Here the verdict in amount, $7,500, is in excess of the amount which could have been allowed under the Employers' Liability Act as I calculate it, taking the estimated earnings for the three years preceding the injury; these may be said

B.C.
C. A.
1914
SHEARER
v.
CANADIAN
COLLIERIES.
McPhillips, J.A.

to have been $109 a month, and would for three years amount to $3,924, and that sum would be the total amount the plaintiff could be allowed—if there is liability only under the Employers' Liability Act.

Upon the facts as I glean them, the plaintiff was injured because of the fact that the single ram pump stopped on the centre. It is apparently admitted that a pump in the best of repair may do this. There is evidence that the plaintiff was told to attend to the pump by Gillespie, the overman. The plaintiff was not the pump man. It is disputed whether, at the time of the accident the pump man was on duty. Without express instructions the plaintiff would not have any right or duty to interfere with the pump. There is not such evidence as warrants a holding that there was delapidation, or that the pump was not, as installed, a proper and safe pump. There is not evidence to warrant the holding that fit and proper persons were not in superintendence, and that all facilities were available to make proper repairs; and there is not sufficient evidence to bring home to the defendant company the disrepair of the pump, but there is evidence that the state of disrepair was known to others in superior authority to the plaintiff, and that the plaintiff was acting under instructions from Gillespie in attempting to keep the pump in action. Therefore, upon the facts as I find them there is no liability upon the defendant company at common law, but there is liability under the Employers' Liability Act, and as I conceive it to be the duty of this Court to, in all cases, obviate the necessity for a new trial where possible, judgment ought to be entered for the plaintiff for $3,924, and the judgment appealed from varied to that extent.

The jury having found generally in favour of the plaintiff, it may be well considered that they did so upon facts which they have believed sufficient to found liability under the Employers' Liability Act, and if, in my opinion, that conclusion can reasonably be drawn, and that there are no facts remaining *in dubito*, then it is the duty of this Court to enter judgment for the plaintiff for the reduced amount. I am rather supported in this view by the line of argument of Mr. Davis, the learned counsel for the appellant, who, in the course of an able argument directed to establish no liability upon the defendant company, could not gainsay that the questions of fact were for the jury, and that there was evidence upon which the jury could have found liability against the defendant company under the Employers' Liability Act, were such a finding upon the facts an unreasonable one, then only should we send the case back for a new trial. *Paquin* v. *Beauclerk*, [1906] A.C.

148, 75 L.J.K.B. 395, is a clear authority for the course which I here adopt in deciding that judgment should be entered for the plaintiff, varying the judgment below as I have stated. Had the jury been instructed as I submit they should have been, to assess the damages under each branch of the claim, we would not be in the difficulty we now are; but in the interests of justice, and to prevent unnecessary costs being visited upon the litigants, the ends of justice require that this Court should now proceed and dispose of this action in the way of finality, in so far as the due exercise of jurisprudence admits of it being done. I might further add that we could treat the verdict of the jury as being excessive and reduce it to that sum which I have stated would be the correct amount—liability being only under the Employers' Liability Act. Authority for this course is to be found in O. 58, r. 5A, marginal No. 869*a*.

In a review of the law I think it can be well stated in the language of the Lord Chancellor in *Wilson* v. *Merry*, L.R. 1 Sc. App. 326 at 332:—

> What the master is, in my opinion, bound to his servant to do in the event of his not personally superintending and directing the work, is to select competent and proper persons to do so, and to furnish them with adequate material and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence that is not the negligence of the master.

Upon the facts of this case it cannot, in my opinion, be established that the works and plant were not properly constructed and installed, and the cases which well elucidate the law, are *Ragotte* v. *Canadian Pacific R. Co.*, 5 Man. L.R. 297-365; *Matthews* v. *Hamilton Powder Co.*, 14 A.R. (Ont.) 261; and *Wood* v. *Canadian Pacific R. Co.*, 6 B.C.R. 561, 30 Can. S.C.R. 110.

Upon the facts of this case I do not consider that knowledge was brought home to the defendant company of the defect in the pump, and it follows that there can be no liability at common law. The authorities to support this view are *Williams* v. *Birmingham Battery & Metal Co.*, [1899] 2 Q.B. 338, and *Matthews* v. *Hamilton Powder Co.*, 14 A.R. (Ont.) 261. The pump was not in such a state of disrepair but that ordinary care and attention would have rendered it safe, and there were competent persons in charge, and adequate materials at hand, and the failure was that of, and the negligence only of the persons in superintendence, *i.e.*, this was a case where there was proper machinery and competent servants, but negligence and failure on the part of those in superintendence to do ordinary repairs, and express orders by the overman Gillespie to the plaintiff to attend to the pump; and by reason of this, and

B. C.
C. A.
1914
SHEARER v. CANADIAN COLLIERIES.
McPhillips, J.A.

only because of the Employers' Liability Act, is there liability. An authority in support of this view is *Henderson* v. *Carron Co.* (1889), 16 Rettie's R. (Sc.) 633.

Mr. Beven, in his work on Negligence, vol. 1, 3rd ed., at 668, 689, remarks upon the difference in the law as expounded by the Irish Exchequer Chamber in *Conway* v. *Belfast and Northern Counties R. Co.* (1875), Ir. R. 9 C.L. 498, Ir. R. 11 C.L. 345, and the English Court of Queen's Bench on the point of vice-principal or representative. The Irish Court holds that there is liability for the acts of the *alter ego*, but not so in England. Beven, at p. 669, says:—

> If the case of *Howells* v. *Landore Siemens Steel Co.* (1874), L.R. 10 Q.B. 62, had been brought to the attention of the Irish Exchequer Chamber, it is difficult to understand how that Court could have avoided noticing it; and as the case was distinctly referred to in the judgment of the Court below it is equally difficult to see how it could fail to be brought to their notice.

Beven, 3rd ed., at p. 669, dealing with *Wilson* v. *Merry*, L.R. 1 Sc. App. 326 at 332, and the language of the Lord Chancellor above quoted, says:—

> This opinion does not seem to have been excepted to by any of the other law Lords, and if Blackburn, J., is right in the concluding sentence of his judgment in *Howells* v. *Landore Siemens Steel Co.*, the decision of the House of Lords is distinct at least so far as this, that the fact that the servant holds the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow servant. The case of *Conway* v. *Belfast and Northern Counties R. Co.*, then so far as it draws a distinction between a "vice-principal" and a manager and foreman runs counter to authority.

Lord Watson in *Johnson* v. *Lindsay*, [1891] A.C. 371 at 387, adopts "the compendious definition of the principle upon which the master's non-liability rests," given by Blackburn, J., in *Howells* v. *Landore Steel Co.*, *supra*.

Beven, 3rd ed., 670, says:—

> The Scotch Courts at once accepted the full effect of Lord Cairns' judgment. This is clear from *Sneddon* v. *Mossend Iron Co.* (1876), 3 Rettie 868, where Lord Ardmillan says (3 Rettie 874):—
>
> "In that case" (*Wilson* v. *Merry*) "I then attempted as I had done on previous occasions, to make a distinction and exception in regard to the position of a superior manager with general superintendence whom I was disposed to regard as the representative of the master rather than as a fellow workman of the man injured. The distinction was not accepted. The House of Lords in affirming the judgment, placed the case on the broader ground that in a question of damages for injury inflicted by the fault of one servant on another, down through the whole gradation of servants, the employer is not responsible, unless personal fault on his part is instructed. The opinion of Lord Chancellor Cairns leaves no doubt on this matter." . . . The conclusion is, therefore, inevitable

that persons in all grades of employment that can be comprehended as "common" are included within the disability to recover against the employer for injuries sustained from the negligence of persons of any grades whatever in the same employment.

It follows, therefore, that in my opinion, and as previously expressed upon the facts of this case, there is no liability at common law, but there is under the Employers' Liability Act.

I would, therefore, allow the appeal to the extent of varying the judgment by directing a judgment to be entered for the sum of $3,924 damages under the Employers' Liability Act.

Appeal allowed.

STANLEY v. WILLIS.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 31, 1914.

1. LANDLORD AND TENANT (§ III D 1—99)—RENT—DISTRESS—AFTER RETAKING POSSESSION.

A stipulation in a lease that, on breach of covenant by the lessee, three months' accelerated rent may be forthwith distrained for as "rent in arrear," and that the term may be forthwith forfeited, does not entitle the lessor to both remedies concurrently; the two remedies are necessarily repugnant to each other, and if the landlord elects to forfeit the term, he loses his right to distrain as for three months' rent in arrear, in the absence of any clause authorizing the lessor to keep the term in existence for the purpose of making a distress (as to which the continuance of the term is essential under Manitoba law) and at the same time to declare it forfeited in other respects.

[*Linton* v. *Imperial Hotel Co.*, 16 A.R. (Ont.) 337, considered; and see *McKinnon* v. *Cohen*, 16 D.L.R. 72.]

2. LANDLORD AND TENANT (§ III D 3—110)—RENT—DISTRESS—FORFEITURE.

The provisions of the Imperial Statute 8 Anne ch. 18 (Landlord and Tenant Act), allowing a distress for rent to be made within six months after the determination of the lease, do not apply where the tenancy has been put an end to by forfeiture thereof under a notice of forfeiture for breach of conditions given by the landlord under the terms of the lease.

[*Linton* v. *Imperial Hotel Co.*, 16 A. R. (Ont.) 337, considered.

Statement

APPEAL by the plaintiff from judgment of the County Court in favour of the defendant. Plaintiff became lessee of a suite in an apartment block owned by the defendant, C. M. Nugent. The lease contained a covenant on the part of the lessee not to do or permit any act to disturb the quiet enjoyment of any of the other tenants or occupiers of the apartment block. There was a further covenant that after notice in writing of any breach by him of the provisions of the lease the rent for the whole term should immediately become due and payable and three months' portion thereof might be forthwith distrained for as rent in arrear and the said term should immediately become forfeited and void without notice or legal form of process and the lessor could forthwith re-take

MAN.

C. A.
1914

STANLEY
v.
WILLIS.

possession of the suite. The lessor gave notice to the lessee that the covenant as to quiet occupation was not being observed.

On September 5, 1913, defendant Willis, a bailiff, under a distress warrant signed by Nugent, seized the plaintiff's goods, for three months' rent due. It appeared at the trial that the plaintiff, at the time of the seizure, tendered to the bailiff $45, a month's rent in advance, payable on September 1, 1913.

Statement

This action was in replevin and for damages. At the trial the County Court Judge ordered the plaintiff to return the goods distrained, or pay the defendants $135 and costs.

The appeal was allowed, HAGGART, J.A., dissenting.

W. H. Curle, for plaintiff.

W. F. Hull, for defendant.

Howell, C.J.M.
Richards, J.A.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with PERDUE, and CAMERON, JJ.A., in allowing the appeal.

Perdue, J.A.

PERDUE, J.A.:—The clause under which the distress in question was made is set out in full in the judgment of my brother Cameron. It provides that if certain things shall happen or certain breaches or defaults occur on the part of the lessee,

> then upon the happening of any of the above events the rent for the whole term shall immediately become due and payable and three months' portion thereof may be forthwith distrained for as rent in arrears, and the said term shall immediately become forfeited and void, and the lessor may, without notice or any form of legal process, forthwith re-enter upon and re-take possession of the said suite and premises, etc.

The plaintiff admits that when the distress was made he had been guilty of a breach or breaches of the covenants in the lease and that the breach continued after notice given to discontinue same. The lessor on September 3 wrote a letter notifying him of her intention to re-take possession of the premises under the terms of the lease. This letter was handed to the plaintiff on September 5 by the bailiff after the bailiff had taken possession of the premises for the lessor and was about to distrain for three months' rent. At that time the rent for September, payable in advance, was due. There is no doubt that the lessor re-entered and put an end to the term on September 5, and then distrained for three months' rent under the lease. The distress warrant signed by the lessor directs the bailiff to distrain on the plaintiff's goods for $135, being, as it states, three months' rent due to her on September 4, 1913. The bailiff's notice of seizure delivered by him to the plaintiff declares that the goods have been seized to satisfy a claim for $135 and costs, "being rent now past due." The provisions of the statute, 8 Anne ch. 18, allowing a distress to be made within six months after the determination of the lease, do not apply where the tenancy has been put an end to by forfeiture: *Doe* v. *Williams*, 7 C. & P. 322; *Grimwood* v. *Moss*, L.R. 7 C.P. 360; *Linton* v. *Imperial Hotel Co.*, 16 A.R. (Ont.) 337, 11 Hals. 150.

The clause in question declares that, on the happening of the event constituting the breach, three months of the rent may be distrained for *as rent in arrear*. Now rent in arrear cannot, under the authorities just cited, be distrained for it, as in the present case, the landlord had re-entered and forfeited the term before the distress was made. The lessor cannot, in my opinion, forfeit the term and at the same time, or thereafter, distrain for the three months' rent under the above clause. To put an end to the term and then to distrain for rent for part of that term as unexpired, would be, I think, exercising two remedies necessarily repugnant to each other. The relationship of landlord and tenant cannot exist and at the same time be at an end. One or other remedy must be selected by the lessor. She may either forfeit the term for the breach, or she may distrain for the three months' rent, treating the lease as subsisting.

In *Linton* v. *Imperial Hotel Co.*, 16 A.R. (Ont.) 337, a clause in a lease provided that in the event of certain things happening or certain breaches occurring,

> the then current year's rent shall immediately become due and payable, and may be distrained for, but in other respects the said term shall immediately become forfeited and at an end and the said lessors shall thereupon be entitled . . . to re-enter, etc.

It was held that, a breach having occurred, the lessors might distrain for the rent as they had not elected to forfeit the term. Osler, J., at 345, said:—

> I think the clause is divisible, and the lessor may distrain for the rent so long as he has not elected to forfeit the term. If he elects to do that, he loses his remedy by distress, and is perforce driven to recover the rent in some other manner.

In the present case there was a clear election to forfeit the term and a re-entry was made prior to the making of the distress.

Counsel for the defendants placed much reliance upon the following sentence appearing in the judgment of Osler, J., [16 A.R. 337 at 343], in the *Linton* case:—

> And if the term is gone, the landlord being unable to distrain as at common law, or by virtue of the statute, the power of distress specially mentioned in the lease can only be regarded as a personal license to be executed on the tenant's own goods.

It will, however, be observed that the clause in that case provided that the rent might be distrained for, "but in other respects the said term shall become forfeited;" that is to say, the term shall be considered as existing for the purpose of making a distress, but in other respects it shall become forfeited. The clause in the present case provides that the three months' portion of the rent may be distrained for as rent in arrear, "and the said term shall immediately become forfeited." This clause gives the lessor two remedies, she may treat the rent for the whole term as due and may distrain for three months' rent, part of it, or she may forfeit

MAN.
C. A.
1914
STANLEY
v.
WILLIS.
Perdue, J.A.

the term and re-enter. The lease, on a breach occurring, is avoidable at the option of the lessor: *Davenport* v. *The Queen*, 3 A.C. 115, 128; *Bowser* v. *Colby*, 1 Hare 109, 66 Eng. R. 969. The lessor may waive the forfeiture and distrain for the rent declared to be due, or she may elect to forfeit, in which case she cannot distrain for the rent. But the clause does not authorize the lessor to keep the term in existence for the purpose of making a distress and at the same time to declare it forfeited and at an end in all other respects.

I think that when the lessor had elected to put an end to the term and had done so, she could no longer distrain for rent under the clause. The clause only gives power to distrain for rent, it does not give a license to seize and sell goods of the tenant after the lease is at an end, in order to enforce the payment of a sum by way of liquidated damages.

I think the appeal should be allowed and judgment entered for the plaintiff. On September 1, a month's rent, $45, fell due. This was tendered to the bailiff and refused by him. As it was in arrear when the re-entry took place and the plaintiff offered to pay it after the forfeiture, the amount may be deducted from the money in Court and paid to defendant Mrs. Nugent. The plaintiff will be entitled to the usual costs in the County Court and in this Court.

Cameron, J.A.

CAMERON, J.A.:—The plaintiff became the lessee of a suite in an apartment block owned by the lessor, Carrie N. Nugent, under a written lease dated April 29, 1913, at a monthly rental of $45 a month, payable in advance. The lease contained the following covenant on the part of the lessee:—

> And will not do, or permit to be done by others under his control, any act to disturb the quiet enjoyment of any of the other tenants or occupiers of the said apartment building, nor do any act which may annoy or tend to the annoyance of the said other tenants, or of the lessor, or which, in the opinion of the lessor, may injure or tend to injure, or detract from the character of the said building as a quiet and desirable place of private residence.

And the further covenant:—

> And, also, that, if during the term and before payment of the rent to the end of the term, the lessee removes or begins to remove his furniture or effects from the said premises or shall sell, mortgage, pledge or in any way part with the ownership or control thereof, without the consent in writing of the lessor first had and obtained, or if the term hereby granted shall be at any time seized or taken in execution or in attachment by any creditor of the said lessee, or if the said lessee shall make any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or, after notice in writing of any breach or non-observance by the lessee of any of the terms, covenants or provisions of this lease, expressly calling his attention thereto, shall not observe, perform and keep, all and every

of the covenants, provisions, stipulations and conditions herein contained, to be observed, performed and kept by him, then, upon the happening of any of the above events, the rent for the whole term shall immediately become due and payable, and three months' portion thereof may be forthwith distrained for as rent in arrears, and the said term shall immediately become forfeited and void, and the lessor may without notice or any form of legal process, forthwith re-enter upon and re-take possession of the said suite and premises and remove the lessee's effects therefrom, any statute or law to the contrary notwithstanding.

It was charged by the lessor in a letter to the plaintiff dated July 2, 1913, that the first mentioned covenant was not being observed and he was warned to conform therewith, otherwise proceedings would be taken in accordance with the terms of the lease.

On September 5, 1913, the defendant Willis, a bailiff, entered the suite in question and, under a distress warrant signed by the defendant Carrie M. Nugent, dated September 4, seized the plaintiff's goods and chattels to satisfy her claim for $135, or three months' rent. The bailiff had with him a letter from the lessor, dated September 3, 1913, pointing out that as the plaintiff had continued to violate the provisions of the lease

> I am compelled to avail myself of the provisions of your lease and retake possession and remove your effects therefrom.

It was admitted at the trial that the plaintiff had been guilty of breaches of certain covenants in the lease and that the breaches continued after the letter of July 2.

The action was brought in replevin and for damages. At the trial the learned County Court Judge ordered the plaintiff to return the goods distrained or pay the defendants $135 and costs. It appeared at the trial that the plaintiff, at the time of the seizure, tendered to the bailiff $45, a month's rent in advance, payable September 1. The letter of September 3 was handed the plaintiff at the same time.

The statute, 8 Anne ch. 14, making it lawful for landlords to distrain after the determination of the lease, has been confined to leases expiring by effluxion of time, but does not apply where the lease is determined by forfeiture: *Greenwood* v. *Moss*, L.R. 7 C.P. 365.

The questions arising here were under discussion in *Linton* v. *Imperial Hotel Co.*, 16 A.R. (Ont.) 337. The proviso in the lease in that case, set out at p. 338, resembles that in the case before us. It contains the words

> the then current year's rent shall immediately become due and payable, but in other respects the said term shall immediately become forfeited and at an end.

It was held by Mr. Justice Osler, p. 345, that the above clause was divisible and that the lessor might distrain for rent so long as he had not elected to forfeit the term. Had he elected to forfeit he would have lost his remedy by distress and been forced to

MAN.
C. A.
1914
STANLEY
v.
WILLIS.
Cameron, J.A.

seek another method of recovery. If the wording in that lease is divisible, then it seems to me quite clear that it is in this case also. There was in that case (far more patently than in this) an attempt to preserve the right of distress, notwithstanding the exercise of the right of forfeiture, to which the Court refused to accede. The term in this case having gone, the lessor is unable to distrain at common law or under the Statute of Anne and the plaintiff is entitled to succeed. It might be argued that, the power of distress being at an end at common law or under the statute, it may be regarded as a personal license to be executed on the tenant's own goods, as indicated by Osler, J., in *Linton* v. *Imperial Hotel Co.*, 16 A.R. (Ont.) 337 at 343. In that event, this particular provision of the lease prescribing the payment of a fixed amount as a uniform sum to be paid in the event of non-compliance by the lessee with covenants of varying importance and character must be held as imposing a penalty. I refer to Lord Watson's dictum in *Lord Elphinstone* v. *Monkland Iron & Coal Co.*, 11 A.C. 332, and to the observations of Lord Esher, M.R., and A. L. Smith, L.J., in *Willson* v. *Love*, [1896] 1 Q.B. 626.

But in this view of the contract the lessor could recover merely for the damages actually sustained. As to these there is no evidence except that there was due the sum of $45 for the month's rent payable September 1, which sum was tendered by the plaintiff at the time of the seizure. The license, therefore, if subsisting would afford the defendants no justification and there is no counterclaim by the lessor against the plaintiff. The only method of ascertaining the damages would be by bringing an action for that purpose, which has not been done, though such damages should have been ascertained before exercise of the power.

There is, however, no doubt that the defendant Carrie M. Nugent distrained as lessor and not as licensee. In the circumstances, I think the plaintiff is entitled to judgment in the replevin action and the judgment of the County Court must be varied accordingly.

Haggart, J.A. (dissenting)

HAGGART, J.A. (dissenting):—The lease in question between the defendant Carrie M. Nugent and the plaintiff Fred C. Stanley is for the term of one year, to be computed from May 1, 1913, and the rent reserved is $45 a month. It contains a provision or covenant which, so far as it affects the matters in question, is as follows:—

> . . . . or if the said lessee shall make any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or, after notice in writing of any breach or non-observance by the lessee of any of the terms, covenants or provisions of this lease, expressly calling his attention thereto, shall not observe, perform and keep all and every of the covenants, provisions, stipulations and conditions herein contained, to be observed, performed, and kept by him, then, upon the happening of

any of the above events, the rent for the whole term shall immediately become due and payable, and three months' portion thereof may be forthwith distrained for as rent in arrears, and the said term shall immediately become forfeited and void, and the lessor may, without notice or any form of legal process, forthwith re-enter upon and re-take possession of the said suite and premises, and remove the lessee's effects therefrom, any statute or law to the contrary notwithstanding.

On July 2, the defendant Mrs. Nugent, by her husband, wrote a letter to the plaintiff as follows:—

Sir,—I am astounded to learn from a letter just received from my wife that you have a woman living with you named Elsie Ireland, and that your suite is being frequented by that woman's associates and numbers of men, and that immoral practices are being carried on therein by you and others. On my wife's behalf, as lessor, I call your attention to the provisions of your lease prohibiting your taking roomers or boarders without the consent in writing of the lessor, and that you will not do, or permit others to do, any act to annoy the lessor or the other tenants, or that will detract from the character of the premises as a quiet and desirable place for private residence. You are hereby notified, pursuant to the provisions of your lease of said premises, to *forthwith* remove that Ireland woman, and refrain from all acts detracting from the character of the said premises as a quiet and desirable place for private residence. Proceedings will be forthwith taken pursuant to the provisions of your said lease.

In the lease above referred to there is a provision that the lessee

will not do, or permit to be done by others under his control, any act to disturb the quiet enjoyment of any of the other tenants or occupiers of the said apartment building, nor do any act which may annoy or tend to the annoyance of the said other tenants, or of the lessor, or which, in the opinion of the lessor, may injure or tend to injure, or detract from the character of the said building as a quiet and desirable place of private residence.

Upon the opening of the case before the trial Judge there is an admission by the plaintiff's counsel that the plaintiff had been guilty of a breach or breaches of certain covenants in the lease on his part to be performed and observed, and the breach continued after notice given to discontinue same by the said letter of July 2, 1913. On the 4th or 5th of September the defendant Mrs. Nugent handed to her co-defendant the bailiff a landlord's warrant directing the bailiff to distrain for the sum of $135, being three months' rent due on September 4, 1913, and also a letter, which is as follows:—

Sept. 3rd, 1913.—Fred. C. Stanley,—Winnipeg, Man.—As you continue to have immoral women frequent your suite, disgracing our apartments, in violation of the provisions of your lease and in utter disregard of my letter from Chicago of July 2 last, and by altering the door locks and permitting drinking carousals of men and women in your suite, and in many other ways have violated your lease and brought our apartments into bad repute, I am compelled to avail myself of the provisions of your lease and retake possession and remove your effects therefrom, as provided by the terms

MAN.

C. A.

1914

STANLEY v. WILLIS.

Haggart, J.A. (dissenting)

of your lease. As you were plainly told when you took the suite that no improprieties of any kind that would bring discredit upon our apartments would be tolerated, you have only yourself to blame for the consequences of your acts.—FRANK S. NUGENT, for Mrs. Carrie M. Nugent.

On September 5, the bailiff entered for the purpose of making a distress as directed in the warrant and after he had taken possession of the goods and chattels the plaintiff came upon the premises and while the bailiff was in possession he handed to the plaintiff the letter of September 3rd. The goods were removed under the warrant and subsequently a writ of replevin was issued. On the trial of the replevin action the County Court Judge decided the case in favour of the defendant.

The plaintiff claims that the distress was levied after termination of the lease by forfeiture and that the distress was therefore illegal and that the sum distrained for was in the nature of a penalty and that no damage was sustained by the respondents by the appellant's breach of covenant.

With all due respect, and with some hesitation, I differ from my brother Judges, who would allow the appeal. In my opinion the words of the lease are wide enough to warrant the defendants in the action they took. The parties contracted that the defendant should have two concurrent remedies for a breach of the lease; that is, the term could be put an end to by the landlord and the payment of the rent for the future should be accelerated. I do not see anything to prevent the landlord from pursuing both remedies concurrently. The strongest objection that can be taken to the provision in the lease above cited is that it is only a license from the tenant for the landlord to distrain upon his goods.

In the case cited, *Linton* v. *Imperial Hotel Co.*, 16 A.R. (Ont.) 337, where the tenant had made an assignment of his goods for the benefit of creditors, the question arose as to whether such a provision would be good as against the assignee and I find Mr. Justice Osler, at p. 343, saying:—

> The power of distress specially mentioned in the lease can only be regarded as a personal license to be executed upon the tenant's own goods, and not upon the property which has passed to the assignee.

Here, of course, the tenant is still the owner of the goods, and that leave or license was still in full force at the time of the distress.

I think the landlord had full power to make a contract with his tenant to the effect set out in that lease and I think, giving a reasonable construction to the document, it is a protection as against the establishing of a bawdy-house in an apartment block. I can understand how the existence of such an institution in an apartment block for even a month would do more damage than could be repaid by three months' rent, and it was just in anticipation of such damage that the lease was worded as it is. Did the

parties not liquidate the damages for such a breach at $135, three months' rent?

On the argument a good deal was said as to the common law and statutory rights and liabilities of landlords and tenants respectively, but here all those rights and responsibilities are settled and defined by an elaborate written agreement and the sole question is for the Court to interpret that writing. I read it that it reserved to the defendant Mrs. Nugent that protection of her property which she has properly availed herself of.

I would affirm the judgment of the trial Judge and dismiss the appeal.

Appeal allowed.

MILLER v. MILLER.

British Columbia Supreme Court, Murphy, J. March 14, 1914.

1. DIVORCE AND SEPARATION (§ V C—56)—PRIOR SEPARATION AGREEMENT—SUBSEQUENT GROSS MISCONDUCT.

If a state of facts is proved to exist which was not in contemplation of the parties when the agreement of separation was executed, as where the husband subsequently contracted a bigamous alliance with another woman, the wife instituting divorce proceedings on the latter ground may be granted the alimony appropriate to the case without being limited to the amount specified in the separation deed where the latter merely contemplated that the parties would live apart and contained no covenant that she would not apply for alimony if legal grounds therefor should arise.

[*Morrall* v. *Morrall*, 6 P.D. 98; and *Gandy* v. *Gandy*, 7 P.D. 168, specially referred to; and see *Gandy* v. *Gandy*, 30 Ch.D. 57; and *Bishop* v. *Bishop*, [1897] P. 138.]

Statement

PETITION for an alimony allowance in the petitioner's suit for divorce in which a decree *nisi* had been granted to her.

The petition was granted.

D. E. McTaggart, for the petitioner.

J. McDonald Mowat, for the defendant.

Murphy, J.

MURPHY, J.:—Assuming that the document exhibit 1 is a valid contract, I consider the wife is not precluded thereby from applying for alimony. If the circumstances now existing were not in contemplation of the wife when she signed it, she is not precluded: *Morrall* v. *Morrall*, 6 P.D. 98, 50 L.J.P. 62.

It is true that in *Gandy* v. *Gandy*, 7 P.D. 168 at 172, it was held that subsequent adultery alone is not a reason for relieving a wife from a direct covenant not to seek further alimony, but that was a separation suit, and exhibit 1 in this proceeding contains no such covenant. The wife suspected adultery here at the time she signed this receipt but was not so sure of it as to cease cohabitation on such signing. In fact the parties continued for two weeks thereafter to live as man and wife. Now she is subjected to the indignity of seeing her

B.C.

S. C.
1914

MILLER
v.
MILLER.

Murphy, J.

husband live in the same city as herself with another woman, who passes as his wife, he having contracted a bigamous alliance with such woman. In my opinion, that is sufficient under *Morrall* v. *Morrall, supra*, as qualified in *Gandy* v. *Gandy, supra*, to preclude the husband from setting up the agreement as a bar. Further, such agreement contains no covenant not to apply for alimony, if legal grounds therefor arise, and on this ground also I think the wife succeeds: *Wilkinson* v. *Wilkinson*, 69 L.T.R. 459. I take into consideration the payment of the $1,000, and I fix permanent alimony in addition thereto at $30 per month to the wife for the term of her natural life, and I direct that same be secured by a proper charge upon the real property of the defendant, the deed to be drawn by petitioner's solicitor and approved by respondent's solicitor; in case they cannot agree, the matter to be again spoken to before me.

Petition granted.

ALTA.

S. C.
1914

AMUNDSEN v. WARD.

Alberta Supreme Court, Harvey, C.J., Beck, and Simmons, JJ.
March 30, 1914.

1. MASTER AND SERVANT (§ III—285)—MASTER'S LIABILITY TO STRANGER FOR SERVANT'S TORT.

A *primâ facie* case of negligence is made out against the owner of a vehicle where it is shewn that the vehicle, while being driven by one of his servants, ran into the plaintiff, who was standing on the sidewalk, and who was injured as the result thereof.

[*Amundsen* v. *Ward*, 11 D.L.R. 167, affirmed.]

2. EVIDENCE (§ II E 1—135)—STATUS—MASTER AND SERVANT—PRESUMPTION OF RELATIONSHIP—STRANGER'S CLAIM.

In an action against the owner of a vehicle for damages for injuries alleged to have been sustained by the negligence of his servant resulting in a collision with the plaintiff, evidence that the vehicle in question was owned by the defendant, who was engaged in the transfer business, and that he employed men to drive vehicles at the time of the accident in question, is sufficient, in the absence of evidence to the contrary, to raise the inference that the person who was driving the vehicle, though his name was unknown, was the servant of the defendant.

[*Amundsen* v. *Ward*, 11 D.L.R. 167, affirmed; *Joyce* v. *Capel*, 8 Car. & P. 370, referred to.]

3. EVIDENCE (§ II E 1—145)—PRESUMPTIONS—STATUS—MASTER AND SERVANT—SCOPE.

In an action against the owner of a vehicle for damages alleged to have been sustained by the plaintiff through a collision with the defendant's vehicle, evidence that the vehicle in question was driven through the streets at a time when draymen were usually at work, that the defendant was engaged in the transfer business and the driver of the vehicle was in the employ of the defendant, is sufficient, in the absence of any evidence to the contrary, to raise the inference that the person driving the waggon was acting in the scope of his employment and that he was about his master's business at the time of the accident in question.

[*Amundsen* v. *Ward*, 11 D.L.R. 167, affirmed.]

4. EVIDENCE (§ II H—224)—NEGLIGENCE—MORE PROBABLE INFERENCE SHIFTING ONUS. ALTA.

In a negligence case where either of two inferences is consistent with the facts proved, the one involving negligence on the defendant's part and the other exonerating him, the onus is shifted to the defendant if the former is the more reasonable or likely. S. C. 1914

[*Amundsen* v. *Ward*, 11 D.L.R. 167, affirmed; *Flannery* v. *Waterford and Lemerock R. Co.*, Ir. R. 11 C.L. 30; and *Crawford* v. *Upper*, 16 A.R. (Ont.) 440, applied.] AMUNDSEN v. WARD.

APPEAL from the judgment of Stuart, J., *Amundsen* v. *Ward*, 11 D.L.R. 167, 24 W.L.R. 280, awarding plaintiff damages in a personal injury action. Statement

The appeal was dismissed.

McDonald & Charman, for the defendant, appellant.

D. S. Moffatt, for the plaintiff, respondent.

The judgment of the Court was delivered by

SIMMONS, J.:—This is an appeal from the judgment of Mr. Justice Stuart, *Amundsen* v. *Ward*, 11 D.L.R. 167, 24 W.L.R. 280, in an action for damages by the plaintiff for personal injuries alleged to have been received by reason of defendant's horse and dray wagon in control of defendant's servant striking the plaintiff and knocking him down on the sidewalk of a street in the city of Calgary. Simmons, J.

The plaintiff was temporarily resident in Calgary at the time of the occurrence and was standing at the corner of Ninth avenue and Second street east. He was facing northeast and was talking to a friend when he was struck on the head, knocked down and rendered unconscious. Neither he nor his friend is able to say what struck him. Immediately afterwards his friend saw a dray with a horse breaking away from it, the dray catching on a steel post near the corner of the sidewalk. A crowd gathered around and a policeman came from a corner one block north and found a dray with a broken shaft and a horse with some broken harness. The policeman interviewed a man whom he took to be the driver and this man said his employer's name was Waugh or Ward. A short time before the accident this policeman saw the driver and horse and dray pass him at the corner of Eighth avenue and Second street east where the policeman was on point duty. The driver was going by in a crush and was whipping his horse as he went south. The driver was identified by the policeman as the man who had recently passed him at the corner of Eighth avenue and Second street east, and the driver said his name was Taylor and his boss Ward, of the Alberta Transfer Co. The defendant and another man both did business under the name of the Alberta Transfer Co. They were not partners, but for the purpose of economy in the way of office expenses and telephone, they had this arrangement to use the same firm or business description. The defendant admits that he had in his employ during the week in

ALTA.

S. C.

1914

AMUNDSEN v. WARD.

Simmons, J.

which the accident happened an employee whose name he does not know and who told the defendant he had an accident, "that he struck a post at the corner and stopped his horse and fell off the dray and he still had hold of the reins." The defendant also says that the harness was broken. He first knew of the accident to plaintiff when the writ was issued about a year subsequent to this happening.

The defendant says he dismissed the employee because he had this smash and he has not seen or heard of the employee since and does not know where he is. It seems to me that in so far as the question of relation of master and servant is involved the plaintiff has made out a *primâ facie* case. The defendant did not call his associate in (the use of the name) the Alberta Transfer Co. The evidence of the witnesses Bank and the policeman fits in with the statement made by the driver to the defendant.

The plaintiff has also made out a *primâ facie* case that the servant was acting within the scope of his employment. The time was just after one o'clock in the afternoon when the servant would most likely be driving along the street in his employer's business: *Joyce* v. *Capel*, 8 Car. & Payne 370.

The onus is also on the plaintiff to make out a *primâ facie* case of negligence. The facts here seem to support such an inference. The defendant says that the horse was gentle, so gentle that a lady could drive him and that he was not likely to shy at things on the street, and that he thought it peculiar that he should become frightened at anything on Second street east and that is why he got angry at his servant. In addition the horse and dray were on the wrong side of the street and the plaintiff was rightfully upon the sidewalk. A man who has a horse is bound to take reasonable care that he does not do damage. It is true a horse may shy for some unaccountable cause, and if the person in charge does what a careful man should do the principle of *Hammack* v. *White*, (1862) 11 C.B.N.S. 588, would apply and the defendant would not be held liable.

The defendant did not in this case think his servant had acted as a careful driver should and dismissed him. The distinction is clear in Beven on Negligence, 3rd ed., ch. 4, p. 119:—

> Where there are two inferences equally consistent with the facts proved, one of them cannot reasonably be drawn to the prejudice of the other, but where, though either of two inferences might be drawn, one involving negligence is more reasonable or likely than the other, then the case cannot be taken away from the jury: *Flannery* v. *Waterford & Lemerock R. Co.*, Ir. R. 11 C.L. 30; and *Crawford* v. *Upper*, 16 A.R. (Ont.) 440.

The onus therefore is upon the defendant when the inference of the existence of negligence is the more reasonable one.

It is contended on his behalf that he is excused by plaintiff's delay which has contributed to the defendant's inability to locate the servant and call him as a witness who might give evidence to

rebut the *primâ facie* case against him. If the delay of the plaintiff in bringing the action was the only cause contributing to this condition of things this might be entitled to consideration. The defendant, however, employed a servant who was, according to his own admission, incompetent. He did not know his name and apparently took no trouble to obtain this information. He admits, however, he saw the servant about a month after he was discharged by him. In addition to this there is a reason for delay given by the plaintiff namely, that serious complications arose some months after the accident which were not apparent immediately after the happening.

The appeal should be dismissed with costs.

Appeal dismissed.

REID v. MOORE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. March 16, 1914.

1. SALE (§ I B—5) — PASSING OF TITLE — NEW COMPANY TO TAKE OVER BUSINESS.

Title to farm machinery purchased by the plaintiff and his associates never vested in a subsequently incorporated company, which was to take over their business, where the plaintiff, after the incorporation of the company, on being compelled to pay for the machinery received an assignment from his associates and the seller of the machinery of all their interest therein, and nothing was ever done to transfer title to the company; and the plaintiff may recover the machinery from one claiming title through the company.

[*Reid* v. *Moore*, 12 D.L.R. 193, affirmed.]

2. SALE (§ I C—17)—CONDITIONAL SALES—STATUTORY REQUIREMENTS.

The provisions of sec. 1 of the "Act respecting Lien Notes and Conditional Sales of Goods," R.S.S. 1909, ch. 145, requiring registration, do not apply to an assignment to a third party of the interest in the goods of the original seller or bailor in good faith for valuable consideration, and neither under that Act (reading sec. 11 with sec. 1) nor on other grounds does such assignment require to be registered.

[*Reid* v. *Moore*, 12 D.L.R. 193, affirmed.]

3. SALE (§ I C—18)—CONDITIONAL SALES — VENDOR'S NAME DISPLAYED, EFFECT—ASSIGNEE OF VENDOR.

The saving provisions of sec. 11 of the Saskatchewan "Act respecting Lien Notes and Conditional Sales of Goods," R.S.S. 1909, ch. 145, exempting from registration sales or bailments of certain manufactured goods on which the name of the manufacturer or vendor is displayed, will also exempt an assignee of such manufacturer or vendor.

Statement

APPEAL by the defendant from the judgment of Johnstone, J., *Reid* v. *Moore*, 12 D.L.R. 193, 24 W.L.R. 575, in favour of the plaintiffs.

The appeal was dismissed.

T. S. McMorran, for the appellant.

W. H. B. Spotton, for the respondents.

SASK.

S. C. 1914

REID v. MOORE.

Elwood, J.

The judgment of the Court was delivered by

ELWOOD, J.:—The goods with respect to which this action was brought were agreed to be purchased by the plaintiffs and one E. F. Pulver and one R. E. Stevenson from Reeves & Co., in or about the month of September, 1909, under an agreement whereby it was, among other things, provided that the property in and title to the goods purchased should remain in the vendor until the full purchase-price should be paid. These goods were subsequently delivered to the said Pulver, and the said Pulver executed a lien note for $2,400, due January 1st, 1910, in which it was also provided that the property should remain in the said vendor until payment should be made. At the time of the delivery of the goods Pulver paid to the vendor $2,400 on account of the purchase-price. These goods were purchased for the purpose of carrying out an agreement, dated September 22, 1909, entered into between the plaintiffs and the said Stevenson, Pulver, and one Arthur Stevenson, whereby, among other things, it was provided that the plaintiffs should furnish by endorsement of notes or otherwise the sum of $10,000 to be used at once for plowing, buying machinery, and developing certain lands, said $10,000 to be a temporary advance to the Elbow Agricultural Co., a corporaation to be thereafter organized, said $10,000 to become a debt of said corporation and to be evidenced by its promissory note for that amount bearing 6 per cent. interest after date payable to the order of the plaintiffs. The said $2,400, paid on account of the purchase-price of said goods, was part of $5,000 obtained by discounting the plaintiff's promissory note, which was handed to the said R. E. Stevenson. The proceeds of that note were deposited to the account of Stevenson. The plaintiffs subsequently paid said promissory note. The Elbow Agricultural Co. never in any way adopted or ratified said agreement of September 22, and never in any way became bound to repay the plaintiffs said sum of $5,000 or any part of it, or in any way became responsible for the payment to Reeves & Co. of the purchase-price, or any part of the purchase-price, of said goods, and never in any way accepted the transfer to them of said goods, except as hereinafter mentioned. The land to which the goods were subsequently taken was land which it had been intended should be transferred eventually to the Elbow Agricultural Co., but the land never was transferred to that company, and that company never had any interest in the land. Subsequently the plaintiffs refused to go on with the agreement to advance the $10,000, and this was because, at the time they entered into the agreement of September 22, 1909, they did so on the representation of Pulver and Stevenson that they were the owners of a certain contract, dated September 4, 1909, for the purchase of said lands on certain conditions, and

it subsequently transpired that one of the parties to said contract of September 4, 1909, had refused to execute the same, and a subsequent contract was entered into by Stevenson and Pulver for the purchase of the said land, but on terms somewhat different from the original contract, and the plaintiffs thereupon refused to proceed any further with the matter. I am of the opinion that the purchase of the machinery from Reeves & Co. was made with the idea of eventually transferring the machinery to the Elbow Agricultural Co., but that, until the Elbow Agricultural Co. ratified the agreement of September 22, and carried out the agreement therein mentioned of giving this promissory note and issuing certain stock to the plaintiffs, the property in the goods was to be in the plaintiffs, and I can find no evidence that the plaintiffs in any way transferred their property in those goods to the Elbow Agricultural Co. nor can I find any evidence that the Elbow Agricultural Co. ever in any way entered into possession of those goods. On or about March 3, 1910, the plaintiffs obtained from the said R. E. Stevenson and said E. F. Pulver an assignment in writing from them of all their title and interest in and to the goods in question; and on or about March 30, 1910, the plaintiffs paid to said Reeves & Co. the amount of the lien note given by Pulver for said goods, and obtained from Reeves & Co. an assignment in writing of all their right, title and interest in and to the goods in question. The assignment from Stevenson and Pulver and the payment to Reeves & Co. were made after it had been definitely understood and agreed by Stevenson and Pulver that the plaintiffs should not proceed with the agreement of September 22, 1909. It seems quite clear that the payment to Reeves & Co. was made by the plaintiffs solely for the purpose of protecting their interest in the goods in question, and that the intention in making that payment was that they should preserve to themselves whatever right and title Reeves & Co. should have to these goods. The defendant was the person who was largely instrumental in endeavouring to effect the sale of the land in question to the Stevensons and Pulver. Within a day or so of September 22, 1909, the Elbow Agricultural Co. was incorporated. The incorporators were Pulver and the Stevensons. It never had a bank account. Within a day or so after its incorporation the defendant was made one of its directors and its vice-president, and continued to be its vice-president down to the time of commencement of this action. On or about October 12, 1910, the Elbow Agricultural Co. purported to execute a power of attorney to the said Arthur Stevenson, authorizing him to sell the goods in question and on October 25, 1910, the said Arthur Stevenson, purporting to act under said power of attorney, sold the goods in question to the defendant for the sum of $300 cash and some securities. In my opinion, even if the Elbow Agricultural Co. owned the goods in question, it could not sell

SASK.
S. C.
1914
REID
v.
MOORE.
Elwood, J.

these goods to Moore, because he was one of its directors and an officer of the company. I am of the opinion that Moore, being an officer of the company, knew or must have known that the company never acquired any title to these goods. He knew that the plaintiffs were not proceeding with the advance of the money; in fact one of his letters shews that he had very great doubts as to the right of the company to sell these goods. The evidence shews that Stevenson was simply trying to sell these goods to Moore for the purpose of beating the plaintiffs. There is evidence which goes to shew that the company or the Stevensons were still holding the securities which the defendant gave for the goods over and above the $300. I am of the opinion, therefore, that the learned trial Judge was correct in holding that the property in the goods in question had never passed to the Elbow Agricultural Co., and that, therefore, they could not make a sale of these goods to the defendant. I am also of the opinion that the plaintiffs never parted with their property in the goods, and that by obtaining an assignment from Stevenson and Pulver, they, at the time of the alleged sale to the defendant, were the sole owners of those goods. I am further of the opinion that they, in any event, had the right to the possession of the goods under the assignment from Reeves & Co. It was objected that the assignment from Reeves & Co. should have been registered under the Act respecting Lien Notes and Conditional Sales of Goods, being ch. 145 of the Revised Statutes of Saskatchewan 1909. It was admitted at the trial that the sale from Reeves & Co. came under sec. 11 of that Act. That section, among other things, provides that nothing in the Act shall apply to the sale or bailment of any manufactured goods or chattels which, at the time of delivery to the buyer, had the manufacturer's or vendor's name printed, painted or stamped thereon. Therefore, the original sale coming under that section, the provisions of the Act would not apply to such a sale, and, therefore, that sale would be as though that Act had never been passed. The plaintiffs, in taking an assignment from Reeves & Co., were merely standing in the place of Reeves & Co. It was not a sale from Reeves & Co. to the plaintiffs, but merely an assignment to them of Reeves & Co.'s interest under the original sale. Apart from sec. 11, I am of the opinion that, where a vendor, after entering into a conditional sale of chattels, assigns to a third party the vendor's interest in such chattels, such assignment does not require to be registered. The Act merely provides by sec. 1 that, unless the provisions of the Act are carried out, the vendor shall not be permitted to set up his right of property as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration, or against judgments, executions, or

attachments against the purchaser or bailee. The Act does not contain any provision requiring the registration of any assignment of the interest of the vendor under a conditional sale. The vendor had done everything that the Act required it to do, and, therefore, the plaintiffs had the right to stand in the place of Reeves & Co., the vendor.

In my opinion, therefore, the appeal should be dismissed, with costs.

Appeal dismissed.

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 16, 1914.

1. CONFLICT OF LAWS (§ II—150)—REMEDIES—ENFORCEMENT OF CONTRACT.

The interpretation of a contract and the rights of the parties are to be determined in accordance with the "proper law of the contract," *i.e.*, the law by which the parties intended, or may be presumed to have intended, the contract to be governed, so that a contract of guaranty made in Minnesota and to be performed there is *primâ facie* subject to the Minnesota statutes.

[*Scandinavian American National Bank* v. *Kneeland*, 12 D.L.R. 202, reversed; *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115, 123, referred to.]

Statement

APPEAL by the plaintiff from the decision of Curran, J., *Scandinavian American National Bank* v. *Kneeland*, 12 D.L.R. 202, 24 W.L.R. 587.

The appeal was allowed, RICHARDS, and HAGGART, JJ., dissenting.

C. P. Wilson, K.C., *O. H. Clark*, K.C., and *P. A. Macdonald*, for the plaintiff, appellant.

H. Phillipps, and *C. S. A. Rogers*, for the defendant, respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The twenty-first paragraph of the statement of defence is that the plaintiff represented to the defendant that one Chase was to be one of the guarantors and this representation induced the defendant to sign the agreement.

The learned trial Judge has not found this fact. He merely found that the defendant believed Chase was to be a party, and in this respect he does not find that the plaintiff wronged or deceived the defendant, unless by finding that Hedwall, the president of the company, was really acting for the bank, and the evidence is overwhelming against this finding. The defendant, according to his evidence, had forgotten about this alleged representation, first when he wrote two letters to the banker, again when he instructed his solicitor to put in his defence and again on his examination for discovery. This defence was apparently

MAN.

C. A.
1914

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS
v.
KNEELAND.

Howell, C.J.M.

discovered long after this suit began, and the defendant's memory of it was apparently refreshed by reading the defence of one of the guarantors filed in the Minnesota Court. The defendant is contradicted clearly, and the weight of evidence is overwhelming against him. The contract is complete on its face, and it is sought to answer it by the vague memory of the defendant as to facts which occurred years before without the support of other witnesses or by any written documents. I think it unsafe to set aside a written document upon such testimony, and especially as the learned Judge had a poor opinion of the defendant's memory during the course of the trial. I think the defendant should not succeed on this branch of the case.

The learned Judge has found as a fact that there was an agreement for further advances by the bank. If there was any evidence to support this allegation the promise was that after the bank had increased its capital and was legally in a position to make a further advance this would be done. There is no evidence of a demand for further advances after this increase of capital that I can find in the evidence.

It is difficult to see how or why parol evidence was got in to vary the express terms "giving additional credit" in the written contract, but if this alleged parol promise varying the written agreement is admitted in evidence, it can only be got in as a collateral verbal independent agreement arising out of and not a part of the written agreement, as in *Byers* v. *McMillan*, 15 Can. S.C.R. 194, and to be enforced as a separate agreement. Even if the evidence supports the finding of fact, I cannot see how the breach of this contract to do something in the future for the benefit of the company can be a defence to this action.

In the construction of the contract of guarantee much can be urged in favour of it being construed as several and not joint and several. It was complete on its face with many signatures or one signature; it contemplated different amounts of liability, and although it was a continuing liability any one by notice might terminate it. See *Tyser* v. *Shipowners*, [1896] 1 Q.B. 135; *Ex parte Harding*, 12 Ch.D. 557; *Collins* v. *Prosser*, 1 B. & C. 682, 107 Eng. R. 250. And if several the discharge of one surety will not discharge the co-sureties: *Ward* v. *National Bank of New Zealand*, 8 A.C. 755. However, without deciding this point, I think the statute law of Minnesota referred to by the learned trial Judge applies to this contract.

With deference, I think the cases relied on by the learned trial Judge do not apply to the facts in this case. The contract was made in Minnesota to be performed there, and the release of the co-surety given there and this act performed there did not affect the contract there. In other words, they entered into a contract there whereby it was agreed, amongst other things, that the plaintiff might release one of the sureties and not thereby release the others. The law of the contract was that a liability

existed and was to continue, although the plaintiff might hereafter discharge one of the sureties so far as the plaintiff was concerned. I have had the advantage of reading the opinion on this branch of the case of my brother Cameron, and I concur with him as to the law.

No doubt if the defendant has been prejudiced by the plaintiff's disposition of the assets he must be protected to that extent, and this involves some careful consideration.

After much reflection I agree with the disposition of the case set out in the judgment of Mr. Justice Perdue.

RICHARDS, J.A. (dissenting):—The learned trial Judge found, as a fact, that the defendant executed the instrument sued on, under an agreement with the plaintiffs, that it was not to become operative until signed by certain other parties, including Mr. C. L. Chase.

Richards, J.A. (dissenting)

The evidence, as it appears in type, is not as clear on this point as could be wished. But there was evidence upon which he could find as he did.

It is patent that he gave the matter most careful consideration. As he saw and heard the witnesses, he was in a better position than this Court can be to decide the weight to be given to their respective testimony, and to draw conclusions of fact. I do not think that there is against his view such a weight of probability as would justify us in reversing it. Mr. Chase did not sign the instrument. Therefore, following the learned Judge's conclusion of fact, it never became operative.

I would dismiss the appeal with costs.

PERDUE, J.A.:—The defendant, amongst other defences, sets up (paragraph 21 of amended statement of defence) that the guarantee, if entered into by him, was entered into upon the representation of the plaintiff that one Chase would become a co-guarantor with him, Kneeland, and would execute the same, and if the defendant did execute the guarantee, he executed it upon faith in the said representation and not otherwise, and that the plaintiff in breach of its said agreement neglected to secure the signature and execution of the guarantee by said Chase.

Perdue, J.A.

If the facts above alleged were established by the evidence, it would afford a complete defence to the action: *Bonser* v. *Cox*, 4 Beav. 379, 49 Eng. R. 385; *Ward* v. *Nat. Bank of New Zealand*, 8 A.C. 755, 764. The learned trial Judge finds that Kneeland was allowed to sign the guarantee under the *bonâ fide* belief that Chase would sign also, and that if the truth had been disclosed as to Chase's refusal to sign, Kneeland would, in the trial Judge's opinion, have refused to sign the guarantee at all. The finding does not appear to me to go the length of establishing that the representation that Chase would also sign was made by the

MAN.

C. A. 1914

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND.

Perdue, J.A.

plaintiff and that the plaintiff suppressed the fact of Chase's refusal to sign. With respect, I am not at all satisfied that the defence raised by paragraph 21 has been established. The evidence upon this point is contradictory, and the defendant's own statements as to what occurred at the time, taken along with his subsequent conduct, do not appear to me to prove this defence with the clearness that would be expected and required.

The guarantee in question, which is set out in full in the trial Judge's reasons for judgment, was the subject of much discussion on the argument, it being claimed on behalf of the plaintiff to be a several undertaking on the part of each of the persons signing it, while it is argued for the defendant that it is a joint guarantee, or at the most, joint and several.

If the document be interpreted according to the law of this province I am of opinion that it constitutes a joint liability. The document in effect says:—

> We, the undersigned, do hereby guarantee . . . the payment at maturity of any and all sums of money owing, etc., to the said bank by the said company.

In *White* v. *Tyndall*, 13 A.C. 263, Lord Halsbury, L.C., dealing with the question of construction of a covenant, as to whether it was joint or several, said, at 269, as follows:—

> The late Mr. Platt, on p. 117 of his work on Covenants, published more than half a century ago, puts the proposition in words that have never been questioned, as far as I am aware, since his time. With respect to the form he says: "No particular words are necessary to constitute a covenant of either kind (that is to say, either joint or several). If two covenant generally *for themselves*, without any words of severance, or that they or one of them shall do such a thing, a joint charge is created, which shews the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts."

In the present case the parties signing the instrument guarantee payment of certain indebtedness to the bank. The undertaking is joint but each one limits his liability to a certain amount. This limitation does not imply that each severally guarantees to the extent of the sum set opposite his name, but when he has contributed towards the joint liability the amount set opposite his signature, he is not to be called upon for more. The last clause provides that the guarantee shall be binding on each of the undersigned until he shall revoke the same in writing. The effect of this clause, it appears to me, is to leave the undertaking joint as to all until one withdraws. The party withdrawing would be jointly liable with the others up to the withdrawal, and after that the others would remain jointly bound as between themselves.

Examples of joint and several guarantees with different limits of liability fixed for each of the guarantors, and the manner of working out the same amongst them, are found in *Ellis* v. *Em-*

manuel, 34 L.T.N.S. 553; and *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q.B. 75, and in the cases there referred to.

In an action upon the guarantee in this province the formal validity and interpretation of the contract should be determined in accordance with the laws of Minnesota, the country where it was made and was to be performed: Dicey, Conflict of Laws, 2nd ed., 540, 556. By the laws of Minnesota (sec. 4282 of the Revised Laws of Minnesota, 1905), it is declared that *parties to a joint obligation shall be severally liable* and may be sued either jointly, or separate actions may be brought against each, and judgment rendered in each, without barring an action against one not included in the judgment, or releasing those not sued; provided that the Court may require the plaintiff to bring in as defendants all parties jointly liable.

The plaintiff in 1910 commenced a suit on the guarantee against Berge, one of the guarantors, in the State of Minnesota, and afterwards released him in consideration of a payment of $3,000. This release was given under the plaintiff's seal, and contained no reservation of rights against the co-sureties. The defendant claims that the effect of this release was to discharge the co-sureties of Berge, on the ground that the contract of suretyship was joint, or joint and several, and that a discharge of one by the principal creditor operated as a discharge of all, the joint obligation of the others being part of the consideration of the contract of each; relying upon *Ward* v. *National Bank of New Zealand*, 8 App. Cas. 755, 764; *Mercantile Bank of Sydney* v. *Taylor*, [1893] A.C. 317. This contention turns altogether upon the question whether the contract is to be regarded as joint, joint and several, or several only. If it is several only the defendant's contention cannot apply. Now, if the contract is to be interpreted according to the laws of Minnesota, the parties, even if the contract is joint in form, shall be severally liable and separate actions may be brought against each without releasing the others. Also, by sec. 4283 of the same Revised Laws a creditor may discharge one of several joint obligors without impairing his right to recover the residue from the others.

In the provisions of the Minnesota laws above referred to, there is much relating to procedure only, which is closely involved with the portions relating to interpretation and the declaration of substantive legal rights. In fact, much may be said in favour of holding these sections to be procedure only and therefore not to be applicable in this province. I have, however, come to the conclusion, after much doubt, that we must take the meaning placed upon the contract in question by the proper law of the contract which must be presumed to be that of the State of Minnesota. In this view the contract must be regarded as several, and the release of one of the co-sureties will not operate as a release of the others or of any one of them.

MAN.

C. A.

1914

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND.

Perdue, J.A.

In the year 1910 the plaintiff took from Hedwall a promissory note made by him for $5,000 in payment of his liability on the guarantee. At the same time the plaintiff delivered to Hedwall two promissory notes made by the principal debtor, the T. M. Roberts Co. and Richardson, one for $2,000 and the other for $3,000. Hedwall proved for that amount against the estate of the principal debtor and received dividends as a creditor from the assignee. The notes which were so delivered to Hedwall are two of the notes now sued upon in this action. It is quite clear that when this action was commenced the plaintiff had parted with these notes for value, was not the holder of them, and was not entitled to sue upon a guarantee given to the plaintiff to secure payment to the plaintiff of all sums of money owing to the plaintiff by the T. M. Roberts Co. The amount of these two notes, with the interest upon them, should be deducted from the plaintiff's claim.

I think the appeal should be allowed with costs and judgment entered for the plaintiff for the amount due after deducting the notes delivered to Hedwall. An account of the amount due to the plaintiff should, if necessary, be taken by the registrar of the Court, and the amount entered in the judgment. The plaintiff will be entitled to the ordinary costs of suit in the Court of King's Bench.

Cameron, J. A.

CAMERON, J.A.:—This is an action on a guarantee given to the plaintiff bank by the defendant and three others, directors and shareholders of the T. M. Roberts Co-operative Supply Co., a corporation doing business in the city of Minneapolis, in the State of Minnesota. The bank is incorporated under the laws of the United States as a national bank, and carries on its business in the same city.

The action was tried before Mr. Justice Curran, who, in his judgment, sets forth the instrument sued upon and the facts and circumstances connected with its signing and delivery to the plaintiff bank. The learned trial Judge dismissed the plaintiff's action.

The guarantee in question was signed by the defendant, September 27, 1909. The T. M. Roberts Co., for whose benefit it was given, was adjudicated insolvent on April 8, 1910. The action was commenced May 21, 1912. The defendant was examined November 9, 1912. The case was brought on for trial January 10, 1913. A few days before the trial certain amendments to the defence were made, amongst them that set out in par. 21, stating in effect that there was an agreement between the defendant and the bank that one Chase should be a co-guarantor with the defendant, that the defendant signed the guarantee upon the faith of that agreement, and that the bank failed to secure the signature of the said Chase. This statement was treated throughout the trial as equivalent to a defence setting forth that it was agreed between the bank and the defendant that all the

parties mentioned, including the defendant, Berge, Richardson, Hedwall and Chase, should sign the guarantee, otherwise, it was further agreed, the said guarantee should be wholly ineffective and void. The evidence on this issue was gone into at length before the learned trial Judge, who found in favour of the defendant.

Here we have a transaction where a banking instrument was formally signed by the parties and delivered by them to the plaintiff bank in September, 1909, and was acted on by the bank (there can be no dispute as to that); where the principal debtor became in default within a short time after the guarantee was given, and where the defendant, a guarantor to the extent of $40,000 on the face of the instrument, was advised of the facts. Action was brought in May, 1912, the defendant was examined in November, and the cause brought on for trial the following January. Yet it was not until the near approach of the trial, within a few days before it commenced, that this defence of the most material importance was placed on the record.

Two important letters written by the defendant shortly after the insolvency of the company were placed in evidence. The first, dated May 14, 1910, written in reply to a letter from the vice-president of the bank, urging payment, contains not one word referring to this important matter. The point that is apparently made most prominent in this letter is the defendant's inability to pay at the time of writing, but no mention is made of Chase.

In the second letter, dated June 5, 1910, the only reference to Chase is in the following passage:—

> Furthermore, we signed the guarantee with the understanding that Mr. Chase was to become a guarantor, and he agreed to sign the contract or guarantee that afternoon, and we are informed that the reason he refused to make good his word and sign the guarantee was on account of the fact that you refused to increase the line up to $50,000, according to the original understanding.

Now, it is possible to read this extract, supplying the words "with the bank" after the word "understanding" where it first occurs. But that cannot fairly be done as I read the extract. To my mind it means this:—

> We, who signed the guarantee, signed it because we, with Chase, had agreed to sign it on the original understanding that you were to increase the line of credit up to $50,000, which you refused to do, and it was on account of this that Chase refused to sign.

There is here no direct statement that there was an agreement with the bank that all who signed the guarantee together with Chase should sign before the agreement should become operative. The grievance is, rather, that the bank had failed to implement its promise to increase the company's line of credit to $50,000.

MAN.

C. A.

1914

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND.

Cameron, J.A.

I have read the portions of the defendant's examination put in at the trial, and I find it impossible to discover therein any positive and definite statement that the bank agreed to procure the signatures of all the parties mentioned to the guarantee before it became effective, as is alleged by the defendant in his evidence at the trial. In one part of his examination he says with reference to such an alleged agreement: "The bank must have been taken into consideration. I do not recall it." His subsequent answer (Q. No. 257), "I went down there to the bank and I said 'I will go on this guarantee if the others do,' and the others said they would," must be contrasted with the above answer and with his statements as set out in the notes of evidence at pp. 289, 290 and following.

The defendant says in his evidence at the trial that he did not become aware that Chase had not signed until after the bankruptcy of the company, April 6, 1910, but it was certainly some time before his letter of June 6, 1910.

In view of the foregoing and of other considerations that arise on a perusal of the evidence, we must surely call for clear and convincing evidence before we give effect to this defence. Had it been put forward from the first, and referred to throughout in the correspondence, interviews and pleadings, then the position might be wholly different. And it cannot be denied that it is quite possible that the facts were as stated by the defendant, and that, in the press of business matters, they were overlooked and did not recur to memory until the trial was imminent. But, as I have said, we are here dealing with a document, one of a class common in banking transactions, delivered to a bank in circumstances such as not infrequently call for a document of its character, and acted upon in due course by the bank. Yet the very existence of that document is for the first time challenged by a pleading and by evidence in supportof that pleading brought forward at the trial more than three years after it had been signed and delivered.

On the other hand, Hedwall declares he knew of no agreement with the defendant making the signing of one contingent upon the signing of all: p. 430. Hedwall witnessed the defendant's signature, but knew of no such statement by the defendant on this matter to Grandin as was alleged at the trial. Grandin also enters a positive denial. He says he never took a guarantee from anyone in his life under those conditions. I refer to his evidence, p. 154, and at p. 491, when recalled.

Upon my best consideration of the matters involved, I feel compelled to hold that the defendant has not satisfactorily discharged the onus placed upon him by reason of the circumstances constituting and surrounding this case in so far as this particular defence is considered. I must add that it is not without some degree of hesitancy that I thus undertake to differ from the view taken by the learned trial Judge.

As for the defence that the guarantee was signed on the understanding that the company's line of credit was to be extended to $50,000, it is to be said that that is not in accordance with the written document. Moreover, the defendant's evidence at pp. 309, 310, is at variance with his statement in the letter of June 6 that the line of credit was to be increased "as soon as you had increased your capital stock."

The defendant in his evidence at the trial states that at the meeting in the T. M. Roberts Co.'s store on the morning of September 27, it was represented by Hedwall that the bank "would advance up to $50,000," and that nobody stated in his presence that this advance was conditional on the bank's increase of capital. Now, the explicit provisions on this subject of the national banking law of the United States must necessarily be familiar to bank officials and directors in that country as well as to those, or to a large proportion of those, having dealings with them. It involves a matter that must be coming before them continually. It is difficult to imagine that an unconditional promise that an advance would be given to a customer beyond the sum allowed by law, could or would be made in any circumstances whatever with the authority of the bank, or by any official of the bank. The probabilities are strongly against anything of the kind, and to support the defendant's evidence on this branch as given at the trial we must seek for corroboration. But, in point of fact, so far from corroboration being available, his evidence at the trial on this point is positively contradicted by that of Hedwall, Grandin and Chase, and differs from the statement in his letter of June 6, as I have pointed out above.

This defence also was not originally set up, but only at the latest possible stage, and the considerations which apply to the defence with which I have already dealt apply substantially to this, and with reference to it I have come to the same conclusion. Even if the defence were established it would appear to me that it is not a matter that goes to the consideration; it would rather be a matter constituting a breach of contract for which the bank might be liable. But in such an action it would strike me as impossible for the defendant to succeed.

This contract was made in the State of Minnesota and was to be performed there. That being so, the rights and obligations of the parties are to be determined in accordance with the laws of Minnesota, which must be taken to be the laws by which the parties intended the contract to be governed. See Dicey, Conflict of Laws, 556, where the general rule is thus stated:—

> The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract.
>
> ("Proper law" is defined at p. 529).
>
> The rights of the parties to a contract are to be judged of by that law

MAN.

C. A.

1914

SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND.

Cameron, J.A.

by which they intended (to bind) or, rather, by which they may justly be presumed to have bound themselves: *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115, 123. And see the other cases cited by Dicey, p. 557.

You must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract: *per* Lord Halsbury, *Re Missouri Steamship Co.*, 42 Ch.D. 321, 336.

The essential validity of a contract (as distinguished from its formal validity), as well as its interpretation and effect and the rights and obligations of the parties to it, are governed (with certain exceptions) by the law which the parties have agreed or intended shall govern it, or which they may be presumed to have intended. This law is generally known as the proper law of the contract: Halsbury, Laws of England, vol. 6, 238.

Wharton on the Conflict of Laws, 3rd ed., has this at p. 936:—

It has been held that the question as to what acts or omissions will release the surety pertains to the remedy, and is, therefore, governed by the law of the forum; but the better view seems to be that the matter relates to the substance of the contract, rather than to the remedy, and is, therefore, to be governed by the law of the place where the contract is made and performable, rather than the law of the forum.

I consider the judgment of the Court in *Tenant* v. *Tenant*, 110 Pa. 485, as sound and in point here.

The case of *Leroux* v. *Brown*, 12 C.B. 801, holding that sec. 4 of the Statute of Frauds relates to proceedings has been subjected to criticism. See *Williams* v. *Wheeler*, 8 C.B.N.S. 299, *per* Willes, J., and Piggott on Foreign Judgments, p. 82.

The law is stated and the cases cited by Mr. Justice Swinfen Eady in *British South Africa Co.* v. *De Beers*, [1910] 1 Ch. 354 at 381.

I quote also from Brandt on Suretyship, 3rd ed., sec. 162:—

As a general rule the liability of sureties and guarantors depends upon and is governed by the law of the place of their contract. Thus, in an action against a surety on a note in New Hampshire, the note having been executed and made payable in Vermont, the law relating to sureties in the latter State is to be applied, and by that law they are governed.

The non-discharge of one joint surety by reason of the discharge of another is not merely a matter relating to the remedy, but is part of the law relating to the substance of the contract, and therefore part of the contract. The section of the Minnesota statutes quoted is an alteration of the common law, making the obligation of each joint obligor absolute irrespective of the release or discharge by the creditor of any other. It is a different matter from the defences involved in the Statutes of Limitations and the Statute of Frauds prohibiting the use of the process of the Courts after a certain period, or without compliance with certain conditions. The right of a creditor to hold one of several joint sureties notwithstanding the discharge of another or others of them is a matter affecting the obligation of the contract, altering it in one of its essential elements, and such right must therefore be ascertained and determined in accordance with the law of the place of the contract.

The above considerations apply if the contract in question be taken as joint. If it be taken as several the defence is inapplicable. Either way I consider the plaintiff bank entitled to recover on the notes sued on, excepting the two notes, No. 1957 for $2,000 and No. 2142 for $3,000 (referred to in Mr. Grandin's evidence at pp. 166-168), transferred by the plaintiff bank to Hedwall. It appears from the evidence of Hedwall, pp. 482-485, that he proved in bankruptcy against the Roberts Co. on these notes, received dividends on his claim, and, according to his evidence, held the notes all the time of the trial. The notes appear to have been endorsed by the plaintiff bank "without recourse." There is plausible reason advanced to shew why these notes were included in the plaintiff's claim, filed as exhibit "B," stated as correct by Judge Neland, p. 194. On these two notes I think the plaintiff must fail. Otherwise I hold the appeal must be allowed and the judgment entered for the plaintiff as set forth in the judgment of Mr. Justice Perdue.

Cameron, J.A.

HAGGART, J.A., concurred with the dissenting opinion of RICHARDS, J.A.

Haggart, J.A. (dissenting)

Appeal allowed.

GARDINER v. DISTRICT REGISTRAR.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 23, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—FIRST REGISTRATION—PROCEDURE—CROWN GRANT—DESCRIPTION OF RIPARIAN LANDS.

Upon an application, under a Crown grant of lands, to register title to a portion of certain numbered lots or parcels thereof, the Registrar of Titles is without jurisdiction (either under the Land Registry Act, R.S.B.C. 1911, ch. 127, or otherwise), to compel the applicant as a condition precedent to registration to acknowledge that the river bed and the lake bed are not included in the grant by way of amplifying the description.

[*Gardiner v. District Registrar, sub nom. Re Land Registry Act*, 13 D.L.R. 790, affirmed.]

APPEAL from the judgment of Murphy, J., relieving against a district registrar's refusal to register unless the claimant relinquished his river and lake bed rights, if any. The application is accordingly to instruct the registrar of titles at Nelson, B.C., to register the title of W. H. Gardiner to a portion of lots 820 and 825, group 1, Kootenay district, which was refused on the ground that the maps and descriptions in the deeds lodged must be amended shewing clearly that the beds and soil of lakes and rivers are excluded, that in the maps the lands conveyed shall be marked red and the lakes and rivers blue.

Statement

The appeal was dismissed and the registrar was instructed to register the title as tendered.

Maclean, K.C., for the appellant.
Harold Robertson, for the respondent.

B. C.

C. A.

1914

GARDINER v. DISTRICT REGISTRAR.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I am not clear about this case, but as my learned brothers have come to a conclusion I will not delay the decision. I quite concur with what has been said by my learned brother Irving that a proceeding of this kind is a most inconvenient way of adjusting the rights of parties under a conveyance of land. It would lead to very great hardship, it seems to me, if disputes were to be tried on proceedings before the registrar, carried from him to the Supreme Court and from the Supreme Court to this Court.

I therefore do not express a concluded opinion upon whether or not it was within the jurisdiction of the registrar to reject the application on the ground upon which he did reject it, that it contained a description of the land which gave to the grantee more than the grantor had to give. I am not prepared to decide that question here because I do not think it necessary in view of the result arrived at by my learned brothers.

As to the costs I think there can be none because of the provisions of the Crown Costs Act, R.S.B.C. 1911, ch. 61.

Irving, J.A.

IRVING, J.A.:—I concur with the learned Chief Justice as to costs.

On the main point I think the registrar's objection should not be allowed. He does not deal with the case under section 61 of the Land Registry Act, R.S.B.C. 1911, ch. 127. He says to the applicant in effect, "I will not register your title unless you acknowledge that the river bed and the lake bed are not included in your Crown grant." He has no right to do any such thing. That is a usurpation of authority that cannot be justified. As every certificate of title in my opinion must be read as being issued subject to reservations and limitations expressed in the original grant from the Crown, it is quite unnecessary. The Crown's rights if any can be asserted at any time, notwithstanding the issue of the certificate of title. I express no opinion as to whether the river bed and lake bed do fall within the limitations. That question should be determined between the parties in a properly instituted suit, not in the inconvenient method now suggested.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

Macdonald, C.J.

MACDONALD, C.J.A.:—Then the appeal will be dismissed.

Irving, J.A.

IRVING, J.A.:—I express no opinion as to whether the river or lake beds fall within the Crown grant or not.

Appeal dismissed.

INDEX OF SUBJECT MATTER, VOL. XVI., PART 4

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XVI., PART 4.

SAGER v. MANITOBA WINDMILL CO.

SASK.

S. C.
1914

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. March 16, 1914.

1. FRAUD AND DECEIT (§ I—1)—MATERIAL AND FALSE REPRESENTATION—DELAY IN DISCOVERING THE FALSITY.

Where a party to a contract induces the other party to enter in by means of a material and false representation, the effect of such false representation cannot be got rid of on the ground that the person to whom it was made might have discovered the truth if he had used diligence, unless there is such delay as constitutes a defence under statutory limitations.

[*Sager* v. *Manitoba Windmill Co.*, 13 D.L.R. 203, affirmed; *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273, applied.]

2. PRINCIPAL AND AGENT (§ II C—20)—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.

The principal is answerable for damage occasioned a person who was induced to enter into a contract to buy a chattel by the wilfully false representations of the agent for sale of such chattel.

[*Sager* v. *Manitoba Windmill Co.*, 13 D.L.R. 203, affirmed.]

3. CONTRACTS (§ V C 2—397) — RESCISSION — RESTORING BENEFITS—PURCHASE.

The general rule that in order to entitle a purchaser of property to rescind a voidable contract against the vendor, such purchaser must be in a position to offer back intact the subject-matter of the contract, does not apply where such subject-matter has become deteriorated solely by the fault of the vendor himself.

[*Sager* v. *Manitoba Windmill Co.*, 13 D.L.R. 203, affirmed; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch.D. 392, applied.]

Statement

APPEAL by the defendant from the judgment of Johnstone, J., *Sager* v. *Manitoba Windmill Co.*, 13 D.L.R. 203, 24 W.L.R. 725, in favour of the plaintiff.

The appeal was dismissed.

J. F. Frame, K.C., for the appellant.

G. E. Taylor, K.C., for the respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—In this case the evidence seems to me to be sufficient to justify the findings of the jury, and their conclusions ought not to be disturbed because they are not such as Judges sitting in Courts of Appeal might themselves have arrived at. See *Simington* v. *Moose Jaw Street R. Co.*, 15 D.L.R. 94, 26 W.L.R. 171. It was objected on the part of the appellant that because the contract signed by the respondent does not contain the representations alleged by the respondent to have been made by the agent of the appellant, and the respondent had a copy of the contract in his possession for some time before he instructed the appellant to ship him the machinery, therefore the respondent is estopped from alleging that any such representations as alleged were made by the appellant's agent, and that, in any

SASK.

S. C.
1914

SAGER
v.
MANITOBA
WINDMILL
CO.

Elwood, J.

event, the respondent could and should have discovered the falsity of the representations from a perusal of the contract. The evidence shewed that, at the time of the signing of the contract, the respondent did not have his glasses with him; he could not read without the glasses; he did not read the contract; it was not read over to him; he relied upon what the agent stated to him it contained, and did not know the true contents of the contract or that it did not contain the alleged representations until after this action was commenced and the contract had been read over to him by Mr. Taylor after he had changed his solicitors. Under such circumstances it seems to me to be an untenable position to try to contend that the respondent cannot object to these representations and to their falsity. If the contention of the appellant in this respect were allowed, one could never succeed in an action founded on false representations with respect to a written document where the party defrauded relies on the statement of the defendant or his agent as to the contents of the document objected to, and, so relying, refrains from reading it, because the answer in all such cases would be, "You should have found out the falsity of the representations. The document itself shews it is not as represented; and, in any event, you should have read it." The respondent is undoubtedly bound by the representations of the agent. The agent was the general agent for the sale of engines. It was the agent's work to sell engines and obtain signed orders: *Lloyd* v. *Grace Smith*, [1912] A.C. 716.

It was further objected that the respondent lost his right to object on the ground of fraud on account of delay. There was evidence from which the jury could find, and I assume the jury did find, that the respondent did object to the contract on the ground of fraud very shortly after he first discovered the fraud.

> If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them." I take it to be a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that this is not an answer, unless there is such delay as constitutes a defence under the Statute of Limitations: Lord Halsbury, L.C., in *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273 at 279).

I think the above laid down the law correctly with respect to delay in actions involving fraudulent representation. It was also objected that the respondent must fail because the parties cannot be restored to their original position. A witness on the part of the appellant testified that a few days prior to the trial he had seen the machinery in question, and that there were certain parts missing. There was no evidence as to how impor-

tant these parts were, or their value, or to what extent the engine had depreciated in value in consequence of these parts being missing. There was no evidence to shew when these parts were taken from the machinery. The evidence shewed that the machinery was received by the respondent on or about May 14, 1910. On May 30, 1910, one Luggen, an expert in the employ of the appellant, wrote to the appellant stating in effect that the engine still lost compression and would have to be looked after, and asking to have a man sent, as the respondent was "in the air about it," and that they would have to keep a man on the engine to get it in shape. On May 31, 1910, the respondent wrote to the appellant complaining of the engine, and stating that the expert had given it up and had left there, complaining of its power, and asking to have returned to him his notes and money paid. Subsequently, other experts were sent to try and make the engine work, and from then on any work that was done with the engine was done in consequence of the request of the experts of the respondent to give the engine a trial, experts from time to time endeavouring to make the engine work satisfactorily. There was evidence from which the jury were justified in finding, and they did find, that the engine never did work satisfactorily. On July 31, 1910, the respondent wrote to the appellant stating that the engine had never given satisfaction, that he had been obliged to finish his work with steam, and asking if the respondent wanted the engine returned to Belle Plains, that he did not think he wanted to bother with it any longer. The respondent never did any work with the engine after this. On or about August 15, an expert of the appellant tried to make the engine work, and in doing so broke a bull pinion. The engine was never used by any person after that. It would appear that none of the parts which, at the trial were alleged to be missing, were missing on August 15, and I therefore assume that these various parts were taken some time after August 15. Action was commenced on August 23, 1910. In the action as originally framed the claim was for a return to him of the moneys paid and the notes which had been given, on the ground that the engine was not as represented. At that time the respondent believed that the various representations which it has been found were fraudulently made were in the original contract, and it was not until an interview which took place with Mr. Taylor in the spring of 1911 that the respondent became aware that these representations were not in the contract. Subsequently leave was given to amend the pleadings setting up the fraudulent representations, and the amended pleading setting up these representations was delivered under an order dated December 11, 1911. It will be perceived that as early as May, 1910, the respondent took the position that he was not obliged to take the

SASK.

S. C.
1914

SAGER
v.
MANITOBA
WINDMILL
CO.

Elwood, J.

engine. He took that position continuously thereafter. It is quite true that he did not raise the question of fraud, because, as I have above stated, he was not aware of the fraud. He assumed throughout that the representations made were in the contract, and he was relying on the fact that the engine was not as represented. In Kerr on Fraud and Mistake, 4th ed., 366, is the following:—

> There cannot indeed be rescission if the position even of the wrong-doer is so affected that he cannot be placed *in statu quo*. But the rule has no application where the subject-matter has been reduced by the wrong-doer himself, and where compensation can be made for any deterioration.

In *Erlanger* v. *New Sombrero Phosphate Company*, 3 App. Cas. 1218 at 1278, I find the following:—

> We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval while he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind. . . . But a Court of equity could not give damages, and, unless it can rescind, the contract can give no relief. And, on the other hand, it can take accounts of profits and make allowances for deterioration; and I think the practice has always been for a Court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. And a Court of equity requires that those who come to it to ask its active interposition to give them relief should use due diligence after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in mora* than a similar change before he was *in mora* should do. . . . Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the intervals, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

In *Lagunas Nitrate Company* v. *Lagunas Syndicate*, [1899] 2 Ch. D. 392 at 456, Rigby, L.J., says:—

> Now, no doubt it is a general rule that, in order to entitle beneficiaries to rescind a voidable contract of purchase against the vendor, they must be in a position to offer back the subject-matter of the contract. But this rule has no application to the case of the subject-matter having been reduced by the mere fault of the vendors themselves; and the rule itself is, in equity, modified by another rule, that where compensation can be made for any deterioration of the property, such deterioration shall be no bar to rescission, but only a ground for compensation. I adopt the reasoning in *Erlanger's* case of Lord Blackburn as to allowances for depreciation and permanent improvement.

On August 15, when the machine finally broke down, it had last been used by the representative of the appellant. The

SASK.

S. C.
1914

SAGER
v.
MANITOBA
WINDMILL
CO.

Elwood, J.

parts now alleged to be missing were apparently on the engine. The respondent did nothing with the engine after that. He simply left it where it was. He then took the position that he was not obliged to keep it. The appellant could then have taken it away. There is no evidence to shew when these parts became missing, and under the circumstances I think that it is incumbent on the appellant to shew at any rate that these parts were not on the engine when the respondent first raised the question of fraud. They may have been taken from the engine just immediately preceding the trial, which, by the way, took place on the 18th and following days of March, 1912. I think it was also incumbent upon the appellant to shew the value of the parts which were missing. These parts may be of trifling value, and it would strike me that this would, in any event, be the case. Compensation might possibly be allowed to the appellant under the authority of the above cases. Under all of the above circumstances I am of the opinion that the objection that the engine is not in the position in which it was at the time of the delivery should not in this case deprive the respondent of his rights of rescission. In my opinion, therefore, the appeal should be dismissed with costs.

The jury awarded to the respondent: amount of draft paid, $1,002.50; interest thereon from payment until trial, $97.75; freight, $56; total, $1,156.25. The trial was concluded on March 23, 1912, but the trial Judge did not order judgment to be entered until June 22, 1913, when judgment was ordered to be entered for the above amount. By way of cross-appeal it was contended on the part of the respondent that there should be added to the above interest at 5 per cent. from March 23, 1912, to June 22, 1913, on $56, $3.50, and on $1,002.50, $65.62; making a total of $69.12. I am of opinion that this contention should be given effect to, and that the judgment should be varied by directing judgment of this sum in addition to $1,156.25, making a total of $1,225.37.

Appeal dismissed.

TYTLER v. GENUNG.

MAN.

C. A.
1914

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 16, 1914.

1. VENDOR AND PURCHASER (§ I B—5)—DEFERRED PAYMENTS—VENDOR'S RE-ENTRY ON DEFAULT—ACCELERATION.

An entry into possession made by a vendor on default of the vendee to meet instalments in arrear under his contract by virtue of a power reserved therein, will not operate as a demand for unmatured instalments nor accelerate their payment for the benefit of the purchaser so as to force the vendor to accept prepayment of unmatured interest-bearing instalments, where the vendor's proceedings were wholly referable to the arrears.

[*Tytler* v. *Genung*, 12 D.L.R. 426, reversed; *Bovill* v. *Endle*, [1896] 1 Ch. 648, distinguished; *Ex parte Ellis*, [1898] 2 Q.B. 79, and *Ex parte Wickens*, [1898] 1 Q.B. 543, considered.]

MAN.

C. A.

1914

TYTLER v. GENUNG.

2. SPECIFIC PERFORMANCE (§ I E 1—30)—RIGHT TO REMEDY—PERFORMANCE OR OFFER TO PERFORM.

In order to entitle a party to a land contract to specific performance, he must shew himself to have been prompt in the performance of the covenants entered into by himself or shew his willingness to perform them within a reasonable time.

[*Wallace* v. *Hesslein*, 29 Can. S.C.R. 171 at 174, followed.]

Statement

APPEAL from the judgment of Galt, J., *Tytler* v. *Genung*, 12 D.L.R. 426, 24 W.L.R. 560, directing specific performance at the instance of the purchaser after the vendor had obtained a judgment in ejectment on the purchaser's default in paying overdue instalments, and had taken possession.

The appeal was allowed, RICHARDS, J.A., dissenting.

J. Galloway, for the plaintiff, appellant.

H. F. Maulson, for the defendant, respondent.

Howell, C.J.M.

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

Richards, J.A. (dissenting)

RICHARDS, J.A. (dissenting):—By agreement in writing the defendant agreed to buy, and the plaintiff to sell, a farm, the payments being spread over a number of years. The defendant took possession, as allowed by the agreement, and made large improvements and some payments, but never caught up, at any time, with the amount then payable by him. Several extension agreements were made, extending the time, and changing the terms, of payment, but leaving the original agreement otherwise in full force, so far as is material to this action. That original agreement provided that, on default, the plaintiff might take possession and might re-sell the property without notice, freed and discharged of all claim of the defendant. Time was declared to be of the essence. The agreement also provided that the defendant should search the title at his own expense and make all requisitions within ten days, from its date, and that, otherwise, the title should be deemed to be accepted.

While the defendant was in default the plaintiff brought an action, the exact nature of which is not shewn by the evidence, but, as a result of which, she obtained possession of the land. After obtaining possession, and while only part of the purchase money was payable, she brought this action asking payment of the arrears, and, in default, cancellation of the agreement of sale.

After suit began the plaintiff let the farm to a third party. The length of the term, for which she so let, is not very definitely stated, but the lessee got the property until at least after that year's crop should be taken off. The only consideration given by the tenant was that he was to do some summer fallowing: but, apparently, the plaintiff was not to get any profit from the letting other than the benefit to the land itself by the summer fallowing. When the action came on for trial the tenant was, as against the

plaintiff, still rightly in possession, and the plaintiff was not able to give possession if she had been paid up the arrears she sued for.

There is no power to let the land contained in the agreement. A power to sell does not, as I understand it, include a power to lease: see *Evans* v. *Jackson*, 8 Sim. 217, 59 Eng. R. 87, which was really upheld by the Court of Appeal in *Re Judd*, [1906] 1 Ch. 684. Although in this latter case the giving of the lease was upheld under a power of sale, it was because, under the title by which he held, that was the only way in which the vendor could sell. The Court treated it as in reality a sale, though in form a lease, and upheld it on that ground.

It seems to me that if the plaintiff had before action let the land as she did after bringing suit, no action would have lain. Also the defendant, on learning of the lease made by the plaintiff, might, I think, have had the action stayed until the lease came to an end, on the ground that, as a result of letting, the plaintiff was not in a position to give that possession which the defendant would have been entitled to if he had made the payments, to recover which the action was brought.

The learned trial Judge held that, by her action in taking possession, the plaintiff had entitled the defendant to pay up the whole of the purchase money, including the sums then not yet payable, and ordered that, on such payment being made, the defendant should be entitled to a conveyance of the land. He also ordered the plaintiff to pay the defendant his costs of the action.

In holding that the plaintiff, by taking possession, made the whole of the purchase money due at the option of the defendant, the learned Judge followed *Bovill* v. *Endle*, [1896] 1 Ch. 648, where it was held by Kekewich, J., that a mortgagee, by taking possession, gave a mortgagor the right to pay off the whole of the mortgage, including moneys not yet due. That case has been upheld in subsequent decisions, and is referred to in a number of textbooks with approval.

In *Ex parte Ellis*, [1898] 2 Q.B. 79, it was held by the Court of Appeal that the test was whether the mortgagee had taken possession to realize his security or merely for the purpose of protecting it, and that, in the former case, the taking possession did cause the subsequent payments to come due at the option of the mortgagor, but that in the latter case it did not. I take it that *Bovill* v. *Endle*, [1896] 1 Ch. 648, must be read in the light of this latter case.

That action (*re Ellis*) concerned a mortgage of chattels, and it was held that the taking possession there was simply for the purpose of protecting the security. It can be easily understood how taking possession, in such a case, might be assumed to be solely for the protection of the security, as chattels might, otherwise, be removed, or done away with. In the case of a land mortgage, however, where the security was practically, as in the pres-

MAN.

C. A.

1914

TYTLER v. GENUNG.

Richards, J.A. (dissenting)

ent case, in the land itself, that position would not, it seems to me, be so readily assumed by a Court. I do not see how the plaintiff in any way can be said to have been "protecting" her security by taking possession.

The defendant in this case was working the land and had greatly improved its value, and, every year until she took possession, the plaintiff got something out of it. She had no reason to doubt, so far as I can see, that if she left him in possession she would still get money out of it; but after she took possession, as she had a right to do, she did an act with regard to the land which was not justified by the agreement—that is, she let it—and in such a way that she would get no money as a result of the letting.

That seems to me to shew an intention to realize (by getting the land if she could), not merely one to protect the security.

She did bring this action for the payments in arrear, but that was her only means of getting rid of defendant's rights, and the result of her taking possession was, as she knew, to cut off the defendant's only means of making payments. It seems to me that, having done this, and dealt with the land beyond the powers given her by the agreement, she should be held to have taken possession for the purpose of realizing.

This is not the case of a mortgage, but it has been held, in many cases, that the parties to an agreement for sale are largely in the position of mortgagee and mortgagor. I can see no reason why the principle laid down in *Bovill* v. *Engle*, [1896] 1 Ch. 648, should not apply to agreements for sale as well as to mortgages.

That being the case, I think the learned trial Judge was right in holding that the defendant was entitled to a judgment enabling him to pay off the full amount. I am unable to see how the law, as to delay in case of a claim for specific performance, applies to the defendant's rights in a case of this kind, when the plaintiff has acted as she has done, and has, herself, brought an action with regard to the land, for payment of part of the purchase money. The defendant's position is simply the equivalent of a right of a mortgagor to redeem.

I can understand that there might be a case where a vendor had not perfected his title, and did not expect to perfect it until just before, or at, the time of the final payment at the date agreed upon. That question has, however, not been raised in this action. The evidence shews, as I understand it, that the plaintiff has in fact a complete title to the land, and the defendant is undoubtedly willing to take the title which she has. In fact, under the terms of the agreement he had accepted it, there being no suggestion that he had raised any question as to it within the ten days after the agreement. I am not sure, in any case, that a party acting as she has done, in taking possession to realize and in letting, the latter being contrary to the agreement, could, even if her title had not been completed, raise this answer to the defendant's request to be allowed to pay off in full.

MAN.

C. A.

1914

TYTLER v. GENUNG.

Richards, J.A. (dissenting)

With regard to the costs, I think the learned Judge acted within his powers in ordering the plaintiff to pay them. Her act, in leasing the land as she did, put it out of her power to carry out her part of what she sought by bringing the suit, and there was no justice in her prosecuting it while that state of affairs existed.

Section 3 of ch. 12 of 7 and 8 Edward VII. (Man.), says that in all actions and proceedings the awarding of costs shall, subject to that Act, be in the absolute discretion of the Court or Judge. I find nothing in the Act which would limit that discretion in the present case. In view of that Act, and of the position in which the plaintiff had placed herself, I think the learned Judge was within his rights in disposing of the costs as he did.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—This is an action brought by the vendor against the purchaser of land for the cancellation of the contract.

By the original agreement between the parties which is dated August 17, 1906, the defendant was not required to make any cash payment, although he was given immediate possession of the land. The purchase money was payable in ten annual instalments of $600 each, the first instalment of principal becoming due on October 1, 1908, and the first payment of interest on October 1, 1907. Time was made the essence of the contract and there was a provision giving the vendor the right to forfeit on breach of any of the covenants.

The parties entered into a further agreement dated November 2, 1908, which recites that the purchaser had made default in the covenants to be performed by him under the first agreement and that the vendor was entitled to cancel it, that the purchaser had requested the vendor not to cancel and to permit him to continue in occupancy of the land. It was also recited that the amount due for principal, interest, and costs under the agreement for sale was $7,126.45. The agreement then provides that the purchaser may continue to occupy the land on performing the covenants contained in it and the covenants and conditions in the agreement for sale which may be applicable. Provision was made for the delivery of the crop of 1909 to an elevator in the name of the vendor, and it was agreed that the purchase money should be payable in instalments of $500 yearly in each of the years 1909 to 1922, both inclusive. Amongst other things the purchaser covenanted that he would not encumber the title to the land, that he would insure against hail and that all remedies to which the vendor was entitled under the agreement for sale, on breach of any covenant on the part of the purchaser, should be applicable to the breach of any covenant contained in the second agreement, and that the agreement for sale should, except as specifically altered by the subsequent agreement, continue in full force and effect.

On April 5, 1910, the defendant executed a further agreement

MAN.
C. A.
1914
TYTLER
v.
GENUNG.
Perdue, J.A.

which recited the agreements of October 17, 1906, and November 2, 1908, and that default had been made by the purchaser under the last mentioned agreement. Permission was given to the purchaser to continue in possession, he covenanting to deliver the crop at the elevator in the name of the vendor. The rights and remedies of the vendor under the previous agreements were preserved.

A still further agreement was entered into by the parties on June 15, 1912. This recited the prior agreements and that the purchaser had failed to carry out the terms and conditions of the agreements made on November 2, 1908, and April 5, 1910, that the vendor was entitled to cancel the sale, and that the purchaser had requested further time. The agreement provided that the vendor would give the purchaser until July 1, 1912, to pay her the sum of $800 on account of arrears and that in the event of such payment being made the purchaser might continue to occupy the land until further default. The purchaser also covenanted that in default of his paying the $800 as agreed he would peaceably deliver up possession of the land. The rights of the vendor under the previous agreements were preserved.

The defendant did not pay the sum agreed to be paid on July 1, 1912, or any part of it. On July 19, 1912, the plaintiff commenced an action for the recovery of the land, obtained judgment for possession on September 13, and was placed in possession of the land some time thereafter.

The plaintiff alleges in his statement of claim the default made by the defendant in the first contract and in the subsequent agreements between the parties, asks that an account be taken of the amount overdue and in arrear, that the defendant be ordered to pay the same, together with the costs, within a time to be fixed by the Court, and that, in default thereof, the agreement of sale be cancelled, the payments already made be forfeited, and the defendant foreclosed of all right to the land. This is a very common form of action in this Province, and one which the plaintiff had unquestionably the right to bring on the facts disclosed in the case and admitted by the defendant.

The action is founded upon the analogy between the position of an unpaid vendor where the purchase money is payable by instalments extending over a period of time and that of a mortgagee, where default has been made. In *Lysaght* v. *Edwards*, 2 Ch. D. 499 at 506, Jessel, M.R., refers to this analogy and points out what is the practice where a vendor brings suit for cancellation of the contract against a purchaser in default. He says:—

> Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate.

This principle has been approved and adopted in this Province:

see *Hudson's Bay Co.* v. *Macdonald*, 4 Man. L.R. 237, 480; *West* v. *Lynch*, 5 Man. L.R. 167; *Canadian Fairbanks* v. *Johnston*, 18 Man. L.R. 589.

In his statement of defence the defendant admits that he made the several agreements referred to in the statement of claim and that he made default thereunder. He claims that the plaintiff improperly charged certain items against him and did not allow him for credits to which he was entitled. This is a matter for accounting in the Master's office. He also claims that the plaintiff distrained upon his crop in September, 1912, and received the proceeds. By way of counterclaim the defendant asked that the plaintiff be ordered to specifically perform the agreement, or, in default, that the defendant should be allowed for the improvements he had made. He also made a claim for damages against the plaintiff for entering into possession of the land. As possession was taken in pursuance of a judgment of the Court, this last claim was not seriously urged.

The plaintiff filed a reply and defence to the counterclaim in which, amongst other things, she stated that she was ready and willing to specifically perform the agreement.

As he admits in the recital to the agreement of Nov. 2, 1908, the defendant had made default under the agreements of sale to the extent of over eleven hundred dollars, and from that time on he made default under all the agreements respecting the purchase made by him with the plaintiff from time to time, the plaintiff was therefore fully justified in bringing this action. The learned trial Judge has, however, dismissed the plaintiff's action with costs. His main reason for so doing is based upon a finding he makes that the defendant in the summer of 1912 "had arranged to borrow $5,000 from one company and $1,000 from another, and he deposited $800 in his solicitor's hands so that he was in a position to pay the plaintiff off in full, and so informed her; but she then declined to accept the money."

Now, there is not upon the record any plea of tender of the purchase money or any allegation that the defendant had offered to pay, and the plaintiff had agreed to accept the purchase money in full prior to the commencement of the action, and there is no evidence that I can find which would support such a plea or such an allegation. The facts upon this point, as they appear in the evidence, are the following:

The defendant says that in June, 1912, he went to the plaintiff and asked her if she would take the whole purchase money. She said she would, but that she did not think he could raise it. He then went to Underhill, a real estate agent, and arranged to borrow $5,000 on a first mortgage and $1,000 or $2,000 on a second mortgage. The defendant also states that there was $800 in money placed in the hands of his solicitor. Then he says, "it fell through, I don't know the cause of it." The following is an extract from his evidence:—

MAN.

C. A.
1914

TYTLER
v.
GENUNG.

Perdue, J.A.

Q. Now, there are some judgments against you, are there not? A. Yes, sir.

Q. What arrangements had you made there? A. I had arrangements made to pay them off in full.

Q. Why was that not carried out? A. I could not tell you that; I don't know.

Q. As far as you are concerned, you were ready and willing? A. I was ready and willing to do what I had agreed to do.

Q. Had you received any notice from Mrs. Tytler, or anyone acting for her, up till November, 1912, that she would not take her money? A. No, sir; I never did.

Underhill states that he made a valuation of the land in July, 1912, and arranged for a loan of $5,000 upon it by parties in Winnipeg. He says the plaintiff enquired of him how much the defendant could borrow and he answered her, $5,000; that she was trying to clean up the estate, seeing how much Genung could borrow. He further states that he had arranged for a loan of $2,000 on a second mortgage.

Mr. Maulson, the defendant's solicitor, was called as a witness for the defence, but he does not say one word in his evidence as to any offer to the plaintiff to pay her off or as to any refusal by her to take the money, and he gives no explanation as to why the negotiations fell through.

The plaintiff when called in rebuttal made the following statements in answer to questions asked by the trial Judge:—

HIS LORDSHIP:—You must realize you have a pretty hard-up purchaser in Mr. Genung. Do you not think it would be the best thing to get your claim in full? If you could get your money, you would consider yourself well off? A. Yes, and the expense I have been put to.

HIS LORDSHIP:—You don't want to keep him on years and years, and have all this trouble? A. No, and that is why I took the different position last June. I tried all I could to help him out. Mr. Wemyss offered that I would take a first mortgage of $5,000, if it would help matters, but at that time he said he could not raise sufficient money on the second mortgage.

There is no other evidence that I can discover bearing upon the question, and, with great respect, I must say that the evidence given fails to support the finding of the trial Judge above set out. It is true that in one of the discussions that took place between the Court and the counsel for the parties during the progress of the trial, Mr. Maulson, the counsel for the defendant, said that the offer was made to pay the whole thing in full, that it was refused, "absolutely in the first instance, and then finally with a bonus altogether out of proportion."

Counsel for the plaintiff had previously objected that no tender had been pleaded and that evidence of an offer was not admissible, and the trial Judge had apparently ruled in plaintiff's favour. Counsel for the plaintiff also intimated that the negotiations between the parties were without prejudice. At all events the evidence does not shew that a tender or an offer of payment in full

was made and refused, even if the pleadings justified the reception of such evidence.

It is of some importance to note that, although the defendant and his solicitor state that the latter had in his hands $800 in money belonging to the defendant at the time these negotiations were going on, this money was not paid to the plaintiff under the agreement of June 15, 1912, although if it had been so paid the payment would, under the terms of the agreement, have given the defendant an extension of time until the next default. It would, doubtless, have prevented the ejectment proceedings and have given the defendant an opportunity to harvest and sell his crop. The failure to pay the $800 as agreed, when the defendant had the money in hand, shews his recklessness in regard to meeting his engagements and left him, under the terms of the agreement, liable to lose possession of the land.

A further point is urged that the plaintiff by taking possession and leasing the land for the season of 1913 had put it out of her power to deliver it in case the defendant paid what was due. We do not know what her arrangements with the tenant were. There may have been a provision for surrender at any time. It is not shewn that she had disabled herself from carrying out the agreement. She alleged her willingness to carry it out and offered to do so, and one must assume that she could do so unless the contrary is shewn. If she has put it out of her power to perform her agreement she might be made liable in damages. The bare statement that she had leased the land to prevent it from deteriorating does not appear to me to afford an answer to the plaintiff's case.

The learned trial Judge has dwelt upon the great improvements to the land made by the defendant and upon the hard luck experienced by the defendant in being three times haled out. Such matters might be considered in case the defendant was applying for relief against forfeiture; but no forfeiture has thus far been claimed, and the plaintiff is willing to permit him to carry out his agreement. The learned trial Judge has taken the view that the plaintiff should be compelled to take the whole purchase money although a large portion of it is not due. At the trial she offered to take it if her solicitor and client costs were paid by the defendant. This appears to me to have been a very fair offer in the circumstances. The learned trial Judge appeared to think that this would entail the payment of heavy bills for legal services and other large expenses. The solicitor and client costs would, of course, be subject to taxation and the plaintiff would only be entitled to such items as would be shewn to be properly allowable between solicitor and client.

The trial Judge has given judgment upon the counterclaim in defendant's favour and has ordered specific performance of the agreement, not as made between the parties, but on the footing that the whole amount of purchase money is now due. It is to be

MAN.

C. A.

1914

TYTLER v. GENUNG.

Perdue, J.A.

observed that the defendant in his counterclaim simply asked "that the plaintiff be ordered to specifically perform the said agreement." Now the specific performance of a contract "is its actual execution according to its stipulations and terms" (Fry on Specific Performance, par. 3), and specific performance of the present contract on the plaintiff's part would mean acceptance of the instalments of purchase money as they fell due and, on payment of the purchase money in full, a conveyance of the land in fee simple to the purchaser freed of all incumbrances. The performance ordered in the present case is not a performance of the contract made between the parties; it is not the performance asked for by the defendant in his counterclaim, but is the performance of a new contract containing terms differing from those agreed upon by the parties. This last contract was not assented to by the plaintiff but is forced upon her for the benefit of the defendant. She is ordered to accept payment of all the purchase money at once and, on receipt of it, at once to convey the land to the defendant.

The learned trial Judge takes the view that the plaintiff in this case should be placed upon exactly the same footing as a mortgagee who is taking proceedings to recover the mortgage money. He holds that the entry of the plaintiff into possession of the land was a demand for payment of the whole purchase money and that the defendant was entitled to pay the whole, although a large portion of it was not yet due under the terms of the agreement. In support of this proposition he cites *Bovill* v. *Engle*, [1896] 1 Ch. 648. That was the case of a mortgagee who had taken possession of the mortgaged premises for the purpose of enforcing his security. Two weeks before the mortgage was due according to its terms, a subsequent encumbrancer made a tender of the principal, interest and costs, which was refused. Kekewich, J., in giving judgment, said:—

> It appears to me that, although the case is not actually covered by authority, yet it is by principle; and that a mortgagee cannot enter into possession for his own benefit and then say he is entitled to remain in the position of a mortgagee out of possession, and to ask for six months' notice or interest. The two positions are inconsistent. In my opinion, by entering into possession the mortgagee says he requires payment, and payment in the way in which the law gives it to him.

Now, although there is a close analogy between the position of a mortgagee and that of a vendor where the payment of the purchase money is deferred, still the analogy is not in all respects complete. Courts of equity have always treated a mortgage as a mere security for money loaned, no matter how stringent the provisions in the instrument may be. Where the mortgagee takes proceedings on his mortgage he is regarded merely as a lender seeking to recover his money. Where, therefore, he takes proceedings to recover all the moneys due or payable under the mortgage, or

takes proceedings which are interpreted as having that effect, payment of principal, interest and costs may be made by the mortgagor and this the mortgagee must accept in satisfaction of his claim. If no proceedings have been taken by the mortgagee to recover the mortgage moneys, the mortgagor cannot compel him to take them and release the land before the date for redemption has arrived: *Brown* v. *Cole*, 14 Sim. 427, 60 Eng. R. 424.

I can find no case which treats vendor and purchaser as lender and borrower merely. Their relationship arises out of the contract between them and they are mutually bound by the obligations contained in it. A vendor may not be in a position to furnish title immediately. There may be encumbrances which he can remove before the time for the payment of the full purchase money has arrived, but which he is not in a position to get rid of at once. The vendor cannot compel the purchaser to pay before the date fixed for payment. Neither should the purchaser be entitled to force the vendor to give a conveyance before the time specified in the contract for so doing.

The agreement in the present case does not contain a provision for acceleration of the payments upon default. But it does contain a provision that the purchaser will give up possession of the land on breach of any of the covenants, and he is permitted to occupy and enjoy the premises subject to the condition that he may do so "until default shall be made in payment of the said sum of money or some part thereof or some part of the interest thereon, etc."

In *Ex parte Wickens*, [1898] 1 Q.B. 543 at 548, it is stated that

> where a mortgagee has entered into possession or taken other steps for the purpose of realizing his security, the Court has jurisdiction, upon payment of the debt, the interest then due, and the costs, to order the security to be given up.

But where the mortgagee goes into possession in order to maintain his security and enforce payment of arrears, and not for the purpose of realizing his security by a sale of the property, the Court will not compel the mortgagee to take principal, interest and costs and surrender the mortgage: *Ex parte Ellis*, [1898] 2 Q.B. 79.

In the present case the plaintiff took possession under a provision in the agreement permitting her to do so on default being made. She then took steps to keep the land under cultivation and prevent deterioration. She made no attempt to obtain her money by a sale of the land. Her act in bringing the present suit in which she called upon the defendant to pay up the arrears only, and asked that a time be fixed by the Court for him to do so and in default that the agreement should be cancelled, shews that she was attempting only to enforce payment of arrears. What she has done cannot, in my opinion, be taken more strongly against her than if she had sued for the arrears and taken possession of the property until the arrears were paid. To do so, even if the

MAN.

C. A.

1914

TYTLER v. GENUNG.

Perdue, J.A.

case were one of mortgagor and mortgagee, would not have the effect of accelerating the payment of moneys not yet due. This, I take it, is the effect of *Ex parte Ellis*, [1898] 2 Q.B. 79, which is the latest pronouncement on the question by the Court of Appeal in England. In that case A. L. Smith, L.J., says at 81:—

> I do not think that an order can be made that the bill of sale shall be given up where the grantee has seized for the purpose of maintaining and not of realizing his security. It would be a great hardship on him if it were otherwise. He has a contract whereby, in consideration of his lending a sum of money for a certain time, the grantor agrees to pay interest at a certain rate for that period. If the law were as contended for by the grantor the grantee could take no steps to maintain his security or enforce payment of interest in arrear without running the risk of being paid off and having the contract to pay interest during the rest of the period vacated.

For the reasons I have given, I am of opinion that the plaintiff's conduct in taking possession of the land had not the effect of accelerating future payments and making the total purchase money due and payable forthwith.

The whole trouble in this matter has been caused by the defendant constantly failing to meet his engagements. Even when filing his counterclaim for specific performance of the agreement he does not pay or offer to pay into Court the amounts which have been long overdue, and he does not offer to carry out the contract on his part. In *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171 at 174, Sir Henry Strong, C.J., said in giving the judgment of the Court:—

> In order to entitle a party to a contract to the aid of the Court in carrying it into specific execution, he must shew himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform, and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the contract.

The conduct of the defendant was shewn to have been the very opposite of that. The allegations and admissions in the defence and counterclaim and the facts of the case shew that he had disentitled himself to specific performance.

The trial Judge has given leave to appeal on the question of costs. In the view I take of this case it is not really necessary to consider the disposition of costs made by the learned trial Judge in the view he took of the case. I would say, however, that I cannot, in any aspect of the case, find a valid reason for depriving the plaintiff of costs and ordering the plaintiff to pay costs. The Judge must exercise his discretion as to costs reasonably and for good cause upon the facts before him. Where the plaintiff is bringing his action to enforce a legal right and no valid ground appears for depriving him of costs, the Judge has no discretion to take away the plaintiff's right to costs. This principle was clearly laid down in *Cooper* v. *Whittingham*, 15 Ch. D. 501, and *Jones* v. *Curling*, 13 Q.B.D. 262.

MAN.

C. A.
1914

TYTLER
v.
GENUNG.

I think the plaintiff was quite within her rights in bringing this action and that all the steps she took were lawfully taken in pursuance of the several agreements between her and the defendant. I can see no valid reason for compelling her to take payments not yet due, if she is unwilling to take them before they come due.

Several matters were dealt with in the trial Judge's judgment which were properly matters of account between the parties and in respect of which no appeal was brought.

Perdue, J.A.

I think the plaintiff's appeal should be allowed and that the usual judgment should be pronounced, taking an account of the amount due to the plaintiff for principal, interest and costs of this suit, an account of all moneys received by the plaintiff from the defendant or for which the defendant is entitled to credit, including a reasonable sum for use and occupation of the premises during the time the plaintiff has been in possession of them since October, 1912, that a time be appointed for the payment of the balance due to the plaintiff together with her costs of suit; that in view of the special circumstances of the case and the large amount of improvements made upon the land by the defendant, such time for payment should be six months from the making of the report; that in default of such payment, the agreement of sale should be cancelled.

The plaintiff should also be paid her costs of this appeal.

CAMERON, J.A., concurred with PERDUE, J.A.

Cameron, J.A.

Appeal allowed.

EXCELSIOR LUMBER CO. v. ROSS.

B. C.

C. A.
1914

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. LOGS AND LOGGING (§ I—21)—EXPORT RESTRICTIONS UNLESS MANUFACTURED—PRODUCT OF CROWN LANDS (B.C.)—SHINGLE BLOCKS.

The prohibition of export from British Columbia of timber cut on Crown lands therein unless manufactured within the province into boards, deal, joists, lath, shingles "or other sawn lumber" (Forest Act, B.C., sec. 100), applies to prevent the export of the product of the timber after sawing the log into short lengths of from 16 to 20 inches, and cutting these short lengths longitudinally so as to leave upon each block only a small arc of the circumference of the log, where the blocks are left unfinished for any practical permanent use and are commercially suitable only for further manufacture into shingles.

[*Excelsior Lumber Co.* v. *Ross*, 13 D.L.R. 740, affirmed; *Foss Lumber Co.* v. *The King*, 8 D.L.R. 457, 47 Can. S.C.R. 130, discussed.]

2. STATUTES (§ II A—105)—CONSTRUCTION—"OR OTHER SAWN LUMBER"—EJUSDEM GENERIS RULE.

The words, "or other sawn lumber" following the expression "boards, deal, joists, lath, shingles" in the B.C. Forest Act, 1912, sec. 100, are limited in their application by the "*ejusdem generis*" rule of construction, and the sawn product to which the general words apply must fall within the same class as the particular products to which reference is made.

[*Excelsior Lumber Co.* v. *Ross*, 13 D.L.R. 740, affirmed.]

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.

APPEAL from the judgment of Clement, J., *Excelsior Lumber Co.* v. *Ross*, 13 D.L.R. 740, refusing an order of replevin to recover from seizure by provincial officers under the Forest Act, ch. 17 of the Acts of B. C. 1912, a quantity of logs sawn into large blocks intended to be exported for the manufacture of shingles.

The appeal was dismissed, MARTIN, J.A., dissenting.

Ritchie, K.C., for the appellant.

A. D. Taylor, K.C., for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In my opinion, the 16 and 24 inch blocks in question in these proceedings were shingle bolts and nothing else.

Until a year or two ago a shingle bolt was understood to be a cedar block 4 feet long, split by axe and wedge in the forest. Latterly a new species of shingle bolt has come into vogue, made from inferior cedar logs cut into lengths of 16 and 24 inches at a saw mill, and then split by saw. What is done at the saw mill is part of the process of manufacturing shingles.

It is not suggested by appellants that the old-fashioned shingle bolt could be exported when cut from timber limits of the character of those from which the blocks in question were obtained. What they argue is that these blocks are sawn lumber and not shingle bolts, and therefore not within the prohibition of the Forest Act.

The evidence of the witnesses who professed to think that the blocks in question are not shingle bolts is not convincing. It appears to me to be specious and lacking in sincerity.

The facts are that the appellants commenced to operate their mill a few months before these proceedings were commenced, admittedly for the purpose of cutting cedar logs into blocks of the character in question. They did nothing else during the time their mill was in operation. They shipped the greater quantity of these blocks to a mill at Blaine in the State of Washington, where they were sawn into shingles. Some few were sold in British Columbia to the owners of shingle mills.

The appellant's whole business consisted of the manufacture of these shingle blocks, and, in my opinion, these blocks are not sawn lumber within the meaning of the Act, and their export is prohibited.

The appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—I concur in the opinion of my brother Galliher, and would dismiss the appeal.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting):—This action raises a question of much public importance respecting the export timber trade of

this province, one of our chief industries, and to an extent that may be gathered from the fact that, in the report of the Minister of Lands recently laid before the last session of the Provincial Parliament, the Minister says, at p. D 69:—

> The life of the timber industry of British Columbia depends upon the profitable export of forest products from the province, for the local population uses less than one-fifth of the timber annually produced, and the other four-fifths must be exported.

The question to be decided is whether or no the sawn cedar blocks seized herein are "sawn lumber" under sec. 100 of the Act, which directs that all the timber therein specified

> shall be used in this province, or be manufactured in this province into boards, deal, joists, lath, shingles, or other sawn lumber . . .

At the outset it must, I think, be clear that if as a fact any timber can be brought within the category of "other sawn lumber," the statute is at once satisfied, and the timber cannot lose or be deprived of that nature merely because by being further sawed or handled it reaches a higher state of manufacture. The Act itself declares the extent or degree of manufacture that will satisfy it, viz., "sawn lumber," and no more. Once the manufacturer has brought the timber from its original form of a rough log to the state that it becomes "sawn lumber" he has discharged his duty, and the manufactured product is free for export, and no further process to which it may be subjected can reduce its acquired character or status, indeed, the more that is done to it the more is that character impressed upon it.

What we have before us are cedar blocks sawn from rough cedar logs, sawn lengthwise on all their sides or faces, which may be at least five in number, as in the sample in evidence, ex. A. (which is itself cut from a log section of eight sawn faces, *i.e.*, one quarter of a sawn octagon), and also sawn crosswise into lengths of sixteen and twenty-four inches; there is, in truth, no part of their surfaces which has not been sawn and the bark removed therefrom. Now, it cannot be disputed that this manufactured product, on which $1.90 per thousand feet has, it is sworn and not disproved, been expended (more than or as much as the cost of manufacturing the same logs into rough admittedly exportable lumber: see evidence of Coyle, p. 27, and Haslam, p. 46), is, in truth and in fact, "sawn lumber," just as much as cedar blocks sawn to smaller dimensions (say 8 x 4 x 4 inches) for street paving unquestionably are. As Mr. Justice Brodeur puts it in *Foss Lumber Co.* v. *The King* (1912), 8 D.L.R. 437 at 446, 47 Can. S.C.R. 130 at 153:—

> It is a sawing process all the same, and the plank, when it has passed through the operation, should be called a sawn plank.

Why, then, cannot they be exported? Because, it is said, the *ejusdem generis* rule applies, and the "other sawn lumber"

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
Martin, J.A. (dissenting)

must be of a similar nature to the "boards, deal, joists, lath and shingles" mentioned, and that these shingle blocks are only partially manufactured shingles. The answer to that, in my opinion, is, first, and in any event, the rule does not on the face of it apply, for the language excludes it. To begin with, the wide and inclusive word "lumber" must be given due effect to, because, as Mr. Justice Galt said in *McAdie* v. *Sills* (1875), 24 U.C.C.P. 606:—

> It is plain that the term "lumber" is a word signifying a variety of articles,

and of itself it is essentially antagonistic to the reason and the application of the rule. Furthermore, the expression is not "boards, deal . . . or sawn lumber," but ". . . . *or other* sawn lumber," which in itself more intensely negatives the inference that the other varieties of sawn lumber should resemble those recited: there is the one group of manufactured (sawn) things, specified in classes, and also the "other" wide and undefined group of manufactured (sawn) things intentionally left unspecified to cover ever-increasing and varying requirements of trade. Nor, further, can I see how the rule is to be made to apply to such different things, both as regards shape and purpose, as shingles and dimension timber, often consisting of great sawn and squared logs, 18 inches square, up to any length, such as are exported to Japan and Australia (evidence, p. 32), or sawn railway ties, or sawn fence posts, or pickets, or barrel staves, or paving blocks; yet all of these admittedly are exportable as "other sawn lumber;" great quantities of pickets, for example, are being exported to Australia under that classification (evidence, p. 34). But it is further argued that, as these blocks were being exported for the purpose of being further manufactured into shingles, they could only be regarded as incomplete shingles, and are therefore prohibited. I am unable, with all due respect, to accede to that argument, because this is not a question of partial or incomplete manufacture or of an unfinished product, but simply one of a course of manufacture to a degree sufficient to attain to the state of "sawn lumber," and the argument seeks to introduce an element into the statute which is wholly wanting, *i.e.*, the intention or purpose of the manufacturer, or the exporter, or the foreign buyer. Can it be seriously argued that a cargo of long sawn and squared logs, *i.e.*, "sawn dimension timber" (officially classified as "manufactured timber" for export: see Minister of Lands' Report, *supra*, p. D 69) could not be exported under the "other sawn lumber" category, because it was the intention to take them to a foreign port and there further manufacture all of them into "boards," and, therefore, the *ejusdem generis* rule applied as "boards" are, like shingles, etc., one of the

B. C.

C. A.

1914

EXCELSIOR LUMBER CO. v. ROSS.

Martin, J.A. (dissenting)

specified classes? I think no one would advance such a contention, and yet, where is the difference in principle between partially manufactured shingles and partially manufactured boards? Some fancied difference is sought for in the fact that the blocks seized here were to be all made into shingles, and it is to meet that point that I have postulated the case of a whole cargo exported for one purpose to make the two cases exactly parallel. There is no escape from this result, that, if this Court holds that "sawn lumber" (which includes dimension timber and squared and sawn logs of all description) cannot be exported if it is intended to be made into shingles, one of the specified classes, and must also hold that it likewise cannot be exported if it is intended to be made into any of the other specified classes, viz., "boards, deal, joists and lath," which admittedly are all "sawn lumber;" if the test is to be one of intention, that intention applies to all the classes. Such a ruling would lead to far-reaching and quite unexpected consequences. It speedily becomes clear, as the matter is pursued, that we are in reality being asked to decide this point upon the purpose for which the sawn lumber is to be used, and the extraordinary result would follow that, in the hold of the same ship, at Victoria, there may be two shipments of, say, half a million feet each of the same kind of sawn dimension timber consigned to the same mill-owner in Tacoma, U.S.A., one of which shipments is for the purpose of being further manufactured by him into boards and shingles (two of the specified classes), and is therefore not exportable and liable to seizure, and the other into pickets and paving blocks (two of the unspecified classes), and therefore exportable and not seizable. Likewise, and to make the illustration still more apt, there may be two lots of cedar blocks of the same kind, at the same time, in the same mill at Victoria, one of which could not be exported to Oregon because they were to be made into shingles, but the other could because they were to be made into boxes, or turnings, or even put to unknown uses.

This result is, while unavoidable, almost grotesque, but it is only the beginning of the confusion that would result, because what is to be done when the manufacturer here does not know the purpose for which the "sawn lumber" is to be used when it is exported to Japan? Or, if it is bought by a broker here for an unknown use by one who intends to take it to San Francisco and sell it to any one who may buy it for any purpose, and therefore, at the time of export no one here knows the purpose for which it may be ultimately used? In such cases, is the "sawn lumber" to be seized and held here till its ultimate use is finally determined? And still further, what is to be done if the shipper refuses to state his intention (the Act provides no way to compel him to speak, as does *e.g.*, the Customs Act),

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
Martin, J.A. (dissenting)

and simply takes the stand that it is "sawn lumber" which he intends to export to Japan for the private purposes of his own business? And, are the inquisitorial powers which it is sought to incorporate into this section to be carried out to the extent that the "sawn lumber" is to be dogged by an agent of the Crown across the Pacific so that its ultimate use and true character may be there finally revealed in their true colours? In *Foss Lumber Co.* v *The King*, 8 D.L.R. 437, 47 Can. S.C.R. 130, the Chief Justice of Canada made a weighty remark which supports my view that we are to exclude the consideration of the purpose of the use, and deal only with the category in which the thing is classed, as follows:—

> Whatever may be the object or purpose of those who subject the plank to the process of a second sawing in the planing-mill, the effect is to produce a piece of plank sawn on three sides.

No importance can be attached to the fact that these cedar blocks have no special government classification, which is not strange, because they have only come into use within the last year or two (evidence, p. 40), the plaintiffs having engaged in the business in March, 1913 (evidence, p. 27), though they already have, as will be seen later, a trade classification as "sawn cedar blocks." With the varying requirements of trade new kinds of sawn lumber will be manufactured and classified in due time if the circumstances render it necessary. It is quite clear that these blocks are not "cedar bolts," and never have been so called or classed in the trade; even the principal witness for the defence, H. R. McMillan, the Chief Forester, in his affidavit, p. 12, says:—

> I did not claim that the bolts in question were ordinary cedar bolts, but that they differed from ordinary shingle bolts

in specified particulars. The official classification and grading rules for shingle bolts which are given at p. D 62 of the Minister's report above cited, shew that to call these sawn blocks "shingle bolts" is a manifest error. Another witness for the defence, Cameron, the official scaler, calls them "cedar blocks," p. 16, as do also Cotton and Champion; and the plaintiffs' witness, Coyle (evidence, p. 34), says that, "in our trade they are classified as sawn cedar blocks;" and see Newton, pp. 6, 42-3; Haslam, pp. 9, 47; and Hamilton, pp. 7, 51, 54, 55, 58, to the same effect.

I note, though it makes no difference, from my point of view, that the blocks seized herein, which were intended to be made into shingles, could be used for various purposes in this province, as other cedar blocks are, *e.g.*, underpinning (evidence, p. 21); "short ends" and exported under that name (evidence, p. 32); boxes (pp. 39, 54); turnings stait spindles, and factory stock generally (pp. 46, 49, 52, 54, 57); and base and corner blocks (pp. 54, 57).

And it should be further noted that, though it is the practice of the plaintiff company to first saw the rough logs, 16 to 40 feet long with bark on, into 16 and 24 inch lengths, and then re-saw each of the lengths into blocks, cutting off all the bark (in which process the logs go through the saw as much as eight times, as already noted in ex. A., and *cf.* Coyle, pp. 25-6), yet it appears by the uncontradicted evidence of Haslam that sometimes the logs are first "split" with the saw, and then cut into lengths of 16 and 24 inches. The importance of this is that it must be admitted that these long sawn logs before being cut to lengths have been "manufactured" into "sawn dimension timber," exportable as such, and if the manufacturer simply took them down to a ship and loaded them into her and entered them for export under that classification they could not be seized. But this paradox is put forward that, because they are further manufactured by each being sawed crosswise 6 to 12 times more, as the case may be, into short blocks, they lose their classification; in other words, the more they are manufactured (sawed), the more they lose their nature as manufactured (sawn) lumber. The most striking illustration of how entirely the case for the Crown rests upon the purpose to which the sawn lumber is to be put is that, if the cedar blocks in question were made of fir or other wood, and not of cedar, they could not, according to the Crown's own contention, be seized, because the sole basis for that contention is that, since shingles are made in this province from cedar and blocks of this size are used here only for the purpose of making shingles, therefore they must be intended for that purpose only, but there is no such use for fir, pine, spruce or other blocks. I pause here to say that I have already cited the evidence to shew that sawn cedar blocks of various lengths are in fact used in this province for several purposes, and so the contention of the Crown must be reduced to this, that it is only sawn cedar blocks which are intended to be further manufactured into shingles which cannot be exported.

It is, however, in my opinion, clear that we cannot read into this statute any words which will support such a contention. In addition to the *Foss Lumber Co.* v. *The King*, 8 D.L.R. 437, 47 Can. S.C.R. 130, I find the precise point taken in the argument of Messrs. D'Alton McCarthy and Christopher Robinson in *Magann* v. *The Queen* (1889), 2 Ex. C.R. 64 at 66, wherein they say:—

> That piece of white oak lumber could not at one and the same time be shaped or not shaped, dutiable or not dutiable, according to the use to which it was to be put. That Parliament, not having enacted, as it had done in other cases, that the article should be dutiable, or not, according to the use to which it was intended to be applied by the importer or his customers—as, for instance, that a white oak plank 30 feet long which,

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
Martin, J.A. (dissenting)

being imported for no specific purpose or for general purposes, would be free of duty—it would not become dutiable because the importer intended to cut it into five pieces six feet long, each of which was adapted to, and intended to be used for, some specific purpose.

And this contention was given effect to by the Court as I understand the judgment, because if it were not accepted the judgment must have been the other way, as the whole point in the case turned on it.

When Parliament intends that imports or exports shall be dealt with in the light of the purpose or use to which they may be put, it finds no difficulty in declaring that intention by apt enactment, many examples of which are to be found in the Customs Act, R.S.O. 1906, ch. 48; *e.g.*, in sec. 47, respecting the value for duty of material imported to form medicinal or toilet preparations, and "intended to be put up labelled or sold under any proprietary or special name or trade mark;" in sec. 235, respecting goods imported "for the use of His Majesty's troops or for any purpose for which such goods may be imported free of duty;" in sec. 236, respecting animals or vehicles or goods brought into Canada by travellers and exempted from duty because of their being used for purposes of travel; in sec. 237, respecting goods entered for the purpose of being exported; in 286 (*e*) respecting exemption from duty of boards, planks, etc., the produce of Canadian logs which have been exported to the United States for the purpose of being sawn and brought back to Canada; in 286 (*k*), (*l*) and (*m*) putting on the free list and granting drawbacks and reductions of duty on materials and goods to be used in Canadian manufactures, which drawbacks vary with the use, and range from 50 to 99 per cent., as set out in Schedule B. of the Customs Tariff Act 1907, ch. 11; and lastly, in Tariff item No. 183 of Schedule A. of said Act fixing the duty to be paid on newspapers, etc., which are "partly printed and intended to be completed and published in Canada."

On the face of it there seems to be something unsound in the suggestion that the classification of export timber should depend upon its domestic use. Sawn cedar blocks may be used for one or more things in this province and for entirely different things in California, Japan, Australia, India, or South America. We have no evidence at all of the nature of these foreign and distant trades or the many and unknown purposes for which foreign merchants may buy lumber or the uses they may put it to. Once manufactured timber has in this province reached the stage of "sawn lumber" how can it lose it because it may be used for different purposes in divers foreign countries? And how inconsequent and unsatisfactory it is to seek to determine its present character by its unknown future use.

Take these very blocks for example, and assume that they had been manufactured by the plaintiff company for the sole object of being made into shingles in California under contract with a mill owner there. But suppose that that mill owner failed, and the company here had left on its hands a million of these blocks which it could not dispose of to shingle manufacturers, but was fortunately able to sell them to a dealer who intended to ship them to Australia or South America or Japan to make boxes out of them, or sell them for any purpose on a trade venture, as the foreign markets might take them. What then becomes of the question of purpose or use? If that is to govern, then because the blocks are no longer to be used for shingles their nature changes with the intention of their owner for the time being, and it follows that though they were liable to be seized yesterday because they were to be further manufactured into shingles in California, they cannot be seized to-day, because they are now to be further manufactured into boxes in Japan. All of which shews that it comes down to this —that the only way in which this statute can be made workable from the practical business standpoint is to exclude any element of purpose or use, which the legislature has not provided for, and hold that the classification of sawn lumber is continuous and unalterable, and is fixed once for all when the timber has been manufactured to the extent necessary to bring it into that category. The test is not the purpose of its use, but the fact of its manufacture into "sawn lumber." To hold that its classification may vary with the intention or purpose of the home manufacturer or exporter, or foreign buyer, or with the ultimate use, or with any change in that use, or any new use, either foreign or domestic, renders the Act unworkable and introduces an element of uncertainty which the statute does not contemplate and would hamper that "profitable export of forest products" upon which "the life of the lumber industry of British Columbia depends."

In conclusion, I would say that, while I have no doubt as to the construction that should be placed upon this section, yet if there should be any doubt, it ought, in the case of a statute which is penal and confiscatory in its nature, to be resolved in favour of the subject, according to the rule recognised in *Foss Lumber Company* v. *The King*, 8 D.L.R. 437, 47 Can. S.C.R. 130. The literal meaning of the words "sawn lumber" in their "plain grammatical and ordinary sense, which is said to be the golden rule of interpretation," is completely satisfied by the construction I have endeavoured to place upon them, "and," as Mr. Justice Idington says in the last cited case, 8 D.L.R. 440, 47 Can. S.C.R. 143,

> when we go beyond such literal meaning we depart from the long-established mode of reading a taxing or revenue Act.

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
Martin, J.A. (dissenting)

And the Chief Justice, at the same pages, cited the following language with approval:—

> In cases of serious ambiguity in the language of an Act, or in cases of doubtful classification of articles, the construction should be in favour of the importer, for duties and taxes are never imposed on the citizen upon vague or doubtful interpretation.

It follows that, in my opinion, the appeal should be allowed as to these cedar blocks, as well as to the logs seized, which seizure, counsel for the respondent admitted could not be supported.

Galliher, J.A.

GALLIHER, J.A.:—From the evidence it is manifest that the operations carried on by the plaintiffs was the partial manufacture of shingles and then exporting them for the purpose of completing the manufacture outside the province.

In order to determine whether this is a contravention of sec. 100 of the Forest Act, ch. 17, of the Statutes of British Columbia, 1912, it is necessary to decide whether the article exported comes within the words "or other sawn lumber" in said section. Section 100 reads as follows:—

> All timber cut on Crown lands or on Crown lands granted since the twelfth day of March, 1906, or on Crown lands which shall hereafter be granted, shall be used in this province or be manufactured in this province into boards, deal, joists, lath, shingles, or other sawn lumber, except as hereinafter provided.

What has been understood as shingle bolts in this province is pieces of timber (chiefly cedar) cut in lengths from 48 to 52 inches and split by axe, and formerly all shingles in this province were manufactured from these. It is admitted that such timber could not be lawfully exported. Of late years, however, some of the mills have been taking second class cedar logs, sawing them into 16 and 24 inch lengths, shaping these up with saws so as to form blocks of different shapes, according to the nature of the timber, and then again by use of saws converting these blocks into shingles.

The plaintiffs have been for some months carrying on this process up to a point short of finally converting them into shingles, and then shipping them to a mill near Blaine in the State of Washington, where the process of shingle making is completed.

The Department have recognized the right to export what is known in the building trade as dimension stuff, being pieces of timber cut out of logs, and shaped up with saws in different dimensions and lengths, which cannot be said to be boards, deal, joists, lath or shingles, to use the words of the Act, but which are deemed to come under the class "or other sawn lumber."

It is clear from the evidence that what is exported here does

not come within the words above enumerated; then does it come within the words "or other sawn lumber."

The term "sawn lumber" is a wide one, and it is urged that these blocks which are only 16 or 24 inches long, would, if they were 8 or 10 or more feet long, be subject for export, and so far as sawing is concerned, quite as much labour is expended on them as on what is termed dimension stuff.

It is contended by the Crown that what is done here is an evasion of the Act, but that does not make it an offence if the wording of the Act permits of that evasion.

Had the words "or other sawn lumber" been omitted from the section, there could be no question, but we must presume they were placed there for a purpose, and that was to include something not specifically mentioned.

The learned trial Judge has found that "boards, deal, joists, lath and shingles" fall within the genus of finished products available in its present shape to the consumer, and is the genus within which the Legislature intended the general phrase to be confined. In my judgment, dimension stuff for the purposes for which it is to be used comes just as much within "the genus" as boards, deal, or joists. The fitting and framing of dimension stuff is no more a process of further manufacture than the planing, sawing and fitting into a building of rough lumber boards.

In the one example urged upon us, viz., the dimension stuff, it is clear to me that comes within the principle adopted by the trial Judge. I do not think this can be said of the shingle blocks in question. It is true considerable labour has been put upon them by sawing before they reach the stage at which they are exported, but they are exported for the very purpose, viz., sawing into shingles which the Act says shall be done within the province.

It might as well be said that if you saw a log square and export it for the purpose of being converted into boards, that would not be an evasion of the Act. Clearly the Act was never intended in that way.

I think it appears from the Act itself that the intention was that, as far as practicable, and in the interest of the industry in the province, the timber in the province should be manufactured there.

Bearing this in mind, and having regard to the fact that nothing inconsistent with this view was shewn in the manner in which the Act has been administered, and the wording of the section itself, I am of opinion with the learned trial Judge that the doctrine of *ejusdem generis* applies, and that the authorities cited by him are applicable.

I would dismiss the appeal.

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
McPhillips, J.A.

McPHILLIPS, J.A.:—I would dismiss this appeal. In my opinion the learned trial Judge has arrived at the correct conclusion.

The application made was one for an order for replevin—having reference to four carloads of cedar logs, situate on the plaintiff's spur track or siding connected with the Great Northern Railway at Crescent, B.C., and $1,700 worth of logs lying at the mill of the plaintiff at Crescent, B.C., which application was by consent treated as the trial of the action, the result being that the learned trial Judge, Mr. Justice Clement, dismissed the action.

The defendants in the action are the chief commissioner of lands, The Honourable William R. Ross (Minister of Lands), H. R. McMillan, the chief forester of the forest branch of the Department of Lands, and Alexander Cameron, a government official scaler. The timber in question was seized by the officials of the Provincial Government by the exercise of the provisions admitting of seizure under sec. 102 of the Forest Act, ch. 17 of the statutes of 1912 (3 Geo. V.) as amended by sec. 13 of the Forest Act Amendment Act, 1913, ch. 26, the contention being that the timber in question was cut on Crown lands, and to be in course of transit out of the province in contravention of the provisions of Part X. of the Forest Act. Section 100 of the Forest Act, ch. 17 of 1912, reads as follows:—

> 100. All timber cut on Crown lands or on Crown lands granted since the twelfth day of March, 1906, or on Crown lands which shall hereafter be granted shall be used in this province or be manufactured in this province into boards, deal, joints, lath, shingles or other sawn lumber, except as hereinafter provided.

There can be no question of the intention of the Legislature, and, in my opinion, it is very clearly expressed. The timber is to be used in the province, or if not, it cannot be shipped out of the province save in the manufactured state that the statute calls for, *i.e.*, it has to be in the shape of boards, deal, joints (I agree with the learned trial Judge we must read "joints" as a clerical error—it should be "joists") lath, shingles or other sawn lumber—the only exception being as provided by sec. 103 of the Forest Act as amended by sec. 14 of the Forest Act Amendment Act 1913, sec. 14, which reads as follows:—

> 103. The Lieutenant-Governor-in-council may authorize the export by lessees or licensees of the Crown of the following kinds of timber cut on ungranted lands of the Crown, or on lands of the Crown granted since the twelfth day of March, 1906, or which shall hereafter be granted, namely, piles, pulp-wood, telegraph and telephone poles, ties and crib timber, although not manufactured nor to be used in the province. And it is hereby declared that the Lieutenant-Governor-in-council was duly authorized under this Act to pass order-in-council No. 810 on the twelfth day of

July, 1912; and the said order-in-council and the action of the Lieutenant-Governor in pursuance thereof are hereby ratified and confirmed.

As the timber in question does not come within any of the particularly described classes, the question that has to be answered is whether it can be defined as sawn lumber.

The timber to which apparently all attention was directed at the trial, consisted of blocks—referred to by the learned trial Judge in his judgment as follows:—

> Each block is either 16 or 20 inches in length, and consists of a section of cedar log or tree sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying width, a very small are only of the original circumference of the log being in evidence.

We had the opportunity of viewing one of the blocks, it being an exhibit in the action.

The learned trial Judge further states in his judgment:—

> It is not disputed that the blocks are intended for the manufacture of shingles; and it is quite clear, in my opinion, that they are not a finished product in the sense that, in their present form, they can be put to any practical permanent use.

Mr. W. B. A. Ritchie in a most able argument addressed to the Court, endeavoured to establish that these blocks are sawn lumber within the terminology of the statute—that it could be said they were a new style of sawn or manufactured lumber, as yet new to the trade, and occupied a distinctive position. I must say that I was greatly impressed with the force of this argument, yet, after the most careful consideration, I have come to the conclusion that the learned trial Judge arrived at the right conclusion.

The question, it seems to me, as to whether the timber in question is or is not sawn lumber, is one of fact, and it is upon evidence this question must be determined—the designation "sawn lumber" is not self-explanatory.

It was held in *McAdie* v. *Sills* (1875), 24 U.C.C.P. 606, that in an action on the following agreement "Due W.M. $100 payable in lumber," etc.—that "lumber" being the general term used for different kinds of lumber, parol evidence was admissible to shew what kind of lumber the parties intended, namely, "culls and joists." The rule *nisi* was supported in Michaelmas Term before a Court consisting of Hagarty, C.J., Galt, and Gwynne, JJ. Hagarty, C.J., at p. 10, said:—

> Evidence may, I think, be admitted, that this general term "lumber" may be fixed and identified as the kind of lumber which defendant had on hand.

Galt, J., at p. 608, said:—

> It is, therefore, plain that the term "lumber" is a word signifying a variety of articles; and the question is, whether a Court is at liberty to receive parol evidence, not to vary, but to explain a written agreement.

B. C.

C. A.

1914

EXCELSIOR LUMBER CO. v. ROSS.

McPhillips, J.A.

There is no doubt that the ambiguity in this case is latent, and not patent; and it has always been held that in such a case parol evidence is admissible. Under the term "lumber" all descriptions of wood are included —such, for example, as oak, pine, hemlock, walnut, and a variety of others. It must, therefore, of necessity, be competent for the parties to shew what particular description of lumber was intended.

. . . . . .

It might be open to another question, if merchantable or any other particular description of lumber had been used: for in such case it might well be argued that culls could in no sense be said to fall within such a definition.

Now, we have here not "merchantable lumber," but we have to some extent—but to some extent only—a particular description, that is "sawn lumber"—sawn lumber standing alone possibly would cover the blocks in question, at least it would leave the matter in much doubt. But have we not to look to that which has gone before the use of the words "sawn lumber?" I think we have, and it is there seen that each specification is of a particular class of lumber known to the trade, *i.e.*, boards, deal, joints (to be read "joists"), lath and shingles, and when we have following these well-known trade descriptions the words "or other sawn lumber," does it not import sawn lumber of a definite and known trade description?

In Craies on Statute Law (1911), 2nd ed., at pp. 72 and 73, we find this stated:—

> Strictly speaking, there is no place for interpretation or construction except where the words of a statute admit of two meanings. The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of the Parliament which passed them. (*Tasmania* v. *Commonwealth* (1904), 1 Australia C.L.R. 329). The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.

This language is that of Lord Blackburn, at p. 412 in *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394.

In my opinion, it would not be carrying out the well-evidenced meaning of the Legislature if it were to be held that the act of sawing the timber alone, in a more or less indifferent manner, constituted manufactured in the province, and compliance with sec. 100 of the Forest Act. Surely the timber must be brought into some category, *i.e.*, be a manufactured article of some known nature and kind.

Lord Justice Bowen in *Curtis* v. *Stovin* (1889), 58 L.J.Q.B. 174 at 175, said:—

> I am of the same opinion. If it is possible to give the words in an Act of Parliament a sensible meaning, we must adopt it, *ut res magis valeat quam pereat.*

It would certainly be rendering the statutory enactment which is plainly aimed at the requirement that the timber to be shipped out of the province must first be manufactured in the province, null and void—if some mere perfunctory sawing takes place—creating nothing in the nature of a manufactured article, and that that constitutes compliance with the Act.

Here we must interpret the words "or other sawn lumber" following the words descriptive of manufactured timber.

Lord Loreburn, L.C., in *Nairn* v. *University of St. Andrews*, [1909] A.C. 147, 161, said:—

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

Here we have words that have relation to a very large industry in this province—the manufacture of lumber of various kinds out of timber which is one of the greatest of the many natural resources of this province, and the timber in the main comes off Crown lands held under lease or license from the Crown, and the Legislature evidently intends to insure the manufacture of the timber within the province.

We have Brett, M.R., saying in *The Duncln* (1884), 9 P.D. 164, 171:—

> My view of an Act of Parliament—and this article is equivalent to an Act of Parliament—which is made applicable to a large trade or business, is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing.

The learned trial Judge proceeded upon affidavit evidence, and upon reference to it I cannot say that there is any evidence which would entitle the timber in question to be rightly termed "sawn lumber" within the language of Brett, M.R., that is, it is not sawn lumber "according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing."

Here we have certain well-known classes of timber or lumber named, then the general expression "or other sawn lumber"—it is a proper case for the application of the *ejusdem generis* rule—which was the decision of the learned trial Judge.

Lord Bramwell in *Great Western R. Co.* v. *Swindon etc. R. Co.* (1884), 9 App. Cas. 787 at 808:—

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
McPhillips, J.A.

Where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.

Lord Campbell in *R.* v. *Edmundson* (1859), 28 L.J.M.C. 213, 215, said:—

I accede to the principle laid down in all the cases which have been cited that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

In *Re Stockport etc. Schools* (1899), 68 L.J.Ch. 41, Lindley, M.R., at p. 44, said:—

At the end of the list there is this proviso: "Provided always, that the said exemption shall not extend to any cathedral collegiate chapter or other schools: The Charity Commissioners ask the Court to read the expression 'other schools' in the largest possible sense, so as to exclude all schools whatever from the exemption, and therefore to bring them within their jurisdiction. I agree with the decision of Mr. Justice Stirling that this cannot be the meaning of the section. There are two ways of reading it: one is that the exemption shall not be extended to any school. The other way of reading it is, that the exemption shall not extend to any cathedral collegiate chapter or other schools more or less like them. Mr. Justice Sterling has adopted the second construction, and it appears to me that this is the natural and proper construction. I am quite aware that there have been cases such as *Anderson* v. *Anderson* (64 L.J.Q.B. 457) (to which I drew attention during the argument), where the Court has protested against pushing the doctrine of *ejusdem generis* too far. It is very often pushed too far, but I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate, and chapter, except to shew the type of school which they were referring to, and, in my opinion, 'other schools' must be taken to mean other schools of that type."

Chitty, L.J., at p. 45, said:—

I am of opinion that "other schools" cannot be read by itself, it must be schools of the like class. I entirely agree with Mr. Justice Stirling's observations on this point, and I shall not weaken them by repeating them.

Now, we have the words "other sawn lumber"—this must be of that type, or of the like class, mentioned, *i.e.*, boards, deal, joists, lath and shingles; but is the lumber in question of that class?

The chief forester of the Forest Branch of the Department of Lands, in his affidavit, said:—

I do not claim that the bolts in question were ordinary cedar bolts, but that they differed from shingle bolts in that they were cut into sixteen (16) inch lengths or twenty-four (24) inch lengths, and were split on a saw instead of an axe, and that these sawn bolts were of the same character as split shingle bolts, in that they were of no use or value, except for manufacturing into shingles, and that the course of business adopted by the plaintiff company was merely to commence the manufacture of shingles in this province and to finish it in the State of Washington.

It cannot be successfully contended, in my opinion, that the timber in question is sawn lumber of the type or a like class to that set forth in the Act.

It is to be observed that in *Foss Lumber Company* v. *The King* (1912), 8 D.L.R. 437, 47 Can. S.C.R. 130, there was a more specific definition, item 504 of Schedule "A" of the Customs Tariff of 1907, reading as follows:—

> Planks, boards and other lumber of wood sawn, split or cut, and dressed on one side only, but not further manufactured. Free.

First, we have certain lumber mentioned—as we have in sec. 100 of the Forest Act, that is, planks and boards are mentioned; but when it comes to defining "other lumber of wood," it is to be "sawn," split or cut and dressed "on one side only, but not further manufactured"—and is, therefore, fully described.

The Chief Justice of Canada, The Right Honourable Sir Charles Fitzpatrick, G.C.M.G., said, at 140:—

> Taken literally and giving to each word used its natural meaning, the section we are asked to construe says, that planks of lumber "sawn" on three sides and dressed on the fourth side (not further manufactured) should be admitted free of duty. The planks in question come, if we are to judge from their physical appearance, in all respects within that description.

And at p. 142, the Chief Justice further said:—

> One can, of course, imagine, as argued by the respondent, a variety of ways in which, by the aid of a saw, the process of manufacture might be very considerably advanced, but we are now called upon to ascertain the intention of Parliament from the words used in this item, as applied to the facts of this case, and we are not concerned with interesting speculations as to the possibility of that intention being defeated by ingenious devices. "Words, like certain insects, take their colour from their surroundings." Here, the word "sawn" is used in the adjectival sense, and must be read in connection with the noun "plank," of which it expresses a quality.

Following the judgment of the Supreme Court it is for us to ascertain the intention of Parliament from the words used in sec. 100 of the Forest Act, ch. 17 of 1912, B.C.—from the words used in the section as applied to the facts—and it would appear to me that it is incontrovertible that the sawn lumber must be of some classification, and of a classification similar or like to that enumerated—all being classes known to the trade, *i.e.*, boards, deal, joists, lath, and shingles—but, of what class is the timber in question, and in what way is it sawn lumber known in the timber industry?

Mr. Justice Duff in his dissenting judgment in *Foss Lumber Co.* v. *The King*, 8 D.L.R. 437, 47 Can. S.C.R. 130, refers to the planks or boards there under consideration, and said at pp. 148, 149:—

B. C.
C. A.
1914
EXCELSIOR LUMBER CO. v. ROSS.
McPhillips, J.A.

After having been completely manufactured as "planks" or "boards" they have been subjected to a further process—a process which forms no part of the procedure by which "planks" and "boards" as such are produced from timber, and which is a special process that is designed to fit the "planks" and "boards" so produced for certain special purposes; and did, in fact, fit them for those purposes. It is true that this special process consisted in part in applying a saw to each of these pieces. But that was not the whole of the process; in addition to that there was manipulation by special devices, which reduced the pieces comprised in any parcel to the uniformity of dimensions which was necessary to make them suitable, and did, in fact, make them suitable for use as "joisting" and "studding," and by which they were converted into a commercial commodity having, in the lumber trade, a distinctive designation.

I have already shewn the distinction which exists in the cases, and I think I can well rely upon the line of reasoning here quoted of Mr. Justice Duff that sec. 100 of the Forest Act, adopting the language of Mr. Justice Duff, requires "other sawn lumber" to be "a commercial commodity having in the lumber trade a distinctive designation," and I would further say must be of a like or similar class to those mentioned, *i.e.*, boards, deal, joists, lath and shingles.

My conclusion is that the judgment appealed from ought to be affirmed, and the appeal, therefore, be dismissed.

Appeal dismissed.

CAN.
S. C.
1913

DONKIN (defendant, appellant) **v. DISHER** (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 27, 1913.

1. PARTNERSHIP (§ I—1)—EXISTENCE—ALLEGED ADMISSIONS—PROFIT SHARING AGREEMENT BETWEEN EMPLOYER AND EMPLOYEE.

Whether or not a partnership should be declared to have been substituted by an alleged oral agreement for a prior profit-sharing agreement between an employer and employee made under secs. 3 and 4 of the Master and Servant Act, R.S.B.C. 1911, ch. 153, is to be determined on conflicting evidence, on the credit to be given the witnesses and from the surrounding circumstances and the conduct of the parties; and it is not conclusive evidence of the existence of a partnership that the defendant in a letter written to the plaintiff employee referred to their arrangement as a "partnership" and later served upon him concurrently with a notice of dismissal a "notice of dissolution of partnership;" it is still open to the Court to find that the word "partnership" as so used was not used in the legal technical sense where the evidence shews that the parties had not reached an agreement as to the contribution by each nor as to the disposal of the capital invested in the business to which the employee had contributed nothing.

[*Disher* v. *Donkin*, 12 D.L.R. 405, 18 B.C.R. 230, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Disher* v. *Donkin*, 12 D.L.R. 405, 18 B.C.R. 230, 24 W.L.R. 955, reversing the judgment of Morrison, J., at the trial, and maintaining the plaintiff's action.

The appeal was allowed.

The plaintiff's action sought a declaration of partnership. The learned trial Judge held, on the evidence, that, as a matter of fact, the defendant had not agreed to admit the plaintiff as a partner in his business and dismissed the action with costs. By the judgment appealed from the action was maintained; it was held that the defendant's correspondence and the notice of dissolution amounted to an admission of an existing partnership, and the usual accounts and inquiries were directed.

Lafleur, K.C., and *R. M. MacDonald*, for the appellant:—We submit that the judgment of the learned trial Judge was right, and that no agreement constituting a partnership had ever been arrived at between the parties. The respondent submitted terms in the document he had prepared, but they were never assented to, and the appellant plainly stated that he would not assent to them. On the terms proposed by respondent, one-half of the capital and assets which the appellant had in the business would have been handed over to the respondent, who never put a dollar of capital into the business. The verbal and only agreement between the parties was that the respondent was to receive remuneration by percentage of profits. The terms of any further arrangement were left to future settlement; there can be no completed *vinculum juris* until terms have been agreed upon: *Blackwoods, Ltd.* v. *Canadian Northern R. Co.*, 44 Can. S.C.R. 92 at 103. The terms of an alleged agreement must be certain for the Court must know what it is to enforce: *Taylor* v. *Brewer*, 1 M. & S. 290; *Pearce* v. *Watts*, L.R. 20 Eq. 492. A final acceptance of terms must be distinguished from a preliminary negotiation as the basis for a formal agreement which alone is to be binding. Reference to a proposed formal document is not conclusive: *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Winn* v. *Bull*, 7 Ch.D. 29. To found estoppel, a representation must be of an existing fact, not of a mere intention: 13 Halsbury, Laws of England, 377. Such a representation must be clean and unambiguous: 13 Halsbury, Laws of England, 379. Such representation must not be induced by the party complaining: 13 Halsbury, Laws of England, 381. It is necessary to estoppel by representation that, in acting upon it, the party to whom it was made should have altered his position to his prejudice: 13 Halsbury, Laws of England, 383, 384. As respondent was an employee remunerated by an interest in the profits, the provisions of secs. 3 and 4 of the Master and Servant Act, R.S.B.C. 1911, ch. 153, are applicable, and his arrangement is to be deemed to be within the provisions of the Act, unless "this may otherwise be inferred."

S. S. Taylor, K.C., for the respondent:—The evidence shews that during 1910 it was definitely arranged that partnership should be entered into for 1911 and that a definite partnership agreement was entered into in 1911, which is sustained by the appellant's actions and conduct; by the evidence and by all the surrounding

CAN.
S. C.
1913
DONKIN
v.
DISHER.
Argument

circumstances; also by statements which the appellant had prepared at the time, which statements would be inconsistent with any other condition.

The evidence concerning the months of June to September, 1912, contained in the letters of the appellant, his telegrams, his notice of dissolution of partnership given under the Partnership Act, and his admission to the manager of the Seattle agency of Libby, MacNeill & Libby, together with the evidence of the respondent, shews conclusively that a partnership existed from January 1, 1911. The evidence on discovery of the appellant is consistent only with the existence of a partnership. See Partnership Act, ch. 175, R.S.B.C. 1911, sec. 4.

The evidence, moreover, is sufficient to meet the requirements of the Master and Servant Act, R.S.B.C. 1911, ch. 153, sec. 3; it is explicit and direct, and conclusively supports the partnership arrangement.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Both parties agree that, previous to 1911, they stood towards one another in the relation of master and servant. It is also admitted that, at the end of 1910, a new agreement was made applicable to the coming year. The dispute is as to the terms and legal effect of that agreement. The appellant says that it was made merely for the purpose of increasing the share in the profits which the respondent had been receiving out of the business as his remuneration for services rendered, that is to say, it was merely intended to modify the then existing agreement, which was, undoubtedly, one of profit-sharing. On the other hand, the respondent submits that the relation of master and servant ceased at the end of 1910, and that he then became a partner in the business on the basis of a half-interest in the profits, and that, with respect to the capital, stock-in-trade, etc., the appellant became a creditor of the new firm. The burden of proof was on the plaintiff, and I do not think that he has satisfied it. Where there is doubt the conduct of the parties at the time is the best evidence of their intentions; especially when the version of the respondent involves a fundamental change in the relations of the parties.

In fact, no change was made in the management of the business or in the relations of the parties towards one another or towards their clerks; no new books of account were opened; the bank account was kept in the same way; cheques, drafts and notes were signed in the old name by the respondent as attorney and not as a partner. In fact, the conduct of the parties at the time corroborates entirely the appellant's position.

I will add nothing to what my brother Duff says as to the two letters relied upon in the Court of Appeal. He conclusively establishes that, read in the light of all the surrounding circumstances, their probative effect is of little value. Neither party

was very disingenuous, and, in that respect, honours are easy between them.

I would maintain the appeal with costs.

DAVIES, J., agreed with ANGLIN, J.

IDINGTON, J.:—I think that the learned trial Judge correctly interpreted the language and conduct of these parties, and defined their relations founded thereupon and applied the appropriate remedy for such relief as respondent was and is entitled to.

Idington, J.

With great respect, I do not think the correspondence relied upon by the Court of Appeal can, when read in light of the acts of the parties both before and after the same, justify the variation of the trial judgment.

The word "partnership" is capable of many meanings and we ought not to fix upon it, as used by these parties, the one legal technical meaning it may bear when obviously the parties have not reached that stage in their protracted negotiations, where such technical meaning would represent their understanding.

The appeal should be allowed here and below, and the judgment of the learned trial Judge be restored.

DUFF, J.:—It is a little important in considering this appeal to note what the foundation of the respondent's claim exactly is. The claim is based upon an oral contract of partnership alleged to have been made between the appellant and the respondent in the latter part of the year 1910, under which, according to the respondent, the two parties actually carried on business under the name of H. Donkin & Co. from January 1, 1911, until September 21, 1912. The learned trial Judge found that no such partnership existed. His judgment was reversed by the Court of Appeal, which held that certain correspondence which passed between the parties in January and February, 1912, contained an admission by the appellant of the existence of the partnership alleged by the respondent of such weight as to dispense with the necessity of considering the oral evidence upon which the judgment of the learned trial Judge was founded. Reading this correspondence in light of the conduct of the parties, especially the conduct of the respondents, I am not able to agree with the conclusion at which the Court of Appeal arrived touching the effect of it, and I think, after an examination of the evidence as a whole, that there is no sufficient ground for disturbing the findings of the learned trial Judge, but that, on the other hand, the evidence preponderates in favour of his view.

Duff, J.

Prior to the year 1910, the respondent had been for some years in the employ of the appellant, who had been carrying on business in Vancouver under the name of H. Donkin & Co. The respondent was first remunerated by a salary alone, but later received a share of the profits as well. The agreement, as he now

CAN.
S. C.
1913
DONKIN
v.
DISHER.
Duff, J.

alleges, made in 1910, was to the effect that a partnership was formed between himself and the appellant to take over the business, including all the assets of H. Donkin & Co., and carry on that business during the year 1911 without change in the firm name, the partners sharing the profits equally. There was, he says, a valuation of the assets of H. Donkin & Co., and it was a part of the arrangement that the appellant was to be paid from these assets according to this valuation. The appellant denies that any agreement for partnership was entered into. He admits that a fresh agreement was made in 1910; he says it was limited to a single point, viz., that, beginning with January 1, 1911, the appellant should receive half the net profits of the business as his remuneration. Disher's status as an employee was, he says, to remain unchanged.

There is a good deal in the evidence, no doubt, to shew, and I think it is probable, that Disher proposed to the appellant that he should be admitted as a partner in the strict sense, that is to say, that he should cease to be an employee and become joint owner of the business with Donkin. I think it is also likely that Donkin did not expect to retain Disher permanently in association with him without ultimately effecting some re-adjustment of their relations by which Disher should become entitled to a proprietary interest in the business. There is no doubt that the question of partnership in this sense was considered by Donkin. He appears, however, to have found it very difficult to overcome his objection (a very substantial one in the circumstances) that, Disher being engaged extensively in speculations, the suggested arrangement might expose the business to disorganization at the instance of Disher's creditors in the event of his speculations proving unfortunate. He had under consideration apparently an alternative plan of incorporating a company to take over the business.

The learned trial Judge, as I have already said, accepted the appellant's evidence upon these points. The correspondence which influenced the judgment of the Court of Appeal does not appear to me to be inconsistent with the view of the learned trial Judge that Donkin had not assented to Disher's proposal that he should be admitted to the status of a partner. On the contrary, Donkin's letter of February 12, upon which the learned Chief Justice based his conclusion, appears to me to fit in with the theory that Donkin had not yielded to Disher's efforts to induce him to make the proposed change better than with the alternative theory that more than a year before Disher had become owner of a half-interest in the business, and that, during the intervening period, they had been carrying on that business together as partners. On the latter hypothesis there are many things in Donkin's letter which would be both unmeaning and foolish. Then if we consider the conduct of Disher himself, it does not appear to be that of a

person who had been recognized as having the status of a partner in this concern for more than a year. If his situation had been such as he describes, he would not, I think, have waited until Donkin had actually left Vancouver with the expectation of being absent several months before insisting that he should be recognized as a partner in the firm's dealings with their bankers or that the terms of the partnership should be definitely reduced to writing. Donkin's letter of February 12 ought to have apprised him of the fact that Donkin was not recognizing him as co-proprietor of the business, and yet there is no answer to that letter, and, on Donkin's return to Vancouver, not a word is addressed to him by Disher on the subject. One ought, perhaps, to note the use of the word "partnership" in Donkin's letter of February 12. I entirely agree with the learned trial Judge that the term "partnership" is often loosely used as descriptive of such arrangements as that which Donkin admits he had with Disher. But the letter appears to me to make it abundantly clear that, in using the term, Donkin had no idea that he was employing a word which implied co-proprietorship.

I see no reason to disagree with the view of the learned trial Judge that Disher was not deceived by the use of this phraseology. It is perhaps needless to refer to the point taken, not very seriously I thought, by Mr. Taylor, that by force of the provisions of the British Columbia Partnership Act, sec. 4, ch. 175, R.S.B.C. 1911, the arrangement with regard to profits is *primâ facie* evidence of the existence of partnership. These provisions of the Partnership Act must be read with sec. 3, ch. 153, R.S.B.C. 1911, Master and Servant Act, which plainly enacts that, in the circumstances existing in this case, the onus rests upon the employee who alleges that he has been admitted as a partner in the strict sense.

The appeal should be allowed.

Anglin, J.

ANGLIN, J.:—Upon conflicting evidence the learned trial Judge found that the arrangement made between the parties to this action, about the end of the year 1910, was not a partnership, but an agreement whereby the plaintiff, while remaining an employee of the defendant, should for the future be entitled to receive, as his remuneration, a 50% share in the profits of the defendant's business instead of the salary of $1,200 a year and a 10% share of the profits, which he had theretofore been paid. That conclusion was reversed by the British Columbia Court of Appeal solely on the ground that a letter written by the defendant, in reply to a letter sent him by the plaintiff asserting that he "had an undivided half-interest" and asking the defendant to execute partnership articles, affords convincing evidence of "a partnership such as the plaintiff alleges," because, instead of writing a "frank, fair letter" denying that "there was any partnership," the defendant wrote a "temporizing" and "indefinite" reply. Far from

CAN.
S. C.
1913
DONKIN
v.
DISHER.
Anglin, J.

being able to find, in the letter so much relied upon, conclusive proof of the partnership alleged by the plaintiff, giving due weight to the circumstances under which it was written, I am, with respect, of opinion that it affords no evidence of any real value against the defendant. He was then *en route* to the Orient on a trip of several months' duration. He had already travelled from Vancouver to Montreal. He had left the care of his business in the hands of the plaintiff, who had a comprehensive power of attorney. It was of vital importance to him at that moment that the plaintiff should not be antagonized, as he probably would have been, by such a distinct and emphatic repudiation of his partnership pretensions as the learned appellate Judges seem to have thought it was the defendant's paramount duty to have made.

The arrangement now claimed by the plaintiff is in itself improbable. That provided for in the document which he had prepared and to which he sought to procure the defendant's signature on the eve of his departure differed very materially from what he now asserts to have been the agreement. That document provided for an arrangement still more improbable. The conduct of the plaintiff in obtaining, in January, 1912, a written opinion from his own solicitors as to the liability of one partner and his share in the partnership property for the debts of the other partner, and procuring a confirmation of that opinion from the defendant's solicitors for the purpose of satisfying the defendant, is scarcely consistent with there having been a concluded agreement for partnership in December, 1910, or January, 1911, as he now asserts. The fact that no partnership books or accounts were opened, although the plaintiff claims that the partnership was in operation for over a year, is also significant. The sending by the defendant to the plaintiff contemporaneously of two notices, one terminating the partnership, the other dismissing the plaintiff as an employee, was merely a precautionary measure, and affords no evidence for or against the pretensions of either party. Apart from the letter of the defendant, the case depends upon a weighing of conflicting oral testimony in the light of the circumstances. The learned trial Judge would appear to have thought the defendant a more credible and reliable witness than the plaintiff, and did not find in the rest of the evidence enough to turn the scale in the plaintiff's favour.

We are in precisely the same position as the learned Judges of the Court of Appeal were to determine what inferences should be drawn from what the defendant wrote. I gather from their opinions that, but for this letter, they would not have differed from the conclusion reached by Morrison, J., on the oral testimony. It is, therefore, with less than usual reluctance that I would reverse the judgment in appeal and restore that of the trial Judge, with which on the whole case I agree.

The appeal should be allowed with costs in this Court and in the Court of Appeal.

BRODEUR, J.:—We have to decide whether there was a partnership between the parties; or whether their relations were those of master and servant. The plaintiff, respondent, claims that he was a partner and the appellant on the contrary says that the respondent was entitled to a share in the profits of his business, and that he was not a partner in the ordinary sense of the word.

For some years previous to January 1, 1911, the respondent was in the appellant's employ as salesman. At first his services were paid on straight salary, but later he got also a share of 10% and of 20% in the profits of the business. It was later on agreed that from January 1, 1911, he would get 50% of the profits.

The appellant, who was doing business under the firm name of H. Donkin & Co., as a commission agent, had not a very large capital invested in his trade, and he did not require, also, much money to run his affairs; but in order that the business should become the property of the two parties it was necessary that the capital invested should be determined and that the new partner should either acquire a share of that capital or should invest a similar amount or that some other agreement should be made to put them both on the same footing.

Even in assuming that the agreement reached by the parties was in the nature of a partnership, it was necessary that there should be an agreement as to the contribution of each of them to the partnership. The respondent stated under oath that no contribution was to be put in by him, but that the capital then invested in the business by the appellant should stay and that he would be creditor for the amount that was to be ascertained as being the capital invested. No figure, however, is agreed upon. In the course of the year 1912, the respondent had a partnership agreement prepared by his solicitors and the capital that was fixed at $40,000 was declared to belong to the two alleged partners. It was never agreed as to what should be done with regard to the contribution of each party and specially as to the disposal of the capital invested in the firm business of the respondent.

But the appellant denies entirely the respondent's statement that they reached an agreement as to a contract of partnership. Their minds never met as to the contribution and as to the amount thereof and how it would be. The evidence is conflicting on those points, and the story as given by the appellant was accepted by the trial Judge.

It is true that in some letters and another document the appellant used the word "partnership" to qualify their relations. But he had in his mind the share profit arrangement agreed upon, and he never pretended to be sure that such a word would cover their agreement or not. We should take the agreement as it has been proved and established, and the evidence does disclose simply a profit-sharing arrangement that the appellant is willing to carry out.

CAN.

S. C.
1913

DONKIN
v.
DISHER.

Brodeur, J.

The Master and Servant Act, R.S.B.C. 1911, ch. 153, enacts in secs. 3 and 4 the following:—

It shall be lawful in any trade, calling, business, or employment, for an agreement to be entered into between the workman, servant, or other person employed and the master or employer, by which agreement a defined share in the annual or other net profits or proceeds of the trade or business carried on by such master or employer may be allotted and paid to such workman, servant or person employed, in lieu of or in addition to his salary, wages or other remuneration; and such agreement shall not create any relation in the nature of a partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding; and any person in whose favour such agreement is made shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer of the net profits or proceeds of the said trade, calling, business or employment on which he declares and appropriates the share of profits payable under the said agreement shall be final and conclusive between the parties thereto, and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever.

Every agreement of the nature mentioned in the last preceding section shall be deemed to be within the provisions of this Act unless it purports to be excepted therefrom, or this may otherwise be inferred.

There is then, under the provisions of those sections, a presumption that an employee who receives as remuneration a share in the profits is not a partner. The relations of partners in such a case are not to be inferred from the fact that the employee gets such a remuneration. Of course, that presumption can be destroyed if a formal agreement to the contrary is proved. But in this case there never was such an agreement. That is the finding of the trial Judge and we should accept it.

For those reasons I am of opinion that the appeal should be allowed with costs and that the judgment of the trial Judge should be restored.

Appeal allowed with costs.

MAN.

C. A.
1914

MANSON v. POLLOCK.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 16, 1914.

1. CONTRACTS (§ I D4—62)—MEETING OF MINDS—SUFFICIENCY OF ACCEPTANCE.

The owner of land who signs and forwards to the proposed purchaser an agreement of sale thereof is entitled to withdraw his offer before the latter accepts; and such right is not barred by the purchaser signing and retaining the agreement where he did not disclose the fact of signature to the vendor, but, on the contrary, held out to him that he would not accept unless certain restrictions contained in the contract form were removed.

[*Manson* v. *Pollock*, 12 D.L.R. 82, reversed on other grounds.]

APPEAL by the plaintiff from the decision of Galt, J., *Manson v. Pollock*, 12 D.L.R. 82, 24 W.L.R. 28.

The appeal was allowed.

F. M. Burbidge, and *H. Andrews*, for defendant, respondent.

HOWELL, C.J.M., concurred in allowing the appeal.

RICHARDS, J.A.:—The plaintiff owned land in Winnipeg, the title to which was under the Real Property Act and was registered in his wife's name. Richards, J.A.

Plaintiff and defendant did not meet in the transactions in question. Mr. McKinnon, a land broker, at first conducted negotiations, which resulted on April 15, 1912, in the plaintiff agreeing to sell, and the defendant agreeing to buy, at a price, and on terms of payment, which were verbally arranged. But it was then understood that there were to be restrictions as to the class of building to be erected on the land, and the terms of those restrictions were not arranged.

On April 16, 1912, defendant gave $25 to Mr. McKinnon, to be paid as a deposit on the sale, and received from him a receipt in writing, which mentioned the property in an indefinite way but said nothing as to price, or terms, and contained the qualifying words, "subject to owner's approval."

The defendant then stated that Mr. Bowles was his solicitor and would close the matter out for him. For the purpose of enabling it to be so closed out, he then paid to Mr. Bowles a sum which, with the $25, would cover the cash payment on the purchase.

On April 17, 1912, Mr. McKinnon paid the $25 to Mr. Mackenzie, of the law firm of Munroe, Mackenzie & Macqueen, whom the plaintiff had stated to be his solicitor, to carry out the transaction, and received from him a receipt in writing, signed in his firm's name, stating more fully the terms, but also qualified by the words, "subject to owner's approval."

Neither of these receipts referred to the building restrictions, which were still not settled.

There was nothing thereafter to shew plaintiff's approval till April 23, when a formal agreement of sale under seal, which had been prepared by Mr. Mackenzie and signed by the plaintiff's wife, was sent by Mr. Mackenzie to Mr. Bowles, to be executed by the defendant. It contained, amongst others, these clauses:—

11. The terms "vendor" and "purchaser" in this agreement shall include the executors, administrators and assigns of each of them.

14. The purchaser further covenants with the vendor that he will not erect upon said land any building for store, shop or work purposes, and that he will not erect upon said land any apartment block or similar building, but that any building that he may erect upon said land shall be built and used for strictly private residential purposes.

MAN.

C. A.

1914

MANSON v. POLLOCK.

Richards, J.A.

The defendant signed the agreement after it was so sent to his solicitor. But, without disclosing to the plaintiff, or the plaintiff's solicitor, that he had done so, he retained it, and at once took exception to the building restrictions, and efforts were made on his behalf, by Mr. McKinnon and Mr. Bowles, to get the plaintiff's consent to their being dispensed with, or modified. Failing in that, the defendant, through the same gentlemen, tried to buy from plaintiff some adjoining land, owned by the plaintiff, on which the latter had intended to build a dwelling for his own use.

The plaintiff was apparently willing to waive the restrictions if defendant would buy this adjoining land also, but the matter of buying this latter piece fell through as they could not agree on its price.

On April 26, the plaintiff, on being told by Mr. McKinnon, as the fact was, that the defendant still objected to the restrictions, told Mr. McKinnon that he, the plaintiff, called the deal off. Mr. McKinnon then asked about a return of the $25 deposit, but the plaintiff refused to give it back, claiming the right to keep it.

Mr. McKinnon then went to the defendant and told him of the plaintiff's repudiation, and said that he, himself, would repay defendant the $25. The defendant demurred to taking it, or treating the negotiations as ended. But, while he was called off for a few minutes on some business matter, Mr. McKinnon went away, leaving on defendant's desk his own cheque for the $25.

The defendant then telephoned to Mr. Bowles, stating what had occurred, and, by assent of both defendant and Mr. Bowles, the defendant accepted the cheque, and $12.50, half of the $25, was repaid Mr. McKinnon, on the ground that the latter should not be obliged to bear the whole of the loss.

Mr. Bowles thereafter tried, unsuccessfully, to get the plaintiff's solicitor to return the $25.

The matter then stood until May 14, 1912, when a tender was made to plaintiff of a sum sufficient (with the $25 deposit) to pay the cash payment on the purchase. The tender was refused.

On May 15, 1912, the defendant filed a caveat against the lands, claiming title under the formal agreement.

On the same day the plaintiff's wife transferred the land to the plaintiff, and a certificate of title was issued to him.

On June 14, 1912, this action was brought for a declaration that the defendant had no interest in the land, and asking that the registration of the caveat should be vacated.

The defendant filed a statement of defence, and also counterclaimed, by setting up the formal agreement and asking that it be specifically performed.

The plaintiff filed a replication, setting up that, on April 15, 1912, the plaintiff's wife was the registered owner under the Real Property Act of the land, and that on that date the defendant

agreed to buy from her the land upon certain terms and conditions and paid her the $25.

The reply further set up that the defendant had abandoned his intention and repudiated his contract to purchase and had so informed the plaintiff's wife and had received back the deposit, and that the wife had acquiesced in the abandonment, and that, except the said agreement, neither plaintiff nor his wife had ever agreed to sell the land to the defendant.

The defendant amended his counterclaim by claiming that by the reply the plaintiff had admitted the agreement and should not be permitted to deny it.

The learned trial Judge held, in effect, that there was a completed agreement, and that the defendant did not concur in its abandonment by the plaintiff, and that it remained in force, and that the defendant was not guilty of laches because of the delay between April 26 and May 14. He dismissed the plaintiff's action and ordered specific performance of the agreement as asked in the counterclaim.

I have some doubt whether, in view of the form of the pleadings, it is open to the plaintiff to deny that the agreement was completed. If it were not for the replication the counterclaim would fail, I think, for the reason that no completed agreement ever in fact existed, as I read the evidence.

The verbal agreement was incomplete, as it was understood that there were to be building restrictions and the terms of those restrictions were not agreed on.

The two receipts were "subject to owner's approval," so they did not shew a concluded bargain.

Then, there being still no completed agreement, the formal document was prepared. It contained building restriction clauses, the form and extent of which had not, as yet, even been discussed. Until it should be agreed to by the purchaser there could be no consensus of the minds of the parties. Therefore the sending it to the defendant's solicitor, though it was signed by the plaintiff's wife, could be no more than an offer to contract on its terms. It was, in effect, the vendor saying in writing: these are the terms on which I am willing to sell. If you choose to accept them and execute this document it will then, but not till then, become a contract binding me to sell.

It is true that the defendant signed it. But he did not disclose that fact to the plaintiff, or treat it as a completed contract. On the contrary, he retained it and objected to its terms and held out to the plaintiff that he would not accept them.

While matters were in that position the plaintiff withdrew his offer, as he had the right to do before acceptance by the defendant. And even though he had signed the document the latter had not, up to then, in fact, accepted it or intended to become bound by it.

The plaintiff's withdrawal ended the uncompleted negotiations

MAN.

C. A.

1914

MANSON v. POLLOCK.

Richards, J.A.

and left no offer open for the defendant to accept. So that, when he, later on, decided to accept, it was too late and he could not hold the plaintiff to the offer.

If the plaintiff is not estopped by his pleading, the foregoing shews a complete defence to the claim for specific performance.

It does not seem necessary, however, to decide whether he has so estopped himself, as I think that, even if we must, because of the pleadings, treat as completed a contract which, in fact, never was so, the plaintiff has shewn that the defendant concurred in his repudiation and thereby abandoned it.

It seems immaterial whether the $25 was repaid to the defendant by the plaintiff or by Mr. McKinnon. The important point is that the defendant accepted it. He did not take it as a gift. Clearly he took it to avoid, or decrease, his supposed loss of the $25 paid to plaintiff. That implies that he thought he had lost the $25.

I do not express any opinion as to whether he had, in fact, forfeited that sum. But, if he had, it could only be because of his concurring in the plaintiff's repudiation of the agreement to sell—that is, by abandoning that agreement. If he had not done so, and if it was still open to him to claim specific performance, he would be entitled to have the $25 applied on the cash payment of the purchase money.

As already stated, the defendant had placed the matter in the hands of his solicitor, Mr. Bowles. Mr. Mackenzie, the plaintiff's solicitor, stated, in his evidence, that he told Mr. Bowles that the plaintiff would not remove the restrictions, and that, thereafter, Mr. Bowles told him that the defendant would not go on with the transaction, and asked for a return of the $25.

Mr. Bowles remembered asking for the money, but did not recollect saying that the defendant would not go on with the transaction, though he could not be sure he had not. He said he had not, in fact, been instructed to either abandon or ask for the $25.

In the absence of contradiction by him, I think we must find that Mr. Bowles did say that his client would not go on with the matter. By holding him out as his representative the defendant, I think, so clothed Mr. Bowles with authority, in the eyes of the other party, as to justify the plaintiff and his solicitor in accepting, as they did, Mr. Bowles' statement, and precluded himself from now denying, as against the plaintiff, Mr. Bowles' power to bind him by it. What Mr. Bowles so said was a sufficient communication (if one was necessary) to the plaintiff of concurrence in the latter's repudiation.

In equity a contract can be rescinded by one party verbally abandoning or repudiating it and the other party verbally concurring. The fact that the abandoned contract was under seal does not prevent the application of the rule.

Whether, if the defendant had not accepted the $25, the delay

from April 26 to May 14, without objecting in some way to the plaintiff's express repudiation, would be evidence of concurrence therein, need not now be considered.

I would allow the appeal with costs, set aside the judgment in the Court of King's Bench, allow the plaintiff's claim to have the caveat removed, and dismiss the counterclaim. Costs of the action and counterclaim to be paid by defendant to plaintiff.

Perdue, J.A.

PERDUE, J.A.:—The defendant relies wholly upon the formal agreement, exhibit 5, and bases no claim upon the receipt, exhibit 8, signed by Munroe, Mackenzie & Macqueen. That receipt was given "subject to owner's approval" and the owner is not shewn to have approved of the terms therein set out.

The evidence shews that McKinnon, a real estate dealer, suggested to the defendant the purchase of the land in question. This was on or about April 15. The land was then in the name of Mrs. Manson, but her husband was the real owner and conducted all the negotiations. I shall therefore speak of Manson as the actual vendor. McKinnon made inquiry of Manson as to the price and terms. Manson stated the price but refused to sell unless the property would be used for residential purposes only. The terms were then communicated to Pollock and he was told by McKinnon that no store or apartment block was to be built upon it. Manson owned the adjoining thirty-three feet of land and intended to build upon this a residence for himself. He therefore insisted upon the building restrictions.

Pollock was willing to buy the land and gave McKinnon $25 to pay to Manson's solicitors as a deposit on the purchase and took objection at the time to any restrictions affecting the property. This money was paid over and the receipt of April 17 was given by the solicitors. They then prepared the formal agreement, had it executed by Mrs. Manson and sent it to Pollock's solicitor, Mr. Bowles, so that it might be signed by the purchaser and the transaction completed.

On or about April 23, Pollock executed the agreement and placed the balance of the cash payment in his solicitor's hands, but he objected to the restriction against erecting upon the land any building not intended for a private residence. The signed document and the cash payment were held by Pollock's solicitor and negotiations were opened with Manson and his solicitor, Mr. Mackenzie, with the object of getting the restrictions removed. Manson proved obdurate and positively declined to waive or modify them. Then Mr. Bowles suggested that Pollock should buy the adjoining thirty-three feet of land owned by Manson, the idea being that if the latter ceased to own the adjoining land he would have no further interest in maintaining the restrictions. Negotiations with this object in view were carried on. McKinnon took an active part in them and appears to have worked

MAN.
C. A.
1914
MANSON
v.
POLLOCK.
Perdue, J.A.

in the interests of the defendant. The plaintiff, however, asked a higher price for the thirty-three feet than the defendant would give and negotiations were broken off. It is at this point that difficulty arises in determining exactly what was done.

Manson says that when negotiations for the thirty-three feet failed McKinnon said to him, "we will call the deal entirely off." McKinnon denies telling Manson that Pollock would not carry out the contract with the restrictions in it, but admits saying to Manson, "Do you want to call the deal off? Do you want to give back that $25 deposit to Mr. Pollock?" To this, he says, Manson replied that they would keep it for solicitor's fees. McKinnon then went and reported to Pollock what had taken place at the interview with Manson and offered himself to pay the $25 back to Pollock. Pollock at first refused to take it, but McKinnon left a cheque for the amount on Pollock's desk and went out. Pollock accepted the cheque and telephoned to Mr. Bowles to pay McKinnon $12.50. This Mr. Bowles did and afterwards the amount was repaid to him by Pollock.

Mr. Mackenzie, Manson's solicitor, gives very clear evidence as to the negotiations for the removal of the restrictions or, failing that, for the purchase of the adjoining land, all of which negotiations fell through. He relates a conversation between himself and Mr. Bowles in the course of which he says, "Mr. Bowles told me that Mr. Pollock would not go on with the transaction and he asked me to return the $25 which Mr. McKinnon had left with me." They then had an argument about the defendant's right to a return of the deposit. Mackenzie called up Manson and referred the matter to him with the result that Bowles' request for the return of the deposit was refused.

Mr. Bowles says he has no recollection of stating to Mr. Mackenzie that Pollock would abandon the deal, but that he could not be positive as to that. He admits that he did ask for the return of the deposit, but says Pollock had not instructed him to call off the deal or to get the return of the deposit.

Pollock was informed by McKinnon that the return of the deposit had been refused. McKinnon, probably as a matter of policy, offered to repay it to Pollock, and Pollock received the money, paying back to McKinnon a half of the amount. The facts in regard to the return of the deposit and Pollock's actions in regard to the same are clearly established and appear to me to shew beyond doubt that he was unwilling to go on with the purchase, subject to the restrictions, that he had abandoned the transaction and wished to get back his deposit. The learned trial Judge has, however, made a different deduction from the evidence. He says:

> But it must be borne in mind that the $25 in question was not the deposit which the plaintiff and his wife insisted on retaining, but was only a similar amount which, for business reasons, McKinnon thought it advisable to pay over to the defendant. It must also be borne in mind that

McKinnon's agency for either or both of the parties had terminated several days before. I think, therefore, that this incident cannot be relied upon for the purpose claimed by the plaintiff.

Now, as to the first part of the above, the evidence of McKinnon who was a witness for the defence is clear that he paid the $25 himself to Pollock as a return of the deposit when the plaintiff refused to repay it. The defendant accepted the $25 from McKinnon knowing of the plaintiff's refusal, but paid back to McKinnon half the amount. With great deference, it appears to me that the proper construction to place upon this is that Pollock and McKinnon felt that the purchase had been abandoned or had fallen through and that they agreed to share the loss of the deposit which Manson was retaining.

I cannot see that the agency of McKinnon for one or other of the parties affects the real point involved in the payment by him of the $25. The importance of that transaction is to shew the knowledge by the defendant of what had been done and how the negotiations had terminated, that he believed they were at an end and that the plaintiff was retaining the deposit because he, Pollock, had refused to buy the land with the restrictions.

There is another phase of this case upon which, in my opinion, the plaintiff is entitled to succeed. Apart from the formal instrument drawn up by Manson's solicitor there was no binding agreement between the parties. The vendor had the terms of the agreement he was willing to enter into embodied in the formal instrument, he executed it and sent it to the purchaser so that the latter might accept it by executing it and at the same time paying the cash payment called for by the agreement. It was in effect an offer which called for an unconditional acceptance. The defendant instead of accepting, objected to a very material term contained in the instrument and asked to have it struck out or modified. This the vendor refused, and before he was notified of the acceptance of the terms of the instrument by the purchaser the vendor withdrew the offer. It is true the purchaser claims that he executed the agreement on or about April 23, but even if he signed it then, he did not until May 14 deliver one of the duplicates to the vendor, and he did not until the last mentioned date offer to make the cash payment. Signing the instrument and holding it in his solicitor's hands while active negotiations were going on for the elimination of a part of the terms contained in it was not an acceptance of it. Then there was no notice to the vendor that it had been executed and there was no payment of the money stipulated to be made "on or before the execution and delivery" of the agreement. Apart from the evidence that the defendant through his solicitor refused to carry out the purchase the fact that he objected to the terms and asked to have them altered in a material respect is in itself a rejection of them. As

MAN.
C. A.
1914
MANSON
v.
POLLOCK.
Perdue, J.A.

authority for the above propositions I would refer to the following cases:—

In *Hyde* v. *Wrench*, 3 Beav. 334, 49 Eng. R. 132, the owner of land offered in writing to sell it to a proposed purchaser for £1,000 on stated terms. In reply to this the purchaser offered £950 and the owner after some delay refused the offer. The purchaser then wrote to the owner accepting the offer to sell for £1,000. The owner's first offer had not been withdrawn. The purchaser on receiving no answer filed a bill for specific performance. In giving judgment Lord Langdale said:—

> Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract: instead of that, the plaintiff made an offer of his own to purchase the property for £950, *and he thereby rejected the offer previously made* by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant by tendering acceptance of it; and that therefore there exists no obligation of any sort between the parties.

In *Jones* v. *Daniel*, [1894] 2 Ch. 332, the defendant had made an offer to purchase a property and had stated the price he was willing to give. The plaintiff's solicitors wrote to him saying that the plaintiff, who was the vendor, accepted the offer and added that they enclosed a contract for signature by the purchaser. This contract contained special terms not referred to in the offer. The defendant then wrote declining to purchase and returning the contract unsigned. It was held that no contract had been constituted between the parties.

In *Dickinson* v. *Dodds*, 2 Ch.D. 463, the defendant had signed and delivered to the plaintiff a memorandum of which the material part was as follows:—

> I hereby agree to sell to Mr. George Dickinson the whole of the dwelling houses, garden, ground, stabling and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800.

There was attached a postscript signed by defendant saying "this offer to be left over until Friday." It was held by the Court of Appeal that the document was only an offer which might be withdrawn at any time before acceptance. James, L.J., said at 471:—

> Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell.

He also stated that it was clear settled law that the promise not to retract until a future day was a *nudum pactum* and not binding, and that at any moment before acceptance of the offer the party making it was free to withdraw.

In the same case Mellish, L.J., said at 473:—

> I apprehend that, until acceptance, so that both parties are bound, even

though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound.

It was held by both James, L.J., and Mellish, L.J., that no formal notice of withdrawal of the offer was necessary, and that it was sufficient if the person to whom the offer was made had actual knowledge that the other man was no longer minded to sell it to him.

In *Paterson* v. *Houghton*, 19 Man. L.R. 168, it was held that there need not be any formal retraction of an offer to sell by the giver thereof; that it is sufficient if the person to whom the offer was made has knowledge that the giver has done an act inconsistent with the continuance of the offer.

McKinnon's evidence shews that Manson rejected Pollock's proposals and called the deal off. This McKinnon reported to Pollock and at the same time told him that Manson refused to return the deposit. They then arranged to share the loss of the $25 between them. This occurred on April 26.

I have already pointed out that the mere signing of the document by Pollock on April 23, while he retained it in his solicitor's hands, objected to its terms, and retained the cash payment, did not constitute an execution of the document or an acceptance of its terms. The importance of the payment of the cash instalment called for by the instrument is shewn in *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555. As far as I can gather from the report, the formal agreement was almost exactly similar in form to that relied upon in the present case. It provided for the payment of "$10,000 cash on the signing of this agreement, the receipt of which is hereby acknowledged." It had been preceded by the payment of a deposit and the giving of a receipt with the intention that it should be followed by a formal agreement. The purchaser signed the agreement but refused to make the cash payment until provision was made for the severance of a mortgage covering the land sold and other land. It was held by Davies and Anglin, JJ., that the execution of the agreement constituting the relationship of vendor and purchaser was the consideration for the cash payment then to be made, and, in default of such payment, the obligation to sell and convey with a good title did not become binding on the vendor. Idington, J., held that, the purchaser's refusal to make the cash payment was in the circumstances a repudiation of the agreement. Duff and Brodeur, JJ., were of opinion that the payment of the ten thousand dollars in cash was a condition precedent to the constitution of any obligation by the vendor to sell or convey the land.

In the present case no payment or tender of the cash instalment was made until a considerable time after the vendor had withdrawn his offer and had refused to go on with the sale. I cannot,

MAN.
C. A.
1914
MANSON
v.
POLLOCK.
Perdue, J.A.

in regard to this point, distinguish the present case from *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555.

The plaintiff has somewhat complicated matters by alleging in his reply to the defence that Julia Rachel Manson, the plaintiff's wife, and the then owner of the property, agreed on April 15, 1912, to sell the land to the defendant and the defendant agreed to buy the land at the price of $3,768 on terms and conditions then agreed upon and that on or about April 22, 1912, the defendant repudiated his contract and demanded back the $25 he had paid as a deposit. The defendant then claimed by amendment to his defence that the plaintiff should not now be permitted to deny the existence of the agreement. But the alleged agreement on which the case turns is the formal one, exhibit 5, and it is over the terms of this agreement that the whole dispute arose. The terms embodied in it were objected to by the defendant and he never communicated any acceptance of them to the plaintiff until May 14. Whatever the terms and conditions were which are referred to in the reply, it is alleged in the reply that they were repudiated by the defendant. The facts shew that the vendor was willing to sell for a certain price and on certain terms, and that the defendant in the first place was willing to buy but afterwards declined to purchase on the terms embodied in the agreement prepared by the vendor. If necessary, the reply might be amended so as to clearly set forth allegations to the above effect, if it does not already cover them.

I do not think it is necessary to say anything in regard to the fact that Pollock allowed the amount of the cash payment to remain in his solicitor's hands, or to the fact that the return of the agreement was not demanded by Manson's solicitors. Neither of these facts, in my opinion, has any material bearing upon the case.

With great respect, I think the appeal should be allowed with costs and that there should be judgment declaring that the defendant has no interest in the land in question and that the caveat filed by him in the land titles office should be vacated and removed. The plaintiff is entitled to the costs in the Court of King's Bench up to and including the trial.

Cameron, J.A.

CAMERON, J.A.:—In the transaction out of which this action arose the plaintiff (the vendor) was represented by Mr. Mackenzie as solicitor. The defendant (the purchaser) was represented by Mr. Bowles. McKinnon, having received the $25 deposit from Pollock, took it to Mr. Mackenzie. This was about April 18. April 23, the defendant gave Mr. Bowles the balance of the cash payment, viz. $1,231. April 26, the plaintiff told McKinnon "the deal was off." McKinnon went to the defendant's office and left his cheque for $25. This was accepted by the defendant, who returned $12.50 of it to McKinnon. McKinnon had told the defendant that the plaintiff had refused to give back the $25 de-

posit. It is true the $25 paid by McKinnon (one-half of which was repaid him) was not the $25 deposit. But the acceptance of the $25 from McKinnon by the defendant seems to me a clear recognition on his part that the transaction was at an end. Not only that, but we have the evidence of Mr. Mackenzie that when the plaintiff refused to entertain the proposal to sell the adjoining 33 feet he communicated this to Mr. Bowles and that the plaintiff "would not remove the restrictive clauses and that he would not sell the 80 feet." Mr. Mackenzie further states:—

> Mr. Bowles told me that Mr. Pollock would not go on with the transaction, and he asked me to return the deposit of $25 which Mr. McKinnon had left with me.
>
> Q. What did you do? A. We had an argument about their right to have the deposit returned, as they had been in default, and I called up Mr. Manson and I asked him about returning the deposit, and I think Mr. Manson is mistaken when he says he left it entirely in my hands. I explained to Mr. Manson that under the circumstances that we knew of, they hadn't the right to have the deposit returned, as they had been in default, and I so informed Mr. Bowles, that we would refuse to return the deposit. Mr. Bowles intimated that they were entitled to have the deposit returned.

Mr. Bowles says that he did not ask for the return of the $25. When asked whether he told Mr. Mackenzie that the defendant would abandon the contract, he replied that, "I don't think I told him that, if I did it was to hurry the deal through." This is equivalent to a refusal to contradict Mr. Mackenzie's version of the interview. I can lay no stress whatever on Mr. Bowles' denial of authority inasmuch as he was held out by his client as having full authority to act.

In the result the evidence indicates, therefore, that the defendant, through his solicitor, told the plaintiff's solicitor, when informed by him that the transaction was at an end, that he (the defendant) would not proceed further with it and demanded a return of the deposit. In view of this, it seems clear that the agreement, if ever there was any, was repudiated by the plaintiff and that the defendant acquiesced therein and has no standing whatever to ask for relief.

I am further of the opinion that there was in reality never any concluded agreement between the parties. The reasoning on this branch of the case in the judgment of Mr. Justice Richards, which I have read, seems to me unanswerable. The form of the pleading placed on record by the plaintiff may be taken as precluding the defendant from setting up this matter in reply to the defendant's statement of defence. But, for my part, I see no reason to prevent this Court from making the slight amendment to the reply necessary to entitle the plaintiff to the benefit of the facts disclosed by the evidence.

I agree with Mr. Justice Richards in his disposition of this appeal.

Appeal allowed.

B. C.

C. A.
1914

COLONIAL DEVELOPMENT CO. v. BEECH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. ASSIGNMENTS FOR CREDITORS (§ III A—11)—WHO MAY BE ASSIGNEE—COMPANY AS SUCH.

A company cannot act as an assignee under the Creditors' Trust Deed Act, R.S.B.C. 1911, ch. 13.

[*Colonial Development Co.* v. *Beech*, 12 D.L.R. 738, affirmed; *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857, referred to.]

Statement

APPEAL by the plaintiff from the judgment of Clement, J., *Colonial Development Co.* v. *Beech*, 12 D.L.R. 738, in favour of the defendant in an action to set aside certain alleged preferential transfers of property.

The appeal was dismissed, MCPHILLIPS, J.A., dissenting.

Ritchie, K.C., for the appellant, plaintiff.

Joseph Martin, K.C., for the respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be dismissed for the reasons stated in the Court below.

In Maxwell on the Interpretation of Statutes, 5th ed., 53, the learned author after referring to a number of cases analogous to the one at bar, says:—

> In all these instances the Legislature supplied in the context the key to the meaning in which it used expressions which seemed free from doubt; and that meaning, it is obvious, was not that which literally or primarily belonged to them.

In the case at bar the sections of the Act referred to by Clement, J., furnish the key to its meaning. The language of said sections is not reconcilable with the idea of a joint stock company acting as assignee, of a debtor, for the benefit of his creditors.

I would also dismiss the application to substitute a creditor for the present plaintiff, assuming that we have the power, to do so would at this late stage be of little benefit to anyone.

Irving, J.A.

IRVING, J.A.:—The reasons given by Clement, J., *Colonial Development Co.* v. *Beech*, 12 D.L.R. 738, seem to me unanswerable. I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—In my opinion the learned trial Judge has, on the authorities cited to us, substantially reached the right conclusion on the question of the assignee being a natural person, though I think that more effect can be given to sec. 42 than he has seen fit to give, because the expression "no person other than a permanent . . . and *bonâ fide* resident" is not one

which could aptly be applied to a company since it implies that the person whose residence is required to be permanent must have the power to change it, *i.e.*, the power of physical locomotion; otherwise, there would be no object in providing against the change. In the proper sense of the word a company once it is registered or licensed to do business in this province is necessarily fixed here during the existence of its charter or license, and though it may cease to transact business thereunder, it does not thereby change its residence. For the period covered by said charter or license it is inevitably permanently within this province, and therefore there was no necessity for the Legislature to guard against something that could not happen, which goes to shew that it did not contemplate a corporation filling an office which it was necessary to safeguard in this manner.

I have considered not only the sections that we were chiefly referred to, viz., [Creditors' Trust Deed Act R.S.B.C. 1911, ch. 13] secs. 3, 29, 42 and 64, but all the sections of the Act to gather the intention of the Legislature, and have no doubt about it. The special language of 64 declaring that the

> assignee shall be subject to the summary jurisdiction of the Supreme or County Court in the same manner and to the same extent as the ordinary officers of the Court

contemplates a living person, and the fact that the latter part of the section might be partially satisfied by an application to attack, the officers of a corporation under R. 609A does not detract from the personal element and the direction by sec. 29 that the assignee "shall be punished by committal as for a contempt of Court" is a different (and inappropriate) procedure from the attachment referred to.

I find this personal note also struck in other sections which have been overlooked and which we were not referred to, viz., in sec. 61 which provides that the assignee shall be chairman of meetings in a specified case; and that the chairman "shall decide all disputes or questions that may be raised at such meetings, etc. . . .;" in sec. 22 which gives the assignee a casting vote; in sec. 23 which provides for the transfer of the estate of the assignee "to some other person named in such resolution as assignee"; in secs. 62 (4) and 63 which refer to his "partner" and the partnership or company of which he is a member; and finally and conclusively in sec. 49 which empowers him to examine the assignor upon oath touching his estate, business, conduct, causes of insolvency, etc., and "to administer any necessary oath" and with power to adjourn the examination from time to time.

It cannot, to my mind, be seriously intended that the judi-

B. C.

C. A.

1914

COLONIAL DEVELOPMENT CO. v. BEECH.

Martin, J.A.

cial functions here bestowed can be discharged by any other than a living person.

It follows that the appeal should be dismissed. But we are asked to grant an amendment which was not asked for below, and substitute, under rules 126 and 868, the name of the False Creek Lumber Co., Limited, for the present plaintiff, the invalid assignee, on the ground that all the time the said False Creek Co. has been the real plaintiff suing pursuant to leave granted by order of June 5, 1912, in the name of said assignee under sec. 53, to set aside certain conveyances for its own exclusive benefit, though it is admitted that it would lose this benefit were the amendment granted. I have no doubt that we have the power to do so, but in the circumstances of the case and at this late stage I think, in the exercise of our discretion, we should refuse to do so, because the terms of the amendment as to costs would have to be so onerous that little expense would be saved and complications and difficulties might be experienced, so it is better that the proceedings should begin *de novo*, if they are begun.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss this appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The action is one brought to set aside certain conveyances, and for the cancellation of the registration thereof, and for an order directing the district registrar to register the property in the name of the plaintiff company. The plaintiff company is the assignee for the benefit of creditors of the defendant Beech, and the allegation is that the defendant Morgan when unable to pay his debts in full, made a conveyance of the property in question to the defendant Beech, and that it was a preference, and that the defendant company, in taking a conveyance from the defendant Beech of the same property, took it with knowledge of the anterior facts as alleged. That is, that the transaction throughout is impeachable under the Fraudulent Preferences Act, R.S.B.C. 1911, ch. 94.

The learned trial Judge, Mr. Justice Clement, held that the plaintiff company had no status as assignee under the Creditors' Trust Deeds Act, ch. 13, R.S.B.C. 1911, holding that a company could not be an assignee under the Act; that the Interpretation Act, ch. 1, R.S.B.C. 1911, in defining "person" would not admit of a corporation or company being appointed—when the Creditors' Trust Deeds Act was examined, *i.e.*, there exists a contrary intention—that contrary intention appearing in secs. 29 and 64 of the Creditors' Trust Deeds Act, R.S.B.C. 1911, ch. 13.

In the result at the trial, the action was dismissed but without costs. From this judgment the plaintiff company appealed

to this Court. The learned trial Judge found the question to be one of much difficulty, and apparently he was not assisted by the citation of authorities upon the point, in his research he relied upon the following decisions: *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (1880), 5 A.C. 857, 49 L.J.Q.B. 736; *Chuter* v. *Freeth & Pocock Ltd.* (1911), 80 L.J.K.B. 1322.

Pharmaceutical Society v. *The London and Provincial Supply Association Ltd.*, 5 A.C. 857, 49 L.J.Q.B. 736, has been referred to and considered in the following cases: *Atty.-Gen.* v. *Geo. Smith* (1909), 78 L.J. Ch. 781; *Re Royal Naval School*, [1910] 1 Ch. 806, 79 L.J. Ch. 366; *Edwards* v. *Pharmaceutical*, [1910] 2 K.B. 766, 79 L.J.K.B. 859; *Atty.-Gen.* v. *Churchill's Veterinary Sanatorium*, 79 L.J. Ch. 741, [1910] 2 Ch. 401.

Upon a careful examination of the decision of the House of Lords in *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 A.C. 857, 49 L.J.K.B. 736, it will be seen that it is not a decision that is as wide as it may at first seem, but is confined to holding that secs. 1 and 15 of the Pharmacy Act, 1868, which prohibit under a penalty any person not being a duly registered chemist from selling or keeping open shop for the sale of poisons, or using the name of chemist or druggist; the word "person" not including a corporation and a corporation having a department for sale of drugs under the management of a duly registered chemist is not liable to the penalty. It is not a decision that a corporation did not come within at least one provision of the Act—namely section 17, being regulations to be observed in the sale of poisons. This is pointed out by Mr. Justice Bray, in *Edwards* v. *Pharmaceutical Society of Great Britain*, [1910] 2 K.B. 766, 79 L.J.K.B. 859 at p. 866:—

> Is there anything in the Act which obliges us to hold that the words "name and address" in sec. 17 have some special and particular meaning? It is said that this Act means that the seller shall have a certificate that he is a competent person; but according to the decision in *Pharmaceutical Society of Great Britain* v. *London and Provincial Supply Association* (1880), 49 L.J.Q.B. 736, 5 App. Cas. 857, the word "person" in sec. 17 includes a corporation; and, in my opinion, sec. 17 is not directed to ascertain the competency of the person selling. The object is to enable the poison to be traced, and to find out who is the person who sold it.

The decision of the House of Lords may be said to have been in effect that, viewing the special circumstances, the corporation was not liable for penalties, but that the question in all cases will be whether the word "person" in a statute includes a corporation—depending in each case on the object of the Act and the enactments by which it was attained.

The Lord Chancellor, Lord Selborne, [*Pharmaceutical Soci-*

B. C.

C. A.

1914

COLONIAL DEVELOPMENT CO. v. BEECH.

McPhillips, J.A.

ety of Great Britain v. *London and Provincial Supply Assn.*, 5 App. Cas. 857, 49 L.J.Q.B. 736 at 738] said:—

The question really comes to be one upon the construction of particular words in the 1st and 15th sections of this statute, having regard to the general principles on which ambiguous words such as "person" ought to be construed. There can be no question that the word "person" may, and I should be disposed myself to say *primâ facie* it does, include in a public statute a person in law, that is, a corporation as well as a natural person; but it is never to be forgotten that although that is a sense which the word will bear in law, and, as I said, perhaps should be attributed to it in the construction of such a document as a statute, unless there be any reason for a contrary construction, yet, that in its popular sense and ordinary use it would hardly extend so far. Therefore, as statutes, like other documents, are constantly conceived according to the popular use of language, it is probable, and may be taken to be certain that the word is often used in statutes in a sense in which it cannot be intended to extend to a corporation, and that accounts for the frequent occurrence in some statutes, in interpretation clauses, of an express declaration that it shall extend to a body politic or corporate, and in other statutes (of which an example will be found in one cited during the argument by Mr. Benjamin, I mean the Act as to apothecaries) of clauses which say, as in that instance, that remedies by persons who complain of acts done under colour of the authority of the Act, or in pursuance of it, must be prosecuted within a certain limit of time against all persons or bodies politic or corporate; which, upon the face of the Act, shews that corporations were contemplated. Now, I hold that with some qualification, the language used by the junior counsel for the respondents is substantially right, that if a statute provides that a person shall not do a particular act, except on condition of his complying with a certain proviso, *primâ facie* it is the natural and reasonable construction of such a statute, unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter to exclude it—*primâ facie* I say it is the natural and reasonable construction of such a clause that by the use of the word "person" the Legislature contemplates one of a class of persons who may or may not do the act, the doing of which is to take them out of the scope of the provision.

Lord Blackburn, in the same case, [49 L.J.Q.B.] at 741, said:—

I own I have no great doubt myself, for instance, that the word "person" may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (I would not like to pledge myself to that) it ought to be held to include both. I have equally no doubt that in common talk in the language of men, not speaking technically, a "person" does not include an artificial person—that is to say, a corporation. Nobody in common talk, if he were asked who was the richest person in London, would answer, the London and North Western Railway Company. It is plain that in common speech "person" would mean a natural person. In technical language it may mean the other, but which meaning it has in any particular Act, must depend on the context and

B. C.

C. A.
1914

COLONIAL DEVELOPMENT CO. v. BEECH.

McPhillips, J.A

the subject-matter. I do not think that the presumption that it includes an artificial person, a corporation, if the presumption does arise, is at all strong. Circumstances, and indeed very slight circumstances, in the context might shew which way the word is to be construed in an Act of Parliament; whether it is to have one or the other meaning. And I am quite clear about this, that whenever you can see the object of the Act requires that "person" shall have the more extended sense, whichever of those the object of the Act shews that it requires, then you should apply the word in that sense and construe the Act accordingly. My view of the matter is that the question what the word "person" means in this particular Act gives rise to the whole difficulty; but I may further say now, in order to avoid coming back to it, that I do not feel the least difficulty arising from what seems to have troubled some of the Judges below in this case. If this means a corporation I quite agree that a corporation cannot commit crime in one sense—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged and put to death, if that be the punishment for the crime. In all those senses a corporation cannot commit a crime; but a corporation may be fined or may pay damages, and I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, from the supposition that a corporation that incorporated itself for publishing a newspaper could not be fined, or an action for damages brought against it for libel, or that a corporation that commits a nuisance could not be convicted of the nuisance, or the like. I must really say I do not feel the slightest doubt about that part of the case, and I think if we could get over the first difficulty of saying that the "person" here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon the other grounds that have been suggested.

In view of present-day conditions, when corporations do so much of the work connected with the winding-up of and management of estates, is it not reasonable and probable that the Legislature fully intended to admit of a corporation becoming an assignee for the benefit of creditors under the Creditors' Trust Deeds Act?

It is to be observed that there is no interpretation of the word "assignee" in the Act, neither is there in the Interpretation Act, ch. 1, R.S.B.C. 1911.

The Act until we reach sec. 23 always refers to "assignor" and "assignee"—in the latter part of that section we first have the word "person" used—referring to a change of assignee—that is, where the assignee is changed it is enacted "and thereupon such person so named shall become and be the assignee of such estate under the provisions of this Act."

Then we have the word "person" used in section 27 as applicable to the assignee, where provision is made for the removal of the assignee by a Judge of the Supreme Court.

Taking the enactments as a whole, unquestionably the word "person" is used in a sufficient manner to entitle reference

B. C.
C. A.
1914
COLONIAL DEVELOPMENT CO. v. BEECH.
McPhillips, J.A.

being made to and reliance being placed upon the Interpretation Act, [R.S.B.C. 1911, ch. 1] which reads—sec. 26, sub-sec. 19, as follows:—

"Person" shall include any body corporate or politic, or party, and the heirs, executors, administrators or other legal representatives of such person, to whom the context can apply according to law.

To indicate that the Legislature would not seem to have had any doubt that a corporation might properly discharge the duties devolving upon an assignee under the Creditors' Trust Deeds Act, reference may be made to the Administration Act, ch. 4, R.S.B.C. 1911, secs. 99, 100, and 101, where it is provided that the executor or administrator administering an estate, finding the estate insufficient to pay debts, may file a declaration of that fact, and thereafter such executor or administrator is to be deemed a trustee for the benefit of the creditors of the person whose estate is being administered, subject to the provisions of the Creditors' Trust Deeds Act.

Admittedly, a corporation may be appointed executor or administrator, and if so, in this way a corporation would be acting as an assignee under the Creditors' Trust Deeds Act. This certainly shews the clear intention of the Legislature, and strongly points to there being no intention to exclude a corporation from acting under the Creditors' Trust Deeds Act.

In *Pearks* v. *Ward*, [1902] 2 K.B. 1, 71 L.J.K.B. 656, it was held that a limited company is a "person" within the meaning of section 6 of the Sale of Food and Drugs Act, 1875, which provides that:—

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser, under a penalty.

Lord Alverstone, C.J., [71 L.J.K.B.] at 660, said:—

The appellants, a limited company, were prosecuted under section 6 of the Sale of Food and Drugs Act, 1875, for selling to the purchaser who had asked for "butter" an article known as "Pearks's butter" consisting of butter blended with milk, and containing in consequence an excess of moisture. The first question is whether a prosecution under the section can be maintained against a limited company; and that is the main question on which we have to give judgment.

Further on, at pp. 661 and 662, we have Lord Alverstone, C.J., saying:—

Coming back to the first and most important question, whether or not proceedings under sec. 6 can be taken against a limited company, I think it bears a strong analogy to the question whether or not a master is civilly responsible for the act of his servant. Section 6 provides that "No person shall sell to the prejudice of the purchaser any article of food, etc.," subject to a penalty. Section 2 of the Interpretation Act, 1889,

provides that "in the construction of every enactment relating to an offence punishable on indictment or on summary conviction whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate. I can see no reason why the term 'person' in sec. 6 should not apply to a limited company. I cannot find either in that section, or in the circumstances of the case, any indication of a 'contrary intention.' There seems to be no sufficient ground for holding that *mens rea* is a necessary element of the offence created by section 6, though it may be that secs. 3 and 5 and the section of the Act of 1899 to which our attention has been called, should be differently construed. It does not appear from section 6 that no person can sell the article unless he has some particular personal qualification—as, for instance, a licensed chemist, a qualified surgeon, or some one of that kind—and the case therefore does not come within that class of cases which was so much discussed in *Pharmaceutical Society* v. *London Supply Association*. Nor does a contrary intention appear from the circumstances of the case. The sale was of an article not of the nature, substance, and quality of the article demanded by the purchaser. The description of the article came from the purchaser, and the sale might have been effected as well by a limited company as by an individual.

In my opinion, moreover, the point is in principle covered by decision. It is true that it seems never to have been raised before, notwithstanding that proceedings have so frequently been taken under this section. The explanation probably is that there would not have been much object in raising it, inasmuch as if it had been held that the proceedings could not be taken against the company they might have been taken against the company's manager, whom the company would no doubt have felt themselves bound to protect or indemnify. Remembering, however, that it has been decided in *Betts* v. *Armstead*, 57 L.J.M.C. 100, 20 Q.B.D. 771, that want of guilty knowledge is no defence to proceedings under the section, and in *Brown* v. *Foot*, 61 L.J.M.C. 110, that proceedings under the section can be taken against a master for a sale by his servant, I think there is no ground for saying that the section is not applicable to a corporation as well as to a private individual. According to the interpretation put upon the section by these decisions, both its protective object and the necessary ingredients of the offence which it creates seem to shew that it is directed against a company as well as an individual. The case of *Kearley* v. *Tonge*, 60 L.J.M.C. 159, in which a master who had expressly prohibited his servant from selling the article so that the servant in selling it was not acting within the scope of his authority, was held not liable under the section in respect of a sale by the servant, further exemplifies the analogy between liability under the section and civil responsibility.

I am clearly of opinion that corporations are liable under section 6 if they have in fact sold the article. It may be necessary to find out who was the actual seller before reaching the real offender, but I see no argument which can fairly be used to shew why a corporation should be exempt from the provisions of the section. I am not sorry to be able to come to this conclusion, because it seems to me that great difficulties would arise from a contrary decision. I therefore think that in *Pearks & Co.* v. *Ward*, the appeal should be dismissed with costs, and that in

B. C.

C. A.
1914

COLONIAL DEVELOPMENT CO. v. BEECH.

McPhillips, J.A.

Hennen v. *Southern Counties Dairies Co. Ltd.*, the appeal should be allowed, and that case go back to the magistrates to be dealt with.

In *Chuter* v. *Freeth & Pocock, Ltd.*, [1911] 2 K.B. 832, 80 L.J.K.B. 1322, it was held that a limited company are liable to be convicted under sec. 20, sub-sec. 6 of the Sale of Food and Drugs Act, 1899, for giving to a purchaser a false warranty in writing in respect of an article of food or drug sold by a company as principal or agent.

The language of the sub-section being as follows:—

(1) Sale of Food and Drugs Act, 1899, sec. 20, sub-sec. 6: Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence, to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true.

Lord Alverstone, C.J., construing the sub-section, [80 L.J. K.B.] at 1324, 1325, said:—

In this case the magistrate refused to convict the respondents upon the ground that, being a corporation, they were not capable under sec. 20, sub-sec. 6 of the Sale of Food and Drugs Act, 1899, of committing the offence in respect of which the proceedings were instituted. In my opinion, he has taken a wrong view of the section. The original purchaser of the milk, on being summoned for selling an article to the prejudice of the sub-purchaser, set up the defence that he had bought the milk from the respondents under a warranty. That defence having succeeded, further proceedings were taken under sub-section 6 of sec. 20 of the Sale of Food and Drugs Act, 1899, against the respondents, as being the original vendors of the milk, for having given a false warranty. The magistrate considered that as the person who gives the warranty is made liable by the section unless he proves "that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true," therefore the person referred to in the section cannot be construed as including a corporation, because a corporation cannot exercise the faculty of believing, and that therefore a corporation cannot be convicted under that section. In my opinion, that is too narrow a construction to place upon that section. Where a person is capable of giving a warranty he can be fined if the warranty is not true. I do not see why that should not apply in the case of a corporation. If a corporation are capable of giving a warranty, I do not see why the corporation should not also be able to believe, through their servants, that the statements contained in the warranty are true. A similar point has been raised with regard to the liability of a corporation in cases of libel and false imprisonment and other matters which in the case of an individual would involve an enquiry into the state of mind of the individual, but in respect of which it has been held that a corporation may be liable.

Further, I think that this point has been practically decided by Mr.

Justice Channell in *Pearks, Gunston & Tee Ltd.* v. *Ward*, in the reasons which he gave for holding that a corporation could be liable under sec. 6 of the Sale of Food and Drugs Act, 1875. These statutes were passed for the protection of purchasers. That being so, I see no reason why the specific defence that is given in sec. 20, sub-sec. 6 of the Act of 1899, to a "person" should not also apply to the case of a corporation. In my opinion, the case must go back to the magistrate with a direction to convict.

We find it stated in Palmer's Company Law (1911), 9th ed., at 55:—

A corporation is a legal *persona* just as much as an individual: *per* Cave, J., in *Re Sheffield, etc, Society*, 22 Q.B.D. 476, 58 L.J.Q.B. 265; *Atty.-Gen.* v. *Smith*, [1909] 2 Ch. 524, in which it was held that a company was a person within the Dentists Act, 1878.

Then we have *Wilmot* v. *London Road Car Co.* (1911), 80 L.J. Ch. 1. That was a case of a lease and covenant not to assign without consent—consent not to be withheld in respect of "respectable and responsible person"—and it was held that a limited company may be a "respectable and responsible person" within the meaning of a covenant by a lessee not to assign without the consent of the lessor (such consent not to be withheld in the case of a "respectable and responsible person)."

The Court of Appeal in this case reversed the decision of Neville, J. (79 L.J. Ch. 431) and overruled on this point *Harrison Ainslie & Co.* v. *Barrow-in-Furness Corporation* (63 L.T. 834). The judgment of Cozens-Hardy, M.R., is so explanatory of the analogous question we are here considering that I think it well warrants being quoted in full. The learned Master of the Rolls, 80 L.J. Ch. 1, at 3, 4 and 5, said:—

This is an appeal from a judgment of Mr. Justice Neville, by which he declared that the London General Omnibus Co., being a corporation, are not a "respectable and responsible person" within the meaning of the covenant contained in a lease which I shall read in a moment, and has declared that the plaintiff, the lessor, is entitled to recover possession of the demised premises, and he is also awarded 30s. damages.

Now this appeal raises a question undoubtedly of importance—undoubtedly too, in my judgment, of difficulty. Two learned Judges—Mr. Justice Romer and Mr. Justice Neville—have taken a view which, with the utmost respect, I am unable to follow or to adopt. The lease was a lease granted in 1900 to a Mr. Porter of some premises at Putney. The rent was £95 a year. It was insured for £5,000, and was apparently a valuable property; and the lease contained covenants by the lessee that he would use the premises as and for the business of a jobmaster, and livery stable keeper, and not to assign or under-let or part with the possession of the premises or any part thereof without the previous written consent of the lessor, but that such consent should not be withheld in "the case of a respectable and responsible person." Mr. Porter, who was the

B. C.
C. A.
1914
COLONIAL DEVELOPMENT CO. v. BEECH.
McPhillips, J.A.

lessee, did assign to the present defendants, the London Road Car Co., in 1901, and the plaintiff gave his consent thereto. The defendants were minded to assign to the London General Omnibus Co. It is quite immaterial, but we are told that it was as part of a scheme of reconstruction or arrangement that they wanted to assign the lease and part with possession of the premises to that company. The real question, and the only question which has been decided by Mr. Justice Neville, is that in his view a corporation is not a "person" and cannot be a "respectable and responsible person" within the meaning of this covenant. Now I think it is necessary to consider with some care what is the true *primâ facie* meaning of the word "person"; what is its meaning at common law and apart from any statutory enactment. I go back to Lord Coke and his exposition of the statutes of 39 Eliz and 21 Jac. I. The language of the statute there was quite positive. It was a statute that all and every person and persons seised of an estate in fee simple might—I am stating the substance of the Act very shortly—found hospitals or almshouses, and Lord Coke upon these words "all and every person or persons" says this (2 Co. Inst., p. 722): "These words regularly doe extend to any body politick or corporate, but not to such as are restrained by any Act of Parliament to alien, etc., but doth extend to such bodies politick and corporate as may alien."

He does not put that on any context in the Act: on the contrary, there is no context, but he puts it as a general proposition—"These words regularly doe extend to . . . such bodies politick and corporate as may alien." Of course, a corporation which had no power of aliening could not be a corporation within the meaning of these Acts of Parliament, which says that any person may aliene. They did not authorise an act which was otherwise *ultra vires*. Then we come down to Blackstone's authority. His authority, which was read by Lord Justice Farwell, is quite explicit—"Persons are divided by the law into either natural persons, or artificial." Then again we come to the very important case of *Pharmaceutical Society of Great Britain* v. *London and Provincial Supply Association* in the House of Lords, where Lord Selborne, in language which in my opinion is perfectly unambiguous, said that in a statute the word "person" would *primâ facie* include an artificial person or a corporation. Lord Blackburn indicated the same view, although he was not so clear about it. It is said, "True, that may be so as to statutes, but it is a matter which is limited to statutes, and has no application to instruments even of the most formal character under seal such as this lease is." Is there any authority for that qualification? As far as I am aware, there is none. Is there any authority to the contrary? In my opinion there is, for Mr. Justice Chitty's decision in *Re Jeffcock's Trusts*, 51 L.J. Ch. 507, which was a case of a will, shews that where trustees of a will have power given to them to grant leases to any person or persons as they may think fit, a limited company—that is to say, a corporation—is within the meaning of that power a person to whom the trustees may lawfully and properly grant a lease. I am not aware that the precise point has arisen with reference to a lease, but certainly I should be most unwilling to draw a distinction which I think would be contrary to the whole trend of modern dealings, and to say that a corporation was not to be regarded as a person within the meaning of a lease of this kind.

B. C.

C. A.

1914

COLONIAL DEVELOPMENT CO. v. BEECH.

McPhillips, J.A.

The real stress of the able arguments of counsel for the respondent rested upon the subsequent words. Let me take them one by one. It is plain, of course, that, under this lease and apart from this covenant this company can be an assign of a lease. There is no dispute about that; it is competent to become an assign. It is not *ultra vires* of the company to accept the lease. Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which was admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease, would be a responsible person within the meaning of that covenant, and therefore a person with respect to whom consent could not be refused. But then it is said—and this is the point which alone has given me difficulty in this case—can it be said that a corporation can be respectable? Does not the addition of that word "respectable" compel the Court to say that in this lease the word "person" must be limited to an individual, a human personality, a person who is capable of acts, moral or immoral? In my opinion that is not so. I think the ordinary use of language justified us in saying that a company is a respectable company. We talk of a respectable insurance company, a respectable bank, a highly respectable business, and our language has no reference at all to the fact that the object is or is not an incorporated body, in which case the word "respectable" is used with reference to the mode and conduct of carrying on the business. But I think we are not without assistance from authority which is absolutely binding upon us. A company limited or not limited can maintain an action of libel for an injury to their reputation in respect of their business without proof of any special damage. *South Hetton Coal Co.* v. *North-Eastern News Association*, which is a decision of this Court in 1893, is a clear authority on that point. The material passages have been read and I do not propose to read them again. I am content to rely on a passage there quoted from the judgment of Chief Baron Pollock in *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859), 28 L.J. Ex. 201, 4 H. & N. 87, where he says, that in order to carry on business it is necessary that the reputation of a company should be protected, and therefore in a case of libel and slander you must have a remedy by action. A company can have a reputation which is not that of the individual directors but that of the company, of the corporation—a reputation which the company itself, and the company alone, can protect by means of an action of libel. Are we to draw a distinction and say, "True, that might be so if the word used had been 'reputable' but the word used is not 'reputable,' it is 'respectable'"? I decline to draw such a fine distinction. In my opinion, the better view—and I think it is in accordance with modern policy and the trend of all mercantile dealings—and the true view, is to say that a company in a document of this kind, and a clause of this kind, is a "person" which may be both "responsible" and "respectable," and that therefore the lessor has no right to refuse his consent. In other words, I think, taking the whole context of this clause, that it really amounts to this—"You, the lessee, shall not without the previous written consent of the lessor, assign, or under-let, or part with the possession of the premises, but such consent shall not be withheld in respect of a respectable and responsible assignee or under-lessee, whether the contemplated assignee, or under-lessee, be a

B. C.

C. A.
1914

COLONIAL DEVELOPMENT CO.
v.
BEECH.

McPhillips, J.A.

natural person or an incorporated company;" and that is expressed by the short phrase "person," a phrase which is in law applicable equally to an artificial as to a natural person.

Now, I am aware that in this case the view which I am taking is contrary to that expressed by Mr. Justice Romer, as he then was, in *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation*, 63 L.T. 834. That decision may have been right on other grounds, as to which I say nothing, but the learned Judge, from whom I never differ but with great hesitation, says this: "No doubt for many purposes, the word 'person' includes corporations, as, for example, for the purposes of the Conveyancing Act of 1881. The question I have to decide is, whether, looking at this particular lease, I can hold that a corporation such as that of Barrow-in-Furness falls within the definition of 'a person of responsibility and respectability.' I think not. Although the word 'person' may, under many circumstances and for many purposes, include a corporation, I do not think that is *primâ facie* the natural meaning of the word; but whether that be so or not, I have here to deal with a clause about a person of responsibility and respectability. Looking at the phrase as a whole and considering the terms of the lease, I do not hold that the corporation can be said to come within the fair meaning of these words." With that decision before him I think Mr. Justice Neville was perfectly right in giving the decision which he did, following the decision of a Judge of co-ordinate jurisdiction, and leaving the parties to come to the Court of Appeal; but having after hearing the full and excellent argument of counsel, arrived at a clear opinion in my own mind that both these decisions are wrong, I think that there is nothing open to us but to say that this appeal must be allowed, and the action dismissed with costs here and below.

Then we have the judgment of Lord Justice Fletcher Moulton to the same effect, and in particular with reference to the changed conditions owing to business being so largely carried on by corporations, [80 L.J. Ch. 1, at 6], said:—

I may say also that, for myself, I think the gradual change in the organization of society which has been going on for the last century, whereby more and more of the business of the country is done by corporations and less and less by private individuals, would probably bring and has brought with it an increased tendency to use the word "person" as including all those who can perform the duties of persons with regard to property. The possibility that a tenant would be a corporate body was very much smaller two hundred years ago than it is at the present time. I should myself in any legal document dealing with property, the holding of it, and the performing of the obligations connected with it, be inclined to hold "person" as being necessarily used in its extended sense unless there was something in the context or in the object of the provision which led me to a different conclusion.

I do not see anything in the judgment of Mr. Justice Duff in the *Canadian Pacific R. Co.* v. *Ottawa Fire Insce. Co.* (1908), 39 Can. S.C.R. 405 at 471, referred to by the learned trial Judge which, in any way, throws any doubt upon the power of the

plaintiff company to be an assignee under the Creditors' Trust Deeds Act; the plaintiff company has corporate existence in the Province of British Columbia, and no question has been raised, nor do I understand that it has been at all questioned that the plaintiff company has corporate powers—admitting of it discharging the business which would devolve upon an assignee under the Act.

In passing it may be remarked that Mr. Justice Duff agreed with Idington and Maclaren, JJ., in that case, that a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance, is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits—giving countenance to the wide and, what I submit, is the true exposition of the law that a company is a legal *persona*, and to deny the efficacy of contract—we must find positive and effective legal inhibition, otherwise, as with the individual, the contract is valid.

In the *Union Colliery Company* v. *The Queen* (1902), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81, it was held that, under sec. 213 of the Criminal Code, a corporation may be indicted for omitting without lawful excuse to perform the duty of avoiding danger to human life from anything in its charge or under its control; the fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not ground for quashing the indictment; and that as sec. 213 provided no punishment for the offence, the common law punishment of a fine might be imposed on a corporation indicted under it. Mr. Justice Sedgewick, in an elaborate judgment, dealt with a number of the cases, and amongst others with *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 A.C. 857, 49 L.J.Q.B. 736, referred to by the learned trial Judge in this case, and dealt with by me in the former part of this judgment. At 84 Sedgewick, J. (who delivered the judgment of the majority of the Court) said:—

> It was at one time thought that a private corporation could not commit torts or be held liable for the wrongful acts of its officers or agents, but this has long since been exploded.

And at 88, he further said:—

> It was, however, contended that "everyone" at the beginning of the section does not include a corporation. I think it does. Section 3 (*t*) states: "The expression 'person,' 'owner' and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts, in relation to such acts and things as they are capable of doing and owning respectively.

B. C.

C. A.
1914

COLONIAL DEVELOPMENT CO. v. BEECH.

McPhillips, J.A.

"Everyone" is an expression of the same kind as "person" and therefore includes bodies corporate unless the context requires otherwise.

In Lewin on Trusts, 12th ed., 1911, 30, we find this language:—

A corporation could not have been seised to a use, for as was gravely observed, it had no soul, and how then could any confidence be reposed in it? But the technical rules upon which this doctrine proceeded have long since ceased to operate in respect of trusts; and at the present day every body corporate, whether civil or ecclesiastical, is compellable in equity to carry the intention into execution.

In *Thompson's Settlement Trusts; Re Thompson* v. *Alexander*, [1905] 1 Ch. 229, 74 L.J. Ch. 133, it was held that a limited company may be a trustee. Swinfen Eady, J., [74 L.J. Ch.] at 134 and 135, said:—

The question raised by this summons is whether, in the events which have happened, the plaintiffs may lawfully appoint the Ocean Accident and Guarantee Corporation, Ltd., to be a trustee of the settlement. Undoubtedly, corporations may be trustees. In *Atty.-Gen.* v. *Landerfield* (1743), 9 Mod. 286, where a testator had devised real estate to St. Bartholomew's Hospital, the Attorney-General argued that, as corporations could not be seised to a use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust; but the report states that the Lord Chancellor (Lord Hardwicke) would not let him go on, nothing being clearer than that corporations might be trustees. And that the Court of Chancery (now the Chancery Division) will enforce and execute the trusts on which corporations hold property, whether lay or ecclesiastical, was established by *Atty.-Gen.* v. *St. John's Hospital, Bedford* (1865), 34 L.J.Ch. 441, 450, 2 DeG. J. & S. 621, 635.

The learned trial Judge would appear to have been most affected by the provisions of secs. 29 and 64 of the Creditors' Trust Deeds Act, and with those provisions in mind came to the conclusion that the plaintiff company could not be an assignee. We find this language in the judgment of the learned trial Judge:—

But secs. 29 and 64 cannot apply to a company which cannot suffer imprisonment, that is the only sanction provided to ensure obedience by an assignee to the orders of the Court respecting the important and comprehensive matters referred to in those sections, particularly sec. 64. Reading the Act apart from those sections the strong impression made upon my mind is that a human assignee was contemplated throughout, but possibly there is not enough "contrary intention" shewn to satisfy the clause in the Interpretation Act, under which "person" is to be read as including a corporation unless from the context a contrary intent appears. But in my opinion secs. 29 and 64 do shew such a clear contrary intent that I am forced to conclude that it was not the Legislature's intention that a company should act as an assignee under the Act in question.

In my opinion, the sections of the Act referred to do not compel any such conclusion, because, in my opinion, there is ample authority to enforce compliance by a company with any and all of the provisions of the Act. The situation is not one such as Lord Selborne was dealing with in *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857, 49 L.J.Q.B. 736, where, at 738, he said:—

> If a statute provides that a person shall not do a particular act, except on condition of his complying with a certain proviso, *primâ facie* it is the natural and reasonable construction of such a statute, unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter to exclude it—*primâ facie* I say it is the natural and reasonable construction of such a clause that, by the use of the word "person" the Legislature contemplates one of a class of persons who may or may not do the act, or who are capable of doing the act, the doing of which is to take them out of the scope of the provision.

There—in that a corporation could not be a chemist—the chemist having to submit to examination—which, of course, was impossible in the case of a corporation, and could only mean an individual person—it followed that "person" would not include a corporation. But here we have no such case—there is no provision in the Creditors' Trust Deeds Act providing that a company or corporation shall not be an assignee, nor providing for any qualification or test that an individual person only could be intended. I cannot satisfy myself that this public statute does not include a person in law—that is, a corporation—as well as a natural person—nor can I see any provisions of the Act which disentitles me from saying that a company or corporation may not reasonably be intended by the Legislature—to be admitted to become an assignee thereunder.

With all respect to the learned trial Judge I must say that to determine the question upon the consideration of the two sections referred to, viz., secs. 29 and 64, and upon the inability to impose imprisonment against a corporation, is indeed to proceed upon too narrow a ground.

Further, can it be said effectively that a corporation is not subject to being proceeded against for contempt, or proceedings of an analogous nature.

Oswald's Contempt of Court, 3rd ed., 1910, Canadian edition, dealing with disobedience to orders, at 102, reads:—

> In the case of a corporation it may be enforced by sequestration against the corporate property, or by attachment against the directors or other officers of the corporation or by writ of sequestration against their property.

The authority cited is O. 42, r. 31, [Supreme Court Rules, Eng.] and notes in the Yearly Practice. We have this same rule, being marginal No. 609.

B. C.
C. A.
1914
COLONIAL DEVELOPMENT CO. v. BEECH.
McPhillips, J.A.

Then we have in Oswald on Contempt of Court, 3rd ed., at 223, the following:—

In the case of a corporation which has disobeyed an order of the Court, the remedy is by writ of sequestration against its property and effects.

. . . . .

Directors, managers, or other officers of a corporation privy to, or aiding, or abetting a contempt by such corporation may be made responsible therefor (R.S.C., O. 42, r. 31; *Ex parte Green, Re Robbins* (1893), 7 T.L.R. 411; *Lewis* v. *Pontypridd Cacrphilly & Newport Railway Co.* (1895), 11 T.L.R. 203 (C.A.), but a director will not be attached unless the order which has been disobeyed has been personally served on him: *McKeown* v. *Joint Stock Institute*, [1899] 1 Ch. 671.

Again, at 96 of Oswald, we have this language:—

The manager of a limited company which disseminates or publishes news amounting to a contempt of Court, may be held responsible and punished for it: *Ex parte Green, Re Robbins* (1891), 7 Times L.R. 411; see also *O'Shea* v. *O'Shea, Ex parte Tuohy* (1890), 15 P.D. 59 (C.A.).

We have Or. 42, rr. 4 and 7, marginal Nos. 582 and 585 reading as follows:—

4. A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment.

7. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything may be enforced by writ of attachment or by committal.

Oswald, at 224, dealing with sequestration, quotes this language:—

Sequestration unquestionably was and is a process of contempt. Sequestration was issued to compel a man formerly to put in an answer and the like, and sequestration also went to compel (in the words of Lord Hardwicke) a defendant to perform a duty such as the payment of money, and such, of course, as the payments of money into Court: *Pratt* v. *Inman* (1889), 43 Ch.D. 175 at 179.

Unquestionably the plaintiff company, acting as assignee, would have to act by and through its managers and agents, and there is, it would seem to me, quite sufficient elasticity in the Creditors' Trust Deeds Act to admit of their so acting and complying in every way with its provisions, and being held answerable for due and proper compliance with all the provisions of the Act.

The plaintiff company being a legal entity, capable of holding real and personal property, and capable of being an assign under any deed, has had assigned to it the property of a debtor for the purpose of paying and satisfying rateably or proportionately, and without preference or priority, all the creditors of such debtor; and now it is asserted that the assignment is invalid upon the ground that a company or corporation is excluded from being an assignee under the Act.

What can be said to be the ground work for any such contention? I submit that the authorities do not support any such contention. The Act itself imposes no exclusion of company or corporation, no inhibition from acting as assignee, and it is a general principle of law that "a corporation is a legal *persona* just as much as an individual." (*Per* Cave, J., in *Re Sheffield, etc. Society*, 22 Q.B.D. 470 at 476).

To hold that a company or corporation cannot be named as assignee under the Act amounts to holding that the legislation is a trap, as what is there to bring to the mind of the assignor—the debtor about to make an assignment under the Act—that he cannot select a corporation as assignee? Nothing whatever, and every day is witnessed transactions in the way of disposition of real and personal property to which corporations are parties.

To indicate the intention of the Legislature in the matter, and to maintain the validity of the assignment once made, it is only necessary to read sec. 3 of the Creditors' Trust Deeds Act, R.S.B.C. 1911, ch. 13, which reads as follows:—

> Every instrument executed after the twenty-sixth day of April, 1890, whereby any property shall be expressed to be conveyed, assigned, or otherwise transferred by any person to an assignee for the purpose of paying and satisfying, rateably or proportionately, and without preference or priority, all the creditors of such person, their just debts, shall be deemed to be and be a good, valid and subsisting conveyance, if its construction and effect shall accord with its expressed purpose, and shall not be set aside or defeated on any account whatsoever except actual fraud, any statute of law to the contrary notwithstanding.

Note the last words of the section, "and shall not be set aside or defeated on any account whatsoever except actual fraud, any statute or law to the contrary notwithstanding."

In view of the nature of the legislation, and the plain intention of the Legislature to encourage the equitable, rateable and proportionate payment of debts—where the debtor is unable to pay his creditors in full—and to preclude preference or priority, intractable language, I submit, must be found to impel and rightly entitle the Court to hold that the assignment is invalid because of the fact that the assignee is a corporation.

It cannot be contended, in my opinion, that the property set forth in the assignment has not passed and become vested in the assignee, nor can it be successfully contended, in my opinion, that the assignee is not capable of discharging the duties which devolve upon an assignee under the Act.

It is to be noted that once the assignment was made to the plaintiff company, it was compelled to proceed under the provisions of the Act, and in default was subject to penalties, and in my opinion, all such penalties could have been enforced against the plaintiff company if there had been default.

B. C.
C. A.
1914
COLONIAL DEVELOPMENT CO. v. BEECH.
McPhillips, J.A.

It follows that, in my opinion, the learned trial Judge was wrong in holding that a company could not be an assignee for the benefit of creditors under the Creditors' Trust Deeds Act. In my opinion, the assignment to the plaintiff company was valid and effective, and the appeal should be allowed.

Having arrived at that conclusion, it necessarily follows—taking the same view as the learned trial Judge as to the merits of the case—that the impeached conveyances should be set aside; that the district registrar do cancel the registration thereof, and the certificate of title in the name of the defendant Crane Co., that the district registrar do register the property in the name of the plaintiff company subject to the mortgage, and do issue a certificate of title therefor to the plaintiff company, and that the defendant Crane Co. do pay to the plaintiff company the rents and profits derived from the property since December 15, 1911.

Judgment accordingly.

ONT.
S. C.
1913

BANCROFT v. MILLIGAN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 19, 1913.

1. SUBROGATION (§ V—20)—AS TO MORTGAGES — RE-LOAN OF BORROWED MONEY—EQUITIES.

Where the father mortgages his property to lend the proceeds to his son and takes from the latter a mortgage on the son's land for the amount of the loan and a prior indebtedness, and the two mortgages are upon different terms of payment, the transaction negatives the theory that there was an agreement by the son to indemnify the father from the mortgage made by the latter, nor is such an agreement to be presumed because of the son having consented to apply his payments by paying them directly to the father's mortgagee; and on the father's death his devisee of the incumbered lands or a transferee from such devisee has no right of subrogation in respect of the security held by the father against the son.

Statement

ACTION for a declaration: (1) that a conveyance of land in Cornwall by the defendant John C. Milligan to his wife, the defendant Maude Milligan, was void; (2) that a mortgage from the defendant John C. Milligan of the same land to his father, William Milligan, since deceased, was entitled to priority over the conveyance first-mentioned; (3) that the said mortgage was given for the express purpose of exonerating the farm of William Milligan from two mortgages placed on it by him for the benefit of the defendant John C. Milligan; and for a sale of the mortgaged lands, and the application of the proceeds of the sale to pay off the two farm mortgages, or for the assignment of the mortgage to the mortgagees of the farm, to carry out an alleged agreement between the defendant John C. Milli-

gan and William Milligan, deceased. The plaintiff was the holder of a second mortgage from the defendant James A. Milligan, upon the part of the farm devised to the latter by his father, William Milligan, deceased.

July 26. FALCONBRIDGE, C.J.K.B.:—I find that the plaintiff has proved all the material allegations in the statement of claim. I give judgment for the plaintiff in terms of the prayers of the statement of claim, with costs against the defendants John C. Milligan and Maude Milligan.

The death of Nancy Milligan since the trial has removed her contentions from the arena. I think that I should have held, in any event, that she had elected to take under the will. The plaintiff was willing, if she had lived, to pay her $100 a year as claimed in paragraph 3 of her counterclaim.

No costs for or against the defendants other than John C. and Maude Milligan.

The action was (by order) continued in the name of the executrix of Nancy Milligan as one of the defendants, and this defendant and the defendants John C. Milligan and Maude Milligan appealed from the judgment of FALCONBRIDGE, C.J.K.B.

The appeal was allowed.

Argument

J. A. Macintosh, for the appellants, contended that the agreement between the father and son was a personal contract and collateral to the land, and could not pass to the devisees of the land unless the benefit thereof was actually given to them by the will: *Canham* v. *Rust* (1818), 2 Moore 164; *In re Errington, Ex p. Mason*, [1894] 1 Q.B. 11. The plaintiff is trying to get something which he did not bargain for or expect. He had no knowledge of the mortgage given by John C. Milligan to his father on the Cornwall property; and the plaintiff got all that he contracted for and that he was entitled to: *Trust and Loan Co.* v. *Shaw* (1869), 16 Gr. 446; *Abell* v. *Morrison* (1890), 19 O.R. 669. Delivery of the conveyance to Maude Milligan took place when it was executed, not when it was registered: Elphinstone on Interpretation of Deeds, Bl. ed. (1889), p. 119 *et seq.*, and cases cited there; *Hayward* v. *Thacker* (1871), 31 U.C.R. 427; *McDonald* v. *McDonald* (1879), 44 U.C.R. 291; *Mackechnie* v. *Mackechnie* (1858), 7 Gr. 23; *Zwicker* v. *Zwicker* (1899), 29 S.C.R. 527. [MEREDITH, C.J.O.:—*In re Hawkes*, [1912] 2 Ch. 251, and *In re Ritson*, [1899] 1 Ch. 128, may have an important bearing on the question whether the devisee took the land subject to a guaranteed debt or not.]

G. A. Stiles, for the plaintiff, the respondent:—The defendant John C. Milligan never made any payment on the $4,000 mortgage to his father or his father's personal representative,

ONT.
S. C.
1913
BANCROFT
v.
MILLIGAN.
Argument

nor did he give any acknowledgment of indebtedness under it. The acceleration clause made the whole of the mortgage-money due a year after it was given: *McFadden* v. *Brandon* (1903-4), 6 O.L.R. 247, 8 O.L.R. 610; *Cameron* v. *Smith* (1913), 12 D.L.R. 64, 4 O.W.N. 1459.

The plaintiff is entitled to succeed in the action and to maintain the judgment appealed against, upon the principles of subrogation and estoppel. The defendant John C. Milligan gave his father the $4,000 mortgage for the express purpose of exonerating the farm property mortgaged to the Cameron executors, and paid the interest on the Cameron mortgages during his father's lifetime. After his father's death, he made payments of interest and reduced the principal. The plaintiff's rights arose in 1909, and for three years after that John C. Milligan continued to make these payments, the benefit of which accrues to the plaintiff. James A. Milligan was entitled to be subrogated to the rights of his father in connection with the indemnity mortgage; and the plaintiff is entitled to be subrogated to the rights of James A. Milligan: Sheldon on Subrogation, 2nd ed., pp. 2, 248, 252: *Gray* v. *Coughlin* (1891), 18 S.C.R. 553; *Coursolles* v. *Fookes* (1889), 16 O.R. 691; *Pearl* v. *Deacon* (1857), 24 Beav. 186. It is now too late for John C. Milligan, in view of a course of conduct extending over eight years up to the time of his father's death and four years afterwards, to contend that he is not liable to pay the Cameron mortgages; that the $4,000 mortgage is not an indemnity mortgage; and that the Sydney street property is not liable to exonerate the homestead property. As to the doctrine of estoppel, see Everest and Strode on Estoppel, p. 5. The plaintiff does not quarrel with any argument from the Wills Act or the Registry Act; his rights are apart from and higher than any conferred by these two statutes, and flow from a transaation to which neither statute has any application. The higher equities are with the plaintiff.

Macintosh, in reply:—The plaintiff's contention is, that John C. Milligan entered into a contract with his father to indemnify him against the Cameron mortgages, and to exonerate the father's farm from these mortgages by a mortgage on the Cornwall property. This contract, to be valid as against the Statute of Frauds, must be in writing; the only writing is the mortgage, and it shews an entirely different contract from that alleged by the plaintiff; it is an ordinary mortgage to secure a debt. By virtue of sec. 37 of the Wills Act, R.S.O. 1897, ch. 128, the two sons, James and Alexander, each took one-half of the father's farm, subject, among other charges, to the Cameron mortgages; and the benefit of the mortgage made by John C.

Milligan did not pass to the two devisees of the farm, but to the residuary legatee, the father's widow, Nancy Milligan. James A. Milligan had no equity to call upon the plaintiff to pay off the Cameron mortgages, and the plaintiff has no higher right than James A. Milligan to call upon John C. Milligan to pay these mortgages. The principle of subrogation cannot be applied, because the plaintiff was a stranger to the transaction between John C. Milligan and his father, he was not liable to pay the mortgages, and he got everything he contracted with James A. Milligan for, namely, a mortgage of the equity of redemption in the land devised to James A. Milligan: Sheldon on Subrogation, 2nd ed., p. 360 *et seq.* No facts were proved upon which estoppel could be based.

Hodgins, J.A.

December 19. HODGINS, J.A.:—In this case we have no specific findings of fact by the learned trial Judge. He, however, states that "the plaintiff has proved all the material allegations in the statement of claim." Turning to the pleadings, it appears that the claim made in them is: (1) that the deed from John C. Milligan to his wife should be declared void; (2) for a declaration that the mortgage from John C. Milligan to his father, William Milligan, is entitled to priority over the deed just mentioned; (3) and a further declaration that the said mortgage was given for the express purpose of exonerating the farm of the father from and against two mortgages put on it by him for the benefit of John C. Milligan; and an order for sale of the lands comprised in the mortgage, and the application of the proceeds to pay off the two farm mortgages, or for the assignment of the mortgage to the mortgagees of the farm, "to carry out the agreement between the said John C. Milligan and William Milligan, deceased."

These claims are based on certain allegations that John C. Milligan had agreed with his father to pay and discharge the two mortgages on the farm and:—

"(8) For the purpose of carrying out the covenant, agreement, and contract made by the said defendant John C. Milligan with his deceased father, the said defendant John C. Milligan executed in favour of his said father a certain mortgage, undated, and made upon its face to secure the principal sum of $4,000, and covering that part of lot number 13 on the south side of Third street, in the said town of Cornwall, hereinbefore particularly described, and delivered the said mortgage to the said William Milligan.

"(9) The execution and delivery of the mortgage referred to in the next preceding paragraph hereof was with the express intent and purpose of exonerating the homestead farm of the said William Milligan from the two mortgages herein-

ONT.
S. C.
1913
BANCROFT
v.
MILLIGAN.
Hodgins, J.A.

before specifically described, made by the said William Milligan, and for the purpose of protecting the said property against the same, and to indemnify and save harmless the said William Milligan from and against the sums thereby secured."

By paragraph 29 a claim is made for the priority of this mortgage over the deed to the wife of John C. Milligan.

From these pleadings it is evident that the plaintiff was asserting the validity of the mortgage from John C. Milligan to William Milligan, and its priority over the deed to Maude Milligan, and averring that it was executed for the purpose of carrying out the covenant, agreement, and contract made by him with his father, and that the intent and purpose thereof was to exonerate the farm and to protect it against the two mortgages, and to indemnify and save harmless the said William Milligan from and against the sums thereby secured.

The result of the finding of the learned trial Judge is, therefore, to establish that the mortgage was valid, and that it was executed for the purpose mentioned. This is not a finding that the mortgage was merely an indemnity (and, therefore, not otherwise enforceable), but that its purpose was to protect the father and his lands; in other words, that John C. Milligan and his father, for the purpose of indemnifying the farm and the father, agreed that the form in which this indemnity should be put was the giving of the mortgage in question upon other lands, against which it could be enforced.

The proved desire of the father to register the mortgage as a valid security is consistent with this finding; while the only other relevant fact, namely, that John C. Milligan had paid most of the interest and part of the principal on the farm mortgages, is also consistent with it, because, if paid with the assent of the father—and there is no evidence to the contrary—these amounts would naturally reduce the amount owing upon the $4,000 mortgage, if that was the form the indemnity against the two farm mortgages had taken by agreement between them.

The learned trial Judge evidently rejected the account given by John C. Milligan that this mortgage was merely an acknowledgment of indebtedness and was not to be enforced, while the relief given by him to the respondent at the trial is in the form of an order for sale of the lands comprised in the John C. Milligan mortgage, which could only be reached by virtue of the charge created by that mortgage. The finding of the learned trial Judge in favour of the respondent on this point is consistent, as I understand it, with the position taken by counsel for the respondent at the trial in objecting to the evidence given by John C. Milligan, as contradicting the mortgage, a written document.

I think the mortgage was the whole agreement between John C.

Milligan and his father, and was the indemnity he elected to take. See *Cooper* v. *Jenkins* (1863), 32 Beav. 337. It expresses clearly the method by which it was to be enforced. It is for $500 more than the amount of the Cameron mortgages; is payable five years later than the due date of those mortgages; and, out of the $3,500, $350 was retained or paid to the father to settle with Dr. Munro for money borrowed by the father from him to pay for John C. Milligan's education. It is in these respects inconsistent with a contract of simple indemnity against these mortgages alone, and imports a larger and different transaction, so that it ought, in my judgment, to be taken as defining and limiting any contract of indemnity or otherwise between the father and son. See *First Congregational Society in Becket* v. *Snow* (1848), 1 Cush. (Mass.) 510. But, I think, the legal result of this finding is different from that which the judgment in appeal gives to the respondent.

The father appears to have lent his son, John C. Milligan, $3,150, afterwards increased to $3,500, to raise which the father had to mortgage his farm. This method of procuring the money was his own doing, and it was competent to him thereafter to allow the mortgages to stand upon his land and to sell and dispose of it subject to these mortgages. In the father's hands his son's mortgage was a security he could deal with just as freely as he could with his own farm. If he had sold the farm subject to the mortgages, his purchaser could not claim that the son's mortgage must be applied to pay the incumbrances off; and, if the father realised upon it, as he might have done, he would not then be bound to apply it to pay off these mortgages. The father has chosen to devise the west half of the farm to his other son, James A. Milligan, without exonerating it from the mortgages, and has allowed the mortgage from John C. Milligan to fall into his estate as part of it. He had a right so to do; and his will does in effect what he might have done in his lifetime.

It is urged that the doctrine of subrogation applies; that the father was in fact a surety for the debt; that the son, as between himself and his father, was primarily liable for the amount of the two mortgages placed upon the father's farm; and, therefore, the plaintiff, as assignee of James A. Milligan, to whom the farm was devised, can be subrogated to the father's rights as surety, and can assert them now.

I do not think that the assumption is correct that the father is a surety. He borrowed the money and lent it to his son, and it is straining one's conception of what "surety" means to put the father in that position. He could pay off the mortgages and then realise upon John C. Milligan's mortgage, or he could retain it in his hands, whichever he thought best. Assuming

ONT.
S. C.
1913
BANCROFT v. MILLIGAN.
Hodgins, J.A.

that it was a good security, the father might, whether he relieved his farm or not, have elected to retain it as an investment equal in extent to the amount for which his farm had been charged.

It is really a matter of contract, not of equities. The son owed the father what the father had lent to him, and gave him a security for it. No trust arises in such a transaction, and, as it seems to me, no equity. It is a pure business transaction.

These two mortgages on the farm were debts of the testator, the father. He directs the payment of his debts out of his estate as a whole. He devises the farm in question, as to the west half, to James A. Milligan, and as to the east half to William A. Milligan, each subject to two charges, one in favour of the wife and one in favour of his daughter Mary Jane Carson. Under the present Wills Act (1910), 10 Edw. VII. ch. 57, sec. 38, subsecs. 1 and 2, the specific devisee, James A. Milligan, would take the west half of the farm subject to one-half of the mortgages upon it. The same result follows from the sections of the Wills Act in force at the time of the father's death, viz., R.S.O. 1897, ch. 128, secs. 37 and 38. See the following decisions: *Lewis* v. *Lewis* (1871), L.R. 13 Eq. 218, 227; *In re Newmarch* (1878), 9 Ch.D. 12; *Elliott* v. *Dearsley* (1880), 16 Ch.D. 322; *Gael* v. *Fenwick* (1874), 43 L.J. Ch. 178, 22 W.R. 211; *Dungey* v. *Dungey* (1877), 24 Gr. 455; *Mason* v. *Mason* (1887), 13 O.R. 725.

How then are the charges on the devised estate to be borne? If the Act applies, the devisee must take the land burdened with the Cameron mortgages, and the personal estate of the testator is exonerated. If that be so, can the devisee of the land claim the mortgage given by John C. Milligan against the residuary devisee? If he can, it must be because the Act does not apply, or because, notwithstanding its application, the devisee of the lands can claim indemnity from the estate. But exoneration of the personal estate includes exoneration of every part of that estate, otherwise there is no exoneration in fact, or only partial exoneration, for which no warrant is found in this will: *In re Hawkes*, [1912] 2 Ch. 251; *In re Ritson*, [1898] 1 Ch. 667, [1899] 1 Ch. 128.

Besides this, the plaintiff, if he represents James A. Milligan, is a volunteer, and so is the residuary devisee, and the Court does not interfere actively on behalf of a person, not a purchaser for valuable consideration, claiming only through him who created the voluntary settlement, against a volunteer: *Dolphin* v. *Aylward* (1870), L.R. 4 H.L. 486.

In dealing with the case so far, I have assumed that the respondent's position was the same as that of James A. Milligan. It is not necessary to decide whether or not that is so; but I am inclined to think that there may be a difference, in view of

ONT.

S. C.
1913

BANCROFT
v.
MILLIGAN.

Hodgins, J.A.

the covenants in the respondent's mortgages, the situation as between James A. Milligan and the respondent when he acquired them, the Registry Act, and the fact of foreclosure.

If the letters written by John C. Milligan to the present holders of the Cameron mortgages, or his dealings with them, have made him liable to them, the respondent may find some way of getting the benefit of this new liability when he pays off the mortgages on that part of the farm of which he is now the owner.

Nancy Milligan has died since action was begun, and revivor has taken place. Her executrix is before the Court, and claims $400 as being a charge upon the plaintiff's lands. Her husband's will provided for one-half of her support and maintenance, or $100, "whichever she may choose," and charged it upon the lands devised to James A. Milligan. His widow lived with the other brother, William Alexander Milligan, on the east half, was supported by him, and did his work. She made the claim for $100 per annum in April, 1912. I can see no reason for refusing to award her executrix the $400 for the four years, but I think that is all she can get. Nancy Milligan never claimed her support after April, 1912, out of the west half, and the $100 for 1912-13 was not due when she died.

The appeal should be allowed and the action should be dismissed with costs to the appellants who appeared, and there should be judgment on the counterclaim without costs, declaring that the west half of the farm is charged under William Milligan's will with $400, without interest, in favour of the estate of Nancy Milligan.

Meredith, C.J.O.

MEREDITH, C.J.O.:—I agree that the appeal should be allowed and the action dismissed, upon the short ground that the evidence does not warrant the conclusion that the mortgage from the son John to his father was anything but what it purports to be, a mortgage to secure the indebtedness of the mortgagor to the mortgagee of the amount secured by the mortgage. The transactions which resulted in the giving of the mortgage by the father of his own farm and his taking the mortgage from the son were in substance, as well as in form, a borrowing by the father from his mortgagees of the $3,500, repayable on the terms mentioned in the mortgages, and a lending to the son of the amount so borrowed, which was to be repaid according to the terms of the mortgage from the son, which, as my brother Hodgins points out, are different from those applicable to the mortgages which the father had given.

The fact that the son paid the interest on the mortgages of the father is not inconsistent with this view, as the proper inference, in the circumstances, is, that these payments were to

ONT.
S. C.
1913
BANCROFT v. MILLIGAN.
Meredith, C.J.O.

be treated as payments *pro tanto* on the son's mortgage, as well as payments in discharge of the liability of the father on the mortgages he had given.

If this is the proper conclusion, it follows that no question as to subrogation can arise, as the mortgage from the son to the father was not a mortgage to indemnify the father, nor was the father a surety for the debt of the son, but his creditor for the amount of the son's mortgage.

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

MACLAREN and MAGEE, JJ.A., agreed.

Appeal allowed.

CAN.
S. C.
1913

DONALDSON et al. (defendants, appellants) v. DESCHENES (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. December 23, 1913.

1. MASTER AND SERVANT (§ II D—205)—DISOBEDIENCE OF RULES—LOADING VESSEL.

A finding that the employing shipowners had not taken the necessary precautions to enforce their rule that labourers employed in loading the vessel should use the companion-way and not the hatchway in descending to work, will, if supported by the evidence, be sufficient on which to make the employers liable for injury causing the foreman's death, where a labourer in attempting the dangerous mode of descent by the hatchway from the upper to the main deck fell into the hold and upon the foreman who was there in the discharge of his duties and caused injuries to the latter from which his death resulted, where the circumstances shewed that the accident occurred before the labourer became subject to the control of the deceased foreman, and that the enforcement of the rules prohibiting the use of the hatchway as a means of descent was a matter for the general superintendent and others in authority who would have known, if they had exercised proper supervision, that the practice of descending by the hatchway in contravention of the rules had become common amongst the labourers employed.

Statement

APPEAL from the judgment of the Superior Court, sitting in review, affirming the judgment of Mr. Justice Archibald in the Superior Court for the district of Montreal, by which, upon the findings of the jury, judgment was entered in favour of the plaintiff, personally and as tutrix to her minor children, for the sum of $5,000 with costs.

The appeal was dismissed.

Lafleur, K.C., and *Aylmer*, for the appellants.
Pariscault, and *Rhéaume*, for the respondent.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action brought by the widow and minor children of the late Cyrille Fournier to recover damages caused by his death when in the employment of the defendants on board the SS. "Kastala" in the harbour of Montreal.

Some objections were taken to the form of the proceedings

which were, in my opinion, satisfactorily disposed of in the provincial Courts: *Ruest* v. *Grand Trunk Railway Co.*, 4 Q.L.R. 181. They are pressed here merely as affecting costs.

The accident to the deceased was the result of the negligence of a fellow-servant whilst acting in contravention of the rules laid down for his guidance by the owners of the ship. The main defence is that all reasonable precautions were taken by the defendants to protect their employees against the negligence complained of, and, if the instructions, which were undoubtedly given, had been followed in this instance the accident to the deceased, admittedly, could not have happened. It is also urged that the deceased was himself a person in authority, charged as such with the duty of enforcing the rules, and that his failure in that regard was the cause of the accident.

The reply is that, in view of the transient nature of the employment and frequent changes in the "personnel," greater vigilance should have been exercised by the general foreman, Sullivan, and the general superintendent, Duncan, who alone had power to hire and discharge the men and to enforce the rules prohibiting the use of the means adopted by Thibert to descend from the upper to the main deck, which was the cause of the accident.

It appears on the evidence that the accident happened when Thibert was returning to his work on the main deck, and that he would not be subject to the control of the deceased until he reached that place.

The point raised is certainly not free from difficulty, and, were it not for the findings of the jury, the question might be before us for solution as to the extent to which the French law of Quebec has departed from the classic rule governing civil responsibility since the days of Rome that there is no liability without fault, to adopt the principle that the employer, in a case like this, is subject to a liability derived from the law alone.

I would be disposed to hold, if I were trying the case, that proper rules and regulations were made by the owners of the "Kastala" to provide for the safety of their men, and a reasonable attempt was made to enforce them, but there is evidence both ways, and that issue was fairly enough put to the jury of merchants and traders, who found unanimously that the necessary precautions to enforce the rules and regulations were not taken by those in authority. It was for the jury to say whether and how far the evidence was to be believed: Gérard, Torts ou Délits Civils, p. 201. I am, therefore, to confirm, but solely and exclusively on the ground that the injury to the deceased was found by the jury, on sufficient evidence, to have been caused by the fault of Thibert who was, at the time, under the control of the legal owners of the ship, at the loading of which both the deceased and Thibert were employed.

The appeal should be dismissed with costs.

CAN.
S. C.
1913
DONALDSON
v.
DESCHENES.
Idington, J.

IDINGTON, J.:—There is evidence upon which the jury could properly reach the conclusion they did in answering the main question settled and submitted for their consideration. I see no reason for granting a new trial.

If there has been error or oversight in relation to some of the numerous defendants being in fact and law answerable for the damages, that is a mere detail which can only affect the question of costs, for it is admitted a sufficient number of those named as defendants are of such financial substance as to answer the judgment herein. The question of such costs also must be comparatively unimportant, for they all seem to have joined in the defences set up as if they were equally liable with others. Being a mere matter of costs, we should not, if we observe precedents of this Court, interfere.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J., agreed that the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Thibert, whose fall caused the death of the plaintiff's husband, was, at the time, an employee of the defendants, or some of them. He had been absent from the vessel on which he was engaged for purposes of his own. When the fall happened, he was returning to his work by a route forbidden by a rule of his employers. Although on the vessel and under pay, and, therefore, under the defendants' control within the purview of the first paragraph of art. 1054 of the Civil Code, he had not reached the place where the work for which he was engaged was to be done. It may be that, at the critical moment, he would have been "in the course of his employment," within the meaning of that phrase as defined in certain authorities, but I should doubt whether he was "in the performance of the work for which he was employed" within the purview of the concluding paragraph of art. 1054 of the Civil Code. That question, however, I find it unnecessary to determine.

Thibert's fall was caused by his own fault in using a prohibited means of descending from the upper to the main deck. The question presented for determination is whether the defendants have "failed to establish that they were unable to prevent the act which caused the damage:" art. 1054 C.C., para. 6. The finding of the jury that the defendants were negligent in "not having taken the necessary precautions to enforce their rules," read in the light of the charge, in effect means that by taking proper care the defendants could have "prevented the act which caused the damage," *viz.*, Thibert's attempt to descend by this dangerous route. There was evidence to warrant such a finding—evidence that the men were in the habit of using the route which Thibert took. He himself says that he descended as he was

accustomed to descend. The son of the deceased, Fournier, says that there were two methods of going down, and that the men went down as Thibert did as often as by the other route. Another witness, Marrier, says that they often went down as Thibert did. Albert Gagnon, J. B. Lefebvre and George Sarrazin also say that some of the men went down by the forbidden route. This practice was or should have been known to the persons in charge on behalf of the defendants if there was proper supervision. There was evidence, therefore, to justify an inference that they had not taken effective means to check it. It follows that the finding that the defendants had failed to enforce their rules is sufficiently supported.

The jury negatived the responsibility of the deceased, Fournier, for Thibert's wrongful act. While I entertain some doubt as to the correctness of this finding, I am not so clearly satisfied that it is erroneous that I would feel justified in setting it aside—especially in view of its confirmation by the Court of Review.

Brodeur, J.

BRODEUR, J., was in favour of dismissing the appeal. He referred to an English decision which he said was under circumstances analogous to the present case: *Robertson* v. *Allan Bros. & Co.*, 98 L.T. 821.

The restriction of liability under art. 1054 C.C. (Que.), where the person was "unable to prevent the act which has caused the damage," applies only to the cases of parents, tutors, curators, etc., specially mentioned in that article, and does not affect the general liability dealt with in the first part of the article.

Appeal dismissed.

SLENTER v. SCOTT.

B. C.
S. C.
1914

British Columbia Supreme Court, Murphy, J. March 23, 1914.

1. LABOUR ORGANIZATIONS (§ I—5)—SCOPE OF ORGANIZED REDRESS.

Although a trade union, combining with a common purpose to conserve the interests of its members and their trade, may lawfully do the acts reasonably necessary to secure and advance such interests, their course of conduct becomes unlawful if it degenerates into acts intended and calculated to injure the other party in his trade.

[*Quinn* v. *Leathem*, [1901] A.C. 495, applied.]

2. LABOUR ORGANIZATIONS (§ I—5)—INTERFERENCE WITH FELLOW-MEMBER—"JUST CAUSE"—DAMAGES.

A trade union acts without "just cause" where in seeking to compel a member to comply with its decision, it forbids his fellow-members to work in the same employ, and it is liable in damages for the resultant loss of wages to the member where his dismissal was occasioned by the attitude adopted by the union.

[*Quinn* v. *Leathem*, [1901] A.C. 495; *Glamorgan Coal Co.* v. *South Wales Miners Federation*, [1903] 2 K.B. 545; *Graham* v. *Knott*, 14 B.C.R. 97, specially referred to.]

B. C.

S. C.
1914

SLENTER
v.
SCOTT.

ACTION by a workman against a trade union to recover damages for loss of employment occasioned by its alleged wrongful acts.

Judgment was given for the plaintiff.

Bull, for the plaintiff.

W. B. Farris, for the defendant.

Murphy, J.

MURPHY, J.:—The law is clear that a violation of legal right committed knowingly is a cause of action: *Quinn* v. *Leathem*, [1901] A.C. 495 at 510; and also that

> Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Therefore a combination of two or more persons without justification to injure any person by inducing employers not to employ him is, if it results in damage to him, actionable: *Ibid.*

This *primâ facie* wrongful interference may be negatived by shewing that the exercise of the defendant's own rights involved the interference complained of, which interference is merely the exercise of the right of a man to interfere in a matter in which he is jointly interested with others and such interference gives no cause of action. In such a case there will be intentional procurement of a violation of individual rights, contractual or other, but just cause for it as being done for the maintenance of the equal civil rights of the defendants: *Glamorgan Coal Co.* v. *South Wales Miners Federation*, [1903] 2 K.B. 545, 571.

What is "just cause" or "sufficient justification" that will negative the *primâ facie* right of action in such cases as this is a difficult question to determine as to which no general rule can be laid down. "The good sense of the tribunal, which had to decide, would have to analyze the evidence and to discover on which side of the line each case fell": *Glamorgan Coal Co.* v. *South Wales Miners Federation*, [1903] 2 K.B. 545 at 574; *Giblan* v. *National Amalgamated Labourers Union of Great Britain and Ireland*, [1903] 2 K.B. 600, 617.

In this case I find that the minute book contains a true account of what was done at the Union meeting. I find that the plaintiff was forbidden to work in Hazel's shop for a period of six months because of the altercation between him and the walking delegate of the Union. I find that such decision was enforced by the Union men in Hazel's shop refusing to continue at work if plaintiff was not discharged and that such refusal occurred at least twice and probably thrice. I find that in consequence plaintiff actually suffered injury as his employer was forced to dismiss him under penalty of having his work tied up. I find that plaintiff's fellow-

employees so refused, not because they objected to working with plaintiff but because they feared fines would be levied on them by the Union if they continued to work with plaintiff in this particular shop. I find that the object of defendants was not primarily to injure plaintiff but to enforce the decision of the Union.

Now *primâ facie* a combination to interfere with the civil rights of another whether it be a right to full freedom in disposal of his own labour or his own capital or any other right of citizenship, is an unlawful combination because such interference if carried into effect, is an actionable wrong and it is this fact and not any mere malicious motive which constitutes the combination a conspiracy: *Glamorgan Coal Co.* v. *South Wales Miners Federation*, [1903] 2 K.B. 545 at 570.

Do the facts as found furnish a just cause for what was done? One body of men may refuse to work with another if it is not shewn that their purpose was to molest him in pursuing his calling and prevent him except on conditions of their own making, from earning his living thereby: *Graham* v. *Knott*, 14 B.C.R. 97.

But defendants here not only exercised their undoubted right to work or refuse to work, they successfully and intentionally endeavoured to dictate conditions on which plaintiff should work. The law as above cited shews they can only escape liability if they had "just cause." The direction given to the jury by Fitzgibbon, L.J., in *Quinn* v. *Leathem* [*sub nom. Leathem* v. *Craig*, [1899] 2 Ir. R. 667, 4 Irish Law Reports reprint 945], approved in the *Giblan* case, [1903] 2 K.B. 600 at 619; and in *Quinn* v. *Leathem*, [1901] A.C. 495, 508, is that the jury were to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interest or those of their trade by reasonable means, including lawful combinations, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade, through a combination, and with a common purpose to prevent the free action of his customers and servants (in that case; in this, of his employers) and with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests. Applying this principle, I hold the facts do not furnish "just cause" so as to deprive plaintiff of his right of action. In the *Giblan* case *supra*, it was held that the right of action was not defeated when the object was to compel payment of a debt to the Union. The defendants themselves, I think, admit that in their view the altercation could not be a "just cause" for their action, because at the trial they endeavoured to make out, wrongfully as I find, that they acted as they did because plaintiff had as foreman connived at or compelled improper work. Their rules in no way authorized them to take the course adopted. The altercation itself was not of a serious character. If ventilated in the Police Court, if the plaintiff would have been found guilty of an assault

B. C.
S. C.
1914
SLENTER
v.
SCOTT.
Murphy, J.

at all, which I think would be doubtful under all the circumstances, a small fine would in my opinion be the only consequence.

I give judgment for plaintiff for the amount he would have earned in wages up to the time when active steps against him ceased, as shewn by the evidence of Hazel. I think this date is Nov. 20, 1913, but if there is any dispute as to this or as to the quantum counsel may speak to the matter again.

Judgment for plaintiff.

KERR v. CUNARD.

N. B.
S. C.
1914

New Brunswick Supreme Court, McLeod, C.J. March 13, 1914.

1. SPECIFIC PERFORMANCE (§ I B—15)—PAROL AGREEMENT—PART PERFORMANCE—STATUTE OF FRAUDS—REALTY SALE.

A verbal arrangement for the sale of land, indefinite in its terms (for example, as to description and rights of way), falling short of an agreement *ad idem*, is not sufficient basis on which to decree specific performance upon acts of part performance referable thereto, which, had they referred to a definite contract, might have taken it out of the Statute of Frauds.

[*Maddison* v. *Alderson*, 8 App. Cas. 467 at 478; *Calhoun* v. *Brewster*, 1 N.B.Eq. 529; Fry on Specific Performance, 5th ed., secs. 633 and 634, referred to; see also *Beck* v. *Duncan*, 8 D.L.R. 648.]

2. MISTAKE (§ VI B—105)—RELIEF—WHEN IT MAY BE GRANTED.

Where, by reason of mutual mistake between the parties, in a supposed parol agreement for the sale of land, the plaintiff has, with the other's acquiescence, erected a barn and planted fruit trees on the premises, a court of equity will grant reasonable compensation therefor.

Statement

ACTION for specific performance of an alleged parol agreement for the sale of land, or in the alternative for compensation for the erection of a barn and planting of fruit trees on the premises.

Judgment was given for the plaintiff by way of compensation only, specific performance being refused.

Argument

J. King Kelley, K.C., for plaintiff:—We claim specific performance. There is nothing in writing, but there has been part performance of the contract. The amount of land we claim is ten rods wide, running to the rear. It may be ascertained from the evidence where the rear is, if not, the matter might have to be submitted to a reference to ascertain more clearly the boundaries. Failing this, we are entitled to a strip six rods wide, running to the brook. We claim specific performance and in case the contract is not carried out an order of the Court that the lands be sold and the proceeds applied to the payment of the damages which we claim are five hundred dollars: Brown on the Statute of Frauds, 5th ed., secs. 5, 467-469; Snell's Equity, 16th ed., 481; Fry on Specific Performance, 5th ed., sec. 610, p. 303; *Caton* v. *Caton*, L.R. 1 Ch. 137, L.R. 2 H.L. 127.

[THE COURT:—The first proposition is, was there a contract made, and what was it?]

The contract was commenced in May and completed in December. The lot was to be ten rods in width and run to the rear. The building of the barn was sufficient possession to take the contract out of the Statute of Frauds. If the property can be identified, the Court will ascertain from the best evidence possible the extent of the property that was intended to be sold: Fry on Specific Performance. If the Court decides there was a contract, then the order should be for the carrying out of the terms of that contract, or if it is impracticable to carry it out then an order for damages. The damages would consist of the price of the barn, the cost of the orchard and the cost of tilling the land. Part performance will take the contract out of the Statute of Frauds, when for example, one of the parties has been let by the other to alter his position by taking possession of land and expending money in buildings: *Caton* v. *Caton*, L.R. 1 Ch. 137, L.R. 2 H.L. 127; *Wills* v. *Stradling*, 3 Ves. Jun. 378, 30 Eng. R. 1063; *McLaughlin* v. *Mayhew*, 6 O.L.R. 174; *Bodwell* v. *McNiven*, 5 O.L.R. 332; Sugden on Vendors and Purchasers, 14th ed., 224. Section 18, sub-sec. 8 of the Judicature Act, gives the Court power to decide everything in dispute so that ample justice will be shewn to all parties concerning the issue then before the Court: 2 Story's Equity, 2nd ed., secs. 759, 765, 768.

R. C. Murray, for defendant:—The defendant contends, first that there is no certainty of a contract; second, that there was a mistake on the part of each party as to the extent of the land negotiated for; third, that the plaintiff had agreed to farm with the defendant on this land and has not performed his part of the contract and refuses to do so. The chief point is, was there a contract, and if so, when was it made, in May or December? The plaintiff claims he was to have ten rods wide from the front to the rear of the farm, one-quarter of the farm. The defendants deny one-quarter was ever mentioned. A reasonable amount of certainty is required for specific performance of a contract: Fry on Specific Performance, 5th ed., sec. 380. In this case there is the evidence of three witnesses as to the terms of the contract which is contradicted by the evidence of the three other witnesses: *McLaughlin* v. *Whiteside*, 7 Grant's Ch. 573. The burden of proof as to the terms of the contract is on the plaintiff: *Lindsay* v. *Lynch*, 2 Sch. & Lef. 8; *Price* v. *Salusbury*, 32 Bev. 446, 55 Eng. R. 175. The minds of the parties never met. The plaintiff had one idea, the defendant, Mr. Cunard, had another idea of the contract, and the defendant, Mrs. Cunard, had yet another idea of the contract. There was clearly a mistake as to the contract and where one party understood one thing and the other party another thing, there is no such contract as the Court will enforce: Fry on Specific Performance, 5th ed., secs. 771 and 782. If there was no contract, the plaintiff will lose unfortunately the money he expended on the property.

N. B.
S. C.
1914
KERR
v.
CUNARD.
Argument

J. K. Kelley, in reply:—If the plaintiff is not given possession of this land he is a trespasser, and the Court will not permit that state of affairs to exist, as he took possession of the land under an agreement.

[THE COURT:—He would not be a trespasser if he was invited there; he might be invited there but yet the land might not be sold to him.]

Mr. Kelley:—The Court will be very astute to find a contract justifying the man being on the land as against him being a trespasser: *Wills* v. *Stradling*, 3 Ves. Jun. 378, 30 Eng. R. 1063.

McLeod, C.J.

MCLEOD, C.J.:—This action is brought by the plaintiff for the specific performance of a contract the plaintiff alleges he had with the defendants, or one of them, for the purchase by him of a certain piece of land situate at Oak Point in the parish of Greenwich, King's county. There is an absolute difference between the parties as to what the agreement for the purchase of the land was. The plaintiff, it appears, on and prior to the spring of 1911, owned a farm situate at Grand Lake in Queen's county, on which he was at that time living. The defendants on and prior to that time lived on a farm situate at Oak Point in the parish of Greenwich, King's county, containing about two hundred acres, which farm in fact belonged to the defendant, Annie L. Cunard, wife of the defendant, Charles W. Kaye Cunard. The plaintiff and defendants appear to have been on very good terms. The plaintiff stated that his farm at Grand Lake was too large for him to work, and he had difficulty in obtaining help, and in the spring of 1911 he came to Oak Point on the first boat of the season, and saw the defendants. He went to their house, and the defendant, Charles W. Kaye Cunard, took him over the farm. (The plaintiff says that Mr. Cunard told him that the farm belonged to himself and his wife.) And after looking over it he agreed to purchase, and Mr. Cunard agreed to sell him ten rods on the north side of the farm, extending from the front to the rear, for two hundred dollars. He says Mr. Cunard said this was a quarter of the farm, and he (Cunard) said the whole farm was worth eight hundred dollars. He (the plaintiff) says that it was also part of the agreement that he was to have a right of way across the defendants' farm in order to get to the rear of the strip of land he bought, and that the defendants were to have a right of way across the strip of land he bought in order to get to the rear of the remaining portion of the farm. This agreement he claims was acquiesced in by the defendant, Annie L. Cunard. There was no written agreement or memorandum in writing between the parties of the purchase; the agreement, whatever it was, was entirely verbal. In the fall of 1911 the plaintiff brought his stock and farming implements, and his root and grain crops down to Oak Point, and stored the crop in defendants' cellar, and put the stock in defendants' barn. He kept the

stock in defendants' barn for about a month, and then removed it to other places. The plaintiff and his wife had two rooms in defendants' house, and stayed there all winter, but paid nothing for the rooms. The plaintiff says that he intended to build a barn and house on the land he bought, but he was disappointed in getting a man to build the house that fall, but he brought a part of a frame for a barn from his place at Grand Lake, and bought the balance of the frame and sufficient lumber for the barn, and engaged a Mr. Flewwelling, and built a barn on the strip of land he claims to have bought that year. He says the barn cost him over four hundred dollars. He also bought a quantity of apple and other fruit trees and sent them to Oak Point, and the defendant, Mr. Cunard, set them out for him on this strip of land. The plaintiff says that he asked for a deed of the strip of land during the fall of 1911, but was told by Mr. Cunard that the defendants did not have the deed in their possession, but he promised to get it. As a matter of fact, the deed to the defendant, Mrs. Cunard, although made and executed, had not been recorded, but this, I gather, was through no fault of the defendants or either of them. It was subsequently recorded, and in the spring of 1912 the plaintiff prepared a deed of the ten rods on the north side of the farm, extending from the front to the rear, and providing in the deed for the rights of way that he claimed were to be given by each party to the other, and tendered it to both of the defendants for execution, at the same time tendering two hundred dollars for the price he alleged was to be paid for the ten rods. The defendants both refused to accept the deed, or accept the money, and this action was accordingly brought.

The defendants deny that they made the contract as claimed by the plaintiff. Mr. Cunard says that he explained to the plaintiff how the title of the property stood, that is, that the property belonged to his wife, the other defendant, Annie L. Cunard. He alleges that in the spring of 1911 an agreement was made between the plaintiff and the defendants for the purchase by the plaintiff of a strip of land six rods wide from the front running back to a brook across the farm towards the rear. There are two brooks running across the farm towards the rear, one is known as the Meadow Brook, and the other as the Flaglor Brook. The Meadow Brook is sometimes called the little brook, and the Flaglor Brook, the big brook. The Flaglor Brook is nearer to the rear of the farm. Mr. Cunard says that he said to the plaintiff that the strip sold was to run to the brook, and he meant the Flaglor Brook. He says he and the plaintiff went out and looked at the land the first night the plaintiff came to the defendants' house, and the plaintiff agreed to take six rods, which was to extend to the brook. He says he told the plaintiff he would not sell the rear as there was lumber on it. The next morning, he says, he and plaintiff went on the land again, and he paced off six rods so that

N. B.
S. C.
1914
KERR
v.
CUNARD.
McLeod, C.J.

the plaintiff could see how wide the strip would be, and the plaintiff said, "That is a very narrow strip of land," and he (Cunard) said that it was. "Suppose you take eight or ten rods?" and the plaintiff said, "All right," and from the evidence I think it appears that the plaintiff and defendant, Mr. Cunard, agreed that the strip to be taken should be ten rods in width. The defendant, Mrs. Cunard, says that she did not know that ten rods in width was to be taken; she only heard of the six rods mentioned, and when it was said it was to run back to the brook, she thought the Meadow Brook or little brook was meant. However, if this was the only question involved I would be prepared to hold, on a consideration of all the evidence, that Mrs. Cunard would be bound by what her husband said and did, that is that she left the matter entirely in his hands and assented to all he did in the matter. Mr. Cunard also says that there were other arrangements between them that were in fact part of the agreement to purchase, that is a part of the consideration for the purchase of the land. The plaintiff, he says, was to move on the land purchased, and in the fall of 1911 was to build a house and barn on the land, and live there, and they were to farm together, and in addition they were to farm together a farm near the defendants', that is called by the parties "The Bradley Farm." He does not say, however, the terms on which this farming was to be carried on, nor how long this part of the agreement was to last. Mr. Cunard denies that there was any agreement that the plaintiff was to have a right of way over defendants' farm to get to the rear of the portion he was buying, or that the defendant was to have a right of way over the portion purchased by plaintiff to get to the rear of the balance of the farm.

The plaintiff called two witnesses to support his statement that the strip of land he bought was to run to the rear of the defendants' farm, his wife, Mrs. Harriet M. Kerr, and Mr. Flewwelling, who built the barn. Mrs. Kerr says that Mr. Cunard told her that it was to be ten rods wide, and run back to the rear, and she says (page 57):—

> Well, I took from that it was back as far as his place went.
>
> Q. There was nothing said about that, was there? A. Because we were talking about putting the cattle there, and he said ours was just as long as his, but it was narrower.

Mr. Flewwelling says that when he was working at the barn he saw Mr. Cunard and plaintiff measuring the width of the land, and he says, on p. 51:—

> I asked him (Mr. Cunard) how many rods does Mr. Kerr have? and he told me ten rods, and I said, "How far back does it go?" and he said, "It goes to the rear."

and he says on cross-examination (p. 52):—

> I asked that question of Mr. Cunard to find out a definite thing, and

he told me it was ten rods wide, and to the rear. Whatever he meant the rear to be I don't know, but to the rear.

Mrs. Cunard (one of the defendants) says that when plaintiff and Mr. Cunard came into the house after plaintiff had selected the land, they said it was to be six rods wide, and was to run to the brook, which she understood to mean Meadow Brook (or little brook). At p. 88 she said to plaintiff:—

> "Frank, you don't want any lumber land; you don't want to go out in the back part," and he said, "No; I don't want any land with lumber on it. I have plenty of lumber on the land I own up on the Grand Lake."

Miss Bessie Franscombe also says that one day in talking with the plaintiff he asked her if she had a deed of the place (that is, I presume the deed to the defendant, Mrs. Cunard, which had not at that time been found). She said, "No," and she then asked him if he was going to have the land all the way back, and he said, "No, the front part from the brook out."

This is a short statement of the contention of each party as to the alleged agreement. There was, as I have said, no written agreement, and no memorandum whatever in writing. The defendant besides denying the making of the agreement as claimed by the plaintiff, pleaded the Statute of Frauds. As to this last plea, it is claimed by the plaintiff that the contract was partly performed by him going on the land, and with the assent of the defendants building the barn, and by buying and having set out on the land the apple and other fruit trees, and that therefore the defendants were precluded from setting up the Statute of Frauds although the contract merely rested in parol.

It is true that the part performance of a contract by one of the parties may in contemplation of equity preclude the other party from setting up the Statute of Frauds: see Fry on Specific Performance, sec. 578; *Maddison* v. *Alderson*, 8 App. Cas. 467 at 478. There must, however, be proper evidence of the contract, the performance of which is sought. There must be such evidence as will shew that there was a concluded contract between the parties, and the evidence must shew to the satisfaction of the Court, that the contract is what the plaintiff alleges it to be, or at all events substantially what he alleges it to be. In *Calhoun* v. *Brewster*, 1 N.B. Eq. 529, which was an action for specific performance of a verbal contract for the sale of land, Barker, C.J. (at that time, Barker, J.), says, at 533:—

> It is, no doubt, the recognized rule of this Court that, in order to sustain a bill of this nature, the evidence must satisfactorily shew that there was a concluded contract between the parties. The matter must have progressed beyond the stage of mere treaty or negotiation, during which either party could withdraw, and reached the stage of definite concluded contract, certain in all its essential details. More than this, the evidence must satisfactorily shew that the contract is substantially what the plaintiff alleges it to be.

N. B.
S. C.
1914
KERR
v.
CUNARD
McLeod, C.J.

It is also clear that the burden of proving his case rests on the plaintiff, and if there is any such conflict of evidence as leaves any uncertainty in the mind of the Court as to what the terms of the parol contract were, its interference will be refused. (See Fry on Specific Performance, 5th ed., secs. 633 and 634, and cases there cited.)

In the present case the parties agree that there was an agreement with the defendants, or one of them, to sell the plaintiff a part of the farm, but they differ entirely as to how much land to be sold was included in the agreement, and they also differ materially as to the terms of the agreement. From the evidence it would appear that the plaintiff thought he was buying a strip of land ten rods wide on the northern side of the farm, extending the full length of the farm from the front to the rear. He also thought he was getting a right of way over the defendants' remaining portion of the farm for the strip he was so buying, and giving the defendant a right of way over the strip he was buying to the remaining portions of the farm. On the other hand, the defendants thought that they, or rather the defendant, Mrs. Cunard, was only selling a strip ten rods wide, extending from the front of the farm to one of the brooks. Mr. Cunard, who did the negotiating, thought it was the Flaglor Brook (or the big brook). Mrs. Cunard, the owner of the land, says she thought it was to extend only to the Meadow Brook (or the little brook). There are other differences between the parties, such as to the rights of way to be given to each other, and other matters.

Taking the evidence of both parties, I am unable to say that their minds came together, that their minds ever were *ad idem*. It may be that as to these matters in dispute their minds were not *ad idem*, or it may be that the matter was left in a loose, unsettled way, and never finally agreed upon, or if there was in fact a concluded contract between the parties, the evidence of what it is, is so vague and uncertain that the Court will not act upon it. I, therefore, conclude that I cannot order specific performance. The plaintiff, however, further claims that if he is not entitled to have specific performance of the contract, as claimed by him, he has an equitable claim for compensation for the barn he built on the place, and also for the apple trees and other fruit trees put on the place by him, all of which is now in the possession of the defendants.

It has been held since the Judicature Act that although the plaintiff may not be entitled to specific performance of the contract, he may have damages for the breach of it: see *Elmore* v. *Pirrie*, 57 L.T. Rep. 333; and *Worthing Corporation* v. *Heather*, [1906] 2 Ch. D. 532. In Fry on Specific Performance, sec. 1306, it is said as follows:—

> A plaintiff may now come to the Court and say, "Give me specific performance, and with it give me damages, or in substitution for it give

me damages, or if I am not entitled to specific performance, give me damages as at common law, by reason of the breach of the agreement."

These cases, however, do not apply to the present case. They apply where there has in fact been an agreement made. In this case I have not been able to find that an agreement was in fact concluded between the parties. It does, however, appear that by reason of a mutual mistake between the parties the plaintiff built the barn complained of, and had the apple and fruit trees put out on the plaintiff's land. The plaintiff himself thought when he built the barn where he did, with the consent of the defendant, and placed the fruit trees on the land, that he was doing it by virtue of a contract he thought he had with the defendants to purchase a strip of land 10 rods wide, extending from the front to the rear of the farm. The defendants on their part thought when the barn was built and when the fruit trees were placed on the land that the plaintiff was doing it under a contract that they supposed they had made with him, whereby he was to purchase a strip of land ten rods wide, extending back to one of the brooks, and they thought there were other conditions in the contract, which the plaintiff denies. Under these circumstances it seems to me that it would be inequitable to allow the defendant to have the benefit of this barn and these fruit trees, paying nothing for them. I think, sitting in equity, I have the power to do what is right between the parties and assess a certain amount for the plaintiff by way of compensation. I think the plaintiff should have reasonable compensation for the barn and fruit trees now in the possession of defendant. The plaintiff claims that the value of the barn was over $400, and that the fruit trees cost somewhere about $30. The defendant on his part claims that the barn was not worth nearly the amount claimed. In looking over all the evidence I think the plaintiff has over-estimated the value of the barn. I have concluded to assess damages or compensation to the plaintiff after having examined the evidence as follows:—

Two hundred dollars ($200) for the barn, and thirty dollars ($30) for the fruit trees and the order will be that the defendant pay to the plaintiff two hundred and thirty dollars ($230) for the barn and fruit trees put on the place by the plaintiff.

Then as to the question of costs. This question has arisen through the fault or carelessness of both parties in their dealings with reference to the matter. Therefore, under the circumstances, there will be no order for costs.

Judgment for plaintiff.

CAN.

S. C.
1914

WADSWORTH v. CANADIAN RY. ACCIDENT INSURANCE CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Duff, Anglin, and Brodeur, JJ. February 3, 1914.

1. INSURANCE (§ VI B 3—290)—ACCIDENT POLICY—CAUSE OF DEATH—FROM BURNS SUSTAINED WHILE IN FIT.

Death is caused solely by "external, violent and accidental means" within the meaning of a policy of accident insurance, where it was the result of burns received while lying in an epileptic fit.

[*Wadsworth* v. *Canadian Railway Accident Insurance Co.*, 13 D.L.R. 113, 28 O.L.R. 537, affirmed.]

2. INSURANCE (§ VI B 3—280)—ACCIDENT POLICY—CAUSE OF DEATH—FITS—ACCIDENT OCCASIONED AS A RESULT OF—REDUCTION OF LIABILITY.

Where death is caused by an accident which was occasioned as the result of a person having a fit, and not as the result of the fit itself, it is within a condition of a policy of accident insurance reducing the insurer's liability for accidents occasioned by fits; since such condition deals not with the immediate cause of death but with the cause of the accident producing it.

[*Wadsworth* v. *Canadian Railway Accident Insurance Co.*, 13 D.L.R. 113, 28 O.L.R. 537, affirmed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (*Wadsworth* v. *Canadian Ry. Accid. Ins. Co.*, 13 D.L.R. 113, 28 O.L.R. 537, 4 O.W.N. 1145), reversing the judgment of a Divisional Court (3 D.L.R. 668, 26 O.L.R. 55), by which the amount awarded to the plaintiff at the trial was increased. The appeal was dismissed, DUFF and ANGLIN, JJ., dissenting.

Argument

Aylen, K.C., and *R. V. Sinclair*, K.C., for the appellant:—The decision of the Courts in England strongly support the view of the Divisional Court that the fit was only a remote cause of the injuries. See *Pink* v. *Fleming*, 59 L.J.Q.B. 559; *Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42; *Lawrence* v. *Accidental Ins. Co.*, 7 Q.B.D. 216, and the reasoning in *Manufacturers' Accident Indemnity Ins. Co.* v. *Dorgan*, 58 Fed. R. 945, at 947 and 954. See also *Canadian Casualty and Boiler Co.* v. *Boulter, Davies & Co.*, 39 Can. S.C.R. 558. The appellate Courts are not bound by the finding of the trial Judge that the insured caused the fire while in a fit. That is not a finding of fact, but merely an inference from the evidence and, we submit, an unwarranted inference. See *William Hamilton Mfg. Co.* v. *Victoria Lumber and Mfg. Co.*, 26 Can. S.C.R. 96.

Hellmuth, K.C., and *McConnell*, for the respondents, referred to *Mendl* v. *Ropner & Co.*, 29 Times L.R. 37, and contended that the finding of the trial concurred in by both appellate Courts below must be accepted, and, being accepted, the judgment in appeal must stand.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—In December, 1907, the respondent company entered into two contracts to insure the husband of the appellant each in the principal sum of $5,000 "against bodily

injuries caused solely by external violent and accidental means, as specified in the following schedule (subject, however, to the terms and conditions hereinafter contained)."

In October, 1910, Wadsworth dies. The finding of the trial Judge was that deceased took a fit, that while in that fit, he either dropped or knocked over a lantern, the lantern exploded or was spilled or broken in the fall. The result was that the oil escaped, and there was almost immediately a very extensive flame, which enveloped the deceased and inflicted the very serious injury from which he died. That finding has been concurred in by both Courts below.

This appeal turns upon the question whether the injuries sustained by the deceased causing his death happened from fits within the meaning of the policies (clause G). The parts of the policies most material are parts C, G and H. Part C reads as follows:—

If such injuries are sustained while riding as a passenger in a passenger steamship or steamboat, or in any steam, cable or electric passenger railway conveyance, or in a passenger elevator, *or are caused by the burning of a building in which the insured is therein* at the commencement of the fire, the amount to be paid shall be double the sum specified in clause under which the claim arises.

Part G:—

In case of injuries *happening from* any of the following causes, viz.: intentional injuries inflicted by the insured, or any other person (other than burglars or robbers), *fits*, vertigo, sleep-walking, duelling, war or riot, exposure to unnecessary danger, engaging in bicycle, automobile or horse racing, or while under the influence of intoxicating liquours or narcotics, causing death, loss of sight or limb as stated in Part A, the company will pay one-tenth of the amount payable for bodily injuries as stated in Part A, under which claim arises; or if such injuries result in total or partial disability as provided in Part B, the company shall pay one-tenth of the amount payable for weekly indemnity as stated in said Part B, under which claim arises.

Part H:—

In case of the happening of injuries mentioned in Special Indemnity Clauses D, E, F and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim will not be entitled to double benefit as provided in Part C.

There are a number of cases in which accidental insurance policies have been construed by the Courts, and they are practically all dealt with in the various judgments below and here. In every policy, however, which has been construed in those cases, the excepted clause was construed as a clause exempting from all liability.

Here the respondents argue: the policy is based on the hazard of the risk, and provides a schedule of indemnities, first, for bodily injuries caused solely by external violent and accidental causes (Part A); second, for injuries sustained in the circum-

CAN.
S. C.
1914
WADSWORTH v. CANADIAN RY. ACCIDENT INSURANCE CO.
Sir Charles Fitzpatrick, C.J.

stances enumerated in Part C; and, third, if the injury is fairly attributable to some constitutional defect in the insured—fits, vertigo or sleep-walking—or the assumption by him of some extra risk, such as duelling, then the indemnity is fixed by clause G at "one-tenth of the amount payable for bodily injuries, as stated in Part A under which claim arises." In such case, the liability of the company varies. If the death is caused solely by external violent and accidental means, then the capital sum of $5,000 is due under each policy (Part A). If the death occurs in the circumstances enumerated in Part C, double payment is provided for, and, finally, if the injury is fairly attributable to some constitutional defect, then the indemnity is fixed at one-tenth, as provided for by clause G. The case turns upon the meaning of this clause. It is not an exempting clause, but is one of several clauses fixing the liability of the company at different sums according to the different risks, and making the sum in each case proportionate to the risk run. The words to be construed are: "In case of injuries *happening from* any of the following causes." I construe them to mean that the company undertakes, in case the injury, as in this case, comes to pass by chance or otherwise as a result of the fact that the insured had a fit, to assume an obligation to pay one-tenth of the amount which would be payable for bodily injuries under Part A, as it would be obliged to pay double the amount of the capital sum if the injury was sustained in any one of the cases enumerated in Part C. In other words, if the bodily injuries are not caused solely by external violent and accidental means, but arise as a result of any one of the causes mentioned in Part G, the liability is fixed at one-tenth. Shortly stated, the proximate cause of the death was the injuries received from the burning oil, which was set on fire as a result of the fit with which the deceased had been previously seized, and this brings the claim within Part G.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J.:—This was an action brought by the widow of her deceased husband, who had been insured under a policy issued by the company defendant "against bodily injuries *caused solely by external violent and accidental means* as specified in the following schedule."

That the death of the assured was within the terms of the policy was not denied. The substantial question in dispute was as to the amount of the company's liability, and the company's contention was based upon Part G of the schedule, which provided that:—

> In case of injuries happening from any of the following causes, viz.: Intentional injuries inflicted by the insured or any other person (other than burglars or robbers), fits, vertigo, sleep-walking . . . causing death . . . the company will pay one-tenth of the amount payable for bodily injuries as stated in Part A.

There was no dispute as to the amount payable in case it was held that the death of the assured came within this clause G, as having been caused from injuries happening from fits.

The findings of the trial Judge on the facts were as follows:—

> Now this was an injury happening from a fit which this unfortunate man had. He took a fit when he was in the closet, and I think the proper finding of fact is that while in that fit he either dropped or knocked over the lantern, the lantern exploded or was spilled or was broken in this fall —the result was that the oil escaped and there was almost immediately a very extensive flame, which enveloped him and inflicted the very severe injuries from which he died, and I think it is the very kind of case that falls within this clause.

These findings of fact were concurred in by the Divisional Court, and also by the Appellate Division, and, I think, are amply sustainable from the evidence. I fully agree also with the conclusions that the injuries which the deceased received and which caused his death were not caused by the burning of a building at all, and that the double liability of the company provided in Part C does not arise in this case. The question to be determined by us is whether under these findings of fact the case is one within Part G of the policy.

There has been much conflict of judicial opinion upon the point. The learned trial Judge held that "it was the very kind of case that falls within this clause." A majority of the Divisional Court (the Chief Justice with much hesitation) reached the conclusion stated by Mr. Justice Riddell that "the injuries which caused the death are the burns," and that "the burns were caused primarily and immediately by the fire"—the fire was "the proximate cause," or, as Chief Justice Falconbridge put it, that "the injuries happened not from the fit but from the fire." Hodgins, J., dissenting in the Appellate Division, based his judgment on the same grounds, namely, that the injuries "happened from a flame."

A majority of the Appellate Division held with the trial Judge and Mr. Justice Latchford, of the Divisional Court, that the case was one clearly within Part G of the policy, and that a fit was the proximate and efficient cause of the happening of the injuries causing death.

I have read carefully all the cases cited by the learned Judges in their judgments, but I cannot find that any of them afford us much assistance in the construction of this clause G. In those cases the question under the special terms of the assurance policies was: What was the cause of the *death* of the assured? Here that is not the main or controlling question, which is: What was the cause of the *happening of the injuries which caused death?*

It is not, then, a question as it was in the two English cases cited: *Winspear* v. *Accident Ins. Co.*, in 1880 (6 Q.B.D. 42),

CAN.
S. C.
1914
WADSWORTH v. CANADIAN RY. ACCIDENT INSURANCE CO.
Davies, J.

and *Lawrence* v. *Accidental Ins. Co.*, in 1881 (7 Q.B.D. 216) where the *cause of death* was considered. It is a question of the *cause of the happening of the injuries* which caused death.

The cause of the happening of these injuries is found explicitly stated in the findings of fact of the trial Judge accepted by all the Courts as sustainable under the evidence. The fit was the efficient cause of the injuries received by the deceased assured and from which he died. I agree with the judgment of the Appellate Division stated by Meredith, J.A., that this fit was the predominate and proximate cause of the injuries, the scorchings or burnings of the body of the assured, which caused his death, and that "the fit set the fire free and bound the man while it burned him."

It does seem to me that to hold such a case as this not to be within Part G of the policy would be to disregard its plain words, and leave it practically meaningless. Construing the policy as a whole, it seems clear that no liability arises under it at all except in those cases of "bodily injuries caused solely by external, violent and accidental means." The plaintiff brought herself within that risk and satisfied the onus which lay upon her when she proved that the death of her husband was caused by the burning of his body from the upset lamp. Now, if she had proved that her husband had died simply from a "fit," and had failed to prove any "bodily injuries caused solely by external, violent and accidental means" which in themselves caused his death, she could not have recovered under the policy at all. It was common ground that this onus had been satisfied.

Then comes the next question as to the amount recoverable. It seems to me it was just such cases as this of bodily injuries caused by fits and in turn themselves causing death that this clause G was intended to cover.

To my mind the language of the clause itself is not ambiguous. If it was so, the Court might be justified in straining the language used against the company, which, of course, prepared the policy. It appears to me the clause clearly expresses and limits the company's liability in cases of injuries happening from fits and causing death. With great respect, I think it is putting a forced construction upon the clause to say that the injuries of burning and scorching of his body were not "injuries happening from fits." Of course, the "flame" or the "fire" caused the injuries, but they none the less "happened" from the fits which were, in my judgment, the proximate and efficient cause of the injuries from which death resulted.

The clause did not limit or affect the company's liability in cases of death arising directly from fits and without any "external, violent and accidental means." Such a death was not covered by the policy at all, which was one of accident insurance simply. It did, however, cover, and was intended to cover,

cases of death caused by bodily injuries happening from fits, which, in my judgment, is the case before us.

The object, purpose and intent of the clause can be gathered from reading the collocation of other causes than "fits" mentioned in it. Such purpose was to provide a limited liability only in cases of injuries happening to the person assured from any of the several causes mentioned and causing death. Once that conclusion is reached as to the object and intent of the clause, then it follows, to my mind at any rate, that not only are the cases relied upon by the appellant on policies which raised the question of the "cause of death" irrelevant, but that the findings of fact of the trial Judge bring the case directly within clause G.

I think the appeal should be dismissed with costs.

DUFF, J. (dissenting):—After the most anxious consideration, the view at which I have arrived is that the respondent has failed to shew that this case is governed by Part G. In order to bring the case within that part, the respondent must make it appear that the injuries which led to the death of the appellant's husband come within the description "injuries happening from any of the following causes . . . fits."

Questions of legal causation, to use a very loose phrase, commonly give rise to marked differences of judicial view; and this case is no exception. When the term "cause" is used in common speech, one does not, of course, use the word in any strictly logical sense, but (abstracting from the totality of the conditions) one indicates some class of facts or some relation brought into prominence by the practical interest of the moment; and such terms as "cause" and "proximate cause," when employed by lawyers in denoting the grounds for assigning legal responsibility or in defining the conditions of such responsibility, ought to be interpreted in light of the known meaning usually attached to such phrases and their equivalents in similar circumstances. And, indeed, speaking more generally, in the case of insurance policies—prepared by professional men on behalf of an insurance company—where phrases that have been construed in well-known cases are made use of, it may be presumed that the insurance company so employing them had such decisions in view.

Now, it so happens that stipulations which, in my judgment, ought to be considered as in all relevant respects equivalent to that in question here have been interpreted by very high authority in reported decisions, which have since been applied in other cases without a doubt as to the correctness of them; and, adopting, as I do, the principle of construction above indicated, the real point for determination seems to be whether the circumstances of this case are so different from the circumstances of

CAN.
S. C.
1914
WADSWORTH
v.
CANADIAN
RY.
ACCIDENT
INSURANCE
CO.
Duff, J.
(dissenting)

the cases in which the decisions referred to were pronounced as to require us to hold that this case falls on the other side of the line.

Those decisions have this in common; that the insured having, as the immediate consequence of being seized by a fit, been exposed to a noxious agency which destroyed his life, it was held that the injury that was the immediate cause of death was not "caused" by the fit within the meaning of the insurance policy. In the first of these cases, *Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42, the Court held that the insured having been drowned as a result of falling into a stream while in a fit, the "cause" of death was not the fit. This decision was followed in *Lawrence* v. *Accidental Ins. Co.*, 7 Q.B.D. 216, and in *Manufacturers' Accident Indemnity Ins. Co.* v. *Dorgan*, 58 Fed. R. 945, and was referred to seemingly with approval in *Accident Ins. Co.* v. *Crandal*, 120 U.S.R. 527, at 532.

In delivering the judgment of the Supreme Court of the United States in this last-mentioned case, Mr. Justice Gray, discussing the case of suicide committed while in a state of insanity, said:—

> If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes any injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death: *Scheffer* v. *Railroad Co.*, 105, U.S.R. 249 at 252; *Trew* v. *Railway Passengers' Assurance Co.*, 5 H. & N. 211, 6 H. & N. 839 at 845; *Reynolds* v. *Accidental Ins. Co.*, 22 L.T. 820; *Winspear* v. *Accident Ins. Co.*, 42 L.T. 900, affirmed 6 Q.B.D. 42; *Lawrence* v. *Accidental Ins. Co.*, 7 Q.B.D. 216, 221; *Scheiderer* v. *Travellers' Ins. Co.*, 58 Wis. 13.

I cannot satisfactorily distinguish in principle the *Winspear* case, 6 Q.B.D. 42, from the present. Accepting the trial Judge's finding that the breaking or explosion of the lantern was in some way connected with the onset of an epileptic seizure, still the immediate cause of the injuries was the fire coming into contact with the insured or the insured coming into contact with the fire. The fall that led to the drowning of the insured in the one case seems no more remote from the suffocation that ensued than was the fall which it may be assumed in the case before us, directly or indirectly, brought the fire into contact with the body of the unfortunate victim. If the deceased, being overtaken by a seizure, had fallen into a fire and been burned in such a manner as to cause his death, the analogy with the facts of the *Winspear* case, 6 Q.B.D. 42, would be obviously complete. The analogy would not be less obviously complete if it had appeared that as the immediate result of falling upon the lantern or if in some other way as the immediate and direct consequence of the fit the clothing of the deceased had been brought into direct contact with and had caught fire from the flame of the

lantern itself. It appears to me to be plainly impossible to affirm, upon the facts in evidence, that the burning of the insured's body from which he died was not solely attributable to some part of his clothing being brought into direct contact with the flame of the lantern by some movement which followed immediately upon his seizure. Holding this view, the decision of the case appears to me to be governed by the decision of the Court of Appeal in the *Winspear* case, 6 Q.B.D. 42.

I am not overlooking the argument that this construction of Part G deprives some parts of that stipulation of all meaning—for example, in the application of the provision to "injuries happening from sleep-walking." I am not convinced that this is so. And a comparison of Part C with Part G shews that, in framing the policy, the distinction between injuries suffered while in a given situation and injuries attributable to a situation or a condition as a "cause" was not overlooked. At all events, my view is that in dealing with the subject of injuries arising from fits, it was easily possible for the insurance company to make it clear by apt language that the construction acted upon in the *Winspear* case, 6 Q.B.D. 42, was to be excluded. And the respondents having not only failed to do so, but having, on the contrary, used the words as I think indistinguishable in effect from the phrases construed in that and subsequent cases, the consideration which prevailed in those cases ought to be given effect to here.

ANGLIN, J. (dissenting):—The material facts and the relevant portions of the insurance policies sued on are sufficiently set out in the judgments of the provincial Courts—particularly in the very careful opinion delivered by Mr. Justice Riddell in the Divisional Court.

Anglin, J. (dissenting)

That the injuries sustained by the injured were not "caused by the burning of a building, etc.," was a conclusion accepted in both the provincial appellate Courts, and, in my opinion, is the only reasonable conclusion to be drawn from the evidence. This disposes of the plaintiff's claim to recover double payments under Part C of the policies.

There is no doubt that the death of the insured was caused by burns. It is a legitimate inference from the evidence that the fire from which these burns were received was ignited as the result of a lantern being either dropped or knocked over by the insured owing to his loss of self-control while in a fit. As put by Latchford, J., who dissented in the Divisional Court:—

> Mrs. Wadsworth was obliged to establish, and did establish that external, violent and accidental means caused injuries to her husband and that injuries caused by such means caused his death.

While the case is, therefore, covered by the policies, the

CAN.
S. C.
1914
WADSWORTH
v.
CANADIAN RY. ACCIDENT INSURANCE CO.
Anglin, J. (dissenting)

question for determination is whether the burns, which caused death, sustained under these circumstances, were "injuries happening from any of the following causes, viz., . . . fits," within the meaning of Part G of the policies, so that the plaintiff's recovery should be limited to one-tenth of the amounts which would be payable if death had been due to some accident wholly disconnected with fits or any of the other special matters included in Part G. Five Judges—Middleton and Latchford, JJ., and Garrow, Meredith, and Magee, JJ.A., have held that they were—and this was the opinion of the majority in the Appellate Division; while four Judges—Falconbridge, C.J., Riddell, J., and Maclaren and Hodgins, JJ.A.—have held that they were not; and this view prevailed in the Divisional Court.

Did the injuries, *i.e.*, the burns, which caused the death of the injured, happen from the cause—fits? Were fits, in law, the cause of these injuries?

Two opposite views of the construction of clause G are presented—both of them supported by cogent arguments. In one view the clause is dealt with without reference to canons of legal construction, and an effect is given to it which it may be supposed the insurers had in mind, although they may not have sufficiently expressed their intention. In the other view, the language employed is assumed to have been used in the light of rules laid down by the Courts for the construction of insurance contracts—and only the expressed intention to be gathered from the terms used when given the meaning thus put upon them is taken into account.

If, in construing these insurance policies, we might assume that neither the insured nor the insurer was aware of the well-known legal rule embodied in the maxim, *in jure non remota causa sed proxima spectatur*, or of its constant and special application in insurance law (17 Halsbury's Laws of England 567, 437, 530; Broom's Legal Maxims, 11th ed., 179 *et seq.*), a very formidable argument could be made for the defendants that it must have been just such an occurrence as that now before us that they meant to cover by clause G.

Fits, sleep-walking and several of the other "causes" mentioned in clause G do not, as a general rule, *per se* produce injuries. They often occasion and give rise to other secondary causes from which injuries result. Therefore, it is contended, it must be to injuries immediately produced by such secondary causes themselves resulting from the enumerated causes that clause G was meant to apply. This aspect of the case is forcefully presented in the opinion delivered by Meredith, J.A., concurred in by Garrow, and Magee, JJ.A.

But, in construing the language of an insurance policy, it is impossible to ignore a principle, of which the application is so well established in insurance law as is that embodied in the

maxim now under consideration. To do so would be to introduce uncertainty in regard to the construction of contracts in daily use—a consequence to be avoided: *Thames and Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.*, 12 App. Cas. 484, at 490; *Philips* v. *Rees*, 24 Q.B.D. 17, at 21. The application of this maxim sometimes makes against the liability of the insurer: *Taylor* v. *Dunbar*, L.R. 4 C.P. 206; *Livie* v. *Janson*, 12 East 648, at 653; it sometimes makes for it: *Walker* v. *Maitland*, 5 B. & Ald. 171; *Redman* v. *Wilson*, 14 M. & W. 476. In either case, whether he is contracting for liability or is providing to exclude, limit or reduce it, the insurer, when he refers to the cause of loss, injury or death, must be taken to mean the proximate and immediate cause: *Fenton* v. *Thorley & Co.*, [1903] A.C. 443, at 454-5; *Re Etherington and The Lancashire and Yorkshire Accident Ins. Co.*, [1909] 1 K.B. 591, at 601-2; *Waters* v. *Merchants Louisville Ins. Co.*, 11 Pet. 213, at 223-4; unless he uses language which will clearly cover a remote cause and thus preclude the application of the ordinary canon, as was done in *Smith* v. *Accident Insurance Co.*, L.R. 5 Ex. 302.

No doubt the present case is distinguishable from two English cases much relied upon by counsel for the plaintiff—*Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42, and *Lawrence* v. *Accidental Ins. Co.*, 7 Q.B.D. 216. In neither of these cases did the epileptic fit bring into activity the instrument which proximately caused the injuries or death. It was rather in the nature of a cause *sine qua non*. In the present case the fit was undoubtedly, though not the immediate cause of the injuries from which death ensued, a *causa causæ causantis*. Meredith, J.A., says that the fit was in a double sense the predominative and proximate cause of these injuries—it caused the fire and it prevented the escape of the victim. In the *Winspear* Case, 6 Q.B.D. 42, and also in the American case, *Manufacturers' Accident Indemnity Ins. Co.* v. *Dorgan*, 58 Fed. R. 955, cited by Riddell, J., the fit undoubtedly prevented the escape of the assured quite as much as in the present case, yet in neither instance was the fit on that account regarded as the efficient or proximate cause of the injuries. See also *Reynolds* v. *Accidental Ins. Co.*, 22 L.T. 820. In *Taylor* v. *Dunbar*, already referred to, as in *Busk* v. *Royal Exchange Assce. Co.*, 2 B. & Ald. 73 at 80; *Walker* v. *Maitland*, 5 B. & Ald. 171, at 174; and *Bishop* v. *Pentland*, 7 B. & C. 219, at 223, cited by Riddell, J., and in *Pink* v. *Fleming*, 25 Q.B.D. 396, cited at bar, the causes relied upon to found, or to exempt from, liability were undoubtedly in the direct chain of causation; they were not merely *causæ sine quibus non;* they were *causæ causarum causantium;* but, because they were remote and not the immediate causes of the losses, they were deemed immaterial and were held insufficient in some of the cases to support liability, in others to exclude it. As put by Watkin Williams, J., in the *Lawrence* case, 7 Q.B.D. 216:—

CAN.

S. C.
1914

WADSWORTH
v.
CANADIAN
RY.
ACCIDENT
INSURANCE
CO.

Anglin, J.
(dissenting)

It is essential . . . that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death before the company are exonerated.

He quotes from Lord Bacon's Maxims of the Law:—

It were infinite for the law to consider the causes of causes and their impulsions one of another; therefore, it contenteth itself with the immediate cause.

My conclusion from these authorities is that, upon a proper construction of clause G, the injuries which caused the death of the insured did not happen from the fit which he suffered. The fit was a remote cause; the proximate cause was the fire.

I do not rely on the decision of this Court in *Canadian Casualty and Boiler Co.* v. *Boulter*, 39 Can. S.C.R. 558, because of the stress placed in the judgments in that case on the word "immediate" which was used in the policy.

I do not read clause G as creating a new and distinct liability. The injuries with which it deals are the "bodily injuries caused solely by external, violent and accidental means," to which the application of the entire contract is at its outset confined.

The indemnity for such injuries when they happen (*inter alia*) from fits is by clause G reduced to one-tenth of the sum which would be payable under clause A if they happened from other causes. Clause G is a clause of limitation introduced by the company in its own favour, and, like a clause of exception, is to be given a strict construction.

Moreover, as is pointed out by Taft, J., in *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. R. 945, at 956:—

Policies are drawn by the legal advisers of the company, who study with care the decisions of the Courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which Courts have adopted to resolve any doubt or ambiguity in favour of the insured and against the insurer: *Fitton* v. *Accidental Ins. Co.*, 17 C.B.N.S. 122.

In view of the great divergence of judicial opinion as to its proper construction, it would savour of temerity to insist that clause G of the policies before us is wholly free from ambiguity. While of the opinion that, when construed according to well-established legal principles, clause G does not cover the present case, I am not prepared to say of those who hold the contrary view (adapting the language in which Meredith, J.A., refers to the Divisional Court) that "it is easily demonstrated that (they) err and how." I appreciate the force of the argument in favour of the defendant company's contention. But, if I should be wrong in the view which I have taken as to its proper construction, I agree with Hodgins, J.A., that the ambiguity and uncertainty of the clause, which the defendants invoke, should be resolved in favour of the assured: *Re Bradley and Essex and*

Suffolk Accident Indemnity Society, [1912] 1 K.B. 415, at 422, 430; *Re Etherington*, [1909] 1 K.B. 591, at 596, 600.

With all proper respect for the learned Judges who think otherwise, I am, for these reasons, of the opinion that the correct conclusion was reached in the Divisional Court and that its judgment should be restored. The appellant should have her costs in the Appellate Division and her costs of the appeal to this Court. The cross-appeal should be dismissed with costs.

BRODEUR, J.:—I am in favour of dismissing this appeal for the reasons given by Sir Louis Davies.

Appeal dismissed with costs.

WINNIPEG ELECTRIC R. CO (defendants, appellants) **v. SCHWARTZ** (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 24, 1913.

1. CARRIERS (§ II K 1—212)—NEGLIGENCE OF STREET RAILWAY—ALLOWING TIME TO ALIGHT.

Where the circumstances of the case are such that positive and direct evidence on specific negligence cannot be given, as where a street-car had stopped to permit a passenger to alight, and the latter, while in the act of alighting, is rendered unconscious so as not to be able to remember what happened after getting to the car step, and where it is proved that when the car had proceeded only a short distance ahead without knowledge of the accident by any one on it, the passenger was found injured and unconscious by the track, and where there was no evidence to indicate any intervening cause, the jury may infer in the absence of any evidence for the defence, that the car had been negligently started before the passenger had alighted, and that such negligence caused the fall and consequent injuries.

[*Schwartz* v. *Winnipeg Electric R. Co.*, 9 D.L.R. 708, 23 Man. L.R. 60, affirmed; *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72; and *Grand Trunk R. Co.* v. *Hainer*, 36 Can. S.C.R. 180, referred to.]

Statement

APPEAL from the judgment of the Court of Appeal for Manitoba, *Schwartz* v. *Winnipeg Electric R. Co.*, 9 D.L.R. 708, 23 Man. L.R. 60, 23 W.L.R. 688, affirming the judgment of Prendergast, J., at the trial, which, on the verdict of the jury, ordered that judgment should be entered for the plaintiff.

Cohen, for the respondent.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba in an action for damages for personal injuries sustained by the plaintiff while travelling as a passenger in a tram-car of the defendants. The plaintiff's claim is based upon the allegation that her injuries were the consequences of a fall caused by the negligence of the motorman or

CAN.

S. C.

1913

WINNIPEG ELECTRIC R. CO. v. SCHWARTZ.

Sir Charles Fitzpatrick, C.J.

conductor of the car which was started suddenly after having been brought to a stop to enable her to get off.

The plaintiff and one Winkler are the only witnesses who testify to the occurrence. At the close of the evidence for the plaintiff, counsel for the defendant company submitted there was no evidence of negligence. It appears that the plaintiff rang the bell as a signal for the car to stop at the corner of Bushnell street. Having failed, presumably, to attract the attention of the conductor or motorman, the car proceeded at high speed in the direction of Gunnell street, when the plaintiff rang the bell a second time to manifest her desire to alight at that street. As the car was slowing down, plaintiff left her seat and moved in the direction of the door. When she reached that place the car was stopped; she says,

> my right foot I put on the first step and after that I do not remember anything.

The witness Winkler deposed that he heard a woman's scream and ran to the scene of the accident, where he found the plaintiff lying on the road covered with blood and apparently dead. The car in which the plaintiff had been a passenger was seen to be in motion proceeding on its journey a very short distance ahead.

The question is: In these facts was there evidence enough of an apparent cause to leave the case for the decision of the jury?

The point is not free from difficulty, but I am of opinion that, in the circumstances, the trial Judge was justified in leaving it to the jury to say whether the company being under a duty to stop the car in answer to her signal for a sufficient time to allow the plaintiff to alight, the inference of negligence should be drawn.

It is to be assumed that if proper care is used by the company a passenger may alight in safety from a tram-car, and, in the circumstances of this case, there is a rule of evidence which calls upon the carrier in the first instance to exonerate itself by negativing negligence.

If there was doubt on the evidence of the plaintiff and Winkler, the conduct of the officials of the company at the time of the accident may have served to turn the scale. The plaintiff was undoubtedly a passenger on the car, and in attempting to alight the accident occurred, and there is further evidence in the record. The rules of the company required that in cases of accidents the motorman and conductor should render assistance and make a report of the occurrence. They did neither, and the reasonable presumption is that their omission in that respect was due to the fact that the accident must have happened without their knowledge. The jury would be justified in taking this circumstance into account when considering the probabilities of plaintiff's theory that she was thrown from the step by a violent jerk when the car was started suddenly by the officials in ignorance of the position in which she then was.

CAN.

S. C.
1913

WINNIPEG ELECTRIC R. CO. v. SCHWARTZ.

Davies, J.

On the whole I am of opinion that this appeal should be dismissed with costs.

DAVIES, J.:—The question we have to determine is whether there was evidence to justify the findings of the jury with respect to the fact that the car had stopped when the plaintiff attempted to alight from it and had negligently started again and thrown her to the ground before she had alighted.

On the first point we have the positive evidence of the plaintiff that the car had stopped, with an apparently clear and connected statement of the circumstances leading up to the stoppage. The only possible doubt as to the correctness of her statements arises from the rather uncertain and doubtful evidence of the only other witness called who speaks of the fact of the stoppage of the car. The jury surely had the right to accept the clear and unqualified statement of Mrs. Schwartz on the point.

Then, as to the finding of the negligent starting of the car having been the cause of her falling or being thrown to the pavement, Mrs. Schwartz frankly states that the shock she received from her fall completely destroyed or benumbed her memory of the facts immediately connected with her falling, and that she could recall nothing which happened from the moment she attempted to step from the car till after her recovery from the shock caused by her fall to the pavement.

The company, at the close of plaintiff's case, moved for a nonsuit, and that being refused did not call any witnesses. The question is whether, in the absence of direct evidence on this point of negligence, there should have been a nonsuit, or whether it was open to the jury to draw as a fair and reasonable inference from such facts as had been proved that the car had stopped and had started negligently, causing the plaintiff's fall.

There were decisions given by this Court before that of the Judicial Committee in the case of *McArthur* v. *The Dominion Cartridge Company*, [1905] A.C. 72, to the effect that positive evidence of specific negligence causing the injuries complained of must be given to enable an injured person to recover damages. Since that decision, however, this Court has followed the rule or principle there laid down, namely, that where the circumstances are such that positive and direct evidence on specific negligence cannot be given, it is open to a jury, if the facts as proved are sufficient, to find such negligence as a fair reasonable inference from those facts. It was upon that rule we decided the case of *The Grand Trunk Railway Co.* v. *Hainer*, 36 Can. S.C.R. 180, and many cases since then.

Now, in the case before us, what have we had proved? First, the high speed at which the car was moving and its stoppage after the second signal from the plaintiff to permit her to alight. Secondly, the passenger's progress during the slowing-down of the car towards the door of exit, and, on the stoppage, her attempt to

CAN.

S. C.
1913

WINNIPEG ELECTRIC R. CO. v. SCHWARTZ.

Davies, J.

step to the ground, in which attempt she either fell from, as is suggested by the appellants, a sudden attack of vertigo, or, as found by the jury, was thrown down by the sudden, negligent starting of the car. There was no evidence whatever of any negligence on the passenger's part or facts proved from which a fair inference of negligence could be drawn. Thirdly, the fact that the car rapidly moved on its way after stopping without those controlling it presumably having knowledge of the accident.

It is inconceivable that with such knowledge the car should have been allowed to proceed and no aid or assistance tendered the injured passenger left lying on or alongside of the car track. The presumption of ignorance of the accident on the part of the car-men is overwhelming; especially when considered in light of the fact that another car was following very close after them. They probably thought the passenger had safely alighted.

Under those circumstances, and without any other suggested possible inference than that the violent fall to the pavement might have been caused by a sudden attack of vertigo, I have no difficulty in concluding that the finding of the jury has a preponderating weight in its favour, because it is the more fair and reasonable inference from the proved facts. The other suggested inferences seem to me rather to be classed as conjectures than fair inferences.

A jury cannot, of course, select as between equally probable and fair inferences one which they prefer. It is essential that their finding should not only be fair and reasonable, but that it should be of preponderating weight over other possible inferences.

Idington, J.

IDINGTON, J.:—The appeal ought to be dismissed with costs.

Duff, J.

DUFF, J.:—I think there is evidence in support of the verdict. It is no part of my duty to say whether I think it is right or not.

Anglin, J.

ANGLIN, J.:—The sole question raised upon this appeal is whether there was evidence sufficient to warrant the finding of the jury that the plaintiff fell from the step of the defendants' car, as she was in the course of alighting from it at a proper stopping-place and while it was stationary, and their inference that this was due to the negligence of the defendants' servants in improperly starting the car before the plaintiff had reached the ground. From the plaintiff herself we have direct evidence that the car had stopped (the jury was entitled to disregard the evidence given by Winkler, if it is really in conflict with that of the plaintiff on this point), that she was in course of alighting and had one foot on the first step and the other either on the platform or in the air on its way to the second step. At that point her knowledge of what occurred ceased. That she fell violently to the ground is undisputed. That the company's servants in charge

of the car from which she fell were ignorant of her fall is an irresistible inference from the fact that they proceeded on their way leaving her lying seriously injured on the ground, unless we are to assume on their part a callousness and disregard of the company's rules almost incredible. A moment or two later she is found lying dangerously near the track, so much so that the conductor of a following car moved her body out of the way. According to her evidence the plaintiff was proceeding to alight with care. There is no evidence to warrant any suggestion of vertigo, fainting, tripping, or being run down by a passing vehicle as the cause of her fall and injuries. The inference that her fall was caused, as the jury have found, is not only fair and reasonable; it seems to be the most probable inference that could be drawn from all the facts. The negligence involved in starting a car from which a passenger is properly alighting before ascertaining that she has reached the ground is indisputable.

The appeal fails and should be dismissed with costs.

BRODEUR, J.:—The only question is whether the jury could from the facts established infer that the street railway company is guilty of negligence. Brodeur, J.

The plaintiff, respondent, Mrs. Schwartz, was alighting from a street car of the company defendant. She states in her evidence that she rang the bell to stop the car; that the car stopped, and that she started to alight from the car, and she states, moreover, that from that moment until some days afterwards when she found herself on a hospital bed with serious injuries as a result of her fall on the street, she was unconscious.

The jury returned a verdict that the employees caused the car to start when the plaintiff was proceeding to alight.

The company did not find it advisable to bring those employees to testify that they had given to the lady all the time necessary to safely alight. That lady fell on account of her fainting or on account of the starting of the car before she alighted. The accident is necessarily due to one of those circumstances. The jury could draw the inferences from all the circumstances of the case that the company was negligent.

The appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C. 1913

TAYLOR v. GAGE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 15, 1913.

1. HIGHWAYS (§ I E 2—95)—RIGHT AS TO MATERIALS IN—UNOPENED ROAD ALLOWANCE—REMOVAL OF EARTH—NECESSITY OF BY-LAW AUTHORIZING.

The removal of earth by an individual for his own use from an unopened road allowance can be authorized by a county council only by by-law, notwithstanding a portion of the earth was used in improving a near-by road.

[*Pratt* v. *City of Stratford*, 14 O.R. 260, 16 A.R. 5, distinguished; *Croft* v. *Town of Peterborough*, 5 U.C.C.P. 35; and *Reid* v. *City of Hamilton*, 5 U.C.C.P. 269, referred to.]

2. HIGHWAYS (§ I E 2—95)—RIGHT AS TO MATERIALS IN—UNOPENED ROAD ALLOWANCE—REMOVAL OF EARTH FROM—RIGHTS OF ABUTTING OWNER.

For a person to remove earth from an unopened road allowance without the authority of a municipal by-law is an actionable wrong where injurious to an adjoining owner as an interference with his means of access to or the drainage of his land.

Statement

ACTION to recover damages for the making by the defendant of an excavation in the road allowance opposite the defendant's property, which, as the plaintiff alleged, rendered it impossible for him to use the road allowance as he had been accustomed to do, and for injury done to his land and the fruit trees growing on it, caused by the excavation having been made; and for an injunction restraining the defendant from further excavating and removing the earth from the road allowance in such a manner as to injure the plaintiff's property or his user of it.

The defence was that what was complained of was done under instructions from and by the authority of the Corporation of the Township of Saltfleet, and was a necessary work for the improvement of the property in the locality and the opening up of the highway.

The action was tried at Hamilton by FALCONBRIDGE, C.J. K.B., sitting without a jury.

G. S. Kerr, K.C., and *G. C. Thomson*, for the plaintiff.

W. T. Evans and *S. H. Slater*, for the defendant.

Falconbridge, C.J.

March 14. FALCONBRIDGE, C.J.K.B.:—No by-law was passed by the township authorising the defendant to do the work complained of. There was not even an agreement duly signed or executed between the defendant and the township. There was only what was termed a meeting of council on the ground, when a verbal resolution was put and declared to be carried.

The action is not against the township, and the arbitration clauses of the Municipal Act have no application.

The plaintiff has suffered and will suffer damage by deprivation of access, and injury to fruit trees by excessive drainage.

ONT.

S. C. 1913

TAYLOR v. GAGE.

Falconbridge, C.J.

But (especially in view of the fact that the plaintiff's fence seems to be 23 or more feet on the road allowance), I think the question of damage, if any, should form the subject of a reference to the Master.

Some witnesses swore that the value of the plaintiff's property has been enhanced by what the defendant has done.

Judgment for the plaintiff, with an injunction restraining the defendant from further excavating or removing earth.

All questions of costs and further directions reserved until after the Master's report.

The defendant appealed from the judgment of FALCONBRIDGE, C.J.K.B.

The appeal was dismissed, MAGEE, J.A., dissenting.

Argument

G. Lynch-Staunton, K.C., and *W. T. Evans*, for the appellants, argued, that, unless the plaintiff could shew some injury to himself, not common to the world, he could not recover: *Baird* v. *Wilson* (1872), 22 C.P. 491, following *Winterbottom* v. *Lord Derby* (1867), L.R. 2 Ex. 316. [MEREDITH, C.J.O., cited *O'Neil* v. *Harper* (1913), 13 D.L.R. 649, 28 O.L.R. 635]. The plaintiff was authorized by the council to proceed with the work; and, though the authorisation document was lost by the Reeve, its existence and contents were proved by oral evidence at the trial. It was not necessary that a by-law should be passed, and the defendant must have recourse to the Municipal Act for his compensation, if any: *Pratt* v. *City of Stratford* (1887-8), 14 O.R. 260, 16 A.R. 5; *In re Yeomans and County of Wellington* (1878-9), 43 U.C.R. 522, 4 A.R. 301. The township corporation might be held liable for what the defendant did, if it were viewed as the act of a servant, without any by-law being shewn: *Lewis* v. *City of Toronto* (1876), 39 U.C.R. 343. As to compensation see the Municipal Act, 3 Edw. VII. ch. 19, sec. 437. See also secs. 600, 637, subsec. 2. No by-law is needed to remove a fence or open a road; *Township of Gloucester* v. *Canada Atlantic R.W. Co.* (1902), 3 O.L.R. 85, affirmed in 4 O.L.R. 262; *Nevill* v. *Township of Ross* (1872), 22 C.P. 487. The defendant is not liable for work authorised by the council: *Baskerville* v. *City of Ottawa* (1892), 20 A.R. 108; *McDonald* v. *Dickenson* (1897), 24 A.R. 31.

J. Bicknell, K.C., and *G. C. Thomson*, for the plaintiff, the respondent, argued, upon the facts, that the value of the plaintiff's land had been decreased and damage done by the excavation. The township corporation had done no corporate act to make itself liable for compensation: *Ayers* v. *Town of Windsor* (1887), 14 O.R. 682. The word "altering" in 3 Edw. VII. ch. 19, sec. 632 (1), covers what was done by the plaintiff in this case: Biggar's Municipal Manual (1900), p. 859. *Pratt* v. *City*

ONT.
S. C.
1913
TAYLOR
v.
GAGE.
Meredith, C.J.O.

of Stratford is distinguished in Biggar, p. 867. The selling of gravel must be done by by-law; 3 Edw. VII. ch. 19, sec. 640, sub-sec. 7; and reference should be had to sec. 325 as to the general jurisdiction of the council.

Lynch-Staunton, in reply, referred to the evidence upon the question of the sale of gravel.

December 15. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the Chief Justice of the King's Bench, dated the 14th March, 1913, after the trial of the action before him, sitting without a jury, at Hamilton, on the 23rd January, 1913.

The respondent is the owner of part of lot No. 32 in the 3rd concession of the township of Saltfleet, and the appellant is the owner of part of lot No. 33 in the same concession, and between these lots there is an original allowance for road, which extends southerly from the macadamized road in front of these lands to and beyond the property of the Hamilton Grimsby and Beamsville Electric Railway Company, and the action is brought to recover damages for the making by the appellant of an excavation in the road allowance opposite to the appellant's property, which, as the respondent alleges, renders it impossible for him to use it as he had been accustomed to do; and for injury done to his land and the fruit trees growing on it caused by the excavation having been made; and he also claims an injunction to restrain the appellant from further excavating and removing the earth from the road allowance in such a manner as to injure the respondent's property or his user of it.

The defence of the appellant is, that what is complained of was done under instructions from and by the authority of the Corporation of the Township of Saltfleet, and was a necessary work for the improvement of the property in the locality and the opening up of the highway; that the corporation, acting within its jurisdiction, by by-law ordered and directed that the highway west of the respondent's property should be opened up and made safe for public travel and to be used as a highway: that the respondent will not be injured, but will be benefited, by the work being done; that the respondent never used the highway as an approach to his property; and that the new road when completed will afford an additional means of access, and will be a great benefit, to it; and that the respondent "has wrongfully fenced in, and is in possession of, the easterly portion of the highway, varying in width from 23 to 25 feet, which affords him ample means of access to his property from the King street road over the same grade as he originally enjoyed."

The learned Chief Justice found in favour of the respondent, and directed that judgment should be entered restraining

ONT.

S. C.
1913

TAYLOR
v.
GAGE.

Meredith,
C.J.O.

the appellant from further excavating or removing earth from the highway, and for a reference as to damages; reserving further directions and all questions of costs until after the report.

The judgment is based upon the hypothesis that the appellant was a wrong-doer because no by-law was passed by the council authorising him to do the work, and the judgment of the Chief Justice was that the respondent had suffered and would suffer damage 'by deprivation of access, and injury to fruit trees by excessive drainage.''

It was argued by counsel for the appellant that the work that was being done was one which the council had authority, without the passing of a by-law, to do; and that the finding that the respondent had been deprived of access to his land, and that injury had been done to his fruit trees, was not warranted by the evidence.

The respondent testified that there was a lane on his land leading from his barn to the road allowance, and running at right angles to it; and that he used the part of the road allowance south of the lane every day in going to his pasture-field, and the north part of it several times a week during the summer months "drawing into his barn;" that the road allowance south of the lane could not be used for vehicular traffic owing to a declivity commencing near the lane, but that it could be, and was, used for driving his stock to water at a creek at the foot of the hill; that the appellant, by making a gravel pit out of the road, 12 to 16 feet deep, had rendered it impossible for the respondent to use the road allowance as he had been accustomed to use it; and that, besides this, the fruit trees and strawberries growing within 40 or 50 feet of his fence were damaged "on account of the drainage."

The testimony of the respondent was corroborated by several witnesses, and there is, I think, no ground for disturbing the finding of the learned Chief Justice.

Then as to the justification set up by the appellant. The facts on this branch of the case are not in dispute. The appellant was desirous of dividing and laying out his land into building lots. A ridge, commonly called a "hog's back," crossed the lands of the appellant and the respondent and the road allowance, and the land sloped both to the north and to the south from the "hog's back," the top of which was from 16 to 18 feet higher than the land at the foot of the declivities to the north and south.

In order to make his lands suitable for division into building lots, it was desirable, if not necessary, that the appellant's land should be levelled by cutting down the ridge and filling up the

ONT.
S. C.
1913
TAYLOR
v.
GAGE.
Meredith, C.J.O.

lower parts, and that the road allowance should be dealt with in the same way.

With a view to carrying out this object, the appellant applied to the township council to pass a by-law giving him permission to remove from the highway between the south side of the Hamilton and Grimsby stone road and the northerly limit of the right of way lands of the Hamilton Grimsby and Beamsville Electric Railway Company, the sand and gravel for the purpose of laying cement sidewalks.

A by-law was drawn up by the appellant, intituled "By-law number respecting the grading of the road allowance between lots 32 and 33 in the 3rd concession of the township of Saltfleet, and being on the easterly side of Coronation Park Survey," *i.e.*, the appellant's land. The by-law recites his application; and, by its enacting clause, the consent, permission, and authority of the council is given in the terms of the application, subject to a qualification expressed in these words, "said grade not to be lower than King street, and to be approved of by the township council."

This by-law was read a first and second time on the 19th April, 1912, but a motion, made on the 14th May following, that it should be read a third time and passed, was negatived, and it was never passed, owing, as appears from the council minutes, to the adverse report of a committee which had been appointed to look into the matter of the application.

A short time after this action had been taken, the members of the council met the appellant on the road allowance, and an agreement was made between them that the appellant should be allowed to grade and remove the gravel from that part of the road allowance lying west of the respondent's fence, from King street south, to a level 12 feet below the highest point of the ridge, but in no case to be lower than King street, on condition that the appellant should, during the year 1912, gravel the highway from King street north to Main street; grade the south side of the road allowance to the grade of the Hamilton Grimsby and Beamsville Railway tracks, the council furnishing a pipe, or cement culvert, for the watercourse which crossed it, and gravel a macadamized part of Main street, and a part of it which was not macadamized, if the council should macadamize it—the whole of the work to be done during the year 1912.

I speak of these being the terms of the agreement, although they differ somewhat from the terms which the members of the council who were examined as witnesses, and the appellant, testified, were agreed on; and I do so because the terms of the arrangement are set out in a by-law which was prepared by or at the instance of the appellant, for giving effect to what had been agreed on.

According to the testimony of the appellant, the by-law had been prepared before, and was discussed at, the meeting, and he produced what he said was a copy of it, with the alterations in it that had been agreed upon; and, according to his testimony, this by-law was signed by him and by the Reeve; but in this I am satisfied that he is mistaken—no signed document was produced, and it is most unlikely that the by-law which the appellant said was a copy of the document that was signed, would have been signed by the appellant. It is in form a by-law and not an agreement, and it was not, as is shewn on the face of it, intended to be signed by any one but the Reeve and Clerk of the municipality. It does not appear that what was done at this meeting was communicated to the Clerk, and no record of it appears in the minutes of the council, and the by-law was never passed or even introduced.

It is clear that it was contemplated that the arrangement should be evidenced by a by-law of the council, and the proper inference, I think, is, that it was not to become effective unless or until the by-law should be passed; although there was evidence that the appellant was told by the members of the council at the meeting that he might go on at once with the work.

It was contended by Mr. Lynch-Staunton that what was done by the appellant in removing the gravel from the highway was done under the authority and by the direction of the council; that, if the council had done it by its own officers, it would have been a lawful act done in the performance of its statutory duty as to the repair of highways; and that it was not the less lawful because it was done by the appellant, who was in the same position as if he had been employed by the council to do the work; that it was not necessary that a by-law should have been passed to authorise the doing of the work; and that, for these reasons, the action did not lie, and that the respondent's remedy was to obtain compensation under the provisions of the Municipal Act; and in support of that contention counsel cited and relied on *Pratt* v. *City of Stratford*, 14 O.R. 260, 16 A.R. 5.

The decision of the Chancellor in that case was considered by Rose, J., in *Ayers* v. *Town of Windsor*, 14 O.R. 682, and distinguished, upon the ground that in the *Pratt* case the work which was done was work which the defendants could have been compelled to perform, and he held that the work which had been done in the case before him—lowering the grade of the highway—was not such as the defendants could have been compelled to perform, and that there was no authority to do it without a by-law having been passed providing for its being done.

The only reference to *Ayers* v. *Town of Windsor* in the

ONT.
S.C.
1913
TAYLOR
v.
GAGE.
Meredith,
C.J.O.

Pratt case was made by Hagarty, C.J.O., who said (16 A.R. at p. 10) that in that case Rose, J., considered that a by-law was necessary.

In *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.* (1912), 4 D.L.R. 502, 45 Can. S.C.R. 585, 603, Idington, J., who was of counsel for the defendants in the *Pratt* case, refers to it as one of those cases in which "where a duty had been imperatively imposed upon a municipality and had to be discharged in obedience to a statute things necessary to be done to obey the law have been held impliedly as within a council's absolute power." And, he added: "The obligation of the city there rested on a statute imposing a duty . . . No such duty had been imposed here. It was left entirely optional."

In the *Pratt* case the injury of which the plaintiff complained was the raising of the grade of the highway on which his property abutted, which was rendered necessary for making the approach to a bridge which the defendants had built across the river Avon, and the holding was that a by-law authorising the doing of the work was not necessary. The judgment of the Chancellor, before whom the action was tried, was based upon the view that highways and bridges were vested in the defendants, and that they had, "as owners or trustees for the public, the right to repair and in repairing to improve streets and bridges without a by-law for that purpose" (14 O.R. at p. 263.)

In the Court of Appeal, Hagarty, C.J.O., based his judgment on the ground "that the acts in consequence of which the plaintiff claims damages were lawfully done by the defendants under their statutable powers and duties; that they had the right to do these acts without the formality of a by-law, as part of the ordinary duties imposed on them in the maintenance of roads and bridges" (16 A.R. at p. 12).

The view of Osler, J.A., was, that the making of the approach might "properly be regarded as a work incidental to the principal work" (*i.e.*, the erection of the bridge) "or as a work of necessary repair," and that, "if so, a by-law was clearly unnecessary" (p. 16).

Maclennan, J.A., was of opinion that "the Legislature having declared" (*i.e.*, by the special Act) "the bridge to be necessary, its erection became a duty of the corporation and obligatory upon them," and that "repair of bridges is obligatory by the general Act," and that "the effect of the two enactments taken together clearly made the building of this bridge obligatory," and that "the bridge having been erected, and being properly made higher than the old, the raising of the approaches became a duty under sec. 530." He was also of opinion that

"the raising of the grade of the road where it approached the bridge and the construction of the parapet walls" might "both be regarded as acts of repair, the one to make the road as convenient, and the other as safe, as it was before, and if so they were obligatory on the council and, with or without a by-law, had to be done," adding: "But without insisting that the acts were obligatory and not optional, it is sufficient if they were authorised corporate acts, and I think they were" (pp. 20-1).

Burton, J.A., dissented, being of opinion that the work was not one of repair, and that a by-law was necessary.

It would appear from these opinions that two of the Judges, the Chief Justice and Osler, J.A., were of opinion that the work of which the plaintiff complained was one of repair. As the Chief Justice said (pp. 11, 12): "Granted that they could, without a special by-law, expend a large sum in substituting a costly new bridge for the old one, not raising or lowering the approaches, I cannot see why the change in the level, proper and necessary for the improved structure, at once alters their position. . . . I cannot see any sensible distinction in principle between a four feet and a four-inch change of level. The most ordinary repair to a highway may involve constant change of elevations, consequent on the filling up of holes or marshy spots or the laying down of new material for the road, and it is quite possible that such alterations may injuriously affect the approach to buildings or lands;" and, judging from the observations of Osler, J.A., which I have quoted, he appears to have been of the same opinion.

Maclennan, J.A., does not appear to have gone so far, and, judging from his observations which I have quoted, his opinion was, that it was only where the work was one which was required to make the road as convenient or as safe as it was before—*i.e.*, before the work was done—that it could be done without a by-law; that is to say, that, because it was necessary, owing to the raising of the level of the bridge, to raise the approaches, the latter work was one of repair which might be done without a by-law and I find nothing in his opinion to warrant the conclusion that he would have held that what was done in the case at bar was a work of repair.

In view of all this, I do not think that the decision in the *Pratt* case is binding on this Court to the extent of requiring that we should hold that in all cases, and under all circumstances, an alteration of the grade of the highway by a municipal corporation is a work of repair which may be done without a by-law; but that the decision must be taken to have depended on the particular circumstances of that case; and that the Court was mainly influenced, in coming to the conclusion which it

ONT.

S. C.
1913

TAYLOR
v.
GAGE.

Meredith,
C.J.O.

reached, by the fact that the raising of the level of the highway, of which the plaintiff complained, had become necessary owing to the raising of the level of the bridge, and was therefore practically a part of or incidental to that work.

In my opinion, the line of separation between acts which a municipal corporation may do in the discharge of its duty to keep in repair a highway under the jurisdiction of its council, without passing a by-law authorising them to be done, and acts done for the improvement of a highway, for which a by-law is necessary, is nowhere better pointed out than by Macaulay, C.J., in *Croft* v. *Town Council of Peterborough* (1856), 5 C.P. 35, 45-6, 141, 148-9, 150; and I entirely agree with what is there said. See also *Reid* v. *City of Hamilton* (1856), 5 C.P. 269, 287.

In the case at bar, the two by-laws to which I have referred seem to me plainly to indicate that what was proposed to be done was not to be done in the exercise of the corporation's powers or duties as to the repair of highways, but was practically a sale to the appellant of the gravel under the surface of the road allowance, the consideration for which was to be the spreading of part of the gravel upon other roads under the jurisdiction of the council of the municipality. If what was done was, in effect, a sale of the gravel to the appellant, a by-law authorising the sale was clearly necessary (Consolidated Municipal Act, 1903, sec. 647).

It may be that, incidentally, what the appellant would do in removing the gravel would have had the effect of grading the highway, but that was not the primary purpose of what was proposed to be done; and the fact that the gravel was to be removed only up to the line of the respondent's fence, which encroached upon the highway to the extent of from 20 to 27 feet along the whole length of his lot, is an indication that the removal of the gravel was not for the purpose of improving the highway, but of benefiting the appellant.

The contention of the appellant at the trial was, that the road allowance had never been opened, and that it could not be used for vehicular traffic; and indeed that it could not be used even as a means of access to the respondent's land.

In *Hislop* v. *Township of McGillivray* (1890), 17 S.C.R. 479, it was decided that the duty of maintaining and keeping in repair roads under the jurisdiction of councils, imposed on corporations by the Municipal Act, only applies to roads which have been formally opened and used, and not to those which a township corporation, in its discretion, has considered it inadvisable to open; and it follows from that decision that, the road allowance in question never having been opened and

ONT.

S. C.
1913

TAYLOR
v.
GAGE.

Meredith, C.J.O.

used, no duty to keep it in repair rested upon the corporation, and on this ground this case is, in my opinion, distinguishable from *Pratt* v. *City of Stratford*, 14 O.R. 260, 16 A.R. 5.

Great inconvenience would result from holding that what it is said the appellant was authorised by the council to do might be lawfully done without a by-law. There is no record of any such authority having been given, and the respondent might find great difficulty in establishing a claim for compensation against the corporation. Had the council determined to open the road allowance, and to improve it, property-owners that would or might be injuriously affected by what was proposed to be done, would have had an opportunity of knowing of the intention of the council, and, if they had desired to do so, of objecting to its being carried into effect.

I would affirm the judgment, upon the ground that what was being done by the appellant was not a work of repair which had been undertaken by him under the authority or by the direction of the corporation, and that it was not such a work as might be lawfully done by the corporation itself, unless under the authority of a by-law of its council.

The appellant should pay the costs of the appeal.

MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., dissented.

Appeal dismissed.

STEPHENSON v. SANITARIS Ltd.

ONT.

S. C.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Sutherland, J. December 15, 1913.

1. INTOXICATING LIQUORS (§ III A—56)—UNLAWFUL SALES—OF WHAT LIQUORS—2½ PER CENT. PROOF.

Where a wholesale bottler and seller of table waters sells a bottled beverage to a restaurant keeper in a local option town with warranty that they can be re-sold by the buyer in the course of his business without thereby contravening the law, and where the buyer relying on such warranty keeps for sale in his business the commodity in question and is in consequence prosecuted and convicted and fined for "unlawfully keeping liquor for the purpose of sale, barter and traffic therein without the license therefor by law provided"; breach of the warranty is established upon proof that the beverage contained more than 2½ per cent. of proof spirits and was within the prohibition of the local option law.

2. DAMAGES (§ III A 4—40)—SALE OF BEVERAGES FOR RE-SALE—WARRANTY AS NON-INTOXICATING—FINE ON RE-SALE UNDER LIQUOR LAW.

Where a wholesale bottler and seller of table waters sells a beverage termed a non-intoxicating ale to a restaurant keeper in a local option town with warranty that it is not within the inhibition of

ONT.
S. C.
1913
STEPHENSON v. SANITARIS LIMITED.

the Liquor License Act (Ont.), a loss sustained by the buyer by his conviction and fine for infraction of the Act in keeping the commodity for sale in his business is within the measure of damages recoverable as a natural consequence of the breach of warranty, but re-imbursement of a similar fine imposed on a sub-purchaser buying a quantity for re-sale is too remote as a basis for damages where such re-sale was not within the contemplation of the original parties.

[*Cointat* v. *Myham*, [1913] 2 K.B. 220; *Crage* v. *Fry* (1903), 67 J.P. 240, specially referred to.]

3. INTOXICATING LIQUORS (§ III E—75)—UNLAWFUL SALES — WHOLESALE TO PROHIBITED PERSONS—ABSENCE OF LICENSE—NOTICE, EFFECT OF.

Where a wholesale bottler and seller of table waters sells some of the commodity to a restaurant keeper in a local option town with warranty that it is "non-intoxicating hop ale," and knowing that the buyer intended to serve it to his customers although having no license to sell intoxicating liquor, there is in effect a warranty that the ale was such that it could be sold by the buyer in the course of his business without thereby contravening the provisions of the Liquor License Act (Ont.), where he proceeded to so deal with the ale believing that it was not an intoxicating liquor.

4. NEW TRIAL (§ II—6)—FOR ERRORS OF THE COURT—IN REFUSING CONTINUANCE.

The refusal of the trial judge to grant the plaintiff an adjournment of the trial to identify an exhibit produced, may be ground for ordering a new trial, on appeal from the dismissal of the action, where the plaintiff was taken by surprise in respect of such lack of evidence, and leave to bring a new action had not been reserved to the plaintiff, but terms as to costs would properly be imposed upon him.

5. CONTRACTS (§ II D—145)—CONSTRUCTION—PARTICULAR PHRASES—INTERPRETATION BY REFERENCE TO PRIOR CONTRACTS.

Where a restaurant keeper in a local option town buys table water from the defendant under his warranty that the commodity was "non-intoxicating hop ale" and not inhibited by the Liquor License Act (Ont.) and where subsequent orders were given for "hop ale" simply, this phrase will be construed as "non-intoxicating hop ale" so as to be included in the original warranty.

Statement

AN appeal by the plaintiff from the judgment of Wismer, Jun.Co.C.J., dismissing an action for breach of warranty, brought in the County Court of the County of Simcoe.

The warranty alleged was, that certain ale, called "English Club Non-intoxicating Hop Ale," sold by the defendant company to the plaintiff, was in fact non-intoxicating. The plaintiff, the keeper of a restaurant in a local option town, was convicted and fined for keeping the ale for sale without a license; and he claimed as damages the amount of the fine and costs, and also a sum which he paid in satisfaction of a fine and costs imposed upon another man to whom he (the plaintiff) had resold some of the ale purchased from the defendant.

The appeal was allowed and a new trial granted.

Argument

J. Birnie, K.C., for the appellant, argued that the learned trial Judge had wrongfully refused him an adjournment of the trial in order that he might prove the identity of the liquor seized with that which had been analysed at the time of the appellant's conviction for selling. He, therefore, asked for a new

trial. He also argued that the warranty was not only that the liquor was non-intoxicating, in the ordinary meaning of that term, but that it was such as could be legally sold in a local option district: *Behn* v. *Burgess* (1863), 3 B. & S. 751; *Bannerman* v. *White* (1861), 10 C.B.N.S. 844; *Bigge* v. *Parkinson* (1862), 7 H. & N. 955; *Ollivant* v. *Bayley* (1843), 5 Q.B. 288; *Stancliffe* v. *Clarke* (1852), 7 Ex. 439; *Lovegrove* v. *Fisher* (1860), 2 F. & F. 128; *Wallis Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394; *Osborn* v. *Hart* (1871), 23 L.T.R. 851.

C. A. Moss, for the defendant company, the respondent, contended that, even if the identity of the liquor seized with that analysed were established, the appellant could not succeed. No warranty was proved, or, if one was proved, it was only a warranty that the ale was non-intoxicating in the ordinary acceptation of that term, not that it did not contain more than two and a half per cent. of proof spirits; and there was no evidence that it was intoxicating in the sense used in the warranty. The damages, in any event, were too remote.

Birnie, in reply.

Meredith, C.J.O.

December 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Simcoe, dated the 5th August, 1913, which was directed to be entered by the Junior Judge of that Court (Wismer), after the trial before him, sitting without a jury, on the 13th June, 1913.

The appellant is a keeper of a restaurant in the town of Collingwood, in which, at the time of the transactions in question, a local option by-law was in force, and the respondent is a company carrying on the business of bottlers of table waters at Arnprior.

Among other table waters bottled and sold by the respondent was one called "English Club Non-intoxicating Hop Ale," which was manufactured in England by the British Non-Alcoholic Beverage Company of Liverpool. The ale was received in bulk from the English company, and was bottled by the respondent at Arnprior, and upon the bottles was placed a label which reads as follows:—

ENGLISH CLUB
E. C.
Non-Intoxicating
Hop Ale
Sanitaris Limited
Arnprior, Ont.
THE BRITISH NON-ALCOHOLIC BEVERAGE CO.
Liverpool, England.

ONT.
S. C.
1913
STEPHENSON
v.
SANITARIS
LIMITED.
Meredith, C.J.O.

The first transaction between the parties took place in July, 1911, when the appellant placed an order for the ale with a traveller for the respondent, named Tearney. According to the testimony of the appellant, Tearney represented to him that the ale was non-intoxicating; but it does not appear that any bottle was then shewn to the appellant, or that he knew of the use of the label by the respondent.

There is no evidence that Tearney knew that there was a local option by-law in force in Collingwood, but it is a fair inference from his knowledge of what the appellant's business was, and the circumstances attending the transaction, that he knew that the appellant was not a person entitled to sell intoxicating liquor.

The ale that was ordered on this occasion was received by the appellant in due course, and the bottles had upon them the label. The appellant continued to deal with the respondent until the month of August, 1912, and the ale that was purchased during that period was ordered by letter, and described as "hop ale," simply, and came in bottles labelled with the label I have mentioned.

On the 27th September, 1912, a seizure was made of some of the ale which was still in the appellant's possession, and he was charged with an offence against the Liquor License Act—"unlawfully keeping liquor for the purpose of sale, barter, and traffic therein, without the license therefor by law required," the liquor being the "hop ale." It was proved to the satisfaction of the Police Magistrate that the ale which had been seized contained more than two and a half per cent. of proof spirits, which, by par. 1(*a*) of sec. 2 of the Liquor License Act, as enacted by sub-sec. 2 of sec. 1 of the amending Act of 1906, 6 Edw. VII. ch. 47, is conclusive evidence that liquor is intoxicating; and that it was, therefore, intoxicating liquor within the meaning of the Liquor License Act; and the appellant was convicted of the offence with which he was charged, and was fined $100 and costs $5.20, which he has paid.

The action is brought to recover damages for the breach of an alleged warranty by the respondent that the ale was non-intoxicating; and the appellant claims as damages the amount of the fine and costs, and a sum which he paid in satisfaction of the fine and costs which had been imposed upon a man named Muller, upon his conviction of a similar offence in respect of part of the ale purchased by the appellant, which he had resold to Muller.

At the trial, the appellant gave evidence of the facts I have mentioned, but failed to shew that the ale which he had purchased from the respondent was intoxicating liquor within the meaning of the Liquor License Act, or that it was, in fact, in-

toxicating. It appears from the statement of counsel for the appellant at the trial that he had expected that he would be able to prove by the Provincial Analyst, who was examined as a witness, that what he had analysed and found to contain more than two and a half per cent. of alcohol, was part of the ale that was seized, but he was unable to do this, owing to his inability to identify the bottle that had been sent to the analyst as one of those produced at the trial before the Police Magistrate. Upon discovering this, counsel applied for a postponement of the trial to enable him to supply the missing link in the evidence, but his application was refused, and the trial proceeded, with the result that the appellant, having failed to identify the liquor that had been analysed as part of that which had been seized, his action was dismissed.

The learned trial Judge should, we think, have granted the application to postpone, imposing such terms as he thought just as to the costs occasioned to the respondent by the postponement, or at least in dismissing the action should have provided that the dismissal should not be a bar to the bringing of another action.

It was, however, argued by counsel for the respondent, that, even if the missing link in the evidence had been supplied, the appellant would not have been entitled to succeed; that no warranty in respect of the ale that was seized was proved; that, if any warranty was proved, it was a warranty that the ale was non-intoxicating, and that there was no evidence that it was not; that the fact that it contained more than two and a half per cent. of proof spirits, and was, therefore, intoxicating liquor within the meaning of the Liquor License Act, did not shew that it was intoxicating within the meaning of that term as used in the warranty; and that in any case the damages claimed were too remote, and were, therefore, not recoverable.

There was, I think, sufficient evidence of the warranty. It was not shewn from what shipment the seizure was made, but the proper inference is, that it was from one of the later shipments, and not from the ale for which the order to Tearney was given; and, although the subsequent orders were for "hop ale," simply, the parties must have contemplated that what was wanted was "hop ale" similar to that which had been previously sent—non-intoxicating hope ale, labelled as that which comprised the first and all the subsequent shipments.

It was also a proper inference from the fact that, as I have said, the nature of the appellant's business, and that he had not a license to sell intoxicating liquors, was known to the respondent, and from the circumstances under which the first order was given, that the warranty was intended to be a warranty that the ale was such that it could be sold by the appellant in the

ONT.
S. C.
1913
STEPHENSON
v.
SANITARIS
LIMITED.
Meredith, C.J.O.

course of his business, without thereby contravening the provisions of the Liquor License Act; and, if it had been proved that it contained more than two and a half per cent. of proof spirits, a breach of the warranty would have been established.

The loss of the appellant occasioned by his prosecution for the infraction of the Liquor License Act of which he was convicted, was, in my opinion, a natural consequence of the breach of the warranty, and therefore recoverable.

In support of this view, I refer to *Cointat* v. *Myham & Son*, [1913] 2 K.B. 220. In that case, the plaintiff (a butcher) sued for breach of a warranty that meat, which had been sold to him by the defendants for the purpose of its being resold by him in his shop, was fit for human food, and it was held by Lord Coleridge, J., that, as the plaintiff did not know that the meat was bad, but relied on the skill and judgment of the defendants, he was entitled to recover the amount of a fine which had been imposed upon him for having the meat in his possession, contrary to the provision of sub-sec. 2 of sec. 47 of the Public Health (London) Act, 1891, and the costs of the prosecution and of his defence,as well as "the loss of trade owing to the conviction."*

This conclusion was reached, not upon the provisions of any statutory enactment, but by the application of the principles of common law as to remoteness of damages.

In an earlier case, *Crage* v. *Fry* (1903), 67 J.P. 240, Kennedy, J., had reached the same conclusion, though the plaintiff failed to recover the amount of the fine, because "there was no evidence to shew what facts influenced the magistrate in imposing" the heavy fine which he had imposed, and "it might be that the magistrate was led to impose it because he thought the plaintiff had not been as diligent, or as careful, as he ought to have been in periodically examining his stock." In that case the articles sold consisted of 4,400 "sound tins" of tinned mackerel.

Different considerations apply to the fine imposed upon Muller, and the costs he was ordered to pay. There was no evidence that, when the sale of the ale to the appellant was made, the respondent knew that it would be resold otherwise than in the ordinary course of the restaurant business of the appellant, and the sale to Muller was not of that character, but was a sale to him for the purpose of his reselling or using it in the course of his business as a boarding-house keeper, and the damages in respect of the fine imposed on Muller, and the costs he was ordered to pay, are, therefore, too remote, and not recoverable.

*In *Cointat* v. *Myham & Son*, a new trial was directed by the Court of Appeal: (1914), 30 Times L.R. 282; but there is nothing to indicate that the appellate Court's view differed from that of the trial Judge on the point for which the case is cited above.

The judgment should be reversed, and there should be a new trial, confined to the damages claimed in respect of the fine imposed on the appellant, and the costs and expenses incurred in and about his conviction, the evidence that has already been taken to be read upon the new trial, and each of the parties to be at liberty to supplement it by further evidence.

Under all the circumstances, there should be no costs of the appeal to either party. If the postponement applied for by the appellant's counsel had been granted, it would, no doubt, have been allowed only on the terms of the appellant paying all costs occasioned to the respondent by the postponement, and these would probably be at least equal to the appellant's costs of the appeal, and the one may fairly be set off against the other.

I observe that the testimony of Mr. Lancaster, the analyst, was, that the liquids which he examined contained the percentages mentioned by him of "alcohol." The expression used in the Liquor License Act is "proof spirits," and there is nothing in the evidence to shew that "alcohol" and "proof spirits," are synonymous terms; and, indeed, I apprehend that they are not. Something was said by Mr. Lancaster in answer to the question, "What is the difference between proof spirit and alcohol; is proof spirit 49-5?" But his answer is quite unintelligible, and leaves it uncertain whether that is the case, or, if there is a difference between them, what that difference is.

I mention this in order that the point may not be overlooked upon the new trial.

New trial ordered.

UNION BANK v. McKILLOP.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 15, 1913.

1. CORPORATIONS AND COMPANIES (§ IV D 1—68)—POWER TO CONTRACT—CO-OPERATION WITH OTHER COMPANY.

A company cannot legally guarantee the repayment of money advanced to another company for the purpose of financing an undertaking not connected with the business of the first mentioned company, and not within its corporate power.

[*Union Bank* v. *McKillop*, 11 D.L.R. 449, 4 O.W.N. 1253, affirmed.]

2. ESTOPPEL (§ III K—135)—COMPANY—BY RECEIVING BENEFITS FROM ULTRA VIRES CONTRACT.

The receipt of benefits by a company under an *ultra vires* contract and the altering of the position of the other party in reliance thereon, do not estop the company from setting up the invalidity of the agreement.

3. CORPORATIONS AND COMPANIES (§ IV A—40)—RIGHTS AND POWERS—ENGAGING IN BUSINESS FOREIGN TO INCORPORATION.

The incidental powers conferred by sees. 14 and 25 of the Companies Act, R.S.O. 1897, ch. 191, [R.S.O. 1914, ch. 178], on com-

ONT.
S. C.
1913
UNION BANK
v.
MCKILLOP.

panies in order to carry into effect the intentions and objects of incorporation and to permit them to carry on any branch of business incidental and subsidiary thereto, do not permit a company to embark in a business or undertaking foreign to the specific purposes of its incorporation, but such powers only as are necessary to carry into effect such specific purposes are thereby conferred.

Statement

APPEAL by the plaintiffs from the judgment of Lennox, J., *Union Bank of Canada* v. *A. McKillop & Sons Limited*, 11 D. L.R. 449, 4 O.W.N. 1253, dismissing an action brought upon a guaranty given by the defendant company.

The appeal was dismissed.

Argument

H. Cassels, K.C., for the appellant bank, argued that the West Lorne Waggon Company was a subsidiary company to A. McKillop & Sons Limited, and that hence it was not beyond the corporate powers of the defendant company to give a guarantee for this debt. The Ontario Companies Act, R.S.O. 1897, ch. 191, sec. 25 (*e*), was the authority under which the debt was guaranteed. As to the right of the defendant company to take shares in another company, see the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 17 (*d*), (*e*), (*k*), sec. 210 (*c*). The indebtedness grew in 1907 from $40,000 to $200,000. As to the scope of the defendant company's powers, and the application of the doctrine of *ultra vires* in this connection, see *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L.R. 7 H.L. 653; *Attorney-General* v. *Great Eastern R.W. Co.*, 5 App. Cas. 473; *London County Council* v. *Attorney-General*, [1902] A.C. 165, at p. 167.

D. C. Ross, on the same side:—The defendant company is bound by estoppel. Most of the money was advanced after the Act of 1907 was passed: Pollock on Contracts, 7th ed., p. 395; *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202. The defendant company should have spoken out; it ratified its guarantee by its subsequent conduct: 11 Am. & Eng. Encyc. of Law, 2nd ed., p. 427.

C. A. Moss and *J. B. McKillop*, for the defendant company, the respondent:—On the question of ratification and estoppel, see Palmer's Company Precedents, 11th ed., pp. 29, 30; Halsbury's Laws of England, vol. 5, pp. 285, 286; Pingrey on Suretyship and Guaranty, 2nd ed., pp. 34, 35. On the question of the powers of the company to give a guarantee, see *A. R. Williams Machinery Co. Limited* v. *Crawford Tug Co. Limited*, 16 O.L.R. 245; *Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354; Brice on Ultra Vires, 3rd ed., pp. 139-141.

Cassels, in reply, referred to the evidence.

Hodgins, J.A.

December 15. The judgment of the Court was delivered by HODGINS, J.A.:—This is an appeal by the plaintiff from the judgment of Mr. Justice Lennox dismissing the action, which

was upon a guarantee given by the respondent, the defendant company. The main defence was, that the giving of the guarantee was beyond the powers of the respondent. As the latter is the sole defendant, no question arises as to the responsibility of the individual members of the company, who had, in order to relieve themselves from personal liability, induced the United Empire Bank to accept the respondent's guarantee. The case must be decided upon the powers of the company in relation to the actual guarantee, and not upon any representation by those individuals as to its power to give it.

The respondent company was incorporated by letters patent, dated on the 28th September, 1904, and the guarantee was given on the 13th March, 1907. The statute then applicable was R.S.O. 1897, ch. 191. It is not, I think, possible to seek for any enlargement of the powers of the respondent by resort to the provisions of the Ontario Companies Act of 1907. It was not in force when the guarantee was given, and there is no evidence of any new agreement sufficient to bind the respondent.

Under sec. 9 of R.S.O. 1897, ch. 191, letters patent may issue incorporating the subscribers "for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends, except the construction and working of railways, the business of insurance and the business of a loan corporation." Under sec. 10(*b*), the petition must shew "the objects, simply stated, for which the company is to be incorporated." By sec. 14, the Lieutenant-Governor may in the letters patent vary the powers of the company from the powers stated in the petition. Under sec. 15, from the date of the letters patent the company thereby incorporated "shall be invested with all the powers, privileges and immunities which are incident to such corporation, or are expressed, or included in the letters patent and the Interpretation Act, and which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of this Act as are applicable to the company."

The reference to the Interpretation Act is to R.S.O. 1897, ch. 1, sec. 8, sub-sec. 25, which is as follows: "Words making any association or number of persons a corporation or body politic and corporate, shall vest in such corporation power to sue and be sued, contract and be contracted with, by their corporate name, to have a common seal, and to alter or change the same at their pleasure, and to have perpetual succession, and power to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure; and shall also vest in any majority of the members of the corporation, the power to bind the

ONT.
S. C.
1913
UNION BANK
v.
MCKILLOP.
Hodgins, J.A.

others by their acts; and shall exempt the individual members of the corporation from personal liability for its debts, obligations or acts, provided they do not contravene the provisions of the Act incorporating them."

Under sec. 25 of the principal Act, which section is headed "Incidental Powers of Companies," it is enacted that the company shall, in addition to its other powers, possess power: "(*e*) to exercise and enjoy all the privileges and immunities and to do all acts requisite, or incidental to the due carrying on of its undertaking. (*f*) To carry on any branch or branches of business incidental to the due carrying out of the objects for which the company was incorporated, and subsidiary thereto, and necessary to enable the company profitably to carry on its undertaking."

By sec. 46, the directors of the company are given full power in all things to administer the affairs of the company; and may make or cause to be made for the company, any description of contract which the company may by law enter into; and, by sec. 47, to make by-laws dealing with certain things, including (*g*) the conducting in all other particulars of the affairs of the company.

Under sec. 49, if authorised by by-law, passed by the directors and sanctioned by the shareholders by a vote of not less than two-thirds in value, the directors may borrow money upon the credit of the company, and may issue bonds, debentures, or other securities of the company for the lawful purposes of the company, and no other, and may pledge or sell the same, etc.

By sec. 102, authority is given to the Lieutenant-Governor in Council to extend the powers of the company to any objects within the scope of the Act, which the company may desire; and to make provision for any other matter or thing in respect of which provision might be made by original letters patent under this Act.

The letters patent of the company thus describe the objects of the company: "To buy, sell and deal in timber and lumber, and for the said purposes to operate and carry on saw-mills, bending factories, and other wood-working machines, and mills for the manufacture of wood-working implements and carpenters' and builders' supplies, and to carry on the business of a farmer and dealer in live stock and farm produce."

From the above it would appear that, in addition to the powers expressly given in the letters patent, the company are vested with all the powers, privileges, and immunities which are extended to such a corporation, and which are enumerated in the letters patent, or in the Interpretation Act, and also those which are necessary to carry into effect the intention and objects

of the letters patent and such of the provisions of the Ontario Companies Act as are applicable to the company. The company is also expressly given the incidental powers which I have already quoted, namely, to do all acts requisite or incidental to the due carrying on of its undertaking and to carry on any branch of business incidental to the due carrying out of the objects for which the company was incorporated and subsidiary thereto, and necessary to enable the company profitably to carry on its undertaking. There is also express power enabling the directors, if properly authorised, to borrow money upon the credit of the company, and to issue bonds, debentures, or other securities of the company for the lawful purposes of the company.

Palmer, in the 10th edition of his Company Law, says that a power to guarantee the performance of contracts by customers is one not easily implied (p. 65).

So far as the authorities in England and here are concerned, they bear out that statement.

In *Colman* v. *Eastern Counties R.W. Co.* (1846), 10 Beav. 1, the directors of a railway company, for the purpose of increasing the traffic, proposed to guarantee certain profits and secure the capital of an intended steam packet company. The test there proposed by Lord Langdale, M.R., was (p. 14) that the implied powers should be those "necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned," and he continued the injunction against the proposed scheme.

In *In re West of England Bank, Ex p. Booker* (1880), 14 Ch.D. 317, Malins, V.-C., where, as he said, every power that a banker could possibly desire to exercise was given by the deed of settlement to the bank, held that a bank had power to guarantee two debentures which they owned and had handed over to Mrs. Booker as payment for certain property. This property she conveyed to Booker & Co., who were indebted to the bank. The bank thought this conveyance strengthened the position of the firm, and entered into the guarantee as a banking transaction, as the Vice-Chancellor describes it, *i.e.*, the disposing of debentures owned by them upon the terms of guaranteeing the interest thereon.

In *Guinness* v. *Land Corporation of Ireland* (1882), 22 Ch.D. 349, the application of the capital produced from B shares to what was in effect a guarantee fund for the payment of dividends on the A shares, was held not to be a proper application thereof to the objects of the company, nor incidental nor conducive to the attainment of those objects.

In *Small* v. *Smith*, 10 App. Cas. 119, it was decided that

ONT.
S. C.
1913
UNION BANK v. MCKILLOP.
Hodgins, J.A.

guaranteeing the payment of a first mortgage, by a society which held a second charge on the property, was not within its powers and was not justified as incidental to the power to realise on its own security. This case was followed by the Court of Sessions in 1886, *Life Association of Scotland* v. *Caledonian Heritable Security Co.*, 13 Rettie 750.

In *In re Queen Anne and Garden Mansions Co.* (1894), 1 Manson's Bky. Cas. 460, Vaughan Williams, J., treated a guarantee of the contract of building contractors, who were erecting a large building for a company promoted by the guaranteeing company, as *ultra vires*, dealing with it as a mere question of guarantee, but gave effect to it as a contract to make an advance on certain conditions.

In Ontario, in *A. R. Williams Machinery Co. Limited* v. *Crawford Tug Co. Limited*, 16 O.L.R. 245, a Divisional Court has determined that a guarantee by an incorporated tug company of the purchase-price of a boiler required by a tug owner to operate a tug employed by the tug company, was *ultra vires*, as neither covered by the general nor incidental power of the company.

In the case of *A. E. Thomas Limited* v. *Standard Bank of Canada* (1910), 15 O.W.R. 188, 1 O.W.N. 379, 548, the powers of the company are not stated, but the conclusion of the learned trial Judge, affirmed by a Divisional Court, is based upon the nature of the transaction in which the guarantee was substituted for the direct liability of the guarantor, and there were other obvious advantages. The decision rests upon the dealing being of such a nature as to be fairly described as incidental to the main purpose of the company, who were wholesale dealers. It is an extension of the reason deemed sufficient by Vice-Chancellor Malins in the case of a bank in a banking transaction, to other trading companies, and should be treated as depending on its own facts, as the transaction cannot be described as a usual one. The reasons of the Divisional Court are not reported.

In *Real Estate Investment Co.* v. *Metropolitan Building Society* (1883), 3 O.R. 476, at p. 492, Osler, J., indicates that the validity of a covenant that a mortgage is a good and valid security, given upon the sale of a mortgage owned by the defendants, depends on its being customary in such transactions.

In the United States the rule seems to be the same as that in England. In *Humboldt Mining Co.* v. *American Manufacturing Co.* (1894), 62 Fed. Repr. 356, a guarantee by a company incorporated for the purpose of manufacturing iron work for mining companies, of the performance of another company's

contract for the erection of a mining plant, was held void by the Circuit Court of Ohio. The argument was that the guarantee would secure a sale of the iron work used in the plant. Taft, J., there states the rule in the United States and England to be, that one corporation is impliedly prohibited from guaranteeing the contract or debt of another, and he cites decisions from the States of Connecticut, Michigan, New York, Wisconsin, Massachusetts, and Tennessee, as authorities for that proposition.

To the States may be added Maryland and Illinois. In *Western Maryland R.R. Co.* v. *Blue Ridge Hotel Co.* (1905), 102 Md. 307, a guarantee by a railway company of the interest and dividends of an hotel company operating an hotel erected at a point on the railway company's line, and incidentally improving the railway company's receipts, was held void. In *Rogers* v. *Jewell Belting Co.* (1900), 184 Ill. 574, the plaintiff failed to recover on a note signed by the company as surety for another company whose business relations with the defendant company were intimate.

Arguments based upon the receipt by the company of benefits by reason of the giving of the guarantee may be met with the question asked by Jervis, C.J., in *East Anglian Railways Co.* v. *Eastern Counties R.W. Co.* (1851), 11 C.B. 775, at p. 811: "What additional power do they acquire from the fact that the undertaking may in some way benefit their line?" And this question has been asked in much the same words in many succeeding cases. Nor does the fact that the predecessors of the appellant bank changed their position and advanced money, help matters. There is no estoppel by an act which is beyond the corporate powers, and where recovery has been had of property or money received by a company upon a contract afterwards found to be *ultra vires*, the principle is based upon rescission and restoration of the parties to the *status quo ante*, and even that remedy is confined to cases where the consideration has been received from the other contracting party, and not from outside parties.

Unless, therefore, the powers given by the sections of the statute I have quoted, aid the appellant, the established rule of law seems decisive against it.

It is not necessary, upon the general law, to go further back than the case of *London County Council* v. *Attorney-General*, [1902] A.C. 165, where Lord Halsbury, L.C., referring to *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L.R. 7 H.L. 653, and *Attorney-General* v. *Great Eastern R.W. Co.*, 5 App. Cas. 473, remarks: "I think now it cannot be doubted that those two cases do constitute the law upon this subject. It is impossible

ONT.
S. C.
1913
UNION BANK v. MCKILLOP.
Hodgins, J.A.

to go behind those two cases: they are now part of the law of this country, and we must acquiesce in them, whether we like them or not."

From these two cases the general rule is deduced, that whatever may fairly be regarded as incidental or consequential upon the things which the Legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.

The respondent in this case has the "powers . . . which are incident to such corporation, or are expressed, or included in the letters patent and the Interpretation Act, and which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of this Act as are applicable to the company" (sec. 15). I read the word "incident" as related to the word "necessary" and controlled by it. It also has power to do "all acts requisite, or incidental to the due carrying on of its undertaking," and further "to carry on any branch or branches of business incidental to the due carrying out of the objects for which the company was incorporated, and subsidiary thereto, and necessary to enable the company profitably to carry on its undertaking" (sec. 25). The latter part of this section, I think, refers to the company itself carrying on a branch of some business, which business is incidental to the due carrying out of its objects, and is a subsidiary one; and it cannot be said that the respondent carried on the business of the West Lorne Waggon Company as a branch of its business; nor can the giving of a guarantee be described as the carrying on of a business or even the financing of it, although upon the strength of it the other company may have been enabled to continue its business. Therefore, the question seems narrowed down to this: Was the giving of the guarantee authorised as incidental and necessary to enable the company to carry into effect the intention and objects of the letters patent under sec. 15, or as requisite or incidental to the due carrying on of its undertaking under sec. 25?

"Incidental" is explained by Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, at p. 97, as equivalent to what might be derived by reasonable implication from the language of the Act to which the company owed its constitution.

Even the words "incidental or conducive" have been given a restricted meaning, and are treated as not including the taking of stock, although conducive to the interests of the company by increasing the company's connections: *Joint Stock Discount Co.* v. *Brown* (1866), L.R. 3 Eq. 139. And these incidental powers, if conferred by general words, are to be taken in connection

with what are shewn by the context to be the dominant or main object, and are not to be read so as to enable the company to carry on any business or undertaking of any kind whatever. See *In re Haven Gold Mining Co.* (1882), 20 Ch.D. 151; *Re Coolgardie Consolidated Gold Mines Limited* (1897), 76 L.T.R. 269; *In re German Date Coffee Co.* (1882), 20 Ch.D. 169, 188; *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745; *Pedlar* v. *Road Block Gold Mines of India Limited*, [1905] 2 Ch. 427; *Butler* v. *Northern Territories Mines of Australia Limited* (1907), 96 L.T.R. 41; *In re Kingsbury Collieries Limited and Moore's Contract*, [1907] 2 Ch. 259; and *Attorney-General* v. *Mersey R.W. Co.*, [1907] A.C. 415.

Reading the guarantee itself, it is obvious that the widest latitude was given to the bank, and that liability upon the guarantee was not limited to the result of direct dealings between the West Lorne Waggon Company and the bank, but extended to other dealings under which the bank might in any manner whatsoever become a creditor of that company, and remained in force notwithstanding any prejudice to the guarantors arising from the bank's dealings. This accentuates the necessity for the reluctance frequently expressed to imply a power to become surety, because the result of a guarantee against the debts of another company is to put the assets of the guaranteeing company in peril for liabilities incurred in the carrying on of a business in which the guarantor is not directly interested, and whose engagements it has no means of controlling.

Upon the best consideration I can give, I cannot distinguish the issue here from that involved in those cases which deal particularly with the limitations imposed upon incorporated companies in regard to guarantees; and I see nothing in the other cases cited which enables me to say that the incidental powers of this company extend to guaranteeing the debts of another and different company whose sole connection with the respondent was that of a customer. The assent of all the shareholders cannot give validity to the guarantee, if the company had no power to make it.

I am, therefore, obliged to come to the conclusion that the giving of the guarantee was *ultra vires* of the respondent, and that the appeal must on that ground be dismissed with costs. It is, therefore, not necessary to discuss the other question argued, *i.e.*, that there is no debt owing for which liability under the guarantee exists.

Appeal dismissed.

ONT.

S.C.
1913

WYNNE v. DALBY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Sutherland, J. December 15, 1913.

1. AUTOMOBILES (§ III C—305)—RESPONSIBILITY OF OWNER WHEN CAR OPERATED BY ANOTHER—WHO IS "OWNER"—SELLER RESERVING TITLE.

The seller of an automobile under a conditional sale contract whereby he retains the title until fully paid for, with the right, on feeling insecure or on the purchaser's default, to resume possession of the car, is not the "owner" of the automobile within the meaning of sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, R.S.O. 1914, ch. 207, so as to incur a statutory liability for personal injuries sustained by the mismanagement of the car while under the control of the conditional vendee or of his servant, by the infringement of motor car regulations, passed under statutory authority.

[*Wynne* v. *Dalby*, 13 D.L.R. 569, 29 O.L.R. 62, 4 O.W.N. 1330, affirmed.]

Statement

APPEAL by the plaintiff from so much of the judgment of Kelly, J., *Wynne* v. *Dalby*, 13 D.L.R. 569, 29 O.L.R. 62, as dismissed the action as against the defendant the McLaughlin Carriage Company Limited.

The appeal was dismissed.

Argument

J. P. MacGregor, for the appellant:—The learned trial Judge erred in finding that the McLaughlin Carriage Company Limited was not the owner of the motor car, within the meaning of sec. 19 of the Motor Vehicles Act, 1912, 2 Geo. V. ch. 48. Adams was not the owner; he only held the car under an executory contract of sale: *Sawyer* v. *Pringle* (1891), 18 A.R. 218. For Adams to be liable as owner under sec. 19, there must have been a contract to sell plus a conveyance; whereas in this case the conveyance of the property was expressly withheld. Adams was merely a bailee of the chattel, and not an owner; he could not give title to a third party as against the company. The company was the owner, because it had the legal or rightful title, even though it was not in possession: *Smith* v. *Brenner* (1908), 12 O.W.R. 9; *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, at p. 563; *Bernstein* v. *Lynch* (1913), 28 O.L.R. 435; *Sutherland* v. *Mannix* (1892), 8 Man. L.R. 541, 549; Chalmers's Sale of Goods Act, 7th ed., pp. 7 and 9. As was pointed out in *Township of McKillop* v. *Township of Logan* (1899), 29 S.C.R. 702, at p. 704, there cannot be two owners in severalty of the same object; so, when the ownership is in the company, it cannot be in Adams. It was beyond the function of the Court to disregard the plain meaning of the term in the agreement whereby the company was to remain the owner of the car until the completion of all payments: *McEntire* v. *Crossley Brothers Limited*, [1895] A.C. 457, at p. 467. The statute is to be interpreted according to the plain intent of the Legislature. The demand

ONT.
S. C.
1913
WYNNE
v.
DALBY
Argument

resulting in the enactment was for greater security to the public against the reckless driving of automobiles. By common law the driver and his employer were already liable. It was sought by sec. 19 to increase the area of liability by making the real owner—the owner who must obey the Sheriff—also liable, by creating what the Chancellor of Ontario in *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551, defined as a quasi-liability in *rem* attaching to ownership of the car.

L. F. Heyd, K.C., for the defendant the McLaughlin Carriage Company Limited:—I cannot address to the Court a better argument than appears in the reasons for judgment of the learned trial Judge, reported in 29 O.L.R. 62. On the meaning of the word "owner," I refer to *Davidson* v. *Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394, at p. 405.

MacGregor, in reply, referred to *Gardner* v. *Hart* (1896), 44 W.R. 527, and *Stevenson* v. *Rice* (1874), 24 C.P. 245.

Meredith, C.J.O.

December 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from so much of the judgment, dated the 23rd May, 1913, as dismisses her action as against the respondent the McLaughlin Carriage Company Limited, which was directed to be entered by Kelly, J., after the trial of the action before him, sitting with a jury at Toronto, on the 27th February, 1913: 29 O.L.R. 62.

The action is brought to recover damages for personal injuries sustained by the appellant, owing, as she alleges and the jury found, to the negligence of E. G. Dalby, which resulted in her being struck and injured by a motor vehicle which he was driving.

The action was originally brought against Dalby alone, but G. F. Adams and the McLaughlin Motor Car Company Limited were added as defendants by amendment on the 19th November, 1912, and the respondent was also subsequently added as a defendant, and the statement of claim was amended by alleging that the McLaughlin Motor Car Company Limited and the respondent, or one of them, made a conditional sale of the motor car by which the appellant was injured to Adams, and that it was an express condition of the sale and purchase that "the title or ownership" of the car "should not pass from the vendor until the whole of the notes given for the payment of the purchase-money . . . should have been paid in full," and that at the time when the appellant was injured there was owing of the purchase-money $800, and that "therefore the title and ownership" of the car "was vested in the" respondent, and by alleging that Dalby was an employee of Adams. The statement of claim also alleges that Dalby was registered as owner of the car under the Motor Vehicles Act. Dalby delivered a state-

ONT.
S. C.
1913
WYNNE
v.
DALBY
Meredith, C.J.O.

ment of defence, but it was struck out, and judgment was signed against him on the 12th December, 1912, and the case ultimately came on for trial on the issues joined between the appellant and the other defendants, and was tried on the 27th February, 1913. At the conclusion of the taking of the evidence the action was dismissed as against the defendant the McLaughlin Motor Car Company Limited; and, upon the answers of the jury to the questions submitted to them, my brother Kelly directed that judgment should be entered against Dalby and Adams for the amount of the damages assessed by the jury, and that the action should be dismissed with costs as against the other defendants.

Upon the argument of the appeal it was contended on behalf of the appellant that the respondent was the owner of the car, within the meaning of sec. 19 of the Motor Vehicles Act (statutes of 1912, ch. 48), which provides that "the owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council."

It is true, as pointed out by Mr. MacGregor, that, by the terms of the order which Adams gave to the respondent for the car, it was "agreed that the right and title to the goods shipped under . . . order should remain in" the respondent "until the price thereof and any cheque, bill, or note given thereof (*sic*) or any part thereof is paid in full;" but it is plain, from the other terms of the order, that the car was to be delivered to and to pass into the possession of Adams, for it was to be shipped on or about the 6th May, 1912, and it was to be delivered in "first-class running order," and the payments of the purchase-price ($1,400) were to be made $500 on the 6th May, 1912, and the remainder in monthly instalments of $90 on the 1st day of every month until it should be fully paid.

The promissory notes given by Adams were all in the form of that given for $90 on the 4th May, 1912, and payable on the 1st August, 1912, which reads as follows:—

"Oshawa, Ont., May 4, 1912.

$90.00

"Augt. 1, 1912, after date, for value received, I promise to pay The McLaughlin Carriage Co. Limited (hereinafter called the vendor) or order, at the Toronto branch, 128 Church street, the sum of ninety dollars, with interest at 6 per cent. per annum until due, and interest at ten per cent. per annum after due, till paid. This note is given as security for the payment of the price of a McLaughlin No. 17 stamped No. 2155.

"I also agree and understand that the express condition of the sale and purchase of the vehicle or property for which this note is given is such that the title or ownership thereof does not

pass from the vendor until this note and any and all renewals thereof, or of any part thereof, be fully paid; and, in case I make default in payment thereof, or if for any cause the vendor have reason to feel unsecured in respect of the liability hereby created, then this note shall become due and payable even before maturity of the same, and any payment made on account of this note shall be forfeited as rent and damages for the use of the property by me, and should this note be entered for suit outside of the Province of Ontario, I hereby waive any right I may have to demand security for costs from the vendor, or require a power of attorney from the vendor's attorneys, and I waive all claim to, or benefit of, statutory exemption from execution of any of my property in respect of any judgment recovered hereon, and the vendor may in any such case, and also on default in payment hereof at maturity, take the said goods without the process of law, and sell the same by public or private sale, the proceeds after payment hereof and of expenses incidental to such taking and sale to be applied upon any unpaid purchase-money for said goods—but the taking or selling shall not relieve me of my liability for any unpaid balance of such purchase-money; for the purpose of taking possession of and removing such goods the vendor or agent or agents may enter into or upon any land, building, or enclosure, using such force as may be necessary for such purpose. I hereby guarantee the company against loss or damage to said vehicle or goods by fire and tempest or any other cause whatever until said goods are fully paid for by me.

"I hereby acknowledge having received a copy of this note at the time of the execution hereof.

"G. F. Adams,

"583 Indian Road."

According to the testimony of Oliver Hazelwood, the manager of the respondent's Toronto branch, the car was delivered to Adams, who gave his promissory notes for so much of the purchase-money as was not paid in cash, and from the time of the delivery of the car to Adams until the accident happened, the respondent had nothing to do with it, and had no authority over it.

Up to and at the time of the accident and for some time afterwards, the promissory notes were still current, and no default had been made in the payment of them; and it was not until the 21st October, 1912, that the respondent took possession of the car "to satisfy the lien-notes not paid."

Upon this state of facts, I agree with the conclusion of the learned trial Judge that the respondent was not the owner of the car, within the meaning of sec. 19.

ONT.
S. C.
1913
WYNNE
v.
DALBY
Meredith, C.J.O.

The word "owner" is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve.

As was said by Lord Herschell in *Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A.C. 8, 17: "There may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner."

These observations of Lord Herschell were quoted with approval by Lord Atkinson in *Jackson Limited* v. *Owners of S.S. Blanche*, [1908] A.C. 126, 132-3. In that case the question was whether a charterer of a ship by demise who has control of her and navigates her by his own master and crew is the "owner" of the ship within secs. 503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability to damages conferred upon "owners" by those sections, and it was held that he is.

In an earlier case, *Lewis* v. *Arnold* (1875), L.R. 10 Q.B. 245, the question was as to the meaning of the word "owner," as used in sec. 33 of the Town Police Clauses Act of 1847, which authorises the commissioners to send engines, with their appliances and firemen, beyond the limits of the special Act, for extinguishing fire in the neighbourhood of the limits, and provides that the owner of the land and buildings where the fire happened is to defray the actual expenses thereby incurred; and it was held that an occupier was the "owner" within the meaning of the section and liable for the expenses.

That case was overruled by *Sale* v. *Phillips*, [1894] 1 Q.B. 349, but only on the ground that, by an Act which was incorporated with the special Act, "owner" was defined in a way to exclude a tenant from year to year; a fact that was overlooked in the earlier case.

In *Hughes* v. *Sutherland* (1881), 7 Q.B.D. 160, the question arose on sub-sec. 1 of sec. 147 of the Merchant Shipping Act, which provides that if any person not licensed by the Board of Trade other than the owner or master or mate of a ship, or some person who is *bonâ fide* the servant and in the constant employ of the owner, or a shipping master duly appointed, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall incur a penalty. The re-

ONT.

S. C.
1913

WYNNE
v.
DALBY

Meredith, C.J.O.

spondent, having *bonâ fide* contracted to purchase one sixty-fourth share of a British ship from P., who, though not registered as the owner, had the full possession and control of the ship under a contract to purchase the 64 shares, supplied an apprentice to P., who engaged the apprentice for the ship; and it was held that the respondent was an "owner" within the meaning of the exemption, since, though not a registered owner, he had a contract enforceable in Equity for the purchase of a share in the ship. Manisty, J., in the course of his judgment (p. 164) said: "'Owner' there means one who is substantially the owner, having the control and management of the ship." And Lord Coleridge, C.J., said (p. 163): "In the present case the respondent is an equitable part owner of the ship; he has a contract enforceable in equity to purchase one sixty-fourth share. Then is he 'the owner,' within the meaning of sec. 147? If instead of an equitable interest there had been a legal transfer to him of one sixty-fourth share—however small the interest if it were a legal one—he would be 'the owner.' Is he so now? I think he is."

In *Meiklereid* v. *West* (1876), 1 Q.B.D. 428, referred to by Lord Coleridge, it was held, under a proceeding to enforce an allotment note under sec. 169 of the Act, that a person who was the sole registered owner of a ship, but had by charterparty parted not only with the possession of the ship but with all control over her, though he was in one sense the owner, was not the owner for the purpose of being sued upon the allotment note. The allotment note was a direction given by a seaman for payment of part of his wages to his wife, father, mother, grandfather, grandmother, child, grandchild, brother, or sister, and the Act provided that the amount of the allotment note might be sued for and recovered from the owner or any agent who had authorised the drawing of the note. Field, J., delivering the judgment of the Court, said (p. 435): "We think that the meaning of the word 'owner' . . . must be restrained to such actual owner for the time being of the ship as, either himself or by his master or other authorised agent, manages and controls her, and enters into the agreement for the wages of which the allotment note is part."

If in these cases the charterer of the ship, while he had the control of it and navigated it, was the owner of it within the meaning of the Acts which were the subject of consideration, I see no reason why Adams, while he was in the exclusive possession of and had complete dominion over the car under his agreement of purchase, was not the owner of it within the meaning of sec. 19; and no decided case that I am aware of is opposed to this view.

The purpose of sec. 19 was, I think, to avoid any question

ONT.
S. C.
1913
WYNNE
v.
DALBY
Meredith, C.J.O.

being raised as to whether a servant of the owner, who was driving a motor vehicle when the violation of the Act or regulation took place, was acting within the scope of his employment, and to render the person having the dominion over the vehicle, and in that sense the owner of it, answerable for any violation in the commission of which the vehicle was the instrument, by whomsoever it might be driven; and I do not think that it can have been intended to fix the very serious responsibility which the section imposes upon one who, like the respondent, at the time the accident happened, had neither the possession of nor the dominion over the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in land is the owner of the land.

For these reasons, as well as for those of my brother Kelly, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

ONT.
S. C.
1913

Re BLAND and MOHUN.

Ontario Supreme Court, Boyd, C. December 16, 1913.

1. ASSIGNMENT (§ I—2)—CHOSE IN ACTION—RIGHTS OF ASSIGNEE TO SUE—REVERTING TRUST AS TO PROCEEDS.

An assignment of a debt or legal chose in action may be absolute within the Judicature Act so as to enable the assignee to sue therefor, although a trust is created in respect of the proceeds in favour of the assignor.

[*Comfort* v. *Betts*, [1891] 1 Q.B. 737, applied; *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190, referred to.]

2. MORTGAGES (§ V—69)—DISCHARGE BY ASSIGNEE—RIGHT TO USE ASSIGNOR'S NAME—STIPULATION FOR RE-ASSIGNMENT ON TERMS.

An assignment of mortgage which recites that it is given as collateral security for a loan to the assignor but which contains in its operative clause an assignment of the whole mortgage and the whole debt and not merely a part equivalent to the loan and interest, and which further provides for a re-assignment of the mortgage on payment of the loan, is sufficient under the Registry Act, 10 Edw. VII. (Ont.) ch. 60, sec. 62, as amended 1 Geo. V. (Ont.) ch. 17 [R.S.O. 1914, ch. 124, sec. 62], to enable the assignee to receive the whole of the mortgage money and to give a statutory discharge of the mortgage without the assignor joining or giving a further release of his interest, if the assignment expressly grants power and authority to use the name of the assignor for the enforcement of the mortgage.

Statement

APPLICATION by Lancelot J. Bland, the vendor, under the Vendors and Purchasers Act, for an order declaring that the vendor was able to make a good title as against an objection of Arthur C. Mohun, the purchaser, upon a contract for the sale and purchase of land.

The objection was that a certain mortgage upon the land agreed to be sold was not discharged. This mortgage, dated the 15th August, 1904, was made by Amy Tee to M. B. Vandervoort. By an instrument under seal of the 17th August, 1904, M. B. Vandervoort assigned this mortgage to Joseph Ibbotson. The instrument recited that the assignee had lent to the assignor $1,000 for one year at eight per cent. per annum, payable half-yearly, on the promissory note of the assignor. The instrument then recited the terms of the mortgage, which was given to secure the payment of $1,150 and interest; and that there was due upon the mortgage $1,150 and interest from the 15th August, 1904. The instrument then witnessed that, in consideration of $1,000, the assignor assigned to the assignee the mortgage and the sum of $1,150 and interest, together with all the money to become due and the benefit of all the powers, covenants, and provisoes contained in the mortgage, and also power and authority to use the name of the assignor for enforcing the performance of the covenants and other matters and things contained in the mortgage; and granted and conveyed the mortgaged lands to him, his heirs and assigns, to have and to hold the said mortgage and all moneys arising in respect of the same and to accrue thereon, and also the said lands, to the use of the assignee, his heirs, executors, administrators, and assigns, absolutely forever; but subject to the terms contained in such mortgage, and "also to the terms and conditions hereinafter mentioned." The assignor covenanted that the mortgage assigned was a good and valid security; that the sum of $1,150 and interest was owing and unpaid; that he had done no act to release or discharge the mortgage in whole or in part; and for further assurances. The mortgage also contained the following special covenant:—

"And the said assignee, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said assignor, his heirs, executors, administrators, and assigns, that so soon as the said Amy Tee and the said assignor, their heirs, executors, administrators, or assigns, or one or more or any of them, shall have paid or caused to be paid to the said assignee, his heirs, executors, administrators, and assigns, the sum of one thousand dollars ($1,000) for which the said promissory note is made, together with interest thereon, as well after as before maturity, payable half-yearly from the date hereof, at the rate of eight per cent. per annum, as in said note is mentioned, he, the said assignee, his heirs,, executors, administrators, or assigns, shall and will, at the cost and charges of the said assignor, his executors, administrators, and assigns, duly assign and set over

ONT.

S. C. 1913

RE BLAND AND MOHUN.

unto the said assignor, his heirs, executors, administrators, and assigns, the said mortgage and all the moneys then due or owing or thereafter becoming due or owing thereunder, and shall and will grant and convey the lands and premises (subject to the terms of the said mortgage) to the said assignor, his heirs, executors, administrators, and assigns."

Statement

Joseph Ibbotson purported to discharge the mortgage thus assigned to him, by the registration of a statutory discharge; and the purchaser's objection to the title was, that, as Vandervoort had not joined in the discharge or otherwise released his interest in the mortgage, the mortgage was an outstanding incumbrance upon the land.

A. C. McMaster, for the vendor, referred to *Trust and Loan Co.* v. *Gallagher* (1879), 8 P.R. 97; *In re Music Hall Block* (1884), 8 O.R. 225, 228; *Pearman* v. *Hyland* (1862), 22 U.C.R. 202; *Hall* v. *Morley* (1853), 8 U.C.R. 584; *Tancred* v. *Delagoa Bay and East Africa R.W. Co.* (1889), 23 Q.B.D. 239, 242; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190, 197, 198.

H. H. Shaver, for the purchaser.

Boyd, C.

December 16. BOYD, C.:—The assignment of the 17th August, 1904, by Vandervoort to Ibbotson, purports to be an assignment of a mortgage for $1,150, made by Amy Tee to Vandervoort, dated the 15th August, 1904. It recites that the assignee, Ibbotson, has lent to the assignor, Vandervoort, $1,000 for one year, on the promissory note of the assignor, and that the assignor has agreed to execute the assignment as collateral security for the said note. Then the witnessing part declares that the assignor doth assign and set over to the assignee all that the recited mortgage and also the sum of $1,150 and the full benefit of all powers, covenants, and provisoes contained therein, and full power and authority to use the name of the assignor for enforcing the performance of the covenants, etc.

There is a special covenant, written in, by which the assignee binds himself, upon payment of the $1,000, to re-assign and set over the said mortgage and to convey the lands to the said assignor.

Under the provisions of the Judicature Act as to assignments of choses in action, the question arises whether the assignment of the debt is absolute—*i.e.*, does it purport to pass the entire interest of the assignor to the assignee, or is it an assignment purporting to be by way of charge only? If, on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it is not material to consider what was the consideration for the assignment: see *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190, 197.

The cases point to this, I think, under the Judicature Act, that an absolute assignment of a mortgage, even if it appears on the face of the assignment that it was only for the purpose of securing a debt lesser in amount, would be sufficient to come under the Act, so long as it did not purport to be by way of charge only: *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613, 617.

On this assignment, I think that, as between the mortgagor and the assignee, there was the right to receive the whole amount of the mortgage, and that such payment would be a good discharge—leaving it still to be discussed between the assignor and assignee how that sum total should be applied and distributed. As I read the assignment, it is sufficient under the Registry Act, 10 Edw. VII. ch. 60, sec. 62, to put the assignee, Ibbotson, in the position of an assignee to whom the mortgage has been assigned, and also a person entitled by law to receive the money and to discharge the mortgage. The whole mortgage and the whole of the debt is in fact assigned, and not merely a part of the debt and the instrument. See form 10 of the statute 10 Edw. VII. ch. 60, p. 539, and the effect of registration as declared by sec. 66*a*, added to the Registry Act by 1 Geo. V. ch. 17, sec. 31 (1911).

Had default been made by the mortgagor in paying, the action for recovery of the whole must have been by the assignee, in whose hands was the security, and who had the express right to use the name of the mortgagee to enforce performance of the covenant to pay. Suing in the name of the mortgagee, payment to the assignee would be a good discharge for the whole, and he would hold the surplus over the $1,000 for the use of his assignor. But under the Judicature Act he could also sue in his own name, though as to part of the money he would hold it in trust for the mortgagee, his assignor: *Comfort* v. *Betts*, [1891] 1 Q.B. 737.

The title is good as against this objection. I suppose the parties have arranged as to costs.

Order accordingly.

ONT.

S. C.

1913

SNIDER v. SNIDER.

Ontario Supreme Court, Boyd, C., in Chambers. December 17, 1913.

1. PLEADING (§ I N—111)—STATEMENT OF CLAIM—EX PARTE AMENDMENTS—WHAT ALLOWABLE—ENDORSED WRIT.

The ex parte right to once amend conferred by Rule 127, Ont., on the plaintiff, does not permit an amendment to the statement of claim which alters, modifies, or extends the claim endorsed on the writ under rule 32, so as to introduce a new cause of action.

2. PLEADING (§ II E—190)—STATEMENT OF CLAIM—NEGATION OF DEFENCE—CONSIDERATION FOR BILL OR NOTE.

Since it is presumed that a promissory note is based on a legal and good consideration, it is unnecessary for the statement of claim to allege facts to shew such consideration; it is for the defence to specially plead want of consideration.

3. PLEADING (§ II D—185)—STATEMENT OF CLAIM—STATEMENT OF CAUSE GENERALLY—HOW SET OUT.

Irrelevant, diffuse and superfluous allegations in a statement of claim may be struck out under the Ontario practice rules which permit only a concise statement of the material facts.

Statement

MOTION by the defendants the foreign executors of Thomas Albert Snider, deceased, to set aside the statement of claim, on the ground that a new claim, entirely different from that endorsed upon the writ of summons (issued on the 1st February, 1913), was stated in the statement of claim, and to dismiss the action, on the ground that the plaintiff had abandoned the claim endorsed on the writ.

W. J. Elliott, for the applicants.

H. E. Irwin, K.C., for the plaintiff.

F. C. Snider, for the defendant Snider, the Canadian executor.

November 18. Mr. HOLMESTED:—This is a motion to set aside the statement of claim, on the ground that an entirely new claim from that mentioned in the endorsement on the writ is stated therein, and to dismiss the action, on the ground that the plaintiff has abandoned the claim set out in the writ of summons. It was also objected that the statement of claim should not have been delivered because the writ was specially endorsed. This ground was, however, abandoned because the writ had issued before the new Rules came into force (1st September, 1914).

The endorsement on the writ is for $10,000 for two demand notes and interest thereon.

The notes were made by Thomas Albert Snider, and the original defendant Snider was the sole defendant named in the writ, as being the Canadian executor of the maker of the notes, who is deceased.

ONT.

S. C.

1913

SNIDER v. SNIDER.

Statement.

By an order made on the application of this defendant, in presence of the solicitor for the plaintiff and of Charles F. Malsbury and the Central Trust and Safe Deposit Company, executors in the United States of the said Thomas Albert Snider, these last-named parties were added as defendants on the 13th February, 1913. The order recites an undertaking by their solicitor to accept service of the writ and to enter an appearance and an agreement to waive the issuing of a writ for service out of the jurisdiction.

It is said that this order was made at the instance and request of the added defendants; but that, if it were the fact, is not stated in the order. At all events the order stands, it has never been appealed from, and for weal or woe these defendants are parties defendants to the action and have attorned to the jurisdiction of the Court.

These defendants, having thus been made parties to the action and attorned to the jurisdiction of the Court, are parties for all purposes, and cannot now object to any question being raised in the action which might be legitimately raised had they been resident within the jurisdiction of the Court. A defendant cannot appear in an action and disappear at his pleasure. He cannot say, "I will appear and contest this question, but I will disappear if the plaintiff raises any other question."

The only question, therefore, it appears to me, is this. If the defendants are resident within the jurisdiction and served with the writ, can they object to the variation from the endorsement of the writ which is disclosed in the statement of claim? Rule 109 contemplates that a statement of claim may alter, modify, or extend the relief claimed by the endorsement upon the writ, because it provides that where the statement does this, the plaintiff shall not be entitled to judgment on default of defence unless the statement of claim is served personally or in pursuance of an order for substitutional service. The object of the Rule is obvious. A plaintiff may vary his claim, as endorsed on the writ, by his statement of claim (where the writ is not specially endorsed within the present Rules), but, if he does so, he must give the defendant due notice of the change. As long as the defendant has due notice of the variation, that is all that is requisite, as it would be obviously unfair and unreasonable to permit a plaintiff to endorse his writ with one claim, and then, without notice to the defendant, to make an entirely different claim against him by the statement of claim, of which he might have no notice.

It must be remembered that, as the objecting defendants in this case were not parties to the action when the writ was issued, the claim now set up in the statement of claim could not have been endorsed on the writ; but, when the defendants, without ob-

ONT.
S. C.
1913
SNIDER
v.
SNIDER.
Statement

jection, become parties to the litigation, the plaintiff by his statement of claim may, it seems to me, very properly, and without offending any rule of practice, make such claim against the defendants who have, as it were, thrust themselves into the litigation, as he may see fit. The action was instituted to recover upon two notes made by a deceased person, from his Canadian executor. The claim now is that these notes may be set off against certain notes of the plaintiff in the hands of the defendants the United States executors, and that the plaintiff may be declared to be entitled to a legacy in their hands free from any claim on the notes which the plaintiff thus proposes to satisfy by set-off. All of this seems to me quite legitimately to be connected with and arise out of the plaintiff's claim on the notes sued on. The Court, being properly seised of the action, and having all proper parties before it, is bound, under the Judicature Act, 1913, sec. 16(*h*), to deal with the whole question, and it does not seem to me that these defendants are entitled to say that the plaintiff, having recovered a judgment on the notes sued on, must then proceed to the United States and litigate the question whether he is entitled to set off his judgment against the notes held by these defendants, and whether he is entitled to his legacy free from any claim of the defendants on the notes held by them.

For these reasons, it appears to me that the plaintiff has not in his statement of claim departed from his original cause of action; but, by reason of these objecting defendants having become defendants after the suit was instituted, he has a perfect right to present for determination the questions raised in the statement of claim as against them.

The motion is, therefore, refused, with costs to the plaintiff in any event of the action against the defendants other than Snider.

The defendants the foreign executors appealed from the order of the Registrar.

The appeal was allowed.

W. J. Elliott, for the appellants.

H. E. Irwin, K.C., for the plaintiff.

Boyd, C.

December 17. BOYD, C.:—Rule 33. The writ of summons may, at the option of the plaintiff, be specially endorsed with a statement of his claim, where he seeks to recover a debt or liquidated demand in money . . . arising upon . . . a promissory note. The writ shall in such case be according to the form No. 5 (*ib.* (2)).

Where the writ is specially endorsed such endorsement shall be treated as a statement of claim, and no other statement of

claim shall be necessary (Rule 111). The defendant next appears and files an affidavit of merits, and that completes the record unless the plaintiff elects to move for judgment. See Rules 56 and 57.

If the plaintiff does not elect to serve notice of trial at this stage, the defendant can serve a defence or counterclaim, and so the pleadings will develop.

Rule 127 says that the plaintiff may, without leave, amend his statement of claim, including a claim specially endorsed on the writ, once, either before or after the statement of defence is delivered. That is the Rule which, I think, applies to this case, and not Rule 109, which contemplates writs not specially endorsed, and provides that the plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the statement of claim, and may therein alter, modify, or extend his claim as endorsed upon the writ. Rule 137 provides that any pleading which may tend to prejudice, embarrass, or delay the fair trial of the action may be struck out or amended.

Rule 141. Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved.

Rule 143. A defendant shall raise all matters which shew the action not to be maintainable, etc.

Rule 151. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side (*e.g.*, consideration for a bill of exchange).

The power of amendment *ex parte*, once, by the plaintiff, under Rule 127, is more limited than the power to alter, modify, or extend his claim as endorsed on the writ under Rule 32. As at present advised, I should say that he had no power to introduce a new cause of action, although he may amend in such particulars as will not depart from the original cause of action as specially endorsed. But, assuming a larger power, such as is given under Rule 109, I do not think that the pleading now complained of can stand.

There is one cause of action and one statement of claim as endorsed upon the specially endorsed writ, claiming to recover against the defendant as executor on two promissory notes made by T. A. Snider in favour of J. E. Snider for $5,000 each, $10,000, with interest at 5 per cent. from the 1st February, 1909, $2,000.

The plaintiff has now undertaken to file a second statement of claim, in remarkable contrast to the first: containing 14 paragraphs and 4 prayers for relief, in addition to the inevitable prayer for costs. The first three paragraphs describe the plain-

ONT.
S. C.
1913
SNIDER
v.
SNIDER.
Boyd, C.

tiff; the second describes the Canadian executor Snider (who is a son of the plaintiff); the third describes the other defendants, the American executors; the fourth states that the deceased was the plaintiff's brother, and sets forth the interests and confidential relations which existed between them. The fifth states the death of the testator and his leaving a will, and that he left a large amount of assets. The sixth sets forth the giving of two notes of the 1st February, 1909, in respect of a loan from the deceased to the plaintiff. The seventh sets forth a clause in the will by which $10,000 was given as a legacy to the plaintiff, with directions that from it should be deducted any debt secured by notes owed by the plaintiff at the death of the testator. The plaintiff says that these are the notes already mentioned, of February, 1909, given on the loan, and goes on to set forth other unimportant parts of the will. The eighth paragraph says that there was a codicil of the 8th May, 1912, which did not alter the will, and a further codicil of the 12th June, 1912, which did not alter the will. The ninth sets forth that the testator had no children; that he married about the 12th June, 1912, and came to visit the plaintiff; and there is a repetition of the intimate and confidential relations existing between them. The tenth paragraph tells of the death of the testator and his wife in an automobile accident on the 17th June, 1912. The eleventh is a long detailed account of conversations with the deceased, and the calling in of the defendant's son (the present executor) and his being told by the testator to make out demand notes to cancel the old notes of 1909, and thereupon the notes in question were drawn and dated back so as to be contemporaneous with the others. The twelfth paragraph takes up the thread of the narrative after the death of the testator, and the varied manner in which the plaintiff sought to prevail upon the American executors to pay the legacy and treat the notes as cancelled. The thirteenth paragraph tells of the attitude of these executors, viz., that they could not do as the plaintiff asked without the order of the Court. And in the last and fourteenth paragraph the plaintiff alleges that he has been driven to litigation.

The special prayers are: (1) declaration as to the acts and intention of the testator; (2) declaration that there should be a set-off of the promissory notes; (3) declaration that the plaintiff should be paid the legacy of $10,000 without deduction; (4) further and other declarations in the premises, including that of a gift by the deceased to the plaintiff, and maintaining family arrangements and understandings, as hereinbefore set forth, for the considerations therein mentioned.

This is a concise statement of what the pleading sets out with abundant diffuseness. The whole pleading appears to

be open to many objections and offends against many of the rules for the regulation of pleadings, and in particular in its anticipation of the answer of the defendants; and so, according to the homely phrase of Hale, C.J., the plaintiff "is like one leaping before coming to the stile." See Odgers on Pleading and Practice, 6th ed., p. 93; *Bovy's Case* (1673), Vent. 217.

The first, second, and third paragraphs are superfluous in the case of a specially endorsed writ. The fourth and ninth, as to the amicable relations between the brothers, have no relevance to the cause of action. In the seventh and eighth paragraphs a few lines as to the provision in the will were enough; and all the rest of the references to it diffuse and superfluous. The eleventh paragraph is specially objectionable in setting forth the language of conversations and generally the evidence proposed to be offered to the Court, instead of a concise statement of the material facts. The last three paragraphs might have been condensed into three lines.

But, as some of these observations apply only to the pruning of the luxuriance, the more serious point is that the claim as framed is misconceived. It is an elaborate attempt to set forth that the notes sued on were given for legal or good consideration—a matter that is presumed in the case of negotiable instruments. The proper course of pleading is to wait until the defendants make their defence, and then let the plaintiff meet it by appropriate pleading. If the defendants make no defence, the plaintiff gets judgment at once on proof of the notes —so let him wait till there is something that interferes with his recovery. It appears to me manifest that the proper forum of litigation is in this Court as to the validity of the notes sued on; if that is established, all difficulty as to the payment of the legacy will be overcome. In the American forum the testator has left the matter so that the legacy will be equipoised by the notes of the plaintiff held by the American executors. It does not appear to me proper to remove this part of the controversy and make it part of the action on the specially endorsed writ; for, if the plaintiff makes out his contention on the notes sued on, one cannot assume that further litigation in the United States will be needed to enforce that judgment. If the questions raised by the second statement of claim, which I now set aside, are to come up by reason of the defence made, well and good, so long as they are properly pleaded; but at present they are an excrescence on the record and should be removed.

There was good reason for the intervention of the American executors; for, in the first place, the Canadian executor is the son of the plaintiff, and from the objectionable pleading, I should judge, his chief witness; and, in the second place, the

ONT.
S. C.
1913
SNIDER
v.
SNIDER.
Boyd, C.

American executors are interested in actively recovering, as they are entitled to all the assets of the testator not needed for the satisfaction of his debts; and, if his assets fall short in this country of meeting all claims, resort for the balance of the claim will be had to the American assets in the hands of these defendants.

The Registrar in allowing the pleading to stand was probably influenced by the fact that the motion made was too large in seeking to have the action dismissed. The action should be prosecuted on the specially endorsed writ, and the defendant is to have sufficient time to plead thereto.

The costs of the application below and of the appeal will be both in the cause.

Appeal allowed.

CAN.
S. C.
1914

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. March 2, 1914.

1. MILITIA (§ I—3)—QUELLING RIOTS—LIABILITY OF A MUNICIPALITY FOR EXPENSE.

The "senior officer present at any locality" who may, under the Militia Act, R.S.C. 1886, ch. 41, sec. 34, on requisition from three justices of the peace, call out the troops in aid of the civil power, wherever a riot or disturbance of the peace has occurred or is anticipated, is not necessarily the senior officer of a corps stationed at the place where the riot occurs or is likely to occur; the justices, in their discretion, may requisition the senior officer of any available force.

[*Attorney-General of Canada* v. *Sydney*, 9 D.L.R. 282, 46 N.S.R. 527, reversed.]

2. STATUTES (§ II D—127)—CHANGES OF PROCEDURE, RETROACTIVE.

Whether an action to be brought against a municipality for the reimbursement of a government fund for moneys chargeable to the municipality should be brought in the name of one public officer or of another, is a mere matter of procedure as to which statutes are ordinarily retrospective; and the amending statute, 4 Edw. VII. (Can.) ch. 23, sec. 86, vesting in the Crown instead of in the militia officer a right of action for the expense of troops requisitioned in case of riots, enables the Attorney-General of Canada to sue for reimbursement of the Consolidated Revenue Fund (Canada) for such expenses incurred prior to the amendment.

Statement

APPEAL from a decision of the Supreme Court of Nova Scotia, *Attorney-General of Canada* v. *City of Sydney*, 9 D.L.R. 282, 46 N.S.R. 527, reversing the judgment at the trial in favour of the plaintiff.

The appeal was allowed.

Newcombe, K.C., for the appellant.

Finlay Macdonald, for the respondent.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action to recover the sum of $5,309.09 advanced by the Crown out of the Consolidated Revenue

Fund of Canada to defray the expenditure incurred in connection with the pay and allowances of the militia force called out to aid the civil power to suppress a riot or disturbance within the municipality of the city of Sydney.

There is no dispute as to the facts. They are all found in favour of the Crown.

It appears that in July, 1904, there were riots and civil disturbances in Sydney, and the local authorities, unable to cope with them, found it necessary to summon a large military force to their assistance. Requisitions were accordingly made upon three separate military officers. Colonel Irving, the officer commanding at Halifax, District No. 9, which comprises the Province of Nova Scotia, was the only one who brought his forces to Sydney and performed the services required.

The trial Judge maintained the action except as to one item of $20 for legal expenses. On appeal, this judgment was reversed on the sole ground that Colonel Irving was not "the senior officer of the active militia present at any locality" within the meaning of sec. 34 of the Militia Act. Mr. Justice Ritchie, who delivered the judgment of the Court, substitutes for this expression by interpretation the words, "the senior officer at or nearest the place where the riot has occurred or is anticipated." And upon the assumption that there was an officer at Sydney or nearer to Sydney than Halifax, the claim is disallowed.

It appears to me obvious that, speaking generally, the statute contemplates real and effective proceedings to put down disturbances by aid of the militia power when the forces under the control of the local civil authorities are insufficient, and the section in question provides that the initial step must be taken by the civil authorities. It is for those authorities to judge of the magnitude of the disturbance, the necessity for aid, and, in the first instance, the strength of the force required to quell it. The section properly provides, therefore, that the requisitions must be made by those who are immediately associated with the locality where the trouble has arisen and in which the services of the militia are required. They are in a moment of urgency authorized to impose a heavy tax upon the ratepayers; hence the words used in that section authorize the senior officer to act "when thereunto required in writing" by the chairman.

These authorities, charged with the duty of maintaining order in *the* localities where the disturbances have arisen apply to the senior officer of the active militia at "*any* locality." Here there are no qualifying words as in the case of the civil authorities for the obvious reason that there may not be in the locality in which the riot occurs any active militia, or there may be serious reasons why in a local disturbance the local militia should not be called upon to interfere. Hence, the necessity for leaving a wide discretion with the local civil authorities.

CAN.

S. C.
1914

ATTY.-GEN. OF CANADA v. CITY OF SYDNEY.

Sir Charles Fitzpatrick, C.J.

There must have been in this case a serious and wide-spread disturbance, because the magistrates considered it necessary to summon assistance from three different quarters and the senior officer of the active militia who was in command, as I have already said, over the whole district, answered that summons and directed his subordinates to await his further orders.

I do not wish to be understood as saying that the municipal authorities might not have limited their requisition to the officer commanding the militia force at Baddeck or in Sydney. My point is that the statute confers a power upon the local authorities responsible for the maintenance of the peace which they exercise at their discretion in view of the necessities of the situation, and they may requisition any officer in the province, and if the outbreak is sufficiently serious, they might go to headquarters and put the general officer commanding in a position to call out the whole militia force of the country.

The word "locality" as used in the section is perhaps somewhat indefinite, but it must be interpreted in such a way as not to unduly limit and possibly destroy the discretion which is undoubtedly conferred upon the civil authorities, and they having, in the exercise of their undoubted discretion, called upon the senior officer of the active militia for the district which included the scene of the disturbance, it was for him to determine how that requisition was to be met. This is made abundantly clear by reference to sec. 78 of the Act, which gives the officer commanding any military district authority, upon any sudden emergency, to call out the whole or any part of the militia within his command.

The Interpretation Act, sec. 31, paragraph (*c*), provides that

> if a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

The active militia may be called out for service either within or without the municipality in which it is raised (sec. 34, subsec. 1).

The respondents contend that the action should have been brought in the name of the commanding officer of the corps because the militia were called out under the provisions of ch. 41, sec. 34, R.S.C. 1886, sub-sec. 5, which provides that the pay and allowances are to be recovered by the commanding officer. There are many answers to this objection in the circumstances of this case, but the most effective is given by Mr. Justice Anglin.

It appears by the particulars that the disbursements were all made by the Government during the period from August 6, 1904, to February, 1905, and this action was brought in 1910. At that time, the statute of 1904, 4 Edw. VII. ch. 23, was in force and secs. 86 and 87 provide that such sums, as are in question here, may be recovered as a debt due to the Crown by the municipality. This is a mere question of procedure. In *Gardner* v. *Lucas*, 3 App. Cas. 582, Lord Blackburn said at 603:—

CAN.

S. C.

1914

ATTY.-GEN. OF CANADA v. CITY OF SYDNEY.

Sir Charles Fitzpatrick, C.J.

For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly, these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

I entertain no doubt that the city of Sydney is a separate and distinct municipality from the county of Cape Breton, and as such, obliged to pay for the services of the militia duly requisitioned (sec. 3, ch. 70, R.S.N.S. 1900).

The appeal should be allowed with costs.

Idington, J.

IDINGTON, J.:—The claim made herein is to recover from respondent, which is a municipality, payment for services rendered by the active militia called out in aid of the civil power under sec. 34 of the Militia Act.

I am unable to construe that section as the Supreme Court of Nova Scotia has in support of its judgment allowing the appeal from the judgment of the learned trial Judge.

With great respect, it seems to me rather narrow ground to proceed upon the possible meaning to be found in the words of part of one sub-section out of half a dozen such sub-sections and especially so when those words are at best of dubious import.

I think we must look at the scope of the whole of this section and see if there has been a substantial compliance with its meaning and whether or not the action taken has been an illegal or legal proceeding.

For if illegal then if those men so engaged or any one of them in suppressing a riot or disturbance had happened to take human life, a charge of manslaughter or worse might have lain against those responsible for such result.

Such like considerations may well arrest our attention in determining whether or not this calling out of the active militia fell within the meaning of what the statute prescribes. For if by the reasonable interpretation of this section the legality of the action of Lt.-Col. Irving and the magistrates making the requisition upon him cannot be maintained assuredly no action will lie for the recovery of the payments made.

And on the other hand, if what was done can be justified under and by virtue of the statute as legally done, it seems to me the recovery sought must be allowed.

It is admitted that Lt.-Col. Irving was, during the time in question, District Officer commanding No. 9 Military District within which the city of Sydney lies.

There were other officers each commanding a regiment in the district, upon each of whom a requisition was made by the magistrate at the same time as the requisition made upon Lt.-Col. Irving. These other commanding officers were, I take it, under the command of Lt.-Col. Irving.

CAN.

S. C.

1914

ATTY.-GEN. OF CANADA v. CITY OF SYDNEY.

Idington, J.

The first sub-section of sec. 34 provides that:—

> The active militia, or any corps thereof, shall be liable to be called out . . . in aid of the civil power in any case in which a riot, disturbance of the peace, or other emergency requiring such service occurs, or . . . whether such riot, disturbance or other emergency occurs, or is so anticipated within or without the municipality in which such corps is raised or organized.

Sub-section 2 declares that:—

> The senior officer of the active militia present at any locality shall call out the same or such portion thereof as he considers necessary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, etc., . . . when thereunto required in writing by

the several judicial personages defined, etc.

Sub-section 3 provides that every such requisition shall express on its face the actual facts or the anticipation thereof "requiring such service of the active militia in aid of the civil power for the suppression thereof." Sub-section 4 provides that "every officer and man of such active militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer," etc., etc. Then sub-sec. 5 provides that "when the active militia, or any corps thereof, is so called out in aid of the civil power, the municipality in which their services are required shall pay them," etc., etc. Sub-section 6 provides for Government advancing expenses, etc.

I have only quoted the parts of the language used that are material to test the correctness of the judgment here in question, which seems to put the entire application of the section upon the meaning of the words quoted from the second sub-section. Such an interpretation would, if followed to its logical consequences, be apt to reduce the whole section to a most impotent absurdity.

If the only person who may be requisitioned is as suggested, the senior officer nearest to the scene of the disturbance, then the captain of a company might be the only one answerable to such requisition, and his company not even all within reach of his summons and all the rest of the active militia be miles away.

Counsel for respondent when asked how more remote forces were to be brought in if needed suggested that the local officer could call for them. By what authority he was unable to tell us. It is quite clear he would have no such authority. And no one else would until duly and properly requisitioned by the civil authority.

According to the construction adopted by the Court below in reversing the learned trial Judge, the civil authority could not direct any one but the senior officer nearest the scene of disturbance.

The language I have quoted is express in imposing the duty not only upon a single corps, but upon the "active militia," and to my mind demonstrates that the contention made by respondent

is untenable and unworkable. All that the language of sec. 2 on which stress is laid to maintain this contention indicates is that magistrates and officers should each act in a reasonable and due orderly manner. The locality is not defined, but the closing language of the first sub-section clearly shews that the corps need not be within the municipality. And the word "locality" must be given a reasonable and common sense construction.

The magistrates of the county of whom one may be mayor or other head of the municipality concerned are alone entrusted with the power, and they are neither confined to their own county nor to a single corps. They would certainly be expected from the language used to exercise common sense. But they are entrusted with a high duty carrying with it great power and responsibility, and I do not think we can supervise their action, much less reduce them to the impotent state contended for.

Indeed, we have no such evidence before us as would warrant us in criticising their conduct in the premises. I presume it was what respectable men thought was reasonable and necessary to meet the emergency presented to them.

Counsel for respondent, as he was entitled to do, raised the question of the right of the Attorney-General to sue instead of the commanding officer suing as was provided by the Act as it stood at the time in question.

In view of the amendment making provision for the Attorney-General suing I do not think the objection is now tenable. Indeed, I cannot get rid of the impression that the money being ultimately payable to the Crown it was always competent for the Attorney-General to have sued so far as the facts established that the Crown was ultimately entitled to recover.

The case of *Crewe-Read* v. *Cape Breton*, 14 Can. S.C.R. 8, only decides that the officer suing by virtue of the statute, having died, his administratrix could revive and continue the action he had begun.

Nor can I find that the action should have been brought against the county. And if the company most directly interested in the protection of the militia are, as the factum alleges, free from taxation, I suspect that must be a situation created by respondent and not by the county. The protection of property outside the city was no doubt because that was connected with the city and something the county derived no benefit from.

The appeal should be allowed with costs.

Duff, J.

DUFF, J.:—The action out of which this appeal arises was brought by the Attorney-General of the Dominion to recover a sum of $5,309.09 advanced by the Dominion Government to pay the expenses of certain militia forces requisitioned in aid of the civil power under the provision of sec. 34, ch. 41, of the Revised Statutes of 1886. I think the only points that require discussion

CAN.
S.C.
1914
ATTY.-GEN. OF CANADA v. CITY OF SYDNEY.
Duff. J.

are two: first, it is said that the magistrate who professed to act under the authority of sec. 34 had no authority to requisition the troops that were requisitioned; and, secondly, that if they had such authority that the Attorney-General has no status to sue for the advances made. As touching the first point the facts appear to be that the magistrate requisitioned Col. McRae, of Baddeck, and Col. Irving, who was district officer commanding at Halifax for the district of Nova Scotia; troops were sent by Col. Irving from Halifax, but the troops at Baddeck, although mobilized, were not sent forward. The argument appears to be that the power of requisitioning troops given by sec. 34 applies only to troops in the locality in which the disturbance occurs or in some adjacent locality. The Supreme Court of Nova Scotia held that locality in the second sub-section of sec. 34 means the locality nearest the seat of disturbance. The effect of this construction would be that the requisition to Col. Irving at all events was beyond the power of the magistrates.

I think, with great respect, that it is impossible to support this view of the statute. The language of the introductory clause of sec. 34 is general, and whether some limitation may or may not be justified by the context or the subject-matter of the section I think it is impossible to read it in the restricted sense in which it was read in the Court below. The effect of that construction would seriously limit the operation of these provisions. It would make it impossible for the magistrates to call in more than a strictly limited number (generally not more than one) of bodies of troops, no matter how inadequate such forces might be, no matter how clearly undesirable the employment of those particular forces, or any of them might be in the particular circumstances. The argument that the provisions construed as the Government contends are liable to abuse is one that no doubt deserves consideration, but, on the other hand, Parliament may have well felt that it was better to rely upon the good sense of the magistrates and the military authorities than to impose restrictions which, in easily conceivable cases, might entirely neutralize these provisions.

The facts bearing upon the second point are these. The Militia Act to which I have already referred was superseded, in 1904, by a statute which was ch. 23 of the statutes of that year. That Act came into force on the 1st of November. Of the advances sued for a considerable proportion were made prior to that date. As to these advances it is contended that ch. 41 of the Revised Statutes, 1886, applies, and if so the proper person to sue for them is the commanding officer and not the Attorney-General. I think this contention must be rejected for the reason advanced by Mr. Newcombe, *viz.*, that the commanding officer, in suing for the recovery of advances under sub-sec. 6 of sec. 34 of the earlier Act, sued as trustee for the Crown, and that, consequently, the pro-

vision of the later Act, sec. 87, which authorizes an action on behalf of and in the name of the Crown, is strictly a provision relating to procedure only.

This is a sufficient answer to the objection, but there is another answer which would be equally effective. There appears to be nothing in the practice of the Supreme Court of Nova Scotia to prevent the commanding officer now being added as a party (*The "Duke of Buccleuch,"* [1892] P. 201), and the suggestion that his claim would be barred to the Statute of Limitations, falls to the ground when one remembers that the right of action asserted by him is not on his own behalf, but on the behalf of the Consolidated Revenue Fund. In the circumstances it would not be proper to impose any terms as to costs as a condition of such amendment.

The appeal should be allowed with costs here and below; there should be judgment for the Attorney-General with costs of the action.

Anglin, J.

ANGLIN, J.:—The Court *en banc*, reversing the trial Judge, dismissed this action on the ground that the officers on whom the requisitions calling out the militia were made were not then present at the locality of the riot or disturbance, actual or anticipated. With respect, I think the Court has placed a wrong construction on the words "present at any locality" in sub-sec. 2 of sec. 34 of ch. 41 of the R.S.C. 1886. This adjectival phrase qualifies either "the senior officer" or "the active militia"—I think the latter—but it is not very material which. The "locality" referred to is not that where the riot or disturbance occurs—there might be no active militia whatever there; the available force might be quite inadequate—but that where the officer requisitioned or the body of active militia which he commanded is stationed. The phrase "at any locality" was used advisedly. The words which immediately follow—"shall call out the same or such portion thereof as he considers necessary"—obviously refer to the body of active militia under the command of the "senior officer" requisitioned. The contrast between the words "present at any locality" and the words—"the municipality or county in which such riot, or disturbance or other emergency occurs or is anticipated"—found in the same section, I think removes any possible doubt that the application and meaning which I give to the words "any locality" is what Parliament intended they should have. It follows that the requisitions addressed to Colonel Irving and Colonel McRae were within the authority conferred by sec. 34 of ch. 41.

The respondent further insists that the right of action was, by the statute in force when most of the payments were made, given exclusively to the commanding officer, who was required to sue in his own name, although payment had already been made

CAN.
S. C.
1914
ATTY.-GEN. OF CANADA v. CITY OF SYDNEY.
Anglin, J.

out of the Consolidated Revenue Fund, R.S.C. 1886, ch. 41, sec. 34, sub-secs. 5 and 6. But by an amendment of 1904 the right to sue for the recovery of money so expended was given to His Majesty (4 Edw. VII. ch. 23, sec. 86). That right is exercisable by the Attorney-General. No new right of action was created by this amendment; no new liability was imposed. Under the former statute when the money had been paid out of the Consolidated Revenue Fund the commanding officer who sued was bound to pay the amount recovered over to His Majesty. The statute of 1904 merely effects a change in the procedure to be followed in the recovery of the money. It was in force when the action was brought and as a statute regulating procedure applied to it. I think the right of the Attorney-General to maintain this action is clear.

As to the small item of expenditure incurred in protecting the source of supply of the waterworks of the Dominion Steel Company (836) there is a little more difficulty. The source of supply of these waterworks is outside the town limit; but the works of the steel company are within the city of Sydney, and the danger to the water supply arose from rioting and disturbance within the city. It was to prevent injury likely to arise out of that rioting and disturbance that the services of the militia were required. I do not think that it is beyond the scope of the statute that the municipal corporation of the city of Sydney should be required to pay for the services rendered under such circumstances at the source of the water supply.

I would allow this appeal with costs in this Court and in the Court *en banc*, and would restore the judgment of the trial Judge.

Brodeur, J.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Ritchie.

Appeal allowed.

B. C.
S. C.
1914

AIREY v. EMPIRE STEVEDORING CO.

British Columbia Supreme Court, Murphy, J. March 25, 1914.

1. PLEADING (§ 11 J—236)—STATEMENT OF CLAIM—EMPLOYERS' LIABILITY ACT (B.C.).

A plaintiff in a negligence action desiring to claim under the Employers' Liability Act (B.C.) as well as at common law, should specifically raise the claim of defendant's liability under the statute in his statement of claim.

Statement

TRIAL of action for negligence brought against an employer by his employee.

Judgment was given for the defendant, with leave to bring a fresh action so as to claim under the Employers' Liability Act.

C. Craig, for the plaintiff.
S. S. Taylor, for the defendant.

MURPHY, J.:—In my opinion the verdict rests on an issue not raised in the pleadings. It is true that one construction of a paragraph in the statement of defence might be utilized to found this issue upon, but I consider the paragraph is open to a different meaning. Whilst the Court of Appeal in *Cook* v. *Newport Lumber Co.* (not yet reported) did express the opinion that an issue not specifically raised by the statement of claim might be tried if raised by the statement of defence, some of the learned Judges animadverted strongly on the carelessness of pleading too prevalent in our Courts. I think also the Court of Appeal in that case came to the conclusion that the issue was fairly fought out at the trial.

That counsel in this case thought the pleadings defective is shewn by his applying for an amendment, but he did not press for one to the extent of having the question of terms raised. From the outset of the trial, counsel for the defence objected to the particular issue on which the verdict rests being raised. In my opinion that issue was not fully tried out. It was not made the subject of discovery examination, and the defendants clearly might possibly have had witnesses to offset the evidence for the plaintiff if the plea was spread on the record.

It is true that evidence justifying the verdict was admitted without objection, but it is quite true that such evidence was relevant to the common law issue which was on the record. Possibly counsel ought to have made it clear that he objected to its admission except on the issue to which it was relevant but his not having done so does not it seems to me prevent him from taking his present position, particularly as it is merely a re-assertion of a position taken at the opening and persisted in throughout the trial. I must refuse to act on the verdict and enter a judgment for the defendant. If it is desired to bring a fresh action under the Employers' Liability Act, and if it is necessary to obtain any declaration that this judgment should be without prejudice to the right to bring such action, I will hear counsel thereon. This action is dismissed with costs, leave being reserved to move as aforesaid if plaintiff is so advised.

Judgment for defendant.

MAN.

C. A.
1914

DAVIS v. WRIGHT.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. March 30, 1914.

1. DISMISSAL AND DISCONTINUANCE (§ I—2)—INVOLUNTARY—WANT OF PROSECUTION—UNREASONABLE DELAY.

An order to dismiss an action for want of prosecution may be made after a verdict at the first trial had been set aside and a new trial ordered, if the plaintiff allows two months to elapse before the sittings at which he might have proceeded to a second trial and he fails to do so without any reasonable excuse.

[*Davis* v. *Wright*, 15 D.L.R. 385, 26 W.L.R. 517, affirmed; *Spawn* v. *Nelles*, 1 Ch. Ch. (Ont.) 270, approved; *Diamond Harrow* v. *Stone*, 7 O.W.R. 685, distinguished.]

Statement

APPEAL from the judgment of Curran, J., *Davis* v. *Wright*, 15 D.L.R. 385, 26 W.L.R. 517, dismissing an action for want of prosecution.

The appeal was dismissed.

J. F. Davidson, for plaintiff, appellant.

H. F. Tench, for defendant, respondent.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The sole question involved in this case is the construction to be given to rule 540. It is as follows:—

540. If the action is at issue two months before the commencement of any sittings of the Court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor, the action may be dismissed for want of prosecution.

After the granting a new trial by the Court of Appeal the case remained at issue and several "sittings of the Court for which the plaintiff might give notice of trial" were allowed by him to pass and he did nothing.

It is the policy of the law and practice to compel a plaintiff to proceed with the case and not drive the defendant to unnecessary expense. If it was wise to compel the plaintiff in the first instance to bring the cause on for trial, it was pre-eminently wise to compel him to bring it on again after an abortive trial, where probably large expenses were incurred by both parties.

The English rule on this subject, order 36, rule 12, to my mind, is, in its language, not as broad or as general as ours, and under it one might well argue that once having set the case down the rule was satisfied. The learned Judge, however, quotes from the Annual Practice of 1913 shewing that the editor in his opinion (which was probably an echo of the professional opinion on the subject) thought that the rule applied even where notice of trial had been given and the case had been once heard, but the judgment had been set aside. I find on looking at the Practice for 1914 that the same language was repeated at pp. 595-596.

The case of *Diamond Harrow* v. *Stone*, 7 O.W.R. 685, a decision

of the Chief Justice of Ontario, was strongly relied upon by counsel for the plaintiff and requires careful consideration. The learned Chief Justice refers with approval to certain Irish cases which are governed by their Common Law Procedure Act, and following those decisions and certain English cases which were decided under the English Common Law Procedure Act, he put a construction on the Ontario rule in favour of the plaintiff.

I am not familiar with the Ontario Judicature Act; but reading the remarks of Holmested & Langton, 3rd ed., 4, if the authors' views are correct, the two systems of law and equity have not been fused into one practice by that Act. Apparently in Ontario there is no rule corresponding to our rule 992, which is as follows:—

> 992. It is hereby declared that it is the purpose of this Act to fuse and amalgamate the former systems of law and equity and common law and equity practice into one system.

By sub-sec. (*s*) of sec. 38 of the King's Bench Act, R.S.M. 1902, ch. 40, it is declared that where

> there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.

It is stated in the Annual Practice that this rule does not apply to matters of practice; but if I understand *Kearsley* v. *Philips*, 10 Q.B.D. 36, the Court did apply the Chancery practice of production to the new practice, so we might apply the old equity practice of dismissal for want of prosecution to explain the general language of the rule in question.

Up to the time the King's Bench Act came into force the old equity rule 271, corresponding to the old Ontario rule 275, was in force and the practice was to permit the defendant to move to dismiss the plaintiff's bill at any time if he was unduly delaying in bringing the cause on for trial.

Under the similar Ontario rule in the case of *Spawn* v. *Nelles*, 1 Ch. Ch. 270, where the cause had once been set down for trial, Chancellor VanKoughnet used the following language:—

> It seems that bills in cases in the stage in which this suit is have been dismissed on notice. It is a convenient practice and saves expense, and I, therefore, follow it.

Subsequent cases follow this decision, and this wholesome practice was the practice on the equity side of this Court until all practice was fused and our rule 540 became the law on the subject.

I have not overlooked our rule 4, but I think, looking at the history of our practice, when a plaintiff launches an action against a defendant he should proceed with it reasonably and not drive the defendant to the expense of bringing the action on for trial.

I agree with Chancellor VanKoughnet the defendant's course in this matter "is a convenient practice and saves expense." I think "if the action is at issue two months before the commence-

MAN.

C. A.
1914

DAVIS
v.
WRIGHT.

ment of any sittings of the Court for which the plaintiff might give notice of trial" unless he has a reasonable excuse for the delay, his action may be dismissed for want of prosecution, even if he had previously given notice and the trial has been fruitless.

The appeal must be dismissed with costs.

Appeal dismissed.

ALTA.

S. C.
1914

CESSARINI v. HAZELL.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ. March 30, 1914.

1. COSTS (§ I—14)—SECURITY FOR COSTS—WORKMEN'S COMPENSATION ACT (ALTA.)—PROCEDURE LESS FORMAL AND EXPENSIVE.

The general practice relating to security for costs in Alberta is not applicable to proceedings under the Workmen's Compensation Act, Alta., Statutes of 1908, ch. 12, the policy of the Act being to assist a supposedly poor class of persons by a procedure less formal and expensive than is required in ordinary disputes.

[As to a District Court Judge's power under the Act, see also *Bodner* v. *West Canadian Collieries*, 8 D.L.R. 462.]

Statement

Appeal from the order of McNeill, District Court Judge, ordering security for costs in an action under the Workmen's Compensation Act, Alberta Statutes 1908, ch. 12.

The appeal was allowed.

J. R. Palmer, for applicant, respondent.

L. M. Johnston, K.C., for respondent, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the order of His Honour Judge McNeill ordering the applicant to give security for costs.

In *Bodner* v. *West Canadian Collieries*, 8 D.L.R. 462, 5 A.L.R. 163, this Court held in view of differences in the terms of the English Act and the Alberta Workmen's Compensation Act, Statutes of 1908, ch. 12, while under the former Act the County Court Judge is *persona designata* only, yet under the latter Act the District Court Judge is not *persona designata* but acts as Judge of the District Court and that the proceedings are proceedings in Court and consequently that the ordinary practice of the District Court is to be applied so far as it can reasonably be applied and is not inconsistent with the provisions of the Act and the different character of the proceedings. On this principle the Court in that case held that the District Court Judge had power to order the issue of a commission to take evidence. This of course is subject to the express provisions of the Act relating to rules of Court.

There are a number of such provisions in the Act, *e.g.*, Sched. (*b*); 1 (5), (6), (7), (9), (12), (15); Sched. 2 (3), (5), (6), (8), (10), (12).

Sched. 2 (10) appears to give almost plenary powers in this respect. It says:—

> The duty of District Courts under this Act shall, subject to rules of Court, be part of the duties of such Courts, and the officers of such Courts shall act accordingly, *and rules of Court may be made* both for any purpose for which this Act authorizes rules of Court to be made, and also *generally for carrying into effect this Act so far as it affects such Courts and proceedings therein.*

and (Schedule (b)) enacts that

> rules of Court shall mean rules of Court made and promulgated as provided for in the District Courts Act.

The power to make rules of Court is by the District Courts Act conferred upon the Lieutenant-Governor-in-council with power to confer the same power upon the Judges of the Supreme Court. The Lieutenant-Governor-in-council passed a body of rules of Court about the date on which the Act came into force—January 1, 1908—the published copies bear no date. These rules declare (sec. 16) that they are to be read and construed with the rules governing procedure in District Courts, being the rules of Court of the Supreme Court of Alberta in so far as the same are from their nature applicable, and the rules of subsequent date amending the same. Even had no new rules been promulgated and had we consequently to deal with the matter in view only of the general practice of the District Court applicable to proceedings under the Act, I should have held that the practice relating to security for costs was not applicable to proceedings under the Act. Sched. 2 (6) says that *the costs* of and incidental to the arbitration and proceedings connected therewith *shall be in the discretion* of the committee arbitrator or *Court subject as respects such Court to rules of Court.* It also says that the costs . . . shall be *taxed* in manner prescribed by those rules and such taxation may be reviewed by the Court. The Act thus expressly provides for two things in relation to costs, namely, (1) costs being incurred, their disposition is in the discretion of the Court, (2) the ordinary practice relating to taxation is to apply.

The requiring of security for costs is something quite different from either of these two subjects. It is so treated in the existing general rules of Court. The rules relating to costs (Jud. Ord. Consol. Ord. N.W.T. 1905, ch. 21) are rules 517 to 534. They compose order 42. They are divided into three sub-heads: "*i.* Generally; *ii.* Security for costs; *iii.* Taxation and tariff of costs."

Schedule 2 (6), it seems to me, clearly intended to introduce the provisions so far as applicable only of sub-heads *i.* and *iii.* and by implication to exclude sub-head *ii.;* although there is perhaps nothing under sub-head *i.* which is applicable.

The new rules make the matter I think even clearer.

The subject of "costs" is dealt with at large in rules 523, 524,

ALTA.
S. C.
1914
CESSARINI v. HAZELL.
Beck, J.

525 and 526, and only from the point of view of the quantum of costs and their taxation. The implication of an intention to exclude the practice relating to security for costs is to my mind unquestionable. This conclusion too is, I think, in clear accordance with the policy of the Workmen's Compensation Act. The obvious purpose of the Act is to assist a class of persons who it is to be supposed are poor people of little, if any, means—either those who have themselves met with accidents which either wholly or partially incapacitate them from earning their livelihood or those, as poor, dependent upon them; and to provide this assistance by a procedure much less formal and intricate and much less expensive than that perhaps necessarily required in relation to the determination of ordinary disputes.

For the reasons indicated I think the appeal should be allowed with costs with result that the order for security for costs will be set aside with costs.

Appeal allowed.

B. C.
S. C.
1914

Re DOE.

British Columbia Supreme Court, Clement, J. April 1, 1914.

1. CONSTITUTIONAL LAW (§ II A 4—210)—DIRECT AND INDIRECT TAXATION—SUCCESSION DUTY.

As a condition for local probate in respect of property situated within a Province, payment of a succession duty may be required under provincial legislation, for example R.S.B.C. 1911, ch. 217.

[*The King* v. *Lovitt*, [1912] A.C. 212; and *Cotton* v. *The King*, [1914] A.C. 176, 15 D.L.R. 283, considered.]

2. CONSTITUTIONAL LAW (§ II A 4—211)—TAXES, DIRECT AND INDIRECT—PROVINCIAL LAW-MAKING POWERS—SUCCESSION TAX.

A succession tax directly laid on property within the Province by provincial law is not an indirect tax under the B.N.A. Act although payment thereof must be made or security given therefor concurrently with taking out letters probate to the decedent's estate.

[*The King* v. *Lovitt*, [1912] A.C. 212; *Cotton* v. *The King*, [1914] A.C. 176, 15 D.L.R. 283, referred to.]

Statement

APPLICATION by the executor of a will to compel the Supreme Court registrar to deliver the letters probate, without requiring payment of succession duty as a condition precedent.

The application was refused.

Aikman, for the application.

H. A. Maclean, K.C., contra.

Clement, J.

CLEMENT, J.:—This is an application by the executor of the will of the late E. H. R. Doe for a direction to the registrar of this Court that he forthwith deliver to the applicant or his solicitor the letters probate of the will in question without first exacting payment, or security for the payment, of the amount due or payable under the Succession Duty Act of this Province, R.S.B.C.

1911, ch. 217. It is admitted that the property passing under the will is all situate in the province.

The application is based upon the one contention only, namely, that even as to property within the province the tax imposed by the act in question is an indirect tax and as such not within provincial competence. It is not contended that the registrar is not justified under the statute in withholding the letters probate until the duty is paid or secured if in fact any duty has been lawfully imposed. To this question alone I have to address myself.

It is urged that in the recent case of *Cotton* v. *The King*, [1914] A.C. 176, 15 D.L.R. 283, their Lordships of the Judicial Committee of the Privy Council have held all succession duties to be indirect taxation. I do not so read the judgment. The Act there in question was an Act of the Quebec Legislature. It required certain persons (one or more) to make a declaration as to the value of the estate left by any deceased person, and it imposed a legal liability upon the person making the declaration to pay the succession duty, that person not being necessarily interested in the estate as a beneficiary,

> leaving him to recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein.

In the case—which alone was before them—of property situate beyond the Province of Quebec, which the provincial legislature obviously could not charge directly with the duty, such an impost appeared to their Lordships "plainly to lie outside the definition of direct taxation accepted by this Board in previous cases." It fell, in fact, squarely within the accepted definition of indirect taxes, viz:

> those which are demanded from one person in the expectation or intention that he shall indemnify himself at the expense of another.

And when, in the following paragraph of the judgment, Lord Moulton says that

> the whole structure of the scheme of these succession duties depends on the system of making one person pay duties which he is not intended to bear but to obtain from other persons,

he is, I think, speaking of the scheme of the Quebec Act then under examination, and not of succession duties in general, as if the phrase "succession duty" had a well known and definite legal significance. Its real meaning, I think, must be gathered from the statute in which it is used: the real character of the tax, whatever it may be styled, depends upon its intended incidence as disclosed by the statute itself.

I have carefully examined our own Act, and I find that the impost is laid expressly upon the property passing under the will (or the intestacy, as the case may be) and that there is apparently a studied effort to avoid laying any legal obligation to pay the duty upon any person or persons other than the beneficiaries; and

B. C.
S. C.
1914
RE DOE.
Clement, J.

even as to them the liability to pay is inferential, or arises under order of Court made in the course of the enforcement of the charge upon the property. There seems little if any difference in principle between such a tax and the ordinary familiar municipal taxation of land. According to a certain school of economists a tax upon land is the most scientific form of indirect taxation, reaching ultimately and indirectly, as they claim, to all classes of society; but I have never heard of such a tax being held by any Court to be other than a most obvious example of direct taxation. If a tax upon land is in law an indirect tax, the owner of land in this or any Canadian Province who is non-resident in the Province, and who therefore cannot be taxed directly, cannot be reached at all under provincial law.

This would be a startling proposition, and one which I am not disposed now for the first time to countenance. It is true that in the cases in which their Lordships of the Privy Council have sought for a legal definition of direct taxation, they have had regard to the incidence of a tax upon persons (who alone, in a sense, can pay taxes) and not upon property. But that a tax can be laid on property, and that such a tax may be direct taxation, is, in my opinion, not negatived by any of those cases.

However, I am relieved of any necessity for further discussion along this line. In *The King* v. *Lovitt*, [1912] A.C. 212, the Succession Duty Act of the Province of New Brunswick came under review before the Board. In its main outlines it closely resembles our Act. As with us, the tax is "laid on the corpus of the property" and there, just as under our Act, the executor has to provide for payment of the duty as a condition of holding the grant of letters probate. The only difference I can see is that in New Brunswick the executor is required to give a bond; with us he may either forthwith pay the duty or give a bond for its future payment. In neither case does the statute impose a legal liability upon the executor; no tax is laid upon him. "As a condition for local probate on property situated within the Province" payment of a succession duty thereon may be required under Provincial legislation. That is what was held in *The King* v. *Lovitt*, as explained in *Cotton* v. *The King*, [1914] A.C. 176, 15 D.L.R. 283, and it seems to me to exactly cover this case.

The application is refused. Under the Crown Costs Act, R.S.B.C. 1911, ch. 61, I fear I can make no order as to costs, but this feature of the case may be spoken to.

Application refused.

McDONALD v. STOCKLEY.

N. S.

S. C.
1914

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Meagher, Longley, and Ritchie, JJ. April 4, 1914.

1. TROVER (§ I B—10)—CONVERSION, OR TRIVIAL TRESPASS—CONTRACTOR'S EQUIPMENT.

Where a contracting painter leaves on the property owner's premises the blocks and tackle he intends to use in the work, but without any undertaking by the property owner to take care of them, the equipment remains at the painter's risk, and the mere user of them by the property owner does not constitute a conversion, but amounts at the most to a trivial trespass, which the law would not regard.

[See, also, *Mackenzie* v. *Scotia Lumber Co.*, 11 D.L.R. 729.]

Statement

APPEAL from the judgment of Finlayson, County Court Judge for District No. 7, in favour of plaintiff for the sum of $80 and costs, in an action for work and labour done and materials supplied in connection with the painting of defendant's house, and also for blocks and tackle taken to defendant's premises to be used in connection with the performance of the work, and lost while there.

The defence was that the work was not performed by plaintiff in accordance with the terms of the contract and was not accepted by defendant, and, as to the blocks and tackle, denial that they were ever received by defendant.

The learned trial Judge found that the work was of the character contemplated by the parties when they entered into the agreement, and gave judgment in plaintiff's favour for the amount claimed. Also that one block and tackle had been used by defendant's servant, and that this was sufficient to make him liable.

Judgment was given in plaintiff's favour for the sum of $80 with costs, and, as part of plaintiff's claim was satisfied after action brought, the costs were ordered to be taxed on the higher scale.

Defendant appealed.

The appeal was allowed in part.

J. B. Kenny, for defendant, appellant.

B. W. Russell, for plaintiff, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the judgment of the County Court Judge for District No. 7 in favour of plaintiff. The matter in dispute must be considered under two heads: (1) that relating to the contract for the painting of defendant's house; (2) the claim for ropes and blocks. The learned Judge has decided as a matter of fact that plaintiff completed his contract as agreed, and is entitled to recover $65 for painting outside of the house and $12 for painting inside, and that plaintiff paid $5 on this work. There is ample evidence to

N. S.
S. C.
1914

McDONALD v. STOCKLEY.

support this finding, and I can see no reason for interfering with it. As to the block and tackle, he says:—

> One of them at least was used by the defendant's servants; this, I think, was enough to make him liable.

And he accordingly gives judgment for plaintiff for $8 for the block and tackle lost.

Sir Charles Townshend, C.J.

In so deciding, in my opinion, the Judge was in error. The plaintiff, it appears by the evidence, took the blocks and tackle to defendants, intending to use them in carrying out his contract, and left them there. In cross-examination he says:—

> I sent the block there to be used by my own workmen. Stockley did not say he would look after them. I left the ropes and blocks at his place, valued at $16.

The defendant swears that

> In the spring, when cleaning up the cellar, I took gear out and put in boxes—*i.e.*, ropes and blocks. My basement flooded and stuff was under water greater part of winter.

It further appears that defendant's men on one occasion used them by mistake, but plaintiff afterwards got this one that had been so used.

There is nothing in the statement of claim, not even in the amendment, which would justify plaintiff recovering for these; they were left on defendant's premises, for the convenience and intended use of plaintiff without any undertaking on defendant's part to take care of them, and, therefore, at plaintiff's own risk. The mere user of them would not constitute a conversion. At the most it would amount to a trivial trespass, which the law would not regard, and in regard to this item the decision must be varied and the $8 struck out.

The plaintiff is entitled to judgment for $72 only.

Graham, E.J.

GRAHAM, E.J., concurred with RITCHIE, J.

Meagher, J.

MEAGHER, J.:—I concur in the opinion of Mr. Justice Ritchie in every respect except as to the deduction from the painting account, which I think should stand as the learned Judge below found it.

I think there was enough to overcome the specific evidence as to the butts of the shingles not being painted. It was a matter for the Judge below.

As to the disposition of the costs, I agree with my brother Ritchie.

Longley, J.

LONGLEY, J., concurred with TOWNSHEND, C.J.

Ritchie, J.

RITCHIE, J.:—The plaintiff's claim in this case is for $65 for painting the defendant's house on the outside and for $12 for painting it inside. The plaintiff, further, claims damages

for blocks and ropes which he left upon the defendant's premises and did not get back.

As to the outside painting, the defendant claims that it was not done in a workmanlike manner as required by the contract. The plaintiff's version of the contract is that he

> was to give two coats of paint and stains above the belt, two coats of paint below the belt and all the trimmings.

The defendant says he "got the promise of a first-class job." And I think that was the contract. The learned County Court Judge says he "finds no fault with the evidence given either by plaintiff or defendant."

The learned Judge has found that the work was first-class, such as the parties contemplated. With deference, I am obliged to differ from this view. The defendant, in his evidence, swears to two specific objections, viz.: "There are parts of shingles not painted." "The butts of shingles are not touched." These specific objections, in my opinion, call for specific evidence in reply, and there is no such evidence. I cannot think that the work was first-class and such as the parties contemplated, when parts of the shingles were not painted and the butts of the shingles not touched, nor can I come to the conclusion that it was a first-class job as promised by the plaintiff.

Having arrived at this conclusion that the defendant did not get a first-class job, I think the legal question arises as to whether there has been a breach of a condition precedent which would prevent the plaintiff from recovering anything for this painting or is it merely a breach of an independent promise, which can be compensated for in damages or by a deduction from the $65.

The determination of this question depends upon the construction of this verbal contract. But for the specific objections which I have mentioned, I would hold, under the evidence and the findings, that the work was a first-class job. There has not, therefore, been a total failure to perform on the part of the plaintiff. He has, in the main, performed his promise, and the defendant has got his house painted except as to parts of the shingles and the butts.

In Pollock on Contract, 8th ed., 276, it is said:—

> Another test often applied, is whether the term of the contract in which default has been made "goes to the whole of the consideration or only to part"—in other words, whether the importance of that term with regard to the contract as a whole is or is not such that performance of the residue would be not a defective performance of that which was contracted for, but a total failure to perform it. Can it be said that the promisee gets what he bargained for, with some shortcoming for which damages will compensate him? or is the point of failure so vital that his expectation is in substance defeated?

I think the defendant has got his house painted with some

N. S.
S. C.
1914
McDONALD v. STOCKLEY.
Ritchie, J.

shortcomings, and that his expectation in that regard has not been in substance defeated.

I would allow the plaintiff $55 for the outside painting instead of $65.

As to the ropes and blocks, I agree with the views expressed by the learned Chief Justice.

In regard to the costs, the plaintiff will have the costs of the claim for painting on the lower scale. The defendant should, I think, have the costs below as to the claim for conversion. It is a separate cause of action in regard to which he has succeeded. As to the costs of the appeal, I think there should be no costs, as it is a case of partial success and partial failure, except that I would give the defendant two-thirds of the actual cost of printing the case. I make this allowance because the defendant was driven to appeal in order to get rid of the judgment against him as to the conversion and as to the costs being on the higher scale.

Appeal allowed in part.

CAN.
S. C.
1913

WILKS v. MATTHEWS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. December 23, 1913.

1. INSOLVENCY (§ III—12)—RIGHTS OF CURATOR UNDER QUEBEC LAW—RECOVERY OF MONEYS PAID AS FRAUDULENT PREFERENCE.

Recovery may be had under art. 1036 of the Civil Code (Que.) by the curator of an insolvent broker's estate for the benefit of the general body of creditors of a sum re-paid by the insolvent with the alleged profits, on the eve of insolvency and under circumstances proving the customer's belief that the broker was then insolvent as he was in fact, where the customer had handed over moneys to the insolvent broker to be used by him along with moneys of other customers in his alleged speculations in stocks on a "blind pool" in which there was no segregation of each customer's money nor control thereof by anyone but the broker; and such recovery is not barred by art. 1927 of the Civil Code (Que.), even if the transactions between the customers and the broker were to be considered as gaming contracts.

[*Wilks* v. *Matthews*, 7 D.L.R. 395, 22 Que. K.B. 97, reversed.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, *Wilks* v. *Matthews*, 7 D.L.R. 395, Q.R. 22 K.B. 97, affirming the judgment of Greenshields, J., in the Superior Court, District of Montreal, 41 Que. S.C. 155, by which the plaintiff's action was dismissed with costs.

The appeal was allowed.

The plaintiffs, who are the curators appointed to the abandoned estate of one Charles D. Sheldon, an insolvent, brought the action to recover back, as part of the insolvent's estate, the sum of $13,743, which had been paid by the insolvent to the defendant on the day previous to that on which he absconded. Sheldon had carried on business, in Montreal, as an investment broker the defendant being one of his customers who, as such, had

previous to September 10, 1910, deposited for investment by him certain sums of money aggregating $7,102 for the purpose of sharing in profits made or supposed to be made in stock transactions by Sheldon. On September 30, 1910, Sheldon's books of account shewed the amount of $13,743 to the credit of the defendant, being the amount of the deposits which had been made by the defendant within some months previously together with profits accrued upon investments alleged to have been made in the purchase and sale of fluctuating stocks. The defendant obtained from Sheldon the payment of the amount so shewn as standing at his credit, after banking hours, on October 10, 1910, the eve of the day of Sheldon's departure from Montreal for an unknown destination. By their action the plaintiffs claimed the amount thus paid to the defendant on the ground that it was a preferential and illegal payment to the prejudice of all the other creditors of the insolvent, and had been made at a time when Sheldon's insolvency was notorious and known of the defendant. The defendant pleaded good faith, and that, at the time of the payment, he believed that the profits he received had been earned through the investment of his money and that Sheldon was solvent at the time he made the payment.

In the Superior Court Mr. Justice Greenshields dismissed the action on the ground that the evidence did not shew that the defendant was aware of Sheldon's insolvency at the time he received payment. By the judgment appealed from, the Court of King's Bench held that this view was erroneous, but refused to reverse the order dismissing the action because recovery of the amount so paid was denied by art. 1927 of the Civil Code on account of the transactions between the defendant and Sheldon being in their nature gaming contracts: *Wilks* v. *Matthews*, 7 D.L.R. 395, 22 Que. K.B. 97.

Atwater, K.C., and *Chauvin*, K.C., for the appellants.

C. H. Stephens, K.C., and *A. Maillot*, for the respondent.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I do not think we are called upon in this case to inquire into the nature of the agreement made between the defendant and Sheldon with respect to the investment by the latter of the funds entrusted to him. That it was either illicit or immoral is not absolutely free from doubt, and I am not at all sure that the defendant could not have enforced her claim against Sheldon for money had and received. *Vide* S.B. 1913,1,285 (*cas d'un mandataire chargé d'employer une somme d'argent en jouant aux courses*) S.V. 1912,2, sup. 422 (*cas d'un gérant de cercle refusant de rendre ses comptes*). It must also be observed that if this were a suit arising out of that agreement, the position of the plaintiff would be different from that of either of the parties to it. I quote the following "considérant" from a judgment of the Court of Appeal at Paris:—

Vainement on allèguerait, pour écarter la demande en restitution, la

CAN.
S. C.
1913
WILKS
v.
MATTHEWS.
Sir Charles Fitzpatrick, C.J.

règle "nemo auditur propriam turpitudinem allegans," alors que la demande en restitution est formée *non par la parties qui a pris part à la convention, mais par son liquidateur judiciaire, agissant au nom de la masse des créanciers,* qui n'ont pas participé à la convention illicite. (S.V. 1905,2,206.)

But those interesting questions do not arise here. This action is brought by the plaintiff as curator to the insolvent estate of Sheldon under the instructions of the Court, not to enforce the contract which the defendant made with Sheldon, but to recover a sum of money alleged to have been paid to the defendant by Sheldon in fraud of the general creditors of the latter now represented by the plaintiff.

This is an action *sui generis* entirely distinct and independent of any claim which Sheldon might have had against the defendant. It arises not out of the agreement or arrangements which they may have entered into or out of any claim accruing to Sheldon by reason of the payment hereinafter referred to. It takes its rise in the fraud which it is alleged Sheldon practised on his creditors when he parted with the money. Planiol describes the origin and nature of the action so clearly that I will be pardoned this quotation from his Droit Civil, vol. 2, No. 319 (5th ed.):—

> S'il (le débiteur) commet une fraude, s'il cherche à faire disparaître son actif pour éviter de payer ses dettes, sa conduite fait naître, au profit du créancier, une action nouvelle, distincte de la première (under art. 1031, C.C.), car la fraude est un *délit civil*, et comme telle elle a la force de produire une obligation qui a pour objet la réparation du préjudice causé. Le créancier *armé dès lors d'une action spéciale*, cesse de subir l'effet de l'acte frauduleux. Aussi dit-on que le débiteur qui agit par fraude *cesse de représenter ses créanciers*, langage un peu énigmatique, qui désigne simplement la possibilité pour les créanciers de se soustraire aux effects d'un acte déterminé.

The sole question here is: Can an action be maintained on the facts proved in this record. Those which are relevant to the issue are few and undisputed. On October 10, 1910, when it is admitted he was hopelessly insolvent, Sheldon paid the respondent, after office hours, the sum of $13,738. This sum represented $7,102, capital invested with Sheldon by the defendant at different times during the preceding months, and $7,836, profits alleged to have been earned on that investment. The night of that same day Sheldon fled the country, leaving behind him creditors whose claims, in the aggregate, amounted to over $2,000,000. They included not only the business customers, but also trade creditors from whom he had bought his household supplies, carriages, horses, etc. Sheldon's assets at that time were estimated at about $19,951.29; there is, therefore, no doubt as to the fact of his insolvency.

The circumstances surrounding the payment, the subsequent flight, the fact that defendant's son and a former employee of her

husband were in Sheldon's service, the press campaign in which Sheldon's financial methods were vigorously attacked, all combine to convince me that the defendant had good reason to know, when she received the money, that Sheldon was insolvent. I entirely agree with Mr. Justice Cross when he says,

> that there is reason to say that the respondent should be held to have known that Sheldon was insolvent when he paid the money,

and with Mr. Justice Gervais, who, referring to the finding of the trial Judge that the defendant was ignorant of Sheldon's financial condition, said:—

> L'on peut avoir des doutes sur l'exactitude du motif de la cour de première instance.

Assuming, therefore, that we have those facts proved: 1. The insolvency of Sheldon; 2. The knowledge of that insolvency by the defendant when the money was paid to her; 3. The appointment of the plaintiff as curator to the estate of the insolvent; 4. The authority of the Court to bring this action in the interest of the mass of the creditors—what is the law applicable? If the question was not unnecessarily complicated by the issue as to the nature of the agreement between Sheldon and Mrs. Matthews, could there be any doubt about the right of the plaintiff to succeed in this action? I submit that the point would not be arguable (art. 1032 *et seq.* C.C.), and I am at a loss to understand how the issue between the parties can be, when properly understood, affected by the fact that the original transaction between Sheldon and Mrs. Matthews may have been either illicit or illegal as alleged. Let us apply this test: assuming that there had been no abandonment of property, then any one of Sheldon's creditors might have brought this action under article 1032 C.C., and if taken by one of those who had furnished Sheldon supplies for his household, could the defence of "*nemo auditur propriam turpitudinem allegans*" be set up against that creditor? How could that maxim be made to apply in such a case? What would be the "*turpitudo*" chargeable against that creditor or how could art. 1927 C.C., relied on in appeal, be held to be a defence to an action to impeach the payment made to Mrs. Matthews by Sheldon in fraud of the rights of that creditor? As I said before, that would be an "*actio pauliana oblique*," *i.e.*, an action which is given to creditors to obtain the revocation of the acts done by their debtor in fraud of their rights (Planiol, vol. 2, No. 296 *in fine*), and not an action for the recovery of money under a gaming contract or a bet, as the Judges in appeal have assumed this action to be. If the objection relied on below could be set up against a creditor of Sheldon, how can it avail against the curator, an officer of the Court "who exercises all the rights of action of the debtor and all the actions possessed by the mass of the creditors" (877, C.P.Q.), including, of course, the trade creditors? It is said by one of the Judges below

CAN.

S. C.
1913

WILKS
v.
MATTHEWS.

Sir Charles Fitzpatrick, C.J.

that the curator to an abandonment in insolvency is an officer of the Superior Court and should not be required to act as "croupier" to the patrons of a gaming house.

That is undoubtedly a very pretty sentiment. The question at issue is not, however, one of ethics or propriety to be solved in a Court of honour. It is a question of law which Courts of justice must decide in accordance with what I submit with all deference are settled legal principles. The money sued for, when collected, will be distributed under the eye of the Court among the general body of creditors as their interests may appear. The question of the right to share in the fund as well as all priorities will then be settled. For the moment we are called upon purely and simply to say whether by the payment to Mrs. Matthews, or as a result of it, the general creditors of Sheldon, who are represented by the plaintiff, have been prejudiced; or in other words: Was the payment complained of made by the insolvent debtor to a creditor knowing his insolvency? If, as argued here, the contract between Mrs. Matthews and Sheldon was so tainted with illegality that no action could be brought upon it, then the payment by Sheldon must be deemed to have been gratuitous, and, in that case, it is presumed to have been made with intent to defraud and the amount is recoverable at the suit of any creditor at least to the extent of his interest (1034 C.C.).

If in the other alternative Mrs. Matthews' claim was legal and enforceable at law, then the payment complained of was made by an insolvent to a creditor who, as found by the Court of Appeal, must have known of the insolvency; in which case it is deemed to have been made with intent to defraud and is voidable under art. 1036 C.C. So that if the position of the curator is that of a creditor of the insolvent who was not a party to the illegal agreement, his right to recover in either alternative is undoubted.

It is important, therefore, to clearly state again the nature of this proceeding. The action is taken by the curator. By the fact of his appointment he entered into possession of the whole estate of the insolvent (870 C.P.Q.), and is subject to the summary jurisdiction of the Court (875 C.P.Q.). He exercises all the rights of action of the débtor and all the actions possessed by the mass of the creditors (877 C.P.Q.), and the sums realized are distributed under the eye of the Court (880 and 881 C.P.Q.). It is specially important to observe in a case like this that the curator represents not only the debtor, but also the mass of the creditors, for this very obvious reason. If the curator represented only the insolvent debtor, then he would be obliged to rely on art. 1031 C.C., in which case all the pleas available in an action taken by the debtor himself might be raised, such as "*in pari causâ turpitudinis cessat repetitio*" or "*in pari delicto potior est conditio defendentis*," or, again, the defence under art. 1927 C.C. But when the action is brought as in this case under both arts.

1031 and 1032, the issues are different, and the legal principles applicable are well settled. If the payment complained of prejudiced the other creditors in that it decreased the estate of their insolvent debtor, diminishing *pro tanto* their security and it is proved that the payee knew, when she received the money, that the payer was insolvent, that payment is deemed to have been made with intent to defraud, in which case the recipient of the money may be compelled to restore the amount received for the benefit of the creditors of the insolvent according to their respective rights (1036 C.C.).

That the curator as representing the creditors may invoke both arts. 1031 and 1032 C.C. in support of their claim can no longer be doubted.

Un créancier peut exercer cumulativement l'action de l'article 1166 et celle de l'article 1167. En vertu de la première action, il peut exercer les droits de son débiteur, mais il se voit opposer les désistements, renonciations de celu-ci. Aussi peut-il à ce moment les attaquer par l'action Paulienne s'il prétend qu'ils sont frauduleux. C'est ce qu'a jugé la Cour de Lyon, le 8 dec., 1908; Gaz. Pal., 17-18 janv., 1909; v. de même Trib. de Nantes, 12 juill., 1906, Gaz. Pal., 1906.2.366.

This appeal should be allowed and the action maintained with costs.

IDINGTON, J.:—I agree with the learned Judges in appeal upon the monstrous absurdity of any sane person of intelligence believing that a man could go on for years or even for months, making as an investment broker twenty-five to forty per cent. monthly profits on money given him for investment. Idington, J.

I, however, do not see my way to found upon such facts as before us the inevitable conclusion that all the creditors of such a man were gamblers, or that all their claims are founded upon that or some other consideration tainted with illegality.

No such defence is set up in the pleading. Nor was any such case made by the evidence.

It is no violent presumption to suppose that the curator may in fact represent honest creditors regarding whose claims no such imputation can be made.

And such as I take it must be the legal presumption on behalf of the curator herein till the contrary is shewn.

If there are claims made upon the estate by creditors who cannot, by reason of their contracts being founded on some illegality, recover in law, future inquiries must determine any questions so raised.

It seems to me that the only questions herein respecting which there can be any doubt are whether or not respondent's receipt of $13,743 from Sheldon can be said to have fallen within the meaning of either arts. 1034, 1305 or 1036 of the Code.

The incredible suggestion that Sheldon was making for re-

CAN.
S. C.
1913
WILKS
v.
MATTHEWS.
Idington, J.

spondent and his wife and others trusting him such enormous profits as alleged renders it easier to impute knowledge of his insolvency to respondent or his wife than might be possible in the case of an ordinary business.

It only needed very ordinary business intelligence to comprehend that such distribution of alleged profits must end in insolvency, and that within a very limited time.

People possessed of such intelligence must inevitably have been on the lookout for the bursting of such a financial bubble.

And when such a course of dealing, having gone on for months, was publicly assailed and had become the subject of discussion in leading newspapers, the collapse was at hand.

The condition of mind of the respondent's wife on the 9th and 10th of October—the eve of Sheldon's flight—indicating such a desperate determination to obtain the money in question, is betrayed in too many ways to permit of our attributing it to anything else than a deep conviction that disaster awaited her venture, and that the only hope of rescue was to get the money on that evening, the 10th of October. The cashing of his cheque could not await the next morning. And when nearly eight thousand dollars of this money was supposed to be the result of a few months of fabulous profits to make up which somebody else must certainly be robbed, I need not multiply harsh words to describe such a transaction. As to the part of it covering such mythical profits, it might, if it had stood alone, have fallen within art. 1034. Therefore, I must hold that when joined to the rest of the transaction such connection of the obviously illegal with the otherwise possibly legal has, if nothing else has done so, stamped the entire transaction as illegal and void within art. 1036.

The kind of knowledge meant therein is not literally a stock-taking of a man's assets as means of payment, but the conviction that if that were done it would demonstrate insolvency, and sooner than face that issue the person possessed of such conviction has decided to take all chances and get ahead of fellow creditors.

It is not necessary to follow in detail the many circumstances which, added to the inherent nature of the transactions in this peculiar case, demonstrate such belief as irresistibly the equivalent of actual knowledge directly proven.

The insolvency seems abundantly proven. And the suggestion that the estate of the insolvent had not been deprived in fact of the sum in question was not part of the defence in pleading or otherwise.

Whatever merits in law might be found in such a contention if it had been so gone into and the securities given proved worthless, is something I need form no opinion upon.

The *primâ facie* case is entirely the other way. I think the appeal must be allowed with costs throughout, and judgment given the appellant as prayed with costs.

DUFF, J.:—Article 1036 of the Civil Code is as follows:—

1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.

The principal question presented by this appeal as I view it is the question whether or not the payment made by Sheldon to the respondent through his wife was "a payment by an insolvent debtor to a creditor knowing his insolvency," within the meaning of this article. As to the insolvency of Sheldon, whatever plausible suggestions might be made as to possible defences by Sheldon in answer to the claims of his clients, so-called, there was undeniably a strong *primâ facie* case of insolvency to which no solid or even substantial answer has been made.

The real controversy concerns the allegation which the appellant must make good that the payment was made to a creditor "knowing of" Sheldon's "insolvency." Did the respondent or his wife "know of" Sheldon's insolvency within the meaning to be attributed to those words in this article? The question is not, as it appears to me, whether the respondent ought to have known in the sense that persons of reasonable judgment in his situation, or in the situation of his wife, would have known of Sheldon's position, but whether in fact that was or was not the state of mind of one or other of them at the time the payment was made. The tribunal passing upon the question must be able to reach the conclusion upon the evidence before it that the state of mind denoted by "knowledge" in this connection did in fact exist. The first point to consider is, what is meant by "knowledge" here? One may perhaps be permitted to observe at the outset that there is, of course, no sort of warrant for introducing here ideas drawn from the English doctrine of "notice" according to which knowledge of a state of facts may in certain circumstances be imputed to one, although everybody admits that in point of fact one was quite ignorant of it. It may be observed, however, that the terms "know" and "knowledge" are very elastic terms, capable of a broad range of signification varying with the context and the subject matter in connection with which they are employed. And one, of course, must not, if it can be avoided, give to such phrases a meaning which, in practice, would frustrate the purpose of the enactment in which they occur. Without further analysis and without attempting to lay down or even suggest a rule of anything like of universal application I think that where you have a belief on the part of the creditor that insolvency exists and that belief is founded on facts which to a person ordinarily conversant with affairs would point to insolvency there you have a state of facts which constitutes knowledge within the meaning of this article. *Ex hypothesi* in every case in which the question arises, of course, there is insolvency in fact. I am not prepared

CAN.
S. C.
1913
WILKS
v.
MATTHEWS.
Duff. J.

to say that given insolvency in fact the additional fact that the creditor entertained a suspicion of strong conviction that such was the state of affairs without any objective of grounds for that conviction would in itself be sufficient to bring the case within the article. But I think that where you have such a belief based upon solid objective grounds then the case is made out.

In the present case there is ample evidence to shew that none of these elements was wanting. I will not go into the evidence in detail, but I think the natural inference from what was done by the respondent's wife is that she was actuated by a very pressing sense of the fact that the least delay would be fraught with signal risk of the loss of her husband's money; and in view of all the facts in evidence I think that is the proper inference. As in my conclusion upon this question of fact I am differing from the opinion of the learned trial Judge, I think it is right to point out first, neither the respondent nor the respondent's wife, although called as witnesses, made any direct statement as to the state of their knowledge or suspicions touching Sheldon's affairs. Secondly, this question, though a question of fact, turns upon the proper inference to be drawn upon the facts proved, and the answer to be given to it would not, in my view of those inferences, in any material degree be affected by any opinion that one might have formed as to the credibility of the witnesses who gave evidence at the trial. Thirdly, the judgment of the learned trial Judge, which I have considered with care, and of which I desire to speak with the greatest respect, seems to me to be open to the observation that the learned Judge has not given sufficient weight to the circumstance that the respondent was a man of affairs and that the character and circumstances of Sheldon's operations may be taken in absence of some explanation by him to have marked them, for a man of his experience (I think I am putting it very moderately) as both irregular and extremely hazardous. I think, with respect, that the learned trial Judge has fallen into some error in failing to give sufficient weight to this circumstance in interpreting the subsequent conduct of the parties.

On this question of fact the Court of Appeal appears also to have been unable to accept the conclusion of the learned trial Judge, but held the appellant to be barred from recovery by the provisions of art. 1927 C.C.

As I understand the view of the Court of Appeal touching the application of that article it is this: the persons who entrusted their money to Sheldon were partners with him in a series of gambling transactions, and all parties must be presumed, in view of the facts, to have contemplated transactions forbidden by the law. Then it is said that according to art. 1927 C.C. (the moneys in question having been paid to the respondent as moneys to which he was entitled as the profits arising from operations including such transactions) the recovery of these moneys is barred by the express language of the article in question. With great respect

I have been unable to convince myself that the reasoning upon which the Court of King's Bench proceeded is sufficient to support their conclusion. The nullity with which a payment to which art. 1036 C.C. applies is affected by the rule embodied in that article rests upon the fraud upon the rights of creditors which the payment made in such circumstances is presumed to involve; and the right of recovery given by the article is shewn by the express words of it to be primarily, at all events, a right conferred in the interests and for the benefit of the creditors who have thereby been wronged. It would appear, therefore (assuming Sheldon himself to have been disabled from recovering the moneys paid by reason of the provision of art. 1927 C.C.), that this circumstance would not necessarily be conclusive against the claims of creditors under art. 1036 C.C. Indeed, if I am right in my construction of the view taken by the Court of Appeal (assuming the hypothesis upon which that view is founded to be correct, *viz.*, that the moneys in question were paid to the respondent as profits arising out of illegal transactions in which he was a partner), it would appear to be susceptible of plausible argument that the claim of the curator could be sustained under art. 1034 C.C. If, indeed, it had been shewn that the nature of Sheldon's transactions and of his relations with those who entrusted their money to him was such as to disentitle any of them to sustain any claim against him in a Court of law in respect of their transactions with him, then a totally different question might have arisen, *viz.*, the question whether in truth Sheldon was insolvent, within the meaning of art. 1036 C.C., at the time the payment under consideration was made. But to support such a conclusion it would be necessary to go far beyond anything justified by the record before us, and I do not understand the Court of Appeal to have put their judgment on any such ground.

For these reasons, I think the curator was entitled to succeed in his action and that the appeal ought to be allowed.

Anglin, J.

ANGLIN, J.:—I agree with the view apparently taken by the learned Judges of the Court of King's Bench that enough was established in evidence to raise a presumption that the defendant's wife believed that Sheldon was insolvent when she obtained the money in question from him. As he was in fact insolvent, that belief, in my opinion, constituted knowledge of his insolvency within the meaning of art. 1036 C.C. But, with respect, I cannot accept the conclusion reached by the learned appellate Judges that the plaintiff's action is barred by art. 1927 C.C.

His right as curator is to recover all the property of the insolvent debtor, including what he has alienated in fraud of his creditors. Money paid gratuitously by an insolvent is deemed to have been paid in fraud of creditors (art. 1034 C.C.). This applies to the sum of $7,841, fictitious profits paid to the defendant's wife,

CAN.
S. C.
1913
WILKS
v.
MATTHEWS.
Anglin, J.

which would, therefore, be recoverable without proof of the knowledge required by art. 1036 C.C., under which the balance of $5,942, paid to recoup moneys deposited with Sheldon by the defendant, is claimed.

The curator represents the creditors as well as the insolvent debtor. But I cannot think that his right to get in the assets of the insolvent estate depends upon the enforceability of the claims of any or of all of the insolvent's creditors. At all events, in the absence of conclusive proof that no creditor of the insolvent estate has an enforceable claim, the curator's right to recover in this action cannot be questioned. Assuming that the claims of all the business creditors of Sheldon should fall within the bar of art. 1927 C.C. (something which may not be assumed, but must be proved as against each creditor when he seeks to enforce his claim), the claims of his other creditors would have to be met and the expenses of the curatorship provided for. There is no evidence that Sheldon had not creditors other than the customers of his business; and that again may not be assumed. It may be that on the distribution of the estate many or all of the claims of the "clients" of the insolvent will turn out to be so tainted with the vice of gaming that art. 1927 C.C. will preclude their recovery. But the time for considering such questions is when the period arrives for determining who are entitled to share in the distribution of the estate—not before it is realized.

It should also be noted that the defence of gaming is not even hinted at in the defendant's plea. No other defence to the curator's claim has been suggested.

I would, therefore, allow the plaintiff's appeal with costs in this Court and the Court of King's Bench, and would direct judgment for the amount of his claim also with costs.

BRODEUR, J., concurred in allowing the appeal.

Brodeur, J.

Appeal allowed.

McPHEE (plaintiff, appellant) v. ESQUIMALT AND NANAIMO R. CO. (defendants, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 24, 1913.

CAN.
S.C.
1913

1. MASTER AND SERVANT (§ II B 3—144)—UNGUARDED MACHINERY—ASSUMPTION OF RISK.

On the defence of *volens*, in an action for damages by an employee on account of injuries sustained in the course of his employment, the question which has to be considered is whether the plaintiff agreed that, if injury should befall him, the risk was to be his and not his master's.

[*Smith* v. *Baker & Sons*, [1891] A.C. 325, referred to.]

2. APPEAL (§ VII M 8—657)—INSUFFICIENCY OF FINDINGS—DIRECTING NEW TRIAL—EMPLOYER'S LIABILITY ACTION.

Although an appellate court may have statutory power to draw inferences of fact and to give any judgment and make any order which

ought to have been made in the trial court, and to make such further or other order as the case in appeal may require, nevertheless, it should not undertake the functions of a jury where it may be reasonably open to them to come to more than one conclusion on the evidence.

[*Paquin* v. *Beauclerk*, [1906] A.C. 148; and *Skeate* v. *Slaters*, 30 Times L.R. 290, referred to.]

3. TRIAL (§ II C 8—148)—QUESTIONS OF LAW AND FACT—EMPLOYER'S LIABILITY—ASSUMPTION OF RISK.

In a servant's action against his master for damages for negligence where a defence of voluntary assumption of risk was duly presented at the trial and evidence submitted to support it, the plaintiff is not entitled to judgment on findings of the jury in which no answer was given to a question submitted on that issue, although there was a finding of negligence in failing to provide a guard and a further finding that there was no contributory negligence by the plaintiff.

[*McPhee* v. *Esquimalt & Nanaimo R. Co.*, 18 B.C.R. 450, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *McPhee* v. *Esquimalt & Nanaimo R. Co.*, 18 B.C.R. 430, reversing the judgment entered by Morrison, J., at the trial, on the findings of the jury, in favour of the plaintiff, and dismissing the action with costs. A new trial was ordered.

The plaintiff was engineman in charge of a steam-shovel in use by the company on works of construction on their line of railway, which was being removed under its own power from one part of the line to another. While the machinery was in motion, he attempted to lubricate a portion of the gearing which was uncovered and not protected by guard-rails. In doing this he entered a narrow passage in a stooping posture and, in backing out from the lubricator, he was caught in the gearing and severely injured.

On the trial evidence was adduced to shew that the plaintiff had been employed on the machine for a long time, that he was fully aware of the danger to be incurred in approaching the lubricator while the machinery was in motion, that he had made no request to have it protected and that he had carelessly gone into the dangerous position and assumed the risk at a time when it was not necessary to do the work in which he was engaged at the time of the accident. The jury made answers to some of the questions, as stated, in the head-note, but did not give any answer to the question on the issue of *volens*, which had been the principal defence of the defendants. Upon the answers returned by the jury, the trial Judge entered judgment in favour of the plaintiff for $5,000, the amount of the damages assessed by the jury. The Court of Appeal for British Columbia, by the judgment now appealed from, set aside the trial judgment and dismissed the action with costs. In the Court below, the present respondents contended that the plaintiff had been guilty of contributory negligence and that he knew and appreciated and voluntarily accepted the risk of performing the work in close proximity to the unguarded gear in which, in consequence of his own carelessness, he was injured.

CAN.

S. C.

1913

McPHEE v. ESQUIMALT AND NANAIMO R. Co.

Sir Charles Fitzpatrick, C.J.

S. S. Taylor, K.C., for the appellant.

Hellmuth, K.C., for the respondents.

FITZPATRICK, C.J.:—It is admitted that the proximate cause of the accident out of which the plaintiff's claim arises was the defective gear of the steam-shovel on which he was put to work. That defect consisted in the failure of the defendants to provide a proper guard for the gear, and, in consequence, there was a *primâ facie* liability on their part. Among other defences it was urged that the plaintiff assumed the risk incident to the use of the defective machinery.

The maxim *volenti non fit injuria* has its origin in the Roman Law. (*Nulla est injuria quæ in volentem fiat*, Dig. 47, 10, 1, 5.) In the restricted sense in which it is sought to apply it here, that maxim has disappeared from the civil law on the very sound principle that it is contrary to public order to permit a master to relieve himself by express or implied contract of the legal duty to provide adequate appliances, to maintain them in a proper condition and, generally, to conduct his business in such a way as not to subject those employed by him to unnecessary risk. *La Securité des personnes est d'ordre public.* Arts. 13, 1057, 1080, Civil Code of Quebec; Planiol, Revue Critique, 1888, Exam. Doctr., at page 286; Huc., 8, page 571, No. 431, and references.

In the English common law, as I understand it, the maxim is gradually receiving a more limited application. In any event, it is quite permissible to say that it was more rigorously applied against the workman in *Thomas* v. *Quatermaine*, 18 Q.B.D. 685, than in *Smith* v. *Baker & Sons*, [1891] A. C. 325, and *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B.D. 338. In the first case the Court of Appeal took upon themselves to decide that the plaintiff was deprived of any cause of action because *volenti non fit injuria*. Since *Smith* v. *Baker & Sons* [1891] A.C. 325, it is a question of fact for the jury whether the workman by express or implied agreement undertook to suffer harm or run the risk of it.

In the case at bar there was a positive duty upon the defendants not to create or permit the continued existence of the particular source of danger and it was for them to prove affirmatively that the plaintiff had by express or implied agreement taken upon himself the risk of injury resulting from that breach of duty. That issue was squarely raised at the trial on the evidence and the appropriate question was put to the jury but remained unanswered because, presumably, of the very pardonable, if erroneous, assumption that the defence of *volens* was merged in that of contributory negligence which the jury negatived.

In these circumstances, having regard to the law of British Columbia, I would have been disposed to decide the issue of *volens* here, but I defer to the better opinion of Mr. Justice Duff, in whose conclusions I concur.

Sir Charles Fitzpatrick, C.J.

DAVIES, J.:—I will not dissent from the disposition of this appeal proposed by my colleagues, though I acquiesce in it with difficulty and doubt.

I think it better, as there is to be a new trial on the question of *volens*, not to enter upon any discussion of the facts and circumstances out of which my doubts and difficulties arise as these facts will be submitted to a jury on the new trial.

It is not on the legal question that my difficulties arise, but on its application to the facts as proved, and the further fact that, while the jury did not pass upon the question of *volens*, it was open under the law of British Columbia, as I understand it, for the appellate Court to do so, and I find great difficulty in acceding to the reversal of the unanimous judgment of that Court on the question.

Idington, J.

IDINGTON, J.:—The case of the *Canada Foundry Co.* v. *Mitchell*, 35 Can. S.C.R. 452, seems to have been overlooked by the Court of Appeal. It seems to me that this Court in that case decided, though not in terms yet in principle, that a verdict of the jury must be had in order to exonerate the employer by reason of the employee having voluntarily assumed the risk incident to his employment.

The facts in that case seem to me quite as plain as in this calling upon the employee to determine for himself the risk he ran.

The case, as it appeared in this Court, is imperfectly reported. But in the report in 3 O.W.R. 907, the answers of the jury to questions 12 and 13 are reported as follows:—

12. That deceased knew and fully appreciated the risk he ran in doing the work with the appliances which were used;

13. That he did not voluntarily incur the risk, but was working under protest.

I have looked at the appeal case on file in this Court to see if there was anything in that to explain the grounds of this answer to question No. 13, and am unable to find any personal protest on the part of the injured man and assume, therefore, that the answer was founded merely upon the inference that he had, rather than quit his employment, submitted to the risk he ran. It seems to have been merely an inference of a mental protest overborne by his circumstances. This Court there felt bound by the verdict of the jury. I, therefore, conclude that it must be taken that the question is one for the jury in almost any conceivable case save the one of an express contract and one that must be submitted to the jury. Indeed, it seems to me that they are in such cases much more fitted to draw the correct inference than any tribunal of lawyers, whose training leaves them in a measure unable to realize to the full just what the ordinary workman's appreciation of his condition and will must have been in any such given

CAN.
S. C.
1913
McPHEE
v.
ESQUIMALT AND NANAIMO R. Co.
Idington, J.

case, short of express contract evidencing it. I might distinguish this case from that which I cite by relying upon the length of time the workman had to ponder over and decide. I do not think such distinctions are productive of a sound administration of justice. And I think, moreover, that there is a gross fallacy in the argument founded on the length of time that the workman had served under the conditions in question. Each day he escaped from the danger he was running, instead of tending to enable him to appreciate the true nature of the risk he ran, lessened his appreciation of it.

It must be possible in such cases by an extreme care beyond the ordinary care used, and bound to be used, to escape injury. That extreme care he is likely to apply at first, but may become unable to continue it on every occasion. It is the difference between this necessity for extreme care, which the law does not impose on him, and the ordinary care that the ordinary man will use in his daily work and he is bound to use, which he must appreciate yet may not be able fully to do so together with the consequential results.

In the last analysis it is the long average chance he takes and must appreciate that is to be determined and willed by him if the rule of law is to be adhered to that is involved in the doctrine. I think the jury must determine that as best they can according to the manifold circumstances arising in each case. The jury's omission to answer the question was the fault of the respondent in not insisting upon an answer. For the jury said they had answered the questions, yet counsel did not call attention to this omission. I do not think the verdict rendered can be treated as a general verdict which might have covered the case. I think, therefore, the appeal must be allowed and a new trial had, and costs as appear in the judgment of Mr. Justice Duff.

Duff, J.

DUFF, J.:—On further reflection I have come to the conclusion that the view of the Court of Appeal, which was the view I was inclined to take at the close of the argument, cannot be supported. For reasons I shall presently mention, I think there ought to be a new trial and, as in duty bound, I shall, therefore, refer to the facts only in so far as it may be absolutely necessary to do so in order to explain my reasons for differing from the Court of Appeal.

The maxim *volenti non fit injuria* indicates a principle of wide and various application in the English law. In relation to questions between employer and the employed, Lord Watson said in *Smith* v. *Baker & Sons*, [1891] A.C. 325, at 355, the maxim as now used generally imports

> that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is *not whether he voluntarily*

and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's.

An instance of the application of the principle would be the doctrine of common employment if the exposition of that doctrine in *Priestly* v. *Fowler*, 3 M. & W. 1, contains the true account of it.

Where the principle is resorted to for affording a way of escape from liability by an employer, who has not performed his *primâ facie* duty to make reasonable provision for the safety of his employee, the question to be determined is a question of fact and the employer must shew, to use the language of Lindley, L.J., in *Yarmouth* v. *France*, 19 Q.B.D. 647 at 661, quoted with approval by Lord Halsbury in *Smith* v. *Baker & Sons* [1891] A.C. 325 at 337: "as a fact that the workman agreed to incur a particular danger or voluntarily exposed himself to it."

For the purpose of this appeal it may be taken as settled that there was negligent default for which the defendants would be responsible (unless the defences I am about to mention could be made good) in failing to provide a proper guard for the machinery in which the plaintiff received his injuries. The defence of common employment was pleaded, but not relied upon at the trial where it was not disputed that (in the event of the other defences specifically relied upon failing) appellants were answerable for the absence of such a guard. The defences to be considered are two. The first was that the operation of regulating the lubricator on the engine of which the plaintiff was in charge was one which could be efficiently performed at a time when the machinery in question was not in motion and, consequently, in perfect safety; and that, in performing this operation while the machinery was in motion, the plaintiff rashly and unnecessarily exposed himself to the danger of being injured as he was. This defence was really presented to the jury as contributory negligence and, doubtless, was dealt with by them as such. Without saying more, it seems to me to be quite indisputable that there was evidence upon which the jury might properly find for the plaintiff on this issue. The other substantial defence was that the plaintiff entered upon his employment and continued in it for two years with full knowledge of the danger arising from the absence of proper safeguards; and that his conduct in this respect was such as to preclude him from complaining of what otherwise might have been the actionable default of the defendants in not providing such safeguards.

It is to this defence that the Court of Appeal gave effect in dismissing the action. Before coming to the facts, first let me note again the exact legal ground upon which the defence rests.

The jury ought to be able to affirm that he, the employee, consented to the particular thing being done which would involve the risk, and that he consented to take the risk upon himself: Lord Halsbury in *Smith* v. *Baker*, [1891] A.C. 325, at 338.

The question to be considered is: "Whether he agreed that, if

CAN.
S. C.
1913
McPHEE
v.
ESQUIMALT AND NANAIMO R. CO.
Duff, J.

injury should befall him, the risk was to be his and not his master's?" (Lord Watson, in *Smith* v. *Baker & Sons*, [1891] A.C. 325).

In *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338, Lord Justice A. L. Smith says, at p. 344, that the defence summarized by the maxim *volenti non fit injuria* is that the employee has "contracted or consented or undertaken to run the risk of the defect," from which the accident arose. In the same case Lord Justice Romer says that in order to escape liability the master must shew that the servant "has taken upon himself the risk without precautions."

There was no evidence of express consent or agreement on the part of the plaintiff, and the question for the jury, therefore, was whether in all the circumstances the conduct of the plaintiff amounted to such consent. It was argued by Mr. Taylor that this is a question upon which the jury alone is competent to pass; in other words, that where consent is to be inferred from a course of conduct the employer must, in order to make good this defence, obtain a verdict from a jury or other primary tribunal of fact affirming it. I am quite unable to agree with this contention. There are, undoubtedly, expressions in text-books and judgments which seem to give some countenance to it; but it appears to me to be entirely opposed to principle. By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

The power given by O. 58, r. 4, "to draw inferences of fact . . . and to make such further or other order as the case may require," enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial Judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously: *Paquin* v. *Beauclerk*, [1906] A.C. 148 at 161; and *Skeate* v. *Slaters*, 30 Times L.R. 290.

The important thing to remember is that the question for the jury is whether there was, in fact, consent; while the question for the Court is whether the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation. In passing upon this last mentioned question judicial

opinions given in relation to particular states of fact may be valuable as illustrations, but the question whether a particular conclusion is the only reasonably possible inference from a given state of facts is a question of law in the sense only that it is a question for the Court; it is a question for the solution of which (in the very nature of things) the law itself can afford no rule of universal application.

It was argued by Mr. Hellmuth, on the authority of *Clarke* v. *Holmes*, 7 H. & N. 937, and *Woodley* v. *Metropolitan District Railway Co.*, 2 Ex. D. 384, that, since, according to the plaintiff's own admissions, he entered upon his employment with a full appreciation of the danger occasioned by the lack of a guard and of the risk of injury arising therefrom and, as was contended, according to his own admission, with notice that his employers would not correct the defect, the appellant must be taken to have consented to his assumption of the risk as a term of his employment. I do not think it is necessary to examine the cases referred to minutely. When those cases were decided the doctrine of *volenti non fit injuria* had not undergone the elaborate examination to which it was afterwards subjected by the Law Lords in *Smith* v. *Baker & Sons*, [1891] A.C. 325, and I think that in so far as any argument founded upon the earlier cases is inconsistent with the doctrine laid down in *Smith* v. *Baker & Sons*, as explained in *Williams* v. *Birmingham Battery Metal Co.*, [1899] 2 Q.B. 338, and in *Canada Foundry Co.* v. *Mitchell*, 35 Can. S.C.R. 452, that argument ought to be rejected. In *Williams' Case*, it is expressly stated by Romer, L.J., at p. 345, that the circumstance that the servant has entered into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him; and that statement of the law was adopted by this Court in *Canada Foundry Co.* v. *Mitchell*, 35 Can. S.C.R. 452.

Whether the circumstances in any particular case amount to consent must depend upon the facts of that particular case looked at as a whole; and, considering the facts of this case as a whole, I cannot agree that the construction of them adopted by the Court of Appeal is the only construction they will reasonably bear.

I think, however, the respondents are entitled to a new trial on the ground that their plea *volenti non fit injuria* was not passed upon by the jury.

As to costs the appellant should have the costs of the appeal to this court; and, with respect to the costs of the Court of Appeal for British Columbia, the respondents are entitled to the costs of a successful motion for a new trial on the ground just mentioned, while the appellant is entitled to the costs attributable solely to the controversy raised by the respondents' contention in the Court of Appeal that the action ought to be dismissed on the ground

CAN.
S. C.
1913
McPHEE
v.
ESQUIMALT
AND
NANAIMO
R. CO.
Anglin, J.

that the issue in question was conclusively determined in their favour by the evidence. The costs of the abortive trial should abide the event of the new trial.

ANGLIN, J.:—The plaintiff appeals from the judgment of the Court of Appeal for British Columbia reversing the judgment of the trial Judge and dismissing this action on the ground that the plaintiff was *volens*, that is, that he had undertaken to assume the risk of the defect in the defendant's machinery which was the cause of his being injured.

At the trial the jury found the defendants guilty of negligence in not having had a guard placed on the gear of the steam-shovel on which the plaintiff worked, and that such negligence was the proximate cause of the injury; and they assessed the damages at $5,000.

To the fourth question, put at the instance of counsel for the defendants: "Did the plaintiff know and appreciate the risk and danger and did he voluntarily encounter them?" the jury did not give an answer.

The plaintiff had been working for five years and four months on the steam-shovel on which he was injured, for the first three years in a subordinate capacity, and for the last two years and four months as engineer in charge. He says the machine was always in the same condition, and that his predecessor had asked that the gear be guarded, but that nothing was done. The following questions and answers are taken from the plaintiff's evidence.

Q. You always understood the importance of avoiding that gear? A. Yes.

Q. Well, what happened this time that you did not avoid it? A. Well, I was avoiding the clearance, I thought I was avoiding it; I am sure I was avoiding it. I knew how dangerous it was.

Contributory negligence on the part of the plaintiff was negatived by the jury, and their finding on that issue cannot be successfully attacked.

For the plaintiff it is urged that upon the findings as we have them he is entitled to judgment, notwithstanding the failure of the jury to answer the fourth question. For the defendants it is contended that upon the plaintiff's admission that he knew and appreciated the risk from the absence of the gear, the only reasonable inference is that he was *volens* and that the action should, therefore, be dismissed.

Had the defence of *volens* not been fought out at the trial—had the issue upon it not been clearly presented to the jury, I think the plaintiff's contention should have prevailed and the judgment in his favour should have been restored. But that issue was clearly presented at the trial and formed the subject of a specific question. It is impossible to say that the jury intended to deal with it either when they negatived contributory negligence

or when they found negligence on the part of the defendants. Neither is it possible to maintain that the verdict should be taken to be a "general verdict" for the plaintiff. There is no finding upon the issue of *volens*. Without undertaking the functions of the jury we cannot make such a finding. I am, therefore, of opinion that, notwithstanding the power conferred on the Court of Appeal for British Columbia to supplement the findings of a jury, which we may exercise, judgment should not be entered for the plaintiff.

On the other hand, although it is clear that the plaintiff knew of the defect and, perhaps, also sufficiently clear that he fully appreciated the danger to which it exposed him, mere knowledge and appreciation of the danger does not conclusively establish that he contracted or consented or undertook to run the risk and to exonerate his employer from liability for any injury it might cause. As Lord Watson said, in *Smith* v. *Baker & Sons*, [1891] A.C. 325:—

> When, as is most commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But, assuming he did so, I am unable to accede to the suggestion that the mere fact of his continuing in his work with such knowlege and appreciation will in every case imply his acceptance.

As put by Lord Halsbury:—

> In order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to take the risk upon himself.

The same view is expressed by Romer, L.J., in *Williams* v. *The Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338:—

> The circumstance that the servant has entered into or continued in his employment with knowledge of the risk and absence of precautions is important, but not necessarily conclusive against him;

and, as put by A. L. Smith, L.J., in the same case:—

> that the mere knowledge of the risk does nor necessarily involve consent to undertake the risk has now, beyond question, been settled by the House of Lords.

These authorities make it clear that, assuming the plaintiff's knowledge and appreciation of the risk which he incurred to have been fully established, it was still open for a jury to consider whether, having regard to the "nature of the risk and the workman's connection with it" and the other circumstances of this case, it should be inferred that he "contracted or consented or undertook to run that risk" and to exonerate his employer from liability in connection with it.

The fourth question as propounded to the jury in the present case is open to some criticism as to its form. But, in the absence

CAN.
S. C.
1913
McPHEE
v.
ESQUIMALT AND NANAIMO R. CO.
Brodeur, J.

of an answer to it, the burden of obtaining which was upon the defendants, the judgment dismissing the action cannot be maintained. The jury having failed to determine a vital issue, with which it was within their province to deal, the only course open is to order a new trial.

Inasmuch as the defendants have come here to sustain the judgment dismissing the action, the plaintiff's appeal should be allowed with costs. The costs in the Court of Appeal and of the abortive trial should be dealt with as indicated by my brother Duff.

BRODEUR, J., agreed with DUFF, J.

Appeal allowed and new trial ordered.

ONT.
S. C.
1914

REID v. AULL.

Ontario Supreme Court, Latchford, J. February 24, 1914.

1. TRIAL (§ X—400)—PUBLICITY—HEARING IN CAMERA IN SPECIAL CASES.

An order for a trial in camera should not be made in an action for annulment of marriage.

[*Scott* v. *Scott*, [1913] A.C. 417; *Daubney* v. *Cooper* (1829), 10 B. & C. 237, 109 Eng. R. 438, applied; and see Annotation on Trials in Camera, at end of this case.]

Statement

MOTION by the plaintiff, upon notice to the defendant, for a direction for trial of this action in camera.

The motion was refused.

G. H. Watson, K.C., for the plaintiff.

The defendant was not represented.

Latchford, J.

LATCHFORD, J.:—The action is brought on behalf of Doris Reid, an infant under the age of twenty-one years, by her father as next friend, for a declaration that an alleged marriage between the plaintiff and one Robert Aull, solemnised at Cobourg on the 25th July, 1913, but not consummated, is null and void, on the ground that the plaintiff, who was at the time under eighteen, did not consent to the marriage and was not sensibly and willingly a party to the ceremony, but was induced to take part therein by fraud, deceit, and misconduct of the defendant.

In support of the application, Mr. Watson files an affidavit made by the plaintiff's father, verifying a certificate by Dr. J. F. Fotheringham, and stating that his daughter is ill, and that her examination and cross-examination in open Court would, in his opinion, be attended by serious and possibly fatal consequences.

Dr. Fotheringham, as the result of an examination into the state of the plaintiff's nervous equilibrium, considers that her evidence could be much more fully and accurately obtained if she is not called upon to give it in open Court, and that, if she testi-

fied in public, there would, in his opinion, be great danger of a nervous collapse, which might be attended with serious consequences.

It is to be remembered that here, as in England, the law is administered publicly and openly, and its administration is at once subject to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our Courts forms one of the excellences of our practice of the law, and, in the words of Lord Fitzgerald, in *Macdougall* v. *Knight* (1889), 14 App. Cas. 194, at p. 206, admits of exception only in the rare cases of such a character that public morality requires that the proceedings should be in camera in whole or in part.

In criminal trials in Canada, the right to exclude the public conferred upon the trial Judge by sec. 645 of the Code is restricted to cases in which the Court considers the exclusion to be in the interest of public morals.

Other exceptions occur in the case of wards of Court, in lunacy proceedings, and in actions regarding secret processes, where the paramount object of securing that justice be done would be doubtful if not impossible of attainment if the hearing were not in camera.

The recent case of *Scott* v. *Scott*, [1913] A.C. 417, in the House of Lords, reversing the judgment of the Court of Appeal, [1912] P. 241, is remarkable not only for the strength of the Court, composed of Lord Haldane, L.C., and Lords Halsbury, Loreburn, Atkinson, and Shaw of Dunfermline, each of whom delivered a considered judgment, but for the wide field covered by their Lordships, and especially for the numerous and far-reaching propositions declared to be the law of England regarding the necessity (with the exceptions mentioned) of having all trials open and public. The neat point for decision appeared to be unimportant. It was merely whether an order to commit for contempt of Court, made because of the publication of proceedings held in camera, in a case in the Court of Divorce and Matrimonial Causes, was a judgment in a "criminal cause or matter," within the meaning of sec. 47 of the Judicature Act, 1873—in which case no appeal lay.

The disposition of what seemed an ordinary matter of practice involved several questions of the utmost public importance. In construing certain sections of the Matrimonial Causes Act, 1857, 20 & 21 Vict. ch. 85, especially secs. 22 and 46, and the practice that had arisen in the Court thereby constituted, it was pointed out that the modern practice of hearing suits for nullity in private arose out of a misconception of what was the actual practice in the Ecclesiastical Courts. Under sec. 22 of the Act of 1857, the new Court was to proceed and act and give relief on

ONT.
S. C.
1914
REID
v.
AULL.
Latchford, J.

principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had previously acted and given relief. Undoubtedly the earlier stages of the proceedings in the Ecclesiastical Courts for annulment occasionally took place in camera. But, when the Commissioners had taken the evidence, both parties had access to it. This was called "publication" (Lord Haldane at p. 433); but, with a few exceptions, all the subsequent proceedings were public.

Commenting on sec. 22 and on sec. 46, which provides that, subject to such rules as the Court might establish under sec. 22, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court, Lord Shaw of Dunfermline says (p. 475): "In my humble opinion these sections of the Act of 1857 were declaratory in another sense" (i.e., in addition to declaring that the proceedings were to be in open Court throughout). "They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground, so that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice—are general tests."

Most apt to the case made by Mr. Watson is the language of Lord Shaw when he asks (p. 484): "May not the fear of giving evidence in public on questions of status like the present deter witnesses of delicate feeling from giving testimony and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus in some cases be defeated. My Lords, this is very dangerous ground. One's experience shews that reluctance to intrude one's private affairs upon public notice induces many citizens to forego their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would in my opinion tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure, and it must further be remembered that in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause."

Throughout each of the judgments delivered similar expressions of opinion may be found.

The Law Quarterly Review for January, 1913, p. 9, calls

ONT.

S. C.
1914

REID
v.
AULL.

Latchford, J.

attention to a common law decision on the publicity of judicial proceedings which was not referred to in *Scott* v. *Scott*. It is *Daubney* v. *Cooper* (1829), 10 B. & C. 237; there the plaintiff sued a Justice of the Peace for throwing him out of the room where he claimed to appear as attorney for an absent defendant on a summons for having a sporting gun without a license. The Court of King's Bench upheld his right on the higher ground that in any case he was entitled to be present as one of the public. Bayley, J., in delivering the judgment of the Court, said (p. 240): "We are all of opinion that it is one of the essential qualities of a Court of Justice that its proceedings should be public."

In view of the authorities cited, the direction applied for cannot be given.

Motion refused.

Annotation—Trial (§ X—400)—Publicity of the courts — Hearings in camera.

Annotation

Trials in camera

The case of *Reid* v. *Aull*, *supra*, stands squarely on the case of *Scott* v. *Scott*, [1913] A.C. 417, in refusing a motion for a secret hearing to annul a marriage.

Although the *Scott* case treats of two interesting principles of the law of England, namely, (*a*) the open Court, and (*b*) the right to publish the Court's doings, the purpose of this annotation is to define and discuss the open Court only.

The open Court is as clearly and jealously guarded a right as is the independent Parliament. The following quotation from the historian Hallam is approved by Lord Shaw in the *Scott* case:—

"Civil liberty in this kingdom has two direct guarantees: (*a*) the open administration of justice according to known laws truly interpreted and fair constructions of evidence, and (*b*) the right of Parliament, without let or interruption, to inquire into and obtain redress of public grievances. Of these, the first is by far the more indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise: [1913] A.C. 477.

"The three seeming exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are

(*a*) in suits affecting wards;

(*b*) in lunacy proceedings;

(*c*) in those cases where secrecy (as in trade-secret trials) is of the essence of the cause": [1913] A.C. 482.

The first two depend upon the principle that the jurisdiction over wards and lunatics is exercised by the Judges as representing the sovereign as *parens patriæ*, and the transactions are truly *intra familiam*.

The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the

ONT.

Annotation

Annotation (*continued*)—Trial (§ X—400)—Publicity of the courts—Hearings in camera.

Trials in camera

excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain: [1913] A.C. 483.

Lord Shaw in the *Scott* case, [1913] A.C. at 485, said: "The cases of positive indecency remain; but they remain exactly where statute has put them. Rules and regulations can be framed under the statute by the Judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act and also the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider."

The attempts sometimes essayed by trial Judges to treat the old Ecclesiastical Courts as secret are combatted in the masterly exposition of the law present and past, rendered in the *Scott* case.

In the early stages of the suit, the Ecclesiastical Court, charging itself with the interests of both parties, took upon itself the inquiring into the facts, not *in foro contentioso* nor *in foro aperto*, but by way of obtaining, first from the one side, and then, if there was a denial or a counter-case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie *in retentis* until, according to modern ideas, the real trial of the case should begin: *Scott* v. *Scott*, [1913] A.C. 470.

The official precognition, by hearing each side separately, never invaded nor could invade the publication stage at which the trial proper began. The Ecclesiastical Courts Commissioners in 1832 stated the procedure applicable to matrimonial causes as follows: "The evidence on both sides being published, the cause was set down for hearing. All causes are heard publicly in open Court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the Judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel. The judgment of the Court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the Judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matters in controversy between the parties become adjudged.

It will be noted that the common law exceptions which have been invoked for the secret trial of causes are of two general classes, (*a*) as to wards and lunatics coming under paternal administration, and (*b*) trade secrets where the essence of the cause demands secrecy.

Annotation (*continued*)—Trial (§ X—400)—Publicity of the courts—Hearings in camera.

ONT.

Annotation

Trials in camera

It will also be noted that the constitutional right to an open Court is deemed so essential to liberty that it is not taken away, either by the ordinary exercise of judicial discretion, or by consent of parties, or both. Even in purely private litigation, where parties consent, the Judge can exclude the public only when he demits his capacity as a Judge and sits as an arbitrator to determine the rights of the parties on such consent: [1913] A.C. 436, 481.

The *Canada Law Journal* contains able articles on "Trials in camera" to be found at p. 597 of vol. 25 (1889), and at p. 98 of vol. 26 (1890). The former related to the case of *Smart* v. *Smart*, 25 C.L.J. 597, afterwards appealed to the Privy Council (*Smart* v. *Smart*, [1892] A.C. 425). This case involved a dispute between the separated spouses as to the custody of the infant children. It is noted that Ferguson, J., had at the hearing excluded the newspaper reporters and the general public, and had tried the case with closed doors.

STATUTES.

The following Canadian enactments deal with hearings in camera under federal or provincial laws as indicated.

CANADA.

The Criminal Code (1906) by sec. 645 enacts that at the trial of any person charged with an offence under any of the following sections of the Code, *i.e.*, secs. 202-206, 211-220, 228 (as relating to the keeping of a common bawdy house), 239 (as to paragraphs (*i*), (*j*), and (*k*) of sec. 238), 292, 293, 299, 300-306, 313, 314, or with conspiracy or attempt to commit or being an accessory after the fact to any such offence—the Court may order that the public be excluded from the room or place in which the Court is held during such trial.

(2) Such order may be made in any other case also in which the Court may be of the opinion that the same will be in the interests of public morals.

(3) Nothing in the section shall be construed as limiting any power heretofore possessed at common law of excluding the general public from the Court room in any case where it may be deemed necessary or expedient.

By the Criminal Code, sec. 679 (*d*), a justice holding a preliminary enquiry may, in his discretion,

(*d*) order that no person other than the prosecutor and accused, their counsel and solicitors shall have access to, or remain in the room or building in which the inquiry is held, if it appears to him that the ends of justice will be best answered by so doing.

ALBERTA.

The Protection of Children Act, 1909, ch. 12, sec. 21, provides as follows: Where a child or a parent is being tried under that statute, the Judge shall exclude from the room all persons other than the counsel

ONT.

Annotation

Annotation (*continued*)—Trial (§ X—400)—Publicity of the courts—Hearings in camera.

Trials in camera

and witnesses in the case, officers of the law, or of any Children's Aid Society and the immediate relatives or friends of the child or parent.

BRITISH COLUMBIA.

As to Divorce and Matrimonial causes, R.S.B.C. 1911, ch. 67, sec. 6 enacts: In all suits and proceedings, other than proceedings to dissolve any marriage, the Court shall proceed and act and give relief on principles and rules, as nearly as may be, conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted.

On the trial before a jury of an inquisition as to lunacy, the alleged lunatic shall be examined before the evidence is taken, and also at the close of the proceedings before the jury consult as to their verdict, and such examinations shall take place either in open Court, or in private, as such Judge directs: The Lunacy Act, R.S.B.C. 1911, ch. 148, sec. 10.

Cases arising under the Deserted Wives Maintenance Act, R.S.B.C. 1911, ch. 242, sec. 7, may be tried in private at the discretion of the magistrates or justices.

MANITOBA.

The Lunacy Act, R.S.M. 1902, ch. 103, sec. 13, R.S.M. 1913, ch. 120, sec. 13. On a petition *de lunatico* the alleged lunatic shall be produced at such times and in such manner, either in open Court or privately, as the Court may direct.

Children's Protection Act, R.S.M. 1902, ch. 22, sec. 21, R.S.M. 1913, ch. 30, sec. 46: Any examination, prosecution or proceeding, arising under the provisions of this Act may be conducted privately.

County Courts Act, R.S.M. 1902, ch. 38, sec. 132, R.S.M. 1913, ch. 44, sec. 135: It shall be lawful for a Judge while holding a County Court, if he shall see good cause for so doing, to order or direct any cause, issue or matter to stand over to be tried and heard in Chambers after the rising of the Court, etc.

Married Women's Property Act, R.S.M. 1902, ch. 106, sec. 20 (4), R.S.M. 1913, ch. 123, sec. 20 (4): The hearing of an application for an order of protection, or for an order discharging the same, may be public or private, at the discretion of the Judge.

NEW BRUNSWICK.

Married Women's Property Act, Consol. Stats. N.B. 1903, ch. 78, sec. 17: In any question of title between husband and wife, the Judge, if either party so require, may hear any such application privately.

Orders of protection, C.S.N.B. 1903, ch. 78, sec. 20: The hearing of an application by a married woman for an order of protection affecting the earnings of her minor children and any acquisitions therefrom free from the debts and obligations of her husband and from his control or disposition, or for an order discharging same may be public or private, at the discretion of the Judge.

The Divorce Court Act, C.S.N.B. 1903, ch. 115, sec. 12: The practice and proceedings of the Court shall be conformable, as near as may be, to

Annotation (*continued*)—Trial (§ X—400)—Publicity of the courts—Hearings in camera.

ONT.

Annotation

Trials in camera

the practice of the Ecclesiastical Court in England prior to the Divorce and Matrimonial Causes Act.

NOVA SCOTIA.

The Married Women's Property Act, R.S.N.S. ch. 112, sec. 36: The hearing of an application for an order of protection entitling a married woman to have and enjoy all the earnings of her infant children and any acquisition therefrom free from the debts or obligations of her husband and from his control or disposition or for an order discharging any such order, may be public or private, at the discretion of the Judge.

The Divorce Court Act, 1866, ch. 13, sec. 10, see R.S.N.S. 1900, vol. 2, p. 863: The Court shall have the same powers, in respect of or as incidental to divorce and matrimonial causes, and the custody, maintenance, and education of children, as are possessed by the Court for divorce and matrimonial causes in England except as enlarged or abridged or altered or modified by this Act and the Act hereby amended. But in causes instituted on the ground of adultery, the Court shall not have authority to permit the introducing co-respondents or to try the issue of fact by jury.

ONTARIO.

The Lunacy Act, R.S.O. 1897, ch. 65, amended by 9 Edw. VII. ch. 37, sec. 7 (4), R.S.O. 1914, ch. 68, sec. 7 (4): On the trial of the issue in a lunacy petition the alleged lunatic shall be produced at such time and in such manner, either in open Court or privately, as the presiding Judge may direct.

The Neglected Children Act, R.S.O. 1897, ch. 259, sec. 29 (4) amended by 8 Edw. VII. ch. 59, sec. 24 (5), R.S.O. 1914, ch. 231, sec. 5: Where a child, or a parent charged with an offence in respect of a child under this Act, is being tried, the Judge shall exclude from the room or place where such person is being tried or examined, all persons other than the counsel and witnesses in the case, officers of the law or of any Children's Aid Society and the immediate friends or relatives of the child or parent.

QUEBEC.

Code of Civil Procedure, art. 16: The sittings of a Court or of a Judge are public; nevertheless, the Judge may order in writing that they be heard *in camera*, if a public hearing would be prejudicial to good morals or public order.

SASKATCHEWAN.

Protection of children, R.S.S. 1909, ch. 28, sec. 22: Any examination, prosecution or proceeding, arising under the provisions of this Act may be conducted privately.

SASK.

S. C.
1914

DICKSON v. VAN HUMMELL.

Saskatchewan Supreme Court, Newlands, Lamont, and Elwood, JJ. March 16, 1914.

1. GARNISHMENT (§ III—66)—GARNISHEE NOT APPEARING—ADMISSION.

Where a garnishee does not appear to a garnishee summons under the procedure in force for Saskatchewan District Courts, his default should be taken as an admission that he owes the defendant an amount equal to the plaintiff's claim.

2. APPEAL (§ VII I—386)—FROM DISCRETIONARY ORDERS—JUDICIAL DISCRETION NOT EXERCISED.

The Judge's discretion referred to in the exception of sec. 56 of the District Courts Act, R.S.S. 1909, ch. 53, as to appeals in cases for over $50 excepting as to orders made "in the exercise of such discretion as by law belongs to a Judge," must be judicially exercised; and where it cannot be said that there has been an exercise of judicial discretion because of a supervening error as to a point of law, sec. 56 does not prevent an appeal from a Judge's order setting aside a judgment.

Statement

APPEAL by the plaintiff from an order of a District Court Judge setting aside his judgment in the plaintiff's favour.

The appeal was allowed, ELWOOD, J., dissenting from the result, but agreeing that there was a right of appeal.

E. B. Jonah, for the appellant, plaintiff.

P. H. Gordon, for the respondent, garnishee, The Prudential Life Insurance Co., Limited.

Newlands, J.

NEWLANDS, J.:—Where the garnishee does not appear to the garnishee summons, I am of the opinion that his default should be taken as an admission that he owes the defendant an amount equal to the plaintiff's claim, and therefore the judgment entered in this case was regular, and should not have been set aside on the grounds given by the District Court Judge.

The order setting aside the judgment does not reverse the *ex parte* order upon which this judgment was entered, nor does it give the garnishee leave to appear and state whether they owe the defendant or not, and I am doubtful, under these circumstances, whether the District Court Judge's intention was to do any more than set aside the judgment which he considered to have been irregularly entered, leaving the plaintiff to enter a proper judgment under his previous order. As this order has not been appealed from, and the only order before this Court is the order setting aside the judgment, and which I think is wrong, the appeal should be allowed, leaving it to the District Court Judge to decide whether the order allowing the plaintiff to enter judgment against the garnishee should be set aside or not. I may say that I agree with my brother Elwood as to the right to appeal in this case.

Lamont, J.

LAMONT, J., concurred.

SASK.

S.C.
1914

DICKSON
v.
VAN
HUMMELL

Elwood, J.
(dissenting in
part).

ELWOOD, J. (dissenting in part):—This was a matter in which a garnishee summons was served upon the respondent, the Prudential Life Insurance Co., on or about November 28, 1912. No appearance was entered to the garnishee summons, and on or about April 14, 1913, judgment was signed against the garnishee. On November 11, 1913, the garnishee served a notice of motion to set aside said judgment, and on or about December 9, 1913, an order was made by the District Court Judge setting aside the judgment and ordering the garnishee to pay the plaintiff the costs of and incidental to entering judgment and issuing executions. From this order the plaintiff appeals. On the summons the District Court Judge endorsed the following:—

> Order opening up judgment on payment of costs. Judgment opened up on account of judgment and executions being absolute and not for such amounts as might be due by garnishee, the delay being such as would otherwise disentitle garnishee to relief.

The judgment, to my mind, is not a judgment for any specific amount, but is merely for such amount as is due from the garnishee to the defendant. The reference in the judgment to $187.75 is merely indicating the amount due from the defendant to the plaintiff, and is not a judgment against the garnishee for that amount. There was no evidence before us of what the execution contained, but I assume that the execution was in the terms of the judgment and order, and would, therefore, be regular. In my opinion, therefore, the District Court Judge was incorrect in setting aside the judgment on the ground that it was an absolute one against the garnishee. By "absolute" I assume that he means a judgment for a specific amount. It was contended on behalf of the garnishee that, under rule 56 of the District Court Act, R.S.S. 1909, ch. 53, there was no appeal, that this being a matter which was properly in the discretion of the District Court Judge, there could be no appeal therefrom. I am of opinion, however, that what is meant by sec. 56 of the District Court Act is that the discretion of the District Court Judge must be judicially exercised, and where it is not judicially exercised there would of course be a right of appeal. I am of the opinion that the discretion in this case was not judicially exercised, because the order was made on the ground that the judgment entered against the garnishee was improperly entered. The Judge erred in that, and therefore I am of opinion that there is an appeal from his decision on that point. It was, however, further contended on behalf of the garnishee that, in any event, the judgment should have been opened up, that mere delay did not disentitle the garnishee from applying to have the judgment opened. In support of this, counsel for the respondent cited *Sandhoff* v. *Metzer*, 4 W.L.R. 18, and *Hanson* v. *Pearson*, 3 Terr. L.R. 197. In both of those cases the learned ex-Chief

SASK.

S. C. 1914

DICKSON v. VAN HUMMELL.

Elwood, J. (dissenting in part).

Justice of this Court held that mere delay is not an answer to an application to set aside a judgment on the merits, unless irreparable wrong be done. In *Regina Trading Co.* v. *Godwin*, 7 W.L.R. 651, which was decided by the same Chief Justice after the above two cases, he quoted with approval the dictum of Cotton, L.J., in *Atwood* v. *Chichester*, 3 Q.B.D. 725, as follows:—

> I should have thought that if a defendant had lain by intentionally she could not be allowed to appear.

And in that case the ex-Chief Justice refused to set aside the judgment, on the ground that the delay in that case had been practically wilful. In the case at bar, the delay extended from November 28, 1912, to October 24, 1913, and, in my opinion, is not accounted for—at any rate, up to June 6, 1913, when apparently the garnishees forwarded to their solicitors a copy of the garnishee summons with instructions to enter an appearance. The circumstances of the delay, however, in this case do not, to my mind, indicate a wilful delay, as in the case of *Regina Trading Co.* v. *Godwin*, 7 W.L.R. 651. In that case the defendant had repeated notice that judgment would be entered up against him, and he disregarded the notice. In the case of *Vinall* v. *De Pass*, [1892] A.C. 90 at 96, which was a garnishee matter, the Court apparently up to the time of the hearing of the appeal was disposed to allow the garnishee to file an affidavit shewing what, if any, debts were due from him to the defendant, and apparently, if that had been done, the judgment against the garnishee would have been opened up. In view of the position which was there taken with regard to garnishee proceedings, I am of the opinion that the order setting aside the judgment should not be disturbed. I quite appreciate that the District Court Judge has expressed the opinion that the delay has been too great in this case, and had he refused to grant the order I think that we possibly could not have interfered with his decision, but he having granted the order on another ground, it is to my mind possible that had he been driven to decide the question solely on the ground as to whether or not the garnishee should be allowed in to defend on the merits, he might have made an order allowing the garnishee in to defend.

In my opinion, therefore, the order should not be disturbed, and the appeal should be dismissed, with costs.

Appeal allowed.

STARRATT v. DOMINION ATLANTIC R. CO.

N. S.
S. C.
1914

Nova Scotia Supreme Court, Graham, E.J., Meagher, Longley and Ritchie, JJ. March 10, 1914.

1. CARRIERS (§ III H—470)—CONTRACT TO FURNISH CARS.

Where the railway company makes a continuing offer and in effect says "order our cars and we will supply them at a certain rate of freight" a complete contract is established between a railway company and a shipper the moment the shipper gives the order in consequence.

[*Great Northern R. Co.* v. *Witham*, L.R. 9 C.P. 16; *Wellington* v. *Apthorp*, 145 Mass. 69; *Cleveland R. Co.* v. *Closser*, 126 Indiana 368, referred to.]

2. APPEAL (§ VII M 4—615)—INACCURACY IN SUMMING UP—CONDUCING TO WRONG VERDICT.

An inaccurate statement as to the facts made by a Judge in summing up, will not necessarily be a ground for a new trial; the party claiming to have been adversely affected by the error must shew that the misstatement was of a character which must have conduced to a wrong verdict.

[*Clark* v. *Molyneux*, 3 Q.B.D. 237, referred to.]

3. APPEAL (§ VII L—475)—VERDICT OF JURY—WEIGHT OF EVIDENCE.

If the answers by a jury to questions submitted can be supported by any reasonable construction, an appellate court should support them, and not set aside the findings as contrary to the weight of evidence unless they are such as in the opinion of the appellate court could not have been arrived at by reasonable men.

[*McKelvey* v. *Le Roi Mining Co.*, 32 Can. S.C.R. 664; *Jamieson* v. *Harris*, 35 Can. S.C.R. 625, referred to.]

Statement

APPEAL by defendant company from the judgment of Russell, J., in favour of the plaintiff on the answers of the jury in an action claiming damages for breach of contract to supply cars for the shipment of apples.

The appeal was dismissed.

W. A. Henry, K.C., and *L. A. Lovett*, K.C., for appellant.

W. E. Roscoe, K.C., and *C. J. Burchell*, K.C., for respondent.

Graham, E.J.

GRAHAM, E.J.:—The judgment of the Court upon the plaintiff's application for a new trial, when the Judge who had tried the case withdrew it from the jury, will be found in *Starratt* v. *Dominion Atlantic R. Co.*, 11 D.L.R. 607, 12 E.L.R. 545. It was sent down for another trial. The reason for that was that the Court thought there was evidence for the jury, and a second jury, having passed upon it, and found a verdict for the plaintiff, that verdict in this Court logically could only be set aside for something amounting to a mistrial. I propose only to deal with a few points, which it is contended amount to a mistrial, principally, rejection of testimony and misdirection.

1. The first rejection of testimony complained of is that of Kirkpatrick.

It appears that Comeau, the freight agent of the defendant company, and Mr. Lang, of Winnipeg, who proposed to introduce

N. S.

S. C.
1914

STARRATT
v.
DOMINION
ATLANTIC
R. CO.

Graham, E.J.

apples from Nova Scotia into the Winnipeg market, had a conversation in Montreal, and that conversation turned upon the transportation of the apples, and at that conversation Mr. Kirkpatrick was present. This was previous to the contract entered into by Fraser, on the part of the company, and the plaintiff in this province, the grower of the apples. While Lang was interested in the matter, he was in no sense the agent of the plaintiff to bind him by any admission. But as to any statement made by Comeau in that conversation, used for throwing light on the contract afterwards made, it was competent for the defendant to give in evidence what Comeau said, by way of admission, and for the defendants to contradict, by Kirkpatrick, what Lang testified Comeau said. The incident opened previously to meeting with Comeau, Mr. Kirkpatrick, a witness for the defendants, told him (Lang) that Mr. Comeau was in Montreal. What the next question was, if there was one, does not appear, but the stenographer makes this note—

It is objected that this evidence could only be given in contradiction of something Lang said, his Lordship sustains the objection.

Then the witness is taken over the conversation which occurred when all three were present. Apparently, the objection was directed to something preliminary to the conversation, and before all three were present, which Lang had said to Mr. Kirkpatrick. The testimony would be clearly inadmissible.

2. The next testimony tendered, and ruled out, was also that of Kirkpatrick.

At the interview just mentioned, these questions were put to Mr. Kirkpatrick:—

Q. Page 74, line 4, Mr. Comeau told me that for early shipments they would use cattle cars, and for latter shipments they would supply ample refrigerator cars. Was that statement made by Comeau at the interview in question? A. Not to my knowledge.

Q. Have you any reason *for believing* that it was not made in your presence? (Objected to.) A. I have several reasons. (His Lordship rules that the witness cannot give reasons that he would have that the thing would not likely happen.)

The witness made the best answer he could, that the statement was not made to his knowledge. In my opinion, Mr. Kirkpatrick's belief was not evidence. And in the second place, reasons for his belief are still further removed from what would be legal evidence.

3. In the examination of defendants' witness, Comeau, the following questions were asked, and being objected to, were ruled out.

Q. What functions, was he, Fraser, performing at that time in connection with the D.A.R.? (Objected to.)

(*Mr. Henry*—I wish to tender evidence that he had nothing to do with the providing of cars. I tender the question as to what his functions were

in connection with operation of the railway for the purpose of shewing that he would not likely make the arrangement sworn to as made by him. His Lordship ruled out the answer for the reason that it did not bear on the question.)

Q. I want to ask you whether Fraser, at that time, kept in touch with the traffic situation on the railway? (Answer objected to and ruled out.)

Q. I want to ask you whether Mr. Fraser at that time was in a position to quote a freight rate or inform a shipper whether cars could be supplied or not? (Answer objected to and ruled out.)

The same questions in substance were also put to Murphy and were ruled out.

It was contended, on the application for a new trial, that this constituted a rejection of testimony which rendered a new trial necessary.

It must be remembered that on the first trial, neither these witnesses nor Fraser himself were asked these questions. I suppose if it was proper to ask them here it would have been competent in addition to obtaining Fraser's denial that he had made any such statement, to have asked him these questions in addition.

In that evidence it appears that he was traffic superintendent of the defendant company up to the first of February of 1912, covering the period of the transactions in question. This is the evidence:—

Cross-examined by Mr. Roscoe.

Q. You were general traffic superintendent of the company at the time? A. No, I was general freight agent. Mr. Fraser was traffic superintendent.

Q. What was Mr. D. J. Murphy? A. Train master and assistant superintendent.

Q. That is, he was Mr. Fraser's assistant in the superintendence of the traffic of the line? A. Yes.

Q. That superintendence was in regard to freight alone? A. Freight and passengers.

Q. Your position was subordinate to Mr. Fraser's? A. Yes.

Re-examined by Mr. Henry.

Q. You said traffic superintendence of freight and passengers? A. He was manager of the maritime express.

Q. What about his connections with the maritime express? A. He was devoting his entire time practically to that.

Re-cross-examined by Mr. Roscoe.

Q. This is a separate company from the D.A.R.? A. Yes.

Q. And the D.A.R. have an account for business in connection with them in which they charge the company for the carriage of articles that the express contracts to send from one point to another? A. On percentage proportion.

While Fraser denied that he had promised to supply the refrigerator cars, he said, and he repeated it in cross-examination, "I told them we would do the best we could."

It must also be remembered that Fraser was the person who

N. S.
S. C.
1914
STARRATT
v.
DOMINION
ATLANTIC
R. Co.
Graham, E.J.

had been informed by telegraph from Montreal to this effect on August 26, 1911:—

> Mr. Lang, *Winnipeg*, will arrive Bridgetown Monday next, buy apples, suggest you meet him that station arrival train.

Now, if Fraser was not in a position to make an arrangement about traffic, who was? If Murphy, the assistant, why was not Murphy put forward by Fraser?

It is fortunate that under our present rules Fraser's evidence on the former trial may be used on this one. But Fraser, now being dead, cannot be cross-examined upon this new point, his actual performance of such duty at any time and so on. Perhaps, however, that would be for the jury.

However, the fact in issue was, of course, whether Fraser had made this promise to the plaintiff or not. It is not contended that Fraser could not bind the company, or at least the promise, if made, did not bind the company, it certainly would, but it was sought to shew that Fraser, although still superintendent of traffic, was, at that time, also engaged in work for the Maritime Express Co., no doubt in connection with the same line in part, and had not knowledge of the traffic situation and the possibility of supplying cars, therefore he would not be likely to make such a promise.

I have come to the conclusion that the proposed testimony was inadmissible. It would be raising a collateral issue confusing to a jury, and was not relevant to the issue. What Fraser was doing in other cases at that time really constituted *res inter alios actae*. Even if Fraser, although traffic superintendent, was not at that time discharging the functions in other cases, there would be no reasonable inference from that fact that he did not, in that instance, make the promise.

Fraser was expressly notified by Comeau to attend to this matter and he was actually seized of the transaction. In saying it would not be reasonable inference, I am speaking of the common course of things.

It is hardly useful to give illustrations or cite cases. A line must be drawn somewhere by a Judge at a trial. It is always in place to prove an alibi, or to prove that a man could not have lent the money he says he did because, at that time, he had no money to lend. On the other hand, a Judge would hardly receive evidence to shew that a man was a strict Sabbatarian in order to shew that he probably did not go to a particular place on a Sunday. Or that a lender had money as making probable the lending or payment of money, because, as an American Judge said, in *Atwood* v. *Scott*, 99 Mass. 177:—

> Experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it.

In the case of *Dubois* v. *Baker*, 30 N.Y. 355 at 369, the Court decided that proof of the defendant's habit of carrying an inkstand

was not admissible to shew that the inkstand was in his possession on a particular day.

4. Then as to misdirection. It is contended that the Judge misdirected the jury in telling them, after reading the fourth question to them:—

> So far as I understand the evidence, there is no dispute that there were nineteen of these cars (carloads) tendered at the time transportation should have been found, if the plaintiff's contention is right under the evidence.

The learned Judge, directly after reading the question, had said, "I think the number is nineteen." Mr. Henry interposed, "I will ask your lordship to instruct the jury that the number was only four." Then the learned Judge made the statement first quoted.

Of course this was not the substantial issue in the case, but this fourth question was submitted to the jury and when they went into their room they had to decide it. The only thing that could be said about it was that the Judge had previously, in stating the effect of the evidence, made a mistake on a matter of fact. There was no mistake, I am convinced.

The jury had heard the evidence and they heard Mr. Henry's contention, and they, no doubt, would consider it before returning their answer.

5. It is also contended that the learned Judge, in putting the question of whether there had been a promise made by Fraser or not, put it too prominently that there were two witnesses to one in favour of the plaintiff's version of the conversation and, what was more, had not called attention to the fact that, on the previous trial, the plaintiff himself had not testified to the promise in the same terms as at this trial.

It will be remembered that there were five carloads to be shipped directly, and as an experiment, and that the memorandum between Lang and Starratt, W. 64, shewn to Fraser, contemplated, besides these, further shipments. And the evidence on the first trial was:—

> He told me I would have a refrigerator car the next thing, and there would be no trouble to get all the refrigerator cars we wanted.

The statement at this trial is more precise and is corroborated by Lang's version.

I think it was not misleading in any way to refer to the fact, that, on this trial, there were two witnesses to one. The special jury would, quite as quickly as a Judge, take in the fact that the truth does not necessarily lie with numbers.

In respect to the omission to call attention to the fact of the plaintiff's omission to testify as precisely about the promise at the former trial, respecting the details of which he says he was not asked, I say, that while it is usual to refer to an incident like that, it is not always done, and there is no law requiring it to be done. Speaking of the practice in England, it is very common, if

N. S.

S. C.
1914

STARRATT
v.
DOMINION
ATLANTIC
R. Co.

Graham, E.J.

counsel wishes an incident like that to be mentioned by the Judge to the jury, he calls the Judge's attention to it, for there the summing up is generally very short and every point, on both sides, is not generally commented upon by the Judge. The defendants had the benefit of a dramatic cross-examination of the plaintiff, because the version was not the same exactly as on the previous trial. No doubt it was not omitted mention in the closing speech, and I have no doubt the jury were quite competent to carry, as far as it should be done, a discrepancy like that. They appear to have acted with discrimination. They returned to the Court after retiring to their room and asked to have read to them the testimony of Fraser and of Lang. That must have been on this very question of fact.

That the omission would not be sufficient ground for a new trial: *Neville* v. *Fine Art Co.*, [1897] A.C. 68, 76.

In a recent case of *White* v. *Barnes* in England (not yet reported) Lord Justice Williams, during the argument, agreed that the way it had been put by the Judge was misleading. It was not law, however, that every inaccurate statement made by a Judge in summing up, gave a right to a new trial by the party aggrieved, because even a Judge could not always be absolutely accurate. He must shew also that the misstatement had led the jury to give a wrong verdict. The appellant in this case was quite justified in raising the point.

I am of opinion that the application for a new trial should be dismissed and with costs.

Meagher, J.

MEAGHER, J.:—I am unable to say with the confidence one should feel, that there was a fair trial, but dissent on my part would not serve any useful purpose.

Longley, J.

LONGLEY, J.:—I can scarcely make myself believe what the jury have found, that Fraser made any such bargain on behalf of the railway. I suppose I am bound by the verdict. It seems to me, however, that the bargain which Lang deposes to, and which Starratt, at last, on the second trial supports, is one which requires some interpretation, and I am not quite satisfied with the meaning assigned to it in the verdict.

The Judge appears to have ruled out considerable evidence that may have had an effect upon the verdict and has charged in a manner not consistent with the facts.

I should like to see the thing again submitted to a jury for a finding.

Ritchie, J.

RITCHIE, J.:—This is an action to recover damages for breach by the defendant company of an alleged contract to provide refrigerator cars to carry apples from King's county in this province to Winnipeg. The case has been twice tried. At the first trial it was withdrawn from the jury on the ground that there was no

evidence of the contract to supply refrigerator cars. An appeal was asserted which was allowed and a second trial was had, which resulted in a verdict for the plaintiff for $6,700 and an order for judgment was taken accordingly. There is a motion for a new trial and an appeal from the order for judgment.

The findings of the jury are as follows:—

1. Were the terms of the agreement entered into between the plaintiff and Lang Bros. of Winnipeg, Manitoba, at Paradise, Nova Scotia, including the requirements specified in exhibit W.W.-64, communicated to the defendant company by the parties to that agreement? A. Yes.

2. Did the defendant company agree with the plaintiff to carry to Winnipeg plaintiff's apples which he should have for shipment to Lang Bros. under that agreement? A. Yes.

3. Was there an agreement between the defendant company, by its servants and agents, in that behalf and plaintiff, that the company should supply refrigerator cars for the carriage of apples from the plaintiff to Lang Bros. at Winnipeg when the season became so late that such cars were necessary for suitable carriage? A. Yes.

4. How many carloads of apples were made ready for shipment by the plaintiff to Lang Bros. of Winnipeg, and tendered to the defendant company for carriage after the season became so late that refrigerator cars were necessary for suitable carriage for which refrigerator cars were applied for by the plaintiff from the defendant company and not supplied. A. Nineteen.

5. Did the defendant purchase such apples for the carriage of which the defendant company's refrigerator cars were applied for and not supplied on the representation by the company by its servants and agents in that behalf that the same would be furnished? A. He purchased a portion of the nineteen cars.

6. What damage did the plaintiff sustain by the failure of the defendant company to furnish such refrigerator cars? A. Six thousand, seven hundred dollars.

7. Did the defendant company fail to furnish adequate and suitable accommodation for the carrying of the apples in question? A. Yes.

8. Did Fraser at the interview at Paradise promise to supply Starratt with all the cars, including refrigerator cars, which he might need that season for the shipment of apples to Lang Bros., Winnipeg? A. Yes.

9. Did Murphy promise to supply Starratt with all the cars, including refrigerator cars, which he might need that season for the shipment of apples to Lang Bros., Winnipeg? A. No.

The contract, if made at all, was made with William Fraser, who was traffic superintendent of the defendant company, it is not suggested that he was not authorized to bind the company. The verdict is attacked on the following grounds:—

1. Findings against weight of evidence.
2. Damages excessive.
3. The language used by Fraser was not contractual.
4. No consideration.
4. Rejection of evidence.
6. Misdirection.

I will deal with these grounds for a new trial, in the order

N. S.
S. C.
1914
STARRATT
v.
DOMINION
ATLANTIC
R. Co.
Ritchie, J.

named, which is the order in which they were put forward by counsel at the hearing. So far as setting aside the findings of a jury as against the weight of evidence is concerned, the point of view from which the Court should approach the consideration of that question has been dealt with very often. I refer to the law as laid down in the Supreme Court of Canada in *McKelvey* v. *Le Roi Mining Company*, 32 Can. S.C.R. 664 at 676. The rule was stated to be, that before setting aside the findings of a jury "the Court must be satisfied that the finding is one which the jury, viewing the whole evidence, could not properly find." In such a case only should the finding be interfered with.

I also refer to *Jamieson* v. *Harris*, 35 Can. S.C.R. 625 at 631, where Mr. Justice Nesbitt, delivering the opinion of the majority of the Court, said:—

> We fully recognize the principle, that if the verdict could fairly be supported upon any evidence upon which reasonable men might come to a conclusion in its favour, it should not be set aside because the appellate Court did not agree with the conclusions reached. We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction they should be supported.

It is obvious from the foregoing quotations that so far as the facts of a case are concerned, the man with the verdict is on strong vantage ground. Mr. Henry, for the defendant company, made a strong argument against the findings, but the clear answer is, that the questions and inferences of fact were for the jury, and it cannot be denied that there was evidence to support the findings if the jury believed it. So far as the main findings, viz., the 3rd and 8th, which establish the contract, are concerned, it is like going up against a stone wall to attempt to set them aside in this Court, because the judgment of the Court on the first appeal is in the way.

In giving judgment on that appeal, *Starratt* v. *Dominion Atlantic R. Co.*, 11 D.L.R. 607, the learned Chief Justice said:—

> I find myself unable to reach the same conclusion. I think there is evidence which, if believed by the jury, is sufficient to maintain a verdict in plaintiff's favour and therefore the case should not have been withdrawn.

And Mr. Justice Russell says at 612 that " a reasonable jury could have found the facts according to Lang's statement, etc."

Mr. Justice Meagher concurred, though with doubt, and I concurred without any doubt.

The other finding upon which serious attack was made is the 4th, which finds that nineteen carloads of apples were ready for shipment and tendered to the defendant company after the season became so late that refrigerator cars were necessary. This finding is supported by the evidence of the plaintiff, which shews that he had nineteen cars of apples in his warehouse ready for shipment, the warehouse was situate on the land of the defendant

company and rails were laid so that the cars could be brought up to the warehouse to receive the apples. The jury believed the evidence and made the finding accordingly. Mr. Roscoe referred to the pages of the case where this evidence is to be found. I find that evidence as I have said supports the finding, it is not necessary to prolong this opinion by quoting it.

It is the custom, or usage, of the defendant company to receive the apples from the warehouses built along its line of railway, and sidings are constructed so that the cars can be shunted to the doors of the warehouses. Murphy, the train master of the defendant company, knew that the apples were in the warehouse, he had been told that the warehouse was full, the demand for cars was constant. When the plaintiff had, to the knowledge of the defendant company, placed the apples in the warehouse ready for shipment, he had done his part.

I quote with approval from the judgment of the Court in *Galena R. R. Company* v. *Rae*, 68 American Decisions 574 at 576.

> The company was bound to receive the grain of the plaintiff according to its custom and usage, and if that usage was to run their cars upon a side-track to private warehouses, and there receive grain in the cars, a tender accordingly, or notice and readiness so to deliver, would impose obligation on the company to take and carry the grain.

It was scarcity of cars, not scarcity of apples, in the season of 1911.

Applying the Supreme Court of Canada rule, it is impossible to set aside the findings in this case as being against the weight of evidence.

As to the damages, the nineteen cars being ready for shipment, the damages under the evidence become a mere matter of calculation. I can discover no error in that regard.

Dealing with the objection that the language of Fraser was not contractual, here again I think the defendant company are met with the decision of this Court on the first appeal in this case. If the language was not capable of being construed as contractual, the learned Chief Justice could not have said that the evidence, if believed, was sufficient to maintain a verdict in the plaintiff's favour, but apart from this, a perusal of those portions of the evidence to which Mr. Roscoe referred to this point, has satisfied me that the words used were clear words of contract.

I cannot agree with the contention that there was a want of consideration in this case. The freight was agreed upon, the defendant company, according to the findings of the jury, agreed to carry such apples as the plaintiff might have for shipment and to supply refrigerator cars when the season became advanced.

I am unable to distinguish this case so far as this point is concerned, from *Great Northern R. Co.* v. *Witham*, L.R. 9 C.P. 16 at 19. In that case Mr. Justice Brett said:—

> So if one says to another, "if you will give me an order for iron or other

N. S.

S. C.
1914

STARRATT
v.
DOMINION
ATLANTIC
R. CO.

Ritchie, J.

goods I will supply it at a given price," if the order is given there is a complete contract which the seller is bound to perform. There is, in such a case, ample consideration for the promise.

In this case, the defendant company have said, if you will give orders for cars, we will supply them at a certain rate of freight. The moment the orders were given, the plaintiff had done something which amounted to a consideration for the defendant company's promise. This question is dealt with in Leake on Contracts, 6th ed., p. 22, where it is said:—

> A tender to supply goods at certain prices during twelve months is a continuing offer, which, *if* accepted by ordering goods under it, becomes a binding contract to supply those goods, although the party accepting the tender is under no obligation to order the goods.

I also refer on this point to *Wellington* v. *Apthorp*, 145 Mass. 69; *Cleveland R. Co.* v. *Closser*, 126 Indiana 368.

It was further contended, that if there was a continuing offer to supply the cars, Murphy withdrew it and the plaintiff acquiesced in such withdrawal. I can only say that I am unable to find in the evidence any support for this contention.

Objection is taken for the defendant company that evidence was improperly rejected at the trial. At page 80 of the case the following appears:—

> What functions was he, Fraser, performing at that time in connection with the D.A.R.? (Objected to.)
>
> *Mr. Henry* —I wish to tender evidence that he had nothing to do with the providing of cars. I tender the question as to what his functions were in connection with the operation of the railway for the purpose of shewing that he would not likely make the arrangements sworn to as made by him. His Lordship ruled out the answer for the reason that it did not bear on the question.
>
> Q. I want to ask you whether Fraser, at that time, kept in touch with the traffic situation on the railway. (Answer objected to and ruled out.)
>
> Q. I want to ask you whether Mr. Fraser, at that time, was in a position to quote a freight rate or inform a shipper whether cars could be supplied or not. (Answer objected to and ruled out.)

If this evidence was properly receivable, then in every case, where the issue is whether or not a man made a contract, any number of collateral issues may be raised as to whether it was likely, or unlikely, that he made the contract. Such a proposition certainly calls for authority and I do not think any authority can be found for it. It is, of course, true that evidence could be receivable shewing that it was impossible, for instance, by reason of absence, that the man could have made the contract at the time and place sworn to.

At the hearing, I was inclined to think that the cases cited by Mr. Lovett covered the point sought to be made by him, but further reflection and an examination of the cases lead me to a different conclusion.

The cases cited were, *Dowling* v. *Dowling*, 10 Irish Common Law Reports 236, *Jacobs* v. *Tarleton*, 11 Q.B. 421, 116 Eng. R. 534, and *Reg.* v. *Grant*, 4 F. and F. 322.

Dowling v. *Dowling*, 10 Ir. C.L. 236, was an action for money lent; evidence of the poverty of the alleged lender was received upon the issue as to whether or not the money was lent.

Chief Baron Pigot expressly put the case on the ground that the poverty of the lender made it impossible that he could lend; at page 239, he says:—

> In such cases, proof that a party was in such circumstances that *he could not*, has been received as evidence that he *did not* pay the money in question.

Again he says:—

> But lending is only one form of passing money from hand to hand, and upon the question whether or not money was paid, evidence of the inability to pay, of the party who is alleged to have paid is directly applicable to the question at issue, and is one of those circumstances surrounding the alleged transaction, and shewing the relative positions of the parties, which, for determining the real nature of their dealings with each other, are always proper for the consideration of a jury.

The issue is, was a certain sum of money handed over? The evidence is the man did not have it to hand over, therefore it was not possible.

Jacobs v. *Tarleton*, 11 Q.B. 421, 116 Eng. R. 534, is familiar as the case laying down the rule that the plaintiff cannot split up his evidence and give evidence in reply confirmatory of his case. The plaintiff who sued as indorsee of a bill of exchange in the first instance upon a *primâ facie* case by evidence of the indorser's handwriting, evidence was given to shew that plaintiff was too poor to have given value for the bill and had disclaimed all knowledge of it.

It was held that the plaintiff could not give evidence in reply, that he was able to give value and had actually discounted the bill because such evidence was not in contradiction, but merely confirmatory of his *primâ facie* case.

Here again, is the question of inability, through poverty, to give value.

In Roscoe's Nisi Prius Evidence, 18th ed,. 278, the following comment is made on *Jacobs* v. *Tarleton*, 11 Q.B. 421, 116 Eng. R. 534:—

> It is observable on the report of this case that neither the evidence in defence, nor in reply, seems to have been pertinent to the issue, but another report (17 L.J. Q.B. 194) shews that fraud and want of consideration were also in issue on the record.

R. v. *Grant*, 4 F. and F. 332. This was a criminal case. The indictment was for arson. One of the counts alleged an intent to defraud. It was opened for the prosecution that the motive might

N. S.

S. C. 1914

STARRATT v. DOMINION ATLANTIC R. CO.

Ritchie, J.

have been to realize the money insured by the prisoner upon her goods.

Evidence was received that she was in easy circumstances with a view to shewing that she was under no pecuniary temptation. In receiving the evidence Chief Baron Pollock said:—

> When it was put that possibly the prisoner's motive might have been to realize the money insured upon her goods, surely it was material to shew that her circumstances were such as not to raise any temptation to the act.

The evidence was allowed in consequence of the opening of the prosecution in a criminal case, I cannot see that the case is applicable.

I think the evidence tendered was properly rejected.

It is to be observed that Mr. Fraser's cross-examination shews that he had a clear idea of the cars of the defendant company. No attempt was made to get the evidence from him, which it was sought to get after his death from Mr. Comeau.

There was an interview between Lang, Comeau and Kirkpatrick, an official of the C.P.R. in Montreal. Lang gave his version as to what took place at this interview and Kirkpatrick was called. It was objected on behalf of the plaintiff, that, so far as this interview was concerned, the only evidence which Kirkpatrick could give was in contradiction of Lang's evidence. Lang was not the agent of the plaintiff, and therefore nothing that he said could be received as admissions against the plaintiff, and if it was sought to get evidence from him as to this interview other than by way of contradiction, I think it could not be done and the objection was properly sustained. There are, I think, two ways of contradicting, one by putting to the witness the specific things which it is sought to contradict and the other by getting from the witness his version of the conversation, or interview. If it is different, the contradiction appears.

I cannot gather very satisfactorily whether the learned Judge was preventing counsel from adopting the last mode of contradiction or not, but if he was, I am unable to agree that this could properly be done, but the contradiction was obtained, and there clearly was not on this point that substantial wrong or miscarriage which would entitle the defendant company to a new trial.

Another point arose on the examination of Kirkpatrick. The question was, whether Comeau had made a certain statement or not. The answer was, "Not to my knowledge." The question was then asked:—

> Have you any reason for believing that it was not made? (Objection.) A. I have several reasons.

The learned Judge then ruled that the witness could not give reasons that the thing would not likely happen. The reasons were, I think, properly excluded. The question was, whether a statement had been made or not. It was a clean-cut question of fact. Kirkpatrick either knew or did not know whether the statement

was made or not, his belief was not evidence, from which it follows that his reasons for such belief could not be received.

The remaining question to be considered is that of misdirection. The law does not require perfection in a charge to the jury. It is, in the great majority of cases, not difficult for counsel or the Judges on appeal to suggest that something should have been said which was not said, or that something was said which had better have been left unsaid, but if the direction was not calculated to mislead the jury as to the question for their decision and if that question was clearly left to the jury, then I think, except in very extreme cases, the Court should be slow to set aside the verdict. This view finds support in the remarks of Lord Justice Bramwell in *Clark* v. *Molyneux*, 3 Q.B.D. 237 at 243, where he said:—

> I certainly think that a summing up is not to be rigorously criticised: and it would not be right to set aside the verdict of a jury because in the course of a long and elaborate summing up the Judge has used inaccurate language. The whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions.

The questions of fact in this case were left to the jury by specific questions and they were told by the learned trial Judge that the whole matter was in their hands to deal with as they thought they should deal with it in view of the facts and evidence in the case, both oral and written. The trial Judge has an undoubted right to express to the jury his opinion of the facts, so long as he, in the end, leaves the questions of fact to the jury for their decision. On the crucial point of the case, namely, as to whether there was a contract or not, the trial Judge read to the jury all the evidence there was on the subject, and he left it to the jury to say whether they believed Lang and the plaintiff on the one side, or Fraser on the other side. It was contended that this was error, for which a new trial could be granted. I cannot come to this conclusion. It is urged that it was the duty of the trial Judge to point out to the jury, the reasons why it was unlikely that Mr. Fraser agreed to furnish refrigerator cars, for instance, that the defendant company had not refrigerator cars under their control. If the trial Judge had gone into these reasons, it would, of course, have been fair to have gone into the reasons why the evidence of Lang and the plaintiff was likely to be true. For instance, that it was unlikely that Lang and the plaintiff would have entered upon the venture of sending apples to Winnipeg at that season of the year without a definite arrangement as to being supplied with refrigerator cars.

The arguments, pro and con, were no doubt put before the jury by counsel, and I have no doubt that this special jury took these reasons into consideration when they were considering the evidence of Lang and the plaintiff on the one side, and the evidence of Fraser on the other.

N. S.

S. C. 1914

STARRATT v. DOMINION ATLANTIC R. CO.

Ritchie, J.

I do not think a Judge is bound to go over the arguments made by counsel to the jury, unless he sees that an improper argument likely to mislead, has been made, in which event, he ought to assist the jury by pointing out the fallacy.

Discrepancies in the evidence of the plaintiff at the first and second trials were referred to by counsel, that was for the jury and no doubt was fully put before them by counsel. While the charge was being delivered, Mr. Henry called attention to the discrepancies which he thought material and read the evidence. The trial Judge told the jury that he did not think it was certain that the plaintiff had said anything at this trial which was not impliedly involved in what he said at the previous trial, I do not say he was wrong in this, but, assuming that he was, an expression of uncertainty on the part of the Judge, as to a question of fact, does not invalidate the verdict, it leaves the jury perfectly free to attach such weight to the matter as they think proper. So far as facts are concerned, the duty of the Judge is to leave them in a clear and distinct manner to the jury, so they may distinctly understand the issues which they have to try. In some cases, and with some juries, he may think comment, a discussion of the reasons making one way or the other, and an expression of his own opinion on the facts, to be wise, in other cases he may not think so.

It is for the trial Judge to exercise his discretion. A Judge on appeal may think it would have been better to have gone fully into the reasons for coming to one view or the other, but he does not therefore review the discretion of the trial Judge, who is in a better position than he to know as to what it was necessary to say to the particular jury trying the case.

The rule is, I think, correctly stated by Mr. Justice Gray in the case of *Vicksburg, etc., R. Co.* v. *Putnam*, 118 U.S. 545 at 553, where he says:—

> In the Courts of the United States, as in those of England, from which our practice was derived, the Judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on a writ of error.

The charge was attacked upon the ground that the Judge improperly instructed the jury as follows:—

> Now the question becomes one of fact, there is no doubt about the apples having been tendered for transportation, no occasion for dispute about that. There is only one side to that . . .

Later on in the charge, the Judge told the jury he thought the number of cars ready for shipment was nineteen, Mr. Henry intervened and said:—

I will ask your Lordship to instruct the jury that the number was only four, to which the Judge replied: So far as I understand the evidence, there is no dispute that there were nineteen of these cars tendered at the time transportation should have been found, if the plaintiff's contention is right under the evidence.

It is obvious that there was a dispute when Mr. Henry intervened, but as I have before indicated, I do not think there was any real substantial dispute in the evidence on this point. But even if the Judge was wrong, taking the two passages together, he is merely saying, that as he understands the evidence, there was no dispute. This is nothing more than the expression of a wrong opinion as to a question of fact on the part of the Judge, which is not misdirection: *Peters* v. *Silver*, 1 N.S. Decisions 75. I am far from saying that the Judge was wrong in his expression of opinion in the sense in which he was speaking.

Then the question as to the number of carloads of apples which were ready for shipment is left specifically to the jury, the Judge had told them he thought there were nineteen carloads and that the evidence was all one way. They had been told that the whole case was for them and they could have disregarded the Judge's view and accepted Mr. Henry's, but, if they had, I think their finding would have been set aside as against the weight of evidence. Taking the charge as a whole, I cannot say that there was substantial misdirection and that is the only kind of misdirection which is ground for a new trial.

In my opinion, the motion for a new trial must be refused, and the appeal dismissed with costs.

Appeal dismissed.

KARABELAS v. CANADIAN WESTERN NATURAL GAS CO.

Alberta Supreme Court, Walsh, J. April 6, 1914.

1. GAS (§ IV A—18)—NEGLIGENCE—EXPLOSION OF ESCAPED GAS.

In an action against a natural gas company setting up personal injury from the escape and explosion of piped natural gas, the onus rests on the plaintiff to shew the cause of the injury and not a mere conjecture, and where the gas leak causing the explosion is not shewn to be attributable to any defect in the construction or laying of the pipes, nor to inefficiency in the system of operation or of inspection, and it is proved that there were probable causes unconnected with the possibility of negligence on the company's part the plaintiff must establish that the escape of gas was due to the company's negligence, or fail in his action.

Statement

ACTION in damages for personal injury for alleged negligence of a natural gas company resulting in an explosion which caused the injury.

The action was dismissed.

J. J. McDonald, for the plaintiff.

W. H. McLaws, for the defendant.

ALTA.

S. C.
1914

KARABELAS
v.
CANADIAN WESTERN NATURAL GAS CO.

Walsh, J.

WALSH, J. (oral):—I do not see how I can hold the defendant liable for the damages which the plaintiff has unfortunately sustained. The plaintiff's claim is made against the company on the ground that his injuries were occasioned by an explosion of natural gas which accumulated in or under the post-office building through the negligence of the company. The onus is upon the plaintiff of proving that it was the company's gas which negligently escaped, which brought about this injury to him. The plaintiff's case rests almost entirely on conjecture. The explosion is certainly one which might have been caused by natural gas and the reasonable inference might perhaps be drawn, that natural gas did cause it. There are other causes which might have been responsible for the occurrence but it is not proved there were any of them in the place where the explosion took place. But the only evidence that there is of any escaping gas is from the service connection on the main in the alley and the plaintiff simply asks me to assume because gas was escaping there and the explosion may have been caused by natural gas, therefore the gas which did explode came from this leak in the main, and to further assume practically that it so escaped through the negligence of the company. The evidence satisfies me that if the gas was escaping from this connection in the alley it could not make its way into the post-office building through the ground which lay between the trench and the building. I think the evidence of Armentrout, the city gas inspector, is conclusive as to that. I think the only way it possibly could have got in would be by making its way along the trench of the excavation for the sewer, which is in the post-office building, and if it got into the building at all it must have got in in that way. The evidence shews that there is, between the place where the sewer connection enters the building and the place where this explosion took place, a foundation wall with some degree of resistance at any rate. There is nothing to shew the nature of the ground there, the conditions under the floor in the lavatory, nothing to shew whether or not it would be possible for gas which got underneath the floor of the lavatory to escape from there to the room, or beneath the floor of the room in the southeast corner of the building. My conclusion from the evidence would be that it would be very difficult, if not impossible, for the gas to get from one of these compartments to another.

The evidence establishes to my satisfaction that originally this work was properly done; and that the best of materials were made use of by the company. It adopted a system of inspection, the efficiency of which is not questioned, and when the work of making this connection was finished the work seems to have been left in a perfectly safe condition. The leak which resulted afterwards may have been caused from any one of a number of circumstances apart altogether from any possibility of negligence on the part of the company. Mr. Martin says that the heaving of the

ground with the frost, or the subsidence of the soil, or as Mr. Pearson has said, the jolting of the traffic over it, or perhaps the work done in uncovering this trench for the purpose of ascertaining whether or not there was a leak there, might have been responsible for the loosening of the saddle which allowed the escape of gas. I am not allowed to guess at these things. I think the onus is upon plaintiff of establishing to my satisfaction that the gas escaped through the negligence of the company, and I think he has failed to do so. I am not able to find, as a fact, upon the evidence that the gas escaped into the post-office building from this particular leak, nor am I able to find that that leak was the result of negligence on the part of the company, and it follows from these findings that the plaintiff is not entitled to succeed in his action. The action is therefore dismissed.

Action dismissed.

ALTA.

S. C.

1914

KARABELAS v. CANADIAN WESTERN NATURAL GAS CO.

Walsh, J.

MERCHANTS BANK v. HASTIE.

ALTA.

S. C.

1914

Alberta Supreme Court, Harvey, C.J., Stuart, and Beck, JJ. March 30, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—FORM—SUFFICIENCY UNDER STATUTE—DESCRIPTION.

The provisions of sec. 85 of the Alberta Land Titles Act, 1906, read with form W thereof, as to the description of lands to be given by caveators, are merely directory and intended for the guidance of registrars, and a caveat lodged thereunder, which enables the registrar to identify the land affected, is sufficient if the interest claimed is stated with reasonable certainty although in some particular not in strict compliance with the prescribed form.

[*McKillop and Benjafield* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, followed; *Wilkie* v. *Jellet*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282, applied.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—STATUTORY FORM—ADDITION.

The provision of sec. 85 of the Land Titles Act of Alberta, requiring the insertion in a caveat of the caveator's name and addition, is sufficiently met where the information so intended by the statute to be given can be definitely gathered by reading with the caveat the affidavit accompanying and verifying it.

[*McKillop and Benjafield* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, applied; *Jones* v. *Simpson*, 8 Man. L.R. 124; and *Martin* v. *Morden*, 9 Man. L.R. 565, considered.]

APPEAL by the defendant from the judgment of Simmons, J., setting aside a caveat filed against certain lands under the Alberta Land Titles Act. Statement

The appeal was allowed.

H. P. O. Savary, for plaintiff, respondent.

Lougheed & Co., for defendant, appellant.

The judgment of the Court was delivered by

STUART, J.:—This is an appeal by the plaintiffs from a decision in Chambers by Mr. Justice Simmons upon an applica- Stuart, J.

ALTA.

S. C.
1914

MERCHANTS BANK
v.
HASTIE.

Stuart, J.

tion by the plaintiffs by way of originating summons to set aside a caveat filed against certain lands by the defendant Hastie. The plaintiffs hold an unregistered transfer of the lands in question from one Charles A. Shaw, the registered owner. Registration of this transfer is impeded by the existence of the defendant's caveat.

The objections taken to the caveat were: (1) that it did not set forth the occupation of the caveator and therefore did not comply with form W which provides for the insertion in the caveat of the name and *addition* of the caveator, and (2) that it did not state sufficiently the interest of the caveator. The caveat states that Hastie claims

> an interest under a certain mortgage under the Land Titles Act dated September 13, 1912 and made by Charles A. Shaw of the city of Calgary aforesaid, rancher, in my favour in section 23, township 20, range 2, west fifth meridian, standing in the register in the name of the said Charles A. Shaw.

I think this second objection to the caveat ought not to prevail. The subject was considered by the Supreme Court of Canada in *McKillop and Benjafield* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551. In that case the interest claimed was stated to be "under and by virtue of an agreement of sale in writing of the said property to me from" a certain named person. Mr. Justice Anglin said in his judgment:—

> The provision of sec. 137 (the present sec. 85 of our Act) should, I think, be regarded as directory and intended for the guidance of registrars: *Wilkie* v. *Jellet*, 2 Terr. L.R. 133, at 143, 26 Can. S.C.R. 282, at 288. If a caveat enables the registrar to identify the land in respect of which it is lodged, and if the interest claimed is stated with reasonable certainty, he properly receives it, and when duly lodged it has the effect contemplated by the statute although in some particular it should not be in strict compliance with the prescribed form.

Davies and Brodeur, JJ., adopted generally the views of Anglin, J., and although the point was a relatively subordinate one in the case, I think we are bound to follow the opinion thus expressed, which is, if I may say so, also my own.

This view of the provisions of sec. 85, Statutes of 1906, ch. 24, is also applicable to the first objection. I do not think it necessary to express an opinion as to what the result would have been if there had not been in the affidavit accompanying and verifying the caveat a statement of the caveator's occupation.

But his occupation is in fact there given. The objection that it is not inserted in the caveat itself becomes therefore a sheer technicality. All the information intended by the statute to be given is in fact given, though not exactly in the particular spot stated in the form prescribed by the statute. In my opinion Mr. Justice Bain took too narrow a view of the matter in *Jones* v. *Simpson*, 8 Man. L.R. 124; while in *Martin* v. *Morden*, 9 Man.

L.R. 565, Chief Justice Taylor simply reasoned from *Jones* v. *Simpson* upon the *a fortiori* principle. *Martin* v. *Morden* was itself a very much stronger case, and did not need *Jones* v. *Simpson* to support it.

With respect I think the appeal should be allowed with costs, the judgment below set aside, and the application dismissed with costs.

Appeal allowed.

ALTA.
S. C.
1914
MERCHANTS BANK v. HASTIE.

TOOKEY v. EDMONTON (City).

ALTA.
S. C.
1914

Alberta Supreme Court, Harvey, C.J. April 11, 1914.

1. MUNICIPAL CORPORATIONS (§ II F 3—190)—POWERS—ESTABLISHMENT OF MUNICIPAL GAZETTE.

The establishment of a "municipal gazette" or municipal publication dealing exclusively with the details of the city's government is within the powers of the city of Edmonton under the Edmonton charter, Alta. Stat. 1913, 1st sess., ch. 23; and a resolution of the city council to that end will not be quashed unless it be shewn that the council acted otherwise than in good faith.

Statement

APPLICATION to quash a municipal resolution establishing a municipal newspaper or gazette.

The application was dismissed.

Frank Ford, K.C., and *C. F. Newell*, K.C., for the applicant.
J. C. F. Bown, K.C., for the respondent.

HARVEY, C.J.

HARVEY, C.J.:—This is an application to quash a resolution of the city council. The grounds urged are:—

(1) It is indefinite;

(2) It is not passed *bonâ fide*;

(3) It is not in the public interest.

Section 221 of the city charter (ch. 23 of 1913, 1st session) authorizes the council

> to make by-laws and regulations for the peace, order, good government and welfare of the city of Edmonton

with the proviso

> that no such by-laws or regulations shall be contrary to the general law of the province and shall be passed *bonâ fide* in the interests of the city of Edmonton.

This proviso apparently neither adds nor takes away anything, for the Courts have consistently held that a municipal corporation must act *bonâ fide* in the interests of the public, and that it cannot repeal a provincial general law would seem to be a matter of course.

It was assumed in the argument that the provisions relating to "by-laws and regulations" applied to the resolution in question

ALTA.

S. C.

1914

TOOKEY v. EDMONTON.

Harvey, C.J.

and I therefore assume that view to be correct. From the record furnished me it appears that at the meeting of the council at which the resolution was passed, Item 5 on the order paper was "Municipal Gazette; reporting progress." When this order was reached it was moved that the council go into committee of the whole "to take up this matter *de novo*." This motion was carried and after the committee had considered the matter it rose and reported "adoption" of the following resolution:—

> That the council endorse the principle of a municipal gazette and that the working out of details be left with the commissioners and Ald. Sheppard.

It was then moved "That the report of the committee of the whole as reported be now ratified." This motion was carried by a majority of one. It is this resolution as thus adopted by the council which it is sought to quash under the authority of sec. 284 of the charter which gives power to a Judge "to quash any by-law or resolution of the council in whole or in part for illegality."

What is desired of course, is to suppress the municipal gazette referred to in the resolution, though it is by no means clear that the quashing of the resolution would necessarily have that effect. The manner in which the powers of the corporation are exercised under the Edmonton charter is so different from that in most of the municipalities in England and the older provinces that reported decisions are of little value in the consideration of the present case. Instead of all the powers being vested in a council there is a distinct separation of the administrative and legislative powers much as in the case of the government of the Province or Dominion. I have already indicated the general legislative jurisdiction given to the council and section 41 provides that

> Subject to the legislative jurisdiction of the council there shall be vested in commissioners to be appointed as hereinafter provided, and to be called "the commissioners of the city of Edmonton" a general executive jurisdiction over the affairs of the city.

There is an added sub-section which makes it clear, if there could be any doubt, that the legislative power is superior to and has control of the executive.

Now the purpose of this resolution is to authorize and direct the commissioners to act. There is no room for any question of delegation of authority for the authority is in the commissioners by virtue of the charter. It is true that another than the commissioners is named as well, but that appears to me to be not important. The resolution appears to me to express with perfect clearness the intention to establish a municipal gazette, leaving to the commissioners the duly established body for that purpose, with an alderman, the duty of doing what may be necessary to carry the purpose into effect. Having regard to the history of the section it seems that the wide general jurisdiction of the com-

missioners quoted above is not to be deemed to be restricted by the subsequent words and if so, I am of opinion that the commissioners would have had power without any direction from the council to do what the council has directed and consequently there can be no question of the illegality of the resolution for want of specifying particulars.

The questions of *bonâ fides* and public interest are more or less interwoven. The section does not say that a by-law or regulation must be passed "*bonâ fide and* in the public interest" but "*bonâ fide* in the interests of the city."

This means, and probably means no more than, that it must be passed honestly for the general interest and not for some private interest which would be dishonest. I have been furnished with a large number of affidavits made by persons of high present or past official standing expressing the view that the establishment and maintenance of a municipal gazette will be against the best interests of the city and effect a waste of city moneys. In my opinion that is not what is meant by not being in the interests of the city. If it will have that effect it is undoubtedly in that respect in the interests of the city, in that the city generally and not some one or some few only are interested. What is of general interest may ordinarily be easily determined but what is in the best interests is and must always be in many cases something upon which there is sure to be a wide difference of opinion which is indicated in the present case by an almost equal number of affidavits filed against the application combatting the view of those filed in support. If it is in the general interest the council must, I think, be left to exercise its opinion upon this subject so long as it acts in good faith.

Two numbers of the gazette had been issued when the application was made and they were produced. I have also an affidavit of the editor stating the purpose and scope of the publication under the instructions given him. There are also produced similar publications from various cities in the United States. The primary purpose of the publication is to give information to the ratepayers of the city upon matters of general interest affecting the welfare of the city, including the transactions of the council and the commissioners. So long as that purpose is honestly carried out there can be no doubt that that is a matter of general interest and whether that interest can be best served by a publication such as this or by the ordinary newspaper channels, appears to me to be a matter essentially for the council rather than the Courts to determine. Under these circumstances bad faith is not to be assumed but must be established by clear evidence. There is no such evidence. On the other hand, all the members of the council who voted for the resolution with the exception of the mayor, who is absent, have positively sworn that they acted in good faith in what they considered the interests of the city. The

ALTA.

S. C. 1914

TOOKEY v. EDMONTON.

Harvey, C.J.

only suggestion of bad faith, as far as I can see, is the reference to a remark of the Mayor and one of the aldermen in debate upon the matter which it is suggested shewed that they were moved by personal feelings in their action. Even if that would amount to bad faith so as to affect the resolution, I am of opinion that there would be great danger in attaching much importance to remarks of that character uttered in the heat of debate.

I am of opinion that none of the grounds of objection are supported by the facts of the case and the application is therefore dismissed with costs.

Application dismissed.

B. C.

C. A. 1914

PRATT v. CONNECTICUT FIRE INSURANCE CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. February 23, 1914.

1. INSURANCE (§ III E 1—75)—STATUTORY CONDITIONS—VARIATION—DESTRUCTION OF PROPERTY BY FOREST FIRES—REASONABLENESS.

A condition that a fire insurance company should not be answerable for loss occurring through forest fires, is a reasonable variation of the statutory conditions provided by the Uniform Conditions Act, R.S.B.C. 1911, ch. 114.

[*Pratt* v. *Connecticut Fire Insurance Co.*, 12 D.L.R. 645, affirmed.]

2. INSURANCE (§ III E 1—87)—FIRE—STATUTORY CONDITIONS—VACANCY CLAUSE—VARIATION.

That the fire insurance company shall not be answerable if insured premises should become vacant or unoccupied is a reasonable condition to be inserted in a policy as a variation of the statutory conditions under the Uniform Conditions Act, R.S.B.C. 1911, ch. 114, and such condition is therefore valid if printed in conformity with that Act.

[*Pratt* v. *Connecticut Fire Insurance Co.*, 12 D.L.R. 645, affirmed.]

3. APPEAL (§ VII J 3—400)—QUESTIONS NOT RAISED BELOW—NEW THEORIES.

An appellate court may refuse to consider an objection of non-compliance with a regulating statute as to fire insurance policies where it had not been pleaded nor was it referred to at the trial or in the notice of appeal.

Statement

APPEAL by the plaintiff from the judgment of Clement, J., *Pratt* v. *Connecticut Fire Insurance Co.*, 12 D.L.R. 645, dismissing the plaintiff's action on a fire insurance policy.

The appeal was dismissed, MARTIN, and MCPHILLIPS, JJ.A., dissenting.

Ritchie, K.C., for the appellant, plaintiff.

E. C. Mayers, for the respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—It may be useful to state briefly the situation of the parties involved in, or connected with, this litigation. The Hall Mining & Smelting Co. were the owners of mines and mine buildings in the vicinity of Nelson. They had issued debentures which were held by the plaintiffs Flint, Ramsay and Ernest Prier Ashley as trustees for the owners thereof.

The plaintiffs, the Kootenay Development Syndicate, were the

lessees of the mines and buildings aforesaid, and were represented in the Province by a local board and by Mr. R. S. Lennie, a barrister and solicitor, who held the syndicate's power of attorney. Mr. Lennie says that under the terms of the lease the syndicate had agreed with the lessors to maintain insurance against fire on the premises. Mr. Davys was manager for the syndicate. Henry V. Rudd was an accountant and foreman of the syndicate and had much to do with the survey of the insurance which was effected after the syndicate took possession of the mines. Mr. Lennie represented the other plaintiffs as well in the matter of the insurance and had sole authority in that regard, according to his own uncontradicted testimony. The policy in question, being policy numbered 9077, was issued by the defendants on February 5, 1909, to plaintiff Louis Pratt as receiver for the said mining company, and covers certain mine buildings in a mountainous district, at some distance from other habitations.

Pratt, with the consent of the defendants, subsequently, viz.: on May 18, 1910, assigned the policy to the plaintiffs Ramsay and Ashley. The fire occurred on July 31, 1910. The amount recoverable under the policy, if plaintiffs can succeed at all, is not in dispute.

Several questions of law and fact were raised for our consideration. Defendant's first point was that the policy had been cancelled at the request of Rudd in June, 1910. I think it is clear that Rudd had no actual authority to bring about a cancellation of the policy, and this even apart from the fact that Rudd had left the syndicate's employ before his attempt to cancel the insurance. Lennie had charge of the insurance to the knowledge of Brydges, defendants' local agent. It was Lennie who secured the contract of insurance from the defendants through Brydges. Before effecting the insurance Lennie referred Brydges to Rudd, for data on which the contract was based, and afterwards Rudd as the syndicate's accountant paid or arranged payment of the premiums and looked to the keeping of the policy in good standing, by applying for a vacancy permit in May. It does not appear that Rudd ever effected a contract of insurance with the defendants or any other company on behalf of the plaintiffs or any of them, nor that he ever was allowed to effect the cancellation of a policy for them. How then was he held out as having authority to effect a cancellation of this policy?

The only foundation for suggesting such holding-out is based on this, that Lennie asked Brydges, with whom he was negotiating insurance, to make a survey of the insurance and in doing so to consult with Rudd the foreman and accountant and obtain information and data from him, and that after Lennie had entered into the contract based on that survey, Rudd issued the syndicate's cheques and notes in payment of the premiums and saw to

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT
FIRE
INSURANCE
CO.

Macdonald,
C.J.A.

keeping the policy in good standing by obtaining a vacancy permit in May, 1910.

In my opinion the evidence wholly fails to shew facts upon which it could be held that the plaintiffs are estopped from denying that Rudd had the authority claimed for him. Had Rudd had the power to effect cancellation I should feel much doubt as to the correctness of the conclusion arrived at by the learned Judge that there had been no effective cancellation.

Before coming to the defence which, in my opinion, relieves the defendants of liability, I will refer, in order to clear the ground, to two other points raised in the appeal.

The appellant attempted, on the argument before us, to raise for the first time a matter which had not been pleaded nor referred to at trial, nor in the notice of appeal, viz., that the variations of the statutory conditions upon which the defendants rely, were not printed "in conspicuous type" as required by the Fire-insurance Policy Act, ch. 114, sec. 5, R.S.B.C. 1911. The Court by a majority then decided that it was too late to raise the point.

My own opinion was, that whether or not the type was conspicuous was a question of fact which might, to some extent at least, be elucidated by oral evidence, and that we could not by merely looking at the print decide that fact for ourselves. Had there been a jury that question could not, I think, have been withdrawn from them, nor could oral evidence, relative to it, have been ruled out, and hence the question should, if intended to be relied upon, have been made an issue at the trial. If I were now called upon to express my own opinion of the type, I should say that it is more conspicuous than that in question in *Lount* v. *London Mutual Fire Insurance Co.*, 9 O.L.R. 549, which was held to comply with the Act. There the variations were printed in type of the same size and character as that used for printing the body of the policy. Here the variations are printed in type much smaller than that used in printing the rest of the contract including the statutory conditions. It might not be unreasonably held that the type was conspicuous by reason of the contrast, but that is a question I am not now called upon to decide.

Another question raised in the defence was that, by one of the varied conditions, loss, if occasioned by forest fire, which was the case here, was not insured against, and this was combatted on the ground that such condition was not just and reasonable. As to this I desire to express no opinion, it being unnecessary to do so in view of the decision to which I have come on the next and last question which need be discussed, and upon which I rest my judgment.

The policy contains a condition, added to the statutory conditions, reading as follows:—

> This policy will not cover vacant or unoccupied buildings unless insured as such and if the premises insured shall become vacant or unoccupied, or

if the insurance shall be on a manufacturing establishment, or mill, and the time shall cease to be worked, this policy shall cease and be void unless the company shall by endorsement on the policy allow the insurance to be continued.

That the buildings were vacant at the time of their destruction, and for a considerable time prior thereto, is not disputed. The plaintiffs in pursuance of this condition applied for and obtained from said agent an endorsement on the policy permitting vacancy from May 18, 1910, to July 18, of the same year; when that period expired no further action was taken to procure continued permission; as already stated, the fire occurred on July 31.

The case is thus narrowed down to the question, was this condition one "Not just and reasonable" to be exacted by the company?

This condition would clearly fall within the authority of *Boardman* v. *North Waterloo Insurance Co.*, 31 O.R. 525, and the American cases collected at p. 726 of the Cyclopedia of Law and Procedure, vol. 19, were it not for the omission of the ten days of grace after vacancy allowed, by standard conditions of this kind, for obtaining the insurer's permission. But as pointed out by Meredith, C.J., in *Eckhardt* v. *Lancashire Ins. Co.*, 29 O.R. 695, affirmed 31 Can. S.C.R. 72, a condition of this character is to be judged with reference to the facts of the particular case under consideration. The question is not, would such a condition inserted in every contract of insurance be just and reasonable, but on the facts and in the circumstances of this case, can it be said to be not just and reasonable to exact it. The defendants might reasonably say, we do not insure vacant buildings except at a higher rate of premium than this contract calls for. Yours are buildings remote from other habitations. Without your occupancy we would have no protection against itinerant or criminal persons loitering about the premises and lighting fires there for their own purposes or with criminal intent, nor would there be persons there to put out incipient fires. It is practicable for you and impracticable for us to guard against vacancy; you must either, therefore, keep the premises occupied or obtain our permission to let them become vacant, even for a few days.

There is no suggestion that the plaintiffs were ignorant of this condition. It is some evidence of the reasonableness of it that they acted under it and obtained sixty days' permission to leave the building unoccupied. The ten days are allowed in standard conditions to meet all cases. The absence of days of grace in a particular case should not be fatal to the condition, if on the facts of the particular case it was not to be apprehended that the condition would become a trap. It is of the same character as statutory condition No. 3, which requires the insured to notify the insurer of changes, in the surroundings of the premises material to the risk. In a case like the present the vacancy con-

P. C.
C. A.
1914
PRATT
v.
CONNECTICUT FIRE INSURANCE CO.
Macdonald, C.J.A.

dition is less onerous because default in observing it cannot happen except from gross carelessness in connection with an event, the result of deliberate action, on the insurer's part and entirely within his control, and one which is not the subject of uncertainty as to what is or is not material to the risk.

I am in entire accord with those who think that variations of statutory conditions should be jealously scrutinized by the Court in order to guard against a reversion to the conditions which brought about the intervention of legislators and the enactments of laws, for the protection of insurers against unjust contracts. But on the other hand it must not be forgotten that insurance is a lawful business highly beneficial to mankind, and that stipulations which would pass without criticism in ordinary commercial contracts are not necessarily to be condemned because they appear in an insurance contract. While the Legislature intended to fetter insurance companies to some extent in the making of contracts of insurance, it left them the right to protect their own interests, by reasonable restrictions on their liability.

Mr. Ritchie further contended that because Brydges said, at a time subsequent to the expiry of the vacancy permit, "The cancellation had not been put through and the policy *is in force*," that the company is estopped from setting up the breach of the vacancy condition. Had Brydges been a principal that might be so, though I doubt even that because it is quite manifest that neither Lennie nor Brydges had the vacancy in mind on that occasion, but apart from that the policy contains stipulations that

> No officer, agent or other representative of this company shall have power to waive any provisions or conditions of this policy except such as, by the terms of this policy, may be the subject of agreement endorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

And again the vacancy permit is required to be endorsed on the policy, and failure to comply with that condition where the company, as distinguished from its local agent, has not contributed to the failure to do so, or otherwise acquiesced in it, is fatal to the plaintiff's claim; *Western Assurance Co.* v. *Doull et al.*, 12 Can. S.C.R. 446.

The appeal and cross-appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—This is a claim made against defendants in respect of a building destroyed by a forest fire.

The policy contained the following variations from the statutory conditions:—

4. Condition No. 10 has the following clause added to sub-sections

(*b*), (*f*) and (*g*) respectively:—(*b*) Also by earthquake or hurricane, or by *forest fires*.

This policy will not cover vacant or unoccupied buildings unless insured as such, and if the premises insured shall become vacant or unoccupied, or if the insurance be on a manufacturing establishment, or mill, and the same shall cease to be worked, this policy shall cease and be void unless the company shall by endorsement on the policy allow the insurance to be continued.

Upon this defence being raised, the plaintiff set up the contention that the exemption from forest fires was "unreasonable and unjust" within the meaning of the Act.

No evidence was given touching the justness or unreasonableness except this, the building in question was insured by two companies—both contained the same exemption, both charged the same rate—a rate struck by the Board of Underwriters in Vancouver. In these circumstances the proper inference to draw is that this was the ordinary rate for policies not covering forest fire risks.

Dealing with the forest fires risks only, I can see no substantial reason why we should decide in favour of the plaintiffs. The judgment of Meredith, C.J., in *Eckhardt* v. *Lancashire Ins. Co.*, 29 O.R. 695, which has been adopted by the Supreme Court of Canada, 31 Can. S.C.R. 72, seems to me altogether in favour of the defendants.

The question of just and reasonable has been discussed recently by the Appellate Division in Ontario: see *Strong* v. *Crown Fire* (1913), 13 D.L.R. 686, 29 O.L.R. 51 *et seq.* [affirmed *sub nom. Anglo American Fire Ins. Co.* v. *Hendry*, 15 D.L.R. 832].

I would allow the cross-appeal both as to the cancellation of the policy and as to costs. The Judge might have imposed terms on making the amendment, or divided the costs according to the issues, but I can see no reason for depriving the defendants of the costs of the action in which they succeeded.

Martin, J.A. (dissenting)

MARTIN, J.A. (dissenting):—In my opinion the variations in the statutory conditions, as to forest fires and vacancy, cannot, in the circumstances of this case at least, "be held to be just and reasonable to be exacted by the company" under sec. 5, and therefore, by virtue of sec. 7, they are "null and void." With respect to forest fires, they are, in the wooded portions of this Province, wherein this insurance was effected, an ordinary risk, and I think it should no more be justly avoided than any other of that nature: it would be very little more unreasonable to bargain that the risk would not cover fires which did not originate upon the premises insured, which would be most unjust and unreasonable.

With respect to the condition that

> if the premises insured shall become vacant or unoccupied . . . this policy shall cease and be void unless the company shall by endorsement on the policy allow the insurance to be continued,

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT
FIRE
INSURANCE
CO.

Martin, J.A. (dissenting)

I entertain a strong view that it is far too drastic because it comes into operation immediately and gives the insured no time at all to inform himself or to protect himself from any of the ordinary occurrences which might cause the premises to become "vacant or unoccupied" without his notice and with no opportunity to discover the fact or protect himself by the exercise of all due diligence. The term "vacant or unoccupied" is very far-reaching and would, *e.g.*, cover the case of the tenant of a furnished house absconding at night whereby the premises would immediately become vacant, and a fire might destroy them at once before the landlord knew of the vacancy, or, much less, had time to go to the company's office to apply to continue the policy, which would be too late and he would be met by a refusal. And not only this, but if the premises are "unoccupied" the result is or may be the same, because "unoccupied" is a very wide term and there is no limitation upon the period and, *e.g.*, a policy holder who had shut up his house in the morning and taken his family for a day's outing on the water and been unexpectedly detained all night might return to his home to find not only that it had been burnt down in his absence, but that he could recover no insurance because it had been in fact "unoccupied." Numerous other examples might be cited, all going to shew that some period of vacancy or unoccupancy should be fixed with the reasonable intention of giving the insured some time at least to turn round and take steps to protect himself. The vice of the present clause is that no matter how careful or diligent a policy holder may be his rights are instantly and automatically determined and he finds himself at the mercy of some company which insists upon what it calls its strict contractual rights, which is precisely what the legislature is seeking to guard against by said sec. 5. No authority has been cited to us justifying a condition of this harsh and peremptory nature.

So far as the cancellation of the policy is concerned, I think the proper view of it was taken in the Court below: the estoppel relied on here comes within Lord Justice Bowen's definition in *Low* v. *Bouverie*, [1891] 3 Ch. 82 at 106.

In my opinion the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal and allow the cross-appeal. Assuming for the moment that Rudd had authority to apply for cancellation of the policy the evidence is shortly this —he came into Brydges' office on June 13, 1910, asking for the cancellation of the Connecticut policy among others. He was told it was irregular to do so without production of policies; he left, saying he would look them up and returned next day with the policy in question, and requested its cancellation. He was asked to put his request in writing, which he did on the 14th; see ex. 4, p. 121, *a*, *b*.

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT
FIRE
INSURANCE
CO.

Galliher, J.A.

On receipt of the policy and this letter, Brydges cancelled same, credited the assured with the return premium in his books instead of sending them a cheque; as the assured were then indebted to him for premiums, wrote a letter advising his company of what had been done on June 16, ex. 5, p. 122, with a memo at bottom to "hold till policies come in," meaning other policies which Rudd informed him he would get from London, and also wrote a letter to Rudd, June 17, ex. 11, p. 123, *a*, *b*, advising him of the amount of return premium calculated from June 13, as had been requested by Rudd in his letter of June 14.

Still assuming that Rudd had authority, what took place as above set out, to my mind constitutes cancellation, and once cancelled, Brydges, while he had authority to cancel, had no authority or power to revive the policy, and his only course would have been to issue a new policy.

But the plaintiffs say the company are estopped from saying the policy was not in force by reason of something that took place between Lennie, agent of the assured, and Brydges' agent of the company about a month later. I have weighed the evidence upon this very carefully, and while I will not refer to it in detail, I point out a piece of evidence on page 54 of the appeal book, which Mr. Ritchie relied on before us, but which strikes me is significantly against the assured. This evidence was brought out by Mr. Clark, counsel for the assured, in cross-examination of Brydges, and is as follows:—

Mr. Clark:—Isn't this a true position that Mr. Lennie having questioned and written this letter (ex. 13 *a*, *b*, p. 124), you said now we will put this up to the insurance company and pending their reply everything will be in force? A. That is it exactly, yes, that is what I wanted to put before.

I interpret that evidence to mean that while Lennie was questioning the cancellation owing to the fact that Rudd had no authority, the matter was to be put up to the company as to whether the policy was to be considered cancelled, and in the meantime, so far as Brydges could, he assented to the policy being considered in force. But as soon as the policy was cancelled it was dead and Brydges had no power to declare it revived for any period or awaiting any decision. The facts were all before Lennie as well as Brydges (except perhaps the fact that the policy was in Brydges' hands being surrendered by Rudd, which I do not think sufficient to alter the case), and if Lennie and Brydges made a mistake in law as to the position in which matters were, that does not create an estoppel as against the company.

Now as to Rudd's authority. The evidence is clear that he had no express authority, and that at the time he made the application for cancellation his employment with the assured had ceased although he appears to have consulted with Mr. Davys, managing director of the Kootenay Development Syndicate, as to reduction of expenses and restricting insurance (see cross-examination of

B. C.
C. A.
1914
PRATT
v.
CONNECTICUT FIRE INSURANCE CO.
Gallihier, J.A.

Davys, bottom of page 71 and down to line 11, page 72, *a*, *b*, and Rudd, p. 90, lines 14 and 15).

At the time the policy was issued Mr. Lennie gave instructions for a re-survey and re-adjustment of the insurance and referred Mr. Brydges to Rudd, who was then in their employ, to take up the details, in fact left it entirely to Rudd and Brydges to do all this work. Subsequently Brydges swears that Rudd arranged for credit regarding premiums payable, procured the notes for same, attended to their renewals from time to time, and generally attended to this insurance business.

When Rudd came in about cancellation, it does not appear that Brydges knew he was not still in the employ of the assured, and when requested to bring in the policies before cancellation could be made, produced from the custody of the assured the policy in question, wrote a letter on behalf of the assured requesting cancellation, and in every way acted so as to justify Brydges in believing he had full authority.

We must, however, look further to see how Rudd became possessed of the policy, for I think there can be no doubt from the evidence of Miss Cooper that he handed it in to Brydges' office.

Rudd is very hazy on this point, and the only explanation as to how he became possessed of it is to be found in the evidence of Lennie himself, which is to the effect that if Rudd came in wanting any papers of the assured and Lennie was busy, he would give him the key of a box in the safe where these papers were kept, so that he could get what he wanted. This seems the probable explanation of how he got this policy.

It is also to be noted that the power of attorney from the Hall Mining and Smelting Co. to the Kootenay Development Syndicate which was recorded contains a provision expressly authorizing the Development Co. to appoint a substitute or substitutes. Now, considering that Rudd was put forward by Lennie as the man to deal with this insurance, in the first place, his arranging for a line of credit, his procuring of notes and the renewal of same and the production upon request of the document necessary to obtain cancellation with no notice to Brydges of any change in his position and the manner in which the document was procured by Rudd, it seems to me the assured are under the circumstances, bound by his act.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A. (dissenting):—The learned trial Judge in this case (Clement, J.) has found that there was no cancellation of the policy of fire insurance sued upon in this action, which was really the defence that the trial proceeded upon throughout the major portion of the hearing of the action.

The learned trial Judge has these observations to make in his reasons for judgment:—

> The conditions set up are that the company should not be answerable

first, for loss occurring through forest fires, and, secondly, for loss if the premises insured should become vacant or unoccupied, and, as already intimated, the facts bring the case within these conditions. The fire which destroyed the buildings was a forest fire, and at the time the mine was not being worked and the various buildings were unoccupied.

After careful consideration I am unable to say that it was unjust and unreasonable for the company at the date of the contract to stipulate for immunity under the circumstances indicated. I am free to say that, in view of the fact that the company's refusal to recognize liability was at first (and indeed an amended defence was filed in this action) based solely upon the contention that the policy had been cancelled, their reliance now upon these variations hardly calls for commendation, but legally they are entitled to stand upon their contract unless I can find affirmatively that these variations are unjust and unreasonable. I have tried in vain to propound some good reason for so holding and must therefore dismiss the action. I do so, however, without costs, as the company failed in the issue upon which most of the time of the trial was taken up.

The appeal is from the whole judgment, and the company—the respondent—cross appeals against the finding of the learned trial Judge that there had been no cancellation of the policy and for the costs of the action.

The policy of fire insurance issued in favour of Louis Pratt (the appellant) as receiver for the Hall Mining and Smelting Co. Ltd., and was placed upon certain buildings situate on the Silver King Mineral Claim, on Toad Mountain, close to Nelson, B.C.

Upon a perusal of the policy it will be seen that it has conditions set out in three ways: (*a*) Conditions immediately following the description of the property insured; (*b*) statutory conditions; and (*c*) variations in conditions and additions thereto.

The condition first to be noticed reads as follows (which is in very small type and in red):—

> It is understood and agreed that this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning and in no case to include loss or damage by cyclone, tornado or wind storms) not exceeding the sum insured or the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. . .

(The following in larger type—eight point and leaded, and in black):—

> And the said Connecticut Fire Insurance Co. hereby agrees to indemnify and make good unto the said assured . . . heirs or assigns all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property herein described) the amount of loss or damage to be estimated according to the actual cash value of the property, with proper deduction for depreciation, however caused.

Turning to the statutory conditions, these would appear to be as contained in the statute (Fire Insurance Policy Act, ch. 114

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT FIRE INSURANCE CO.

McPhillips, J.A. (dissenting)

R.S.B.C. 1911), and are in black type and the same as last clause above quoted.

The statutory condition that requires to be noticed is 10 (*b*), which reads as follows:—

10. The insurer is not liable for the losses following, that is to say:—

(*b*) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped powers.

The above statutory condition is added to in the variations in conditions in the following manner (in very small type, six-point in red, set solid):—

Condition No. 10 has the following clause added to sub-section (*b*) . . . :—

(*b*) Also loss by earthquake or hurricane, or by forest fires.

Then we find an entirely new condition:—

7. The following clause is added as a new condition:—

This policy will not cover vacant or unoccupied buildings unless insured as such, and if the premises insured shall become vacant or unoccupied, or if the insurance be on a manufacturing establishment, or mill, and the same shall cease to be worked, this policy shall cease and be void unless the company shall by endorsement on the policy allow the insurance to be continued.

Before dealing with any of the *viva voce* facts as brought out at the trial, I purpose to deal with the policy itself, scanning it and applying the law to it, and in particular the Fire Insurance Policy Act, R.S.B.C. 1911, ch. 114.

Looking at the policy it will be seen three colours appear thereon, black, purple and red, and before the statutory conditions are reached we have all of these colours; later we have them all red again, the statutory conditions being in black and the variation of conditions in red; this does not comply in my opinion with the mandatory provision of the statute. To illustrate and punctuate the view I take I will quote the section 5 of the Act, which is as follows:—

5. If an insurance company or other insurer desires to vary the said conditions, or to omit any of them or to add new conditions, there shall be added to the said conditions on the policy in conspicuous type, and in ink of different colour, words to the following effect:—

Variations in Conditions.

This policy is issued on the above statutory conditions, with the following variations and additions:—

These variations (or as the case may be) are, by virtue of the British Columbia statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company.

Provided, however, that the provisions of this section shall not authorize a company or other insurer to vary, omit, or add to the statutory condition Number 16.

It will be seen that where variations or additions are to be made, the words set forth in the statute, or words to the same effect, shall be added to the said conditions *on the policy* in conspicuous type, and in ink of different colour.

Now, *two* things must be present: *First*—"in conspicuous type" it is very small and less conspicuous than the rest of the type; further, the spacing of the lines is closer and is not leaded and it is palpable to everyone that it is designed, whether intentionally or unintentionally, not to make clear but to obscure, and calculated to admit of not being noticed, when the object of Parliament is well enunciated by the language, that any such variations or additions shall be visually and prominently brought to the notice of the assured.

In *Greet* v. *Citizens' Insurance Co.*, (1879) 27 Gr. 121, a somewhat similar matter came up for consideration at pp. 128, 129; Spragge, C., said:—

I refer, without repeating it, to what I said in *Butler* v. *The Standard Ins. Co.*, 26 Gr. 341, as to the legislation in respect of dealings between insurance companies and those insured by them, as indicating that the latter were to be regarded as a class generally wanting in care and circumspection, and needing the protection of the Legislature; and I refer now to the careful provision made in the statutes on this subject, that where the insurance company desires to vary from the statutory conditions it must be done in conspicuous type and in ink of a different colour. Broadly, this means that the insured ought not to be bound by anything in his contract that is not fairly brought under his notice. This provision in the small type is, I will not say framed in order to elude observation, for that might be unjust to the framer; but it is certainly calculated to elude observation; and, I think, eluded the observation of the leading counsel for the defence. It would certainly escape the notice of any but a very vigilant applicant for insurance, and the absence of vigilance is a characteristic of the class. In my opinion, the defendants are not entitled to the benefit of the provision in question, if, indeed, it would operate to their benefit, and turn the scale against the insured.

In England a case arose relative to conditions printed on a passenger's ticket, in which it was held that conditions printed on a passenger's ticket are not binding on the passenger unless he has received notice of them. I am not relying on this case as being particularly in point, but as it was a case that went to the House of Lords it is instructive upon the question here up for consideration—the case is that of *Richardson Spence & Co.* and *Lord Gough Steamship Co.* v. *Rowntree*, [1894] A.C. 217, 63 L.J.Q.B. 283. Lord Ashbourne at p. 285, [63 L.J.Q.B.] said:—

I think having regard to the facts here—the smallness of the type in which the alleged conditions were printed; the absence of any calling of attention to the alleged conditions; and the stamping in red ink across them—there was quite sufficient evidence to justify the learned Judge in letting the case go to the jury.

B. C.

C. A.

1914

PRATT v. CONNECTICUT FIRE INSURANCE CO.

McPhillips, J.A. (dissenting)

In *Green* v. *Manitoba Assurance Co.* (1901), 13 Man. L.R. 395, at p. 401, Bain, J., said:—

> And the variations themselves, while they are printed in a different coloured ink, are printed with type of apparently the same size as that with which the statutory conditions are printed. The type is not conspicuous either in itself or by contrast; and it is open to grave doubt if this complies with the direction that the variations "shall be added in conspicuous type."

The object the Legislature had in view in passing the Act is well known, and it is evident that this object can be effected only by requiring that the directions of the Act must be strictly complied with; and, if any authority were required for holding that the directions of the statute must be taken to be imperative, the following cases would furnish it: *Sly* v. *The Ottawa Agricultural Co.*, 29 U.C.C.P. 28; *Sands* v. *Standard Insurance Co.*, 27 Gr. 167; and *Ballagh* v. *Royal Mutual Fire Insurance Co.*, 5 A.R. 87.

Second—"in ink of different colour."

What does this mean—ink of a different colour to that in the statutory conditions or ink of different colour to that of any other ink on the policy?

Bearing in mind the plain intent of Parliament, the protection of the assured from conditions that might practically render the policy an illusory one—the words of a statute of this class are to be read *strictum jus*. And my reading of the words "in ink of different colour," bearing in mind the plain intention actuating the enactment and considering the context—that what is meant as well as enacted is that the ink must be different in colour to any other ink on the policy. In short, I read that portion of the section 5, now under consideration—dropping the words regarding the type—in the language as in the section contained, that is, "there shall be added to the said conditions on the policy . . . in ink of different colour."

It will be seen that it is "*on the policy*" the ink of different colour must be. Now *on the policy* in this case is to be found black, purple and red ink—and conditions precede the variations in conditions in black, purple and red ink.

Applying one's mind to the policy alone—looking at it as it lies before us—we see black, purple and red ink therein, and conditions appear on the policy in both black and red ink, before we reach the statutory conditions or the variations in conditions.

It is patent that in using red ink in the variations in conditions and additions thereto, the statute has not been complied with, if I am right in my construction, that the difference in colour must be difference in colour *on the policy*, not merely difference in colour from that in the statutory conditions.

In construing statutes it is well to keep in mind the view of Cresswell, J., in *Biffin* v. *Yorke*, 6 Scott N.R. 235 (referred to in Broom's Legal Maxims, 8th ed., 1911, p. 439) where he said:—

> It is a good rule, that in the construction of Acts of Parliament, that

the Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of the words.

The assured, seeing black, purple, and red ink on the face of the policy, to my mind would not have called to his special attention the variations in conditions appearing in red ink on the policy, and Parliament, in my opinion, in legislating was legislating arrestively, if I may so express it—the assured was to have the fact of variations and new conditions focused upon him by the utilization of a colour different from all other colours upon the policy.

Turning to sec. 6 of the Act further light is shed upon the points immediately under consideration:—

> No such variation, addition or omission shall unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid be legal and binding on the assured.

In my opinion it is not only open to this Court, but it is the duty of this Court to see that due compliance is had with a public Act, such as the "Fire Insurance Policy Act," when it becomes necessary to consider varied or added conditions as public policy is well demonstrated in the language of the statute, and unless the variations in the statutory conditions—the omission of any of them or the additions thereto are made as is by the statute provided, they are not legal and binding on the assured, and if properly made they must be further found to be just and reasonable, otherwise the policy shall as against the assured be subject to the statutory conditions only—and this duty is cast by the Act upon the Court or Judge before whom a question is tried relating thereto (secs. 5, 6, and 7, Fire Insurance Policy Act).

It is not apparent upon the appeal book whether the point was raised at the trial that the variations and additions were not made in compliance with the provisions of the Act—unquestionably though the point was raised and urged that the variation in the conditions and addition thereto were not just and reasonable, and the learned trial Judge held that they were just and reasonable.

In a case which came before the Court of Appeal of Ontario—*Reddick* v. *Saugeen Mutual Fire Insurance Co.* (1888), 15 A.R. (Ont.) 363 at 368, Osler, J.A., said:—

> The defendants say that it should have been raised at the trial and decided by the trial Judge, but it was within the plain words of the statute a matter to be determined by the Court to which it was presented, and there was no remaining question of fact connected with it which made it necessary to direct a new trial in order to dispose of it.

Therefore it is my opinion that the variations in conditions and additions thereto do not comply with the statute—that is the variation to condition No. 10 exempting the company for losses caused by forest fires, and No. 7, the added condition that "This policy will not cover vacant or unoccupied buildings . . ." and are not legal and binding on the assured, and therefore to the extent that the company relies upon these conditions in resisting

B. C.
C. A.
1914
PRATT
v.
CONNECTICUT FIRE INSURANCE CO.
McPhillips, J.A. (dissenting)

payment of loss, my opinion is that the company fails in its contention, and the policy must be read as if those provisions were absent therefrom, it is not necessary for me to consider whether the conditions which now, in my opinion, fall to the ground could be held to be just and reasonable.

However, as I have a very pronounced opinion that even were the variation and addition to the policy upon which the company relies carried out in conformity with the provisions of the statute—nevertheless same are unavailing to the company to resist payment of loss, in that they are not, under the circumstances of this case, just and reasonable, whether or no they would under any other state of circumstances be held to be just and reasonable I do not presume to say.

Upon the facts before us the insurance was placed under Mr. R. S. Lennie's instructions, who was the registered attorney under the Companies Act for the Kootenay Development Syndicate, a survey of the premises and the property to be insured first being made, and the insurance was distributed among four companies, the Northern, Guardian, Aetna and Connecticut, it being left with one Brydges, the agent for the respective companies, to distribute the insurance, that is to say, the different proportions of the risk. The Kootenay Development Syndicate had a lease of the premises which were insured—the owners of same being the Hall Mining and Smelting Company, and there was an issue of debentures to Flint Ramsay and Ernest Prier Ashley as trustees for the debenture holders. It is apparent on the face of the policy that notice was brought home to the company that the mining premises were in the hands of a receiver, as the receiver is the assured under the policy.

At the time when the fire occurred men were upon the premises at Mr. Lennie's direction on account of the forest fires prevailing in the immediate vicinity, and it is evident that the agent for the company, Brydges, knew that the mine was not being operated before the fire occurred, and he also knew of the fact that the premises were vacant and unoccupied, as a vacancy permit had issued for sixty days from May 18, 1910 (the fire taking place on July 31, 1910). Mr. R. S. Lennie was acting as the solicitor for all parties—that is to say, for the owners of the mine, the lessees thereof, and for the receiver, acting on behalf of the debenture holders, and the survey made preparatory to the placing of the insurance was made by Brydges, the agent for the company. It is clear upon the evidence that Brydges was aware throughout of the state of the insured premises—that the mine was shut down and that the buildings were vacant and unoccupied, and it can be well found upon the evidence that Brydges was to protect the insurance by vacancy permits—if it can be successfully contended that under the policy such were necessary.

With regard to the alleged cancellation of the policy, the evi-

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT
FIRE
INSURANCE
CO.

McPhillips, J.A.
(dissenting)

dence makes it absolutely clear that the learned trial Judge is right in holding that there was no cancellation, and in this holding I unhesitatingly agree. Brydges personally assured Mr. Lennie that the policy was in full force—after the question of cancellation came up, owing to Rudd's unauthorized interference in the matter.

In some strange way Brydges got possession of the policy sued upon in this action. Upon the evidence it may fairly be assumed through Rudd, who apparently from time to time came to Mr. Lennie's office, and when Mr Lennie was busy he would give him the key to a box containing documents, and he would get what he wanted thereout. Further, it is clear that Rudd had no authority to possess himself of the policy—his official connection with the Kootenay Development Syndicate ceased with the closing down of the mine which was some time in May, 1910.

It is evident that Brydges did not consider that Rudd was referring to the policy sued upon when he asked for cancellation, as note Brydges, Blakemore & Cameron Ltd., letter of June 17, 1910, to Rudd, which advised that "Policy 90775 was cancelled *pro rata* and a new policy was issued on February 5, 1909, to take its place, No. 90777."

Therefore we can dismiss any question of this application on the part of Rudd for cancellation, as the company plainly did not consider it had reference to the policy sued upon, No. 90777. Further, it is an idle contention of the defendant company to set up cancellation founded upon any action of Rudd; he had no authority—was out of the employ of the Kootenay Development Syndicate when he presumed to act in the way of bringing about cancellation, and the syndicate itself was under covenant to keep the insurance existent; then what power, right or authority would even the syndicate have to obtain cancellation of insurance of which it was not the beneficiary? The policy is payable to Pratt, the receiver, and he alone could with the company bring about cancellation. Unquestionably no effective cancellation took place. All that was done was done with no authority whatever. On July 18, 1910, Mr. Lennie wrote to Brydges, Blakemore & Cameron Ltd., advising that Rudd was without authority in asking for any cancellation, and the reply of Brydges, Blakemore & Cameron Ltd., under date July 25, 1910, makes it clear that the company did not act upon Rudd's request, and makes it manifest that no cancellation can be contended for. Then on August 1, 1910, Mr. Lennie advised Brydges, Blakemore & Cameron, Ltd., that

> The portion of the property insured with you in the Guardian Fire Insurance Company and the Connecticut Fire Insurance Company (the defendants and respondents in this appeal) "under policies numbered respectively 3599894 and 90777 was destroyed by a forest fire yesterday" (that would be July 31, 1910) morning.

Following this, Brydges, Blakemore & Cameron, Ltd., wrote a letter under date August 2, 1910, advising that copies of Mr.

B. C.
C. A.
1914
PRATT
v.
CONNECTICUT FIRE INSURANCE CO.
McPhillips, J.A. (dissenting)

Lennie's letter had been forwarded to each of the companies. Now it is to be noted that not until October 12, 1910, although the origin of the fire was stated to be a "forest fire," was there repudiation of liability, and that appears by the letter of A. A. Richardson, adjuster for the Connecticut Fire Insurance Company (the defendants and respondents in this appeal) and it is to be noted that the denial of liability under the policy proceeding from the manager of the company is postulated upon the following premise

> that no liability exists thereunder and that it is neither morally nor legally bound to allow a claim in any sum under the policy, the receipt of which by the Connecticut from the same source which it was originally ordered following a written request for cancellation would seem to be *primâ facie* evidence of the right and authority of the persons who occasioned the cancellation to act.

Here we have—most peculiar, and I cannot but remark—most extraordinary conduct; before the loss takes place the company through its agent advises Rudd that it cannot recognize his request, that it is irregular, and in any case does not refer to the existing insurance, and the same agents assure Mr. Lennie that no cancellation had been effected. Yet it is attempted to deny liability on this ground, and upon the fact that the company had obtained possession of the policy by the known unauthorized act of Rudd, as after the whole matter was well understood, and a claim made under the policy, a Mr. Reed, the inspector of the company, took possession of the policy.

The explanation of how the policy got into the hands of the company is contained in the following letter:—

> November 26, 1912. Robert Scott Lennie, Esq., Barrister, etc., Vancouver, B.C. Silver King Insurance Connecticut Policy 90777. We have yours of the 22nd inst. noted. You are correctly informed. Mr. Reed, inspector for the Connecticut, was here a short time ago inspecting their business here, he found this policy on the "Silver King" file and took it. Brydges, Blakemore & Cameron, Ltd., *per* S. M. Brydges, *Manager*.

It is evident that the company was none too sure of its position, as we find in the adjuster's letter conveying to Mr. Lennie the decision of the company (in part hereinbefore recited) he stated that

> the receipt of which (this no doubt refers to the policy) by the Connecticut from the same source which it was originally ordered, following a written request for cancellation, would seem to be *primâ facie* evidence of the right and authority of the persons who occasioned the cancellation to act.

It is manifest that the "*primâ facie evidence*" has vanished when the evidence at the trial is perused and considered, and nothing remains upon which the company can in my opinion escape liability for the loss which unquestionably is one for which the company is legally answerable.

I do not feel at all incommoded by the terms of the provisions

against liability, even were the provisions as to forest fires and vacancy capable of being invoked—as my opinion is that these conditions were waived upon the facts.

It is evident that the only defence first set up was that of cancellation—later the variation in condition No. 10, and the additional condition No. 7 were invoked; this is well indicated by the trial Judge, and for the first time appeared upon the pleadings, that is to say, in the amended statement of defence, stated to be amended under orders made on October 9, 1911, and November 5, 1912. When this delay is considered it is interesting to note what Idington, J., said in *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.* (1911), 44 Can. S.C.R. 40 at 56:—

> No such objection as now relied upon was ever made until the statement of defence shewed it amongst a great many other random shots.

It is to be remarked that Mr. Lennie promptly and frankly advised the agents for the company under date August 1, 1910, that the property insured had been destroyed by a forest fire, but not until this very late date do we see any defence founded upon the exemption from liability because of forest fires or vacancy or non-occupation of buildings.

It is plainly evident that there was no thought on the part of Mr. Lennie, who effected the insurance, that there was exemption from liability caused by forest fires, as apparently that was a well-understood danger, I might almost say notorious in the neighbourhood, possibly such as might be taken judicial notice of. We have on the policy before us some evidence that losses occasioned by forest fires were insured against; there is to be noticed a flamboyant printed declaration pasted upon the policy which refers to the then recent Fernie fire—a fact of open and general knowledge throughout the Province—a most disastrous fire, occasioned by forest fires. Why is it there if it was not intended to be read by the assured? And it calls attention to the fact that companies had failed to pay losses through instability. It reads as follows:—

> Placing risks in weak companies. An organization that assumed liability and could not meet it. Fernie losers defrauded. (From the *Regina Leader*). The collapse of the Globe Fire Assurance Company with liabilities of over $59,787.50, and assets less than $10,000 would seem to shew the urgent necessity for the passing of some stringent insurance legislation in Saskatchewan.
>
> The insolvent company, for the winding up of which an application is now before the Supreme Court, was incorporated under a provincial charter some two years ago. On the $49,950 of stock, said to have been subscribed, some $3,000 has been paid up. To meet the losses incurred by the company in the Fernie Fire, $59,787.50, there is no cash whatever, the total assets of the company apparently consisting of $7,500 re-insurance and the amount due from outstanding premiums and office furniture, probably between $300 and $500.
>
> It should not be possible for such companies as the Globe to exist and

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT
FIRE
INSURANCE
CO.

McPhillips, J.A.
(dissenting)

toot for business, and the fact that it is possible for such a company as the Globe to go after business with the sanction of a charter granted by the provincial legislature, shews very forcibly the need for radical legislation.

A business such as was carried on by the insolvent company is nothing more than a gamble, pure and simple. Provided that no fires occur, everything goes swimmingly; the directors draw their fees; the shareholders draw their dividends; the agents draw their commission, and the people who are paying in the premiums, out of which dividends, fees and commissions are paid, live under the fond delusion that their homes and businesses are protected against loss by fire. One big fire, and the bubble bursts.

Without charging those connected with the Globe with absolute dishonesty, we do not hesitate to say that the methods, sanctioned though they presumably were by the legislature, were essentially not honest; with no assets worthy of the name, the company was piling up heavy liabilities which those responsible for the company's management knew perfectly well they could never meet should they ever be called upon to do so. It was just a huge gamble on the part of Messrs. Dean and their associates—and the principal losers are the unfortunate people who were so ill-advised as to place confidence in them.

When a man pays money to insure against fire, he should have a very good guarantee that in the event of fire he will receive the compensation he has been paying for. With such a company as the Globe he has no guarantee of the sort, rather, indeed, a guarantee that he will not get back a penny of the good money he has paid away in premiums.

For the protection of that large section of the public which is preyed upon by such jerry-built concerns as the Globe, it is necessary that legislation be introduced providing a reasonable amount of guarantee that the policies issued and upon which premiums are paid are worth something more than waste paper value. When a man sees all his wordly possessions go up in smoke, it is poor consolation to be left with an imposing document, signed by directors and sealed with the company's big seal, but which cannot be turned into cash representing its face value.

The lesson of the Globe Fire Assurance Company is unmistakable.

I am not placing special reliance upon this factor in the case, save to say that finding this affixed to the policy, was it not calculated to lull the assured into a false state of security? And at no time, although the evidence shews that forest fires were raging on the mountainside in the immediate neighbourhood before and at the time Mr. Lennie satisfied himself that the insurance was existent, was there ever a hint given that the insurance was not effective when loss was occasioned by forest fires; and it is inconceivable that Brydges was not also aware of the forest fires and Mr. Lennie's natural anxiety under the circumstances to be sure that the policy was in force.

That the appellants are rightly entitled to rely upon what took place between Mr. Lennie and the agent of the company, Mr. Brydges, I would refer to *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1911), 44 Can. S.C.R. 40 (previously referred to) at p. 58, where Idington, J., said:—

Again, can the appellants not be taken to have adopted the act of the

agents and that adoption to relate back to the time the agents gave the written notice? I merely suggest that as a possibly fair inference from the facts, knowing as matter of common knowledge how much the agents for insurance companies daily constitute themselves the agents of both parties for many things relative to the transaction of the business in hand.

With respect to the position of affairs before and at the time of the loss, the subject matter of this action, I would refer to the evidence of John Scholey at p. 19 of the appeal book:—

Q. Who was there at the time the fire took place on these particular premises? A. At the time of the fire two men, one named Field, the other—I forget his name.

Q. Two besides yourself? A. Yes, we knew the fire was coming, that it was dangerous, and I 'phoned for more help.

Q. How long were you there before the fire? A. There was another fire on the other side of the mountain two or three weeks before, we got that out.

Q. You had been at these buildings two or three weeks before the fire? A. Yes, had to be; the whole country was afire all around.

With respect to the actual facts existent relative to the buildings as to vacancy at the time of the fire, we have also the evidence of John Scholey, at p. 20 of the appeal book.

Q. When you went up nobody was in occupation? A. No, I took charge. Mr. Davys sent me up after they came down.

Q. Where did you live? A. I was down at the smelter, they all belong to the company.

Q. Where did you sleep and eat? A. In the boarding house below.

Q. How far from these houses? A. Perhaps 500 feet or 1000 feet.

In my opinion even were the condition operative as to vacancy or non-occupation, there was such occupation here upon the evidence, coupled with all the surrounding circumstances, which would not entitle the company to be given the benefit of any such condition; as the facts, in my opinion, work an estoppel against the company and there is also ample evidence of waiver, and the further fact that Brydges knew all along the condition of matters, and was to continue the vacancy permit throughout the time of vacancy.

It is my opinion that if the added condition No. 7 as to vacancy is to be considered, it is unjust and unreasonable, and therefore not legal or binding on the assured. An authority which well demonstrates the unreasonableness of any such condition is to be found in the decision of the Queen's Bench Division of Ontario, *McKay* v. *The Norwich Union Ins. Co.* (1896), 27 O.R. 251, Street, J., said, p. 261:—

After some difference of opinion it appears to be now settled that the reasonableness of a variation from the statutory conditions is to be tested with relation to the circumstances of each case at the time the policy is issued, and not in the light of those existing at the time at which the condition is sought to be applied: *Smith* v. *City of London Ins. Co.*, 14 A.R. 328; *Ballough* v. *The Royal Mutual Fire Ins. Co.*, 5 A.R. 87.

That the standard to be applied is that furnished by the statutory con-

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT FIRE INSURANCE CO.

McPhillips, J.A. (dissenting)

ditions, so that variations making the conditions of the policy more onerous than the statutory conditions would have done, should be treated as *primâ facie* unreasonable, is maintained by our Court of Appeal in the cases referred to in *Smith* v. *City of London Ins. Co.*, 14 A.R. 328 at 337, but controverted by Gwynne, J., in his judgment in the same case, 15 Can. S.C.R. 69 at 78 *et. seq.*

The result in the above case was that the actual facts as to occupancy being before the company at the time of the application, the company was liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant or unoccupied houses; also that the variations as to the premises becoming vacant or unoccupied were in that case unreasonable, as the houses were of a class likely to be occupied by tenants for short periods (here the mine might be shut down for short or long periods, and as a matter of fact that which imported such happenings was present in that the assured was a receiver) and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued. It was held in the *McKay* case that owing to the fact that several of the houses were vacant to the plaintiff's knowledge for some months before the fire, that was under the third statutory condition a change material to the risk which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected." But the case we have here to consider is easily differentiated. Here we have complete knowledge in the company of vacancy, the issuance of a vacancy permit, and continued knowledge up to the time of such vacancy, and no exercise of the company's right to return the premium for the unexpired period and cancellation of the policy, or any demand in writing for an additional premium.

Reverting again to the variation of the statutory conditions relative to exemption of liability if caused by forest fires. I am of opinion, after a close study of the cases, and a careful consideration of all the facts, that it cannot be at all supported that any such variation of the statutory conditions can be held under the circumstances as we have them before us, to be just and reasonable; to hold otherwise would be in effect to hold that the policy was an illusory contract, as the risk the assured considered he had insured against (that which was the chief local menace) was undoubtedly forest fires amongst other risks, therefore the variation provision for exemption from liability caused by forest fires—which occasioned the loss in this case—is not legal or binding on the assured.

By way of analogy, cases may be looked at in England dealing with carrier contracts, and the question of just and reasonable comes up for consideration in relation to such contracts, and I would call attention to a decision in the House of Lords, *Peek* v.

North Staffordshire R. Co. (1863), 10 H.L. Cas. 473, 32 L.J.Q.B. 241, at 273, where Lord Wensleydale said:—

I have considered these terms fully and I have satisfied myself that the Legislature meant to allow carriers to limit their responsibility by reasonable conditions, but that a Judge in an ordinary trial or possibly the Court on a trial at bar, should determine whether these conditions were reasonable or not, subject to the control of the Court above. The provision that the company may make conditions, if thought reasonable by the Judge or Court, comes by way of qualification of the general prohibition of exempting the company from losses arising from their own neglect or default or that of their servants. It means that, notwithstanding that general prohibition, they may make a fair bargain for their remuneration, such bargain being sanctioned by the Judge or Court. When the peculiar condition is sanctioned by the Judge and the Court in case of appeal as reasonable, the previous prohibition is done away with.

In the *Peek* case, the goods being carried were marbles, Lord Wensleydale, [32 L.J.Q.B.] at 275, said:—

But I am clearly of opinion that it is not reasonable for a carrier to say, "I will not be liable as a carrier at all for injury by neglect, or any other injury in the course of the carriage of the goods delivered to me, unless I receive a price for insuring the goods against *all* possible loss. I will not be responsible for any loss unless you pay me a fixed sum for indemnifying you against all."

Lord Chelmsford, [32 L.J.Q.B.] at 277, said:—

But it is quite a new principle that parties are to be debarred from making contracts for themselves, not being contrary to law or to public policy, because the uncertain opinion of some Judge who accidentally has to try any question relating to them should adjudge them not to be just and reasonable.

It is to be observed that Lord Chelmsford, though, dissented from the conclusion that the condition insisted upon by the company was neither just nor reasonable.

In Halsbury's Laws of England, vol. 4, 30-31, when considering special conditions as imposed by common carriers, we find this statement:—

These conditions must be just and reasonable and the onus is on the company to shew that they are just and reasonable.

Citing *Peek* v. *North Staffordshire R. Co.* (1863), 10 H.L. Cas. 473, and other cases.

I cannot agree with the learned trial Judge if it is as it would appear to have been his decision that the onus was on the plaintiff to establish that the variation in conditions and addition thereto were unjust and unreasonable, nor do I think that the decision of *Eckardt & Co.* v. *The Lancashire Insurance Co.* (1902), 31 Can. S.C.R. 72 and 74, supports him in that view, as of course if it did it would be binding upon this Court. Gwynne, J., who delivered the judgment of the Court, merely said:—

There is no foundation for the contention that every variation from a

B. C.

C. A.
1914

PRATT
v.
CONNECTICUT FIRE INSURANCE CO.

McPhillips, J.A. (dissenting)

statutory condition or addition thereto should be *primâ facie* held to be unjust and unreasonable.

And my view on the facts of the case before us is that upon those facts, and under all the surrounding circumstances, it is manifest that the variations in conditions and addition thereto are not just and reasonable, and the onus which was upon the company was not satisfactorily discharged to admit of their being held legal and binding on the assured. Upon the whole, therefore, my opinion is that the variations and addition to the statutory conditions are not legal and binding on the assured. Firstly, because of non-compliance with the Act in not being distinctly indicated and set forth in the manner required. (It becomes necessary for me to observe that although this point was held by the majority of the Court at the hearing not to be open to the appellant—not being taken below—my view is that it is a point that devolved upon the learned trial Judge to take, and it is one that a Judge of this Court must take—whether taken below or not—when there has been plain and manifest non-compliance with the Act.) Secondly, if, contrary to my opinion, there has been sufficient compliance with the requirements of the Act to effectuate a change and addition to the conditions, the variations and addition are not just and reasonable. Thirdly, if, contrary to my view, there has been sufficient compliance with the requirements of the Act to effectuate a change and addition to the conditions, and also, contrary to my view, the change and addition to the conditions may be deemed just and reasonable, that then there is upon the facts ample evidence to establish estoppel and waiver against the company such as to disentitle the company from successfully asserting that there was a change material to the risk, owing to vacancy or non-occupation, and that likewise no cancellation of the policy can be established.

In coming to the conclusion which I have in this case, I have not overlooked sec. 2 of the Fire Insurance Policy Act. It is to be observed that the section reads:—

> Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company through its agent or otherwise objects to the loss *upon other grounds than for imperfect compliance with such conditions*, or does not within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time, *or where for any other reason the Court or a Judge, before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions*, no objection to the sufficiency of such statement or proof, or amended or sup-

plemental statement or proof (as the case may be) shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

It would appear clear to me that the legislature indicates in the strongest way that it is the province and the duty of the Courts to closely examine into all the facts relative to liability under policies of fire insurance, and to impose liability thereunder upon companies where it considers it inequitable that the insurance should be deemed void or forfeited. In *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 44 Can. S.C.R. 40, Davies, J., at 53, said:—

> In reason and equity there is no ground for putting the narrow construction upon the above sec. 2 of ch. 87, giving to the Court or Judge the power to prevent on the ground of it being inequitable any objection as to the sufficiency of "such statement or proof" required after the fire. Non-compliance with the condition required as to notice of the fire arising from mistake, accident or necessity from which the company was not prejudiced is just as inequitable a plea as non-compliance arising from the same causes and with the same innocuous results in respect to the fuller particulars which the assured is subsequently required to give.

And Idington, J., at 59, said:—

> I think there is a complete answer to the whole contention furnished by sec. 2 of ch. 87 of the Revised Statutes of Manitoba, enabling the Court to disallow such objection.
>
> The section is identical with one in force in Ontario in whose Legislature it originated as the result of a commission designed thirty-five years ago to put an end to the unjust advantages taken by virtue of such conditions as insurance companies saw fit to put upon their policies.

And at 60, Idington, J., said:—

> It seems to me the remedial nature of the Act must also be borne in mind. Though this is a contract, it is one of which the Act in this regard has imposed the form and tried to limit its meaning.
>
> Its use is rendered imperative upon the companies and was designed to protect insurers, and hence requires we should interpret it as I have no doubt it has in practice and judicially been for a long time.

Certainly, in my opinion, it is inequitable in the case before us that the insurance should be deemed void or forfeited for any reason; on the contrary, in my opinion, it is legal and binding on the company.

In the result, in my opinion, the appeal should be allowed and the cross-appeal dismissed, and the plaintiffs (appellants) do have judgment for the sum of $2,200, and the costs of the Court below.

Appeal dismissed.

ALTA.

S. C.
1914

GOODY v. CARLSON.

Alberta Supreme Court, Walsh, J. March 24, 1914.

1. PRINCIPAL AND AGENT (§ III—34)—AGENT'S INNOCENT MISREPRESENTATION.

While liability for a fraudulent representation made by an agent would be upon both the principal and agent, the responsibility is that of the principal alone when the representations are innocently made by the agent.

Statement

ACTION against Sanford Carlson and a real estate company on an agreement for the sale of lands, seeking, *inter alia*, specific performance against the defendant company.

The action was dismissed as against the defendant company

J. Muir, K.C., and *Blackstock*, for the plaintiffs.

C. S. Blanchard, for the defendants.

Walsh, J.

WALSH, J.:—I think that the plaintiffs knew from the start of their negotiations for these lots that they were not buying them from the defendant company but from some person else. On the date on which Schaffer first approached the question of selling these lots to the plaintiffs he informed them they belonged to a man who recently bought them for four thousand dollars ($4,000), and he thought for that reason he might be able to dispose of them to the plaintiffs for five thousand dollars ($5,000), and he promised to get in touch with the owner for the purpose of ascertaining whether or not they could be had for that price.

The agreement, which was signed by one of the plaintiffs, was with Carlson, and I think he must have known that Carlson was his vendor. So I find that the Goodys did not deal for this property under the idea that they were buying from the company at all. I think they were of the opinion and they had reason for being of the opinion that it was the company who was the agent for Carlson on this transaction. It was in the company's Medicine Hat office that the negotiations took place, and it was one of the company's representatives who interested himself in the matter, and it was at the company's expense these men were taken out to Redcliffe for the purpose of viewing the lots. They held the company's receipt, or at least a receipt on the company's form, for the deposit of $25, and their cheque for the balance of the cash payment was made to the company's Medicine Hat agency. So that they had every reason for believing it was with the company as agents they were dealing.

At the same time, I must find upon the evidence that the company was not the agent in this matter. I think the deal was put through by Bott and Schaffer for their own benefit, without any knowledge on the part of the company that it was being put through, and without any authority from the company to either Bott or Schaffer to put it through. The company's agency in Medicine Hat seems to have been kept open for the purpose of dealing in its own lots and not for disposing of lots for others

upon a commission basis, and I think that Bott and Schaffer, in doing what they did in the company's name, were doing something which they had no right or authority to do. The company did not benefit by the transaction. The commission was paid all but $25 of it to Schaffer, and, according to him, Bott was entitled to a half interest in it with him. So I think I must hold on the facts that the agent in the matter was not the company but Bott and Schaffer. Even if it were not so, if the company was the agent through whose medium this sale was negotiated, I do not see how it could be held responsible for the claim which the plaintiffs make against it. The representation that they made was nothing more than what would have been implied upon this transaction even if nothing had been said. I think that there is an implied condition as to title upon the sale of real estate unless the contrary is expressly agreed upon. The statement which was made as to the title of this land was, I think, honestly made by Bott. I do not think that he was aware of the mix-up there was in the title owing to the fact that Hambley had refused to carry out the sale which the company made to itself for him of this same property. That was something which appears to have taken place between the head office at Redcliffe and Hambley himself of which Bott seems to have no knowledge whatever. The representation, therefore, being, as I find it, an innocent one, and being made by an agent, I do not see how under any circumstances liability could be imposed upon the defendant company for it, as my view of the law is, that if the representation was a fraudulent one, liability for that fraudulent misrepresentation would be upon both the principal and the agent, but when the representation is innocently made by an agent, it is the representation of his principal for which the principal may be properly held liable but for which the agent himself is not liable. So that if I took the other view as to the company being agents for Carlson in this matter, I would still be of the opinion that there was no liability upon the company for the representation made by Bott and Schaffer to the plaintiffs as to the title of this property, because of the fact that it was made innocently. For these reasons I must dismiss the action against the company with costs.

Blackstock made an application for a reduction in the costs.

WALSH, J.:—The only claim that the plaintiffs ever had against the company was for damages for misrepresentation. The action, so far as it was for specific performance, was against Carlson. Carlson was the one with whom the plaintiffs had the contract. I do not think there was any reason why the company should have been joined to the action for specific performance. The only reason why the company was made a defendant was that the action was for damages which the plaintiffs sustained by reason of this representation as to title, and this was found against them, so they are liable for the costs.

Judgment accordingly.

CAN.

Ex. C. 1914

THE KING v. "VALIANT."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J.A. March 30, 1914.

I. FISHERIES (§ I A — 3)—ILLEGAL FISHING — SEIZURE OF BOAT—FRESH PURSUIT BEYOND THREE-MILE LIMIT.

In the enforcement of the fisheries protection laws of Canada, a foreign vessel which is being used in infraction of that law and which sets out to sea to escape capture may be freshly pursued beyond the three-mile territorial limit, and may lawfully be captured in the open sea by a cruiser of the Canadian fishery protection service.

Statement

CROWN suit for forfeiture of a foreign fishing vessel for infraction of the fishery laws (Can.).

Judgment of forfeiture was entered.

W. B. A. Ritchie, K.C., for the Crown.

A. H. Macneill, K.C., for the ship.

Martin, L.J.A.

MARTIN, L.J.A.:—In this action is sought the forfeiture of the gasoline schooner "Valiant," a foreign fishing vessel of Seattle, U.S.A., gross tonnage 18 tons; length 40 feet; breadth 12 feet, 6 inches; depth 4 feet, 9 inches; engaged in the halibut fishery, and seized on May 11 last, off West Haycock Island, about 16 miles from Cape Scott, V.I., by Captain Holmes Newcombe, Canadian Fisheries Protection Officer, then on board the SS. "William Joliffe," employed in that service, under command of Captain Thomas Thomson, because of an alleged infraction of sec. 10 of the Customs and Fisheries Protection Act, ch. 47, R.S.C. 1906, as amended by sec. 1 of ch. 14 of 3-4 Geo. V. 1913. The "Valiant" was seized outside the three mile limit about five miles off shore after a "hot pursuit," which began, I am satisfied, when she was first sighted within said limit and suspected of poaching. I first consider the reference in sub-secs. (*a*) and (*b*) of said sec. 10 to a fishing vessel being "permitted by any treaty or convention" to fish or prepare to fish within Canadian territorial waters, or being prohibited from entering such waters for a purpose not permitted thereby. The contention of the Crown counsel on this point was that the Convention of 1818 between Great Britain and the United States respecting fisheries, boundaries, etc., applied to the Coast of British Columbia as regards fisheries.

Article 2 thereof contains this proviso:—

> Provided, however, that the American fisherman shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

And it is urged that, since upon the evidence, it clearly appears that the "Valiant" did not enter British waters for any of these special purposes, but merely spent the night before the seizure in a bay on the uninhabited Cox Island, in Canadian territory, because it was more pleasant and convenient to do so than to remain outside in rough but not dangerous waters, therefore the Convention affords no justification for her presence in said water. It is further submitted, alternatively, that if the Convention does not apply to these waters, the "Valiant" had no right at all to be where she was, thereby using Canadian bays and natural harbours as bases or points of vantage from which she could conveniently and expeditiously carry on fishing operations on the contiguous halibut banks either within or without the three mile limit.

For the defence it is submitted that said Convention does not apply to said waters, and that the "Valiant" was entitled to be where she was under the 1st article of the Convention of Commerce and Navigation of 1815 between Great Britain and the United States (conveniently given with notes in Malloy's Treaties and Conventions, vol. 1, p. 624, Wash. (1910) as follows:—

> There shall be between the territories of the United States of America, and all the territories of His Britannic Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purpose of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively.

I entertain no doubt that the Convention of 1818 (see Malloy's Treaties, *supra*, vol. 1, p. 631) does not apply to these Pacific waters, so far as fisheries are concerned, because it purports only to enter into an agreement to give the inhabitants of the United States "forever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind" on certain specified coasts of Newfoundland and Labrador, and also to dry and cure fish thereon with certain limitations. And article 2 then goes on to provide that

> The United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits: Provided, however (then follows the proviso quoted *supra*).

CAN.
EX. C.
1914
THE KING
v.
"VALIANT."
Martin, L.J.A.

Now, on this coast there never was any such "liberty heretofore enjoyed or claimed" to take fish, etc., within three miles of the British Coasts, etc.; so the proviso has no application thereto. And, furthermore, it is apparent by art. iii. relating to territorial and navigation claims "on the North-west Coast of America westward of the Stony (Rocky) Mountains" that such matters were excluded from the Convention, and that it had no reference to disputes between them or "to the claims of any other power or state to any part of the said country," which was then almost wholly *terra incognita*. Then, as to the claim under the Convention of 1815. The article already cited shews that no liberty or right whatever is given to foreign vessels to carry on fisheries, but simply, as to vessels,

> to come with their ships and cargoes to all such places, ports and rivers in the territories aforesaid to which other foreigners are permitted to come . . . but subject always to the laws and statutes of the two countries respectively.

Now, one of the laws of Canada is sec. 186 of the Customs Act, R.S.C. 1906, ch. 48, which declares that:—

> If any vessel enters any place other than a port of entry, unless from stress of weather or other unavoidable cause, any dutiable goods on board thereof, except those of an innocent owner, shall be seized and forfeited, and the vessel may also be seized, and the master or person in charge thereof shall incur a penalty of eight hundred dollars, if the vessel is worth eight hundred dollars or more, or a penalty not exceeding four hundred dollars, if the value of the vessel is less than eight hundred dollars, and the vessel may be detained until such penalty is paid.
>
> 2. Unless payment is made within thirty days, such vessel may, after the expiration of such delay, be sold to pay such penalty and any expenses incurred in making the seizure and in the safe-keeping and sale of such vessel.

Here there was no "stress of weather or other unavoidable cause" justifying the entry into this wild "place," *i.e.*, natural harbour on Cox Island, not a port of entry, which the "Valiant" was making use of for fishing purposes, and the vessel was consequently liable to seizure and sale in default of payment of fine, and her dutiable goods to forfeiture, *i.e.*, stores and supplies, gear and bait, which had been purchased in the state of Washington, and which were not those of an innocent owner, because her master, John Courage, was half owner, subject to a bill of sale. In so making use of Cox Island she was not entering a Canadian port for any one of those "innocent and mutually beneficial purposes" which were detailed by Mr. Phelps in 1886 in the *David J. Adams* case, set out in vol. 1, Moore's International Law Digest (1906), pp. 818 *et seq.* and 847, which may in appropriate circumstances be well regarded with a lenient eye.

It follows, therefore, that the "Valiant" has, by said entry of "such waters for (*a*) purpose not permitted" committed a breach of said sub-sec. (*b*), and is liable to seizure and forfeiture as therein provided. The objection was taken that as she was seized outside the three mile limit, she is not liable to seizure under the decision of this Court in *The King* v. *The Ship "North"* (1905), 11 B.C.R. 473, affirmed by the Supreme Court of Canada *sub nom. The Ship "North"* v. *The King* (1906), 37 Can. S.C.R. 385, which it was argued does not extend to an infraction of sub-sec. (*b*). A perusal of that case, however, shews that there is no such distinction, and that the same right of seizure exists in regard to that sub-section as to sub-sec. (*a*), which deals with fishing only. This is clear from the judgment of Mr. Justice Davies, with which Mr. Justice Maclennan concurred, at p. 394, as follows:—

> I think the Admiralty Court, when exercising its jurisdiction, is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws, either for the protection of its fisheries or its revenues or coasts, she may be immediately pursued into the open seas beyond the territorial limits and there taken.

And Mr. Justice Idington says, at p. 403:—

> The fundamental right existed to so legislate that a foreign vessel might become forfeited for non-observance of a municipal regulation, and be seized beyond the three mile zone. This right has been repeatedly asserted by legislation relative to breaches of shipping laws, neutrality laws, and customs or revenue laws, as well as the case of fisheries.

But, while I should feel justified in condemning the "Valiant" on this charge alone, I prefer also to consider the other charge of unlawful fishing, because of the misapprehension that may have existed in regard to liberties or rights under Conventions, but I trust that hereafter the owners of foreign fishing vessels will be careful to ascertain what their rights and duties are before venturing into these Canadian waters. I make this observation and give this warning, because, in the course of the many years' experience I have had in trying cases of this description in this Court, I take judicial cognizance of the fact that immense damage has been done to Canadian fisheries on this coast by foreign vessels using these waters and bays and natural harbours as shifting and temporary headquarters from which they have for years made repeated sudden and secret raids upon adjacent Canadian fishing banks. These acts are a gross "abuse" (to use the word employed in the Convention of 1818) of international hospitality, and the presence of such vessels in such localities without good and sufficient cause is calculated to raise a just suspicion of their motives and conduct. I again draw attention to this apt language of the Chief Justice of the United

CAN.
EX. C.
1914
THE KING
v.
"VALIANT."
Martin, L.J.A.

States (Marshall) uttered in the case of *The Exchange* (1812), 7 Cranch 116 at 144, cited by me in the *North* case, 11 B.C.R. at 476, as follows:—

> When merchant vessels enter (foreign ports) for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.

But, leaving this aspect of the matter, and turning to consider the facts of the present seizure, it is sufficient in the view I take of the matter to say, in addition to the facts already stated, that the question as to whether or no the "Valiant" was fishing within the three mile limit primarily depends upon the contention of the Crown that the halibut which were discovered in her hold that day packed in ice were caught that morning. She was first observed at 11.35 a.m., and was pursued and finally overhauled at 12.20, when Captain Newcombe, accompanied by Chief Officer Moore, went on board her. The master of the "Valiant," John Courage, says, in brief, that said fish (about two thousand, five hundred pounds in all) had all been caught the evening before between 6 and 9.15 o'clock at a point outside the three mile limit, and that he had gone to a bay or natural harbour in Cox Island, near by, to spend the night, which bay he reached about midnight. Next morning about six o'clock, the day being fine and clear, he left to return to the same halibut bank, passing the N.W. corner of Lanz Island on the way, and then setting a course about N.W. by W. ½ W., (which he had taken bearings for the night before, so as to reach said bank); and after proceeding on that course about an hour, at a speed of about 5 knots, the engine broke down and he had to lie-to for repairs, which took all on board (except the cook) about three hours to make, and the vessel during that time drifted about carried by the tide, which was setting in an easterly direction between Lanz and West Haycock Islands, till a quarter past eleven when the vessel started again, on a N.W. course, and ran on it for about 15 minutes, when the master took soundings; then ran on again for ten minutes and sounded again; then ran on for eight minutes more and sounded again; and he had, he says, just satisfied himself that he had reached the fishing bank when the "William Joliffe" was observed coming up just as the dories were being set out.

Up to this time the master affirms that no fishing had been done or attempted, and if his story is true, then he is not guilty of this charge, because he was at the time of overhauling and preparing to fish well outside the three mile limit. It will consequently be seen that if the contention of the Crown is correct that the fish were caught that morning his story cannot be

true, and the fish must have been caught within the three mile limit. It is not asserted by the Crown that the vessel fished outside the limit, but that being, or having been, engaged in fishing within the limit she stood out to sea to escape from the approaching Government ship which, being much larger, was visible to her a long way off. This fact of the time of the catching of the fish must then be determined and is of the first consequence. I have deliberated longer than usual over the facts of this case because the seizure of a vessel is an unusually serious matter, and because of the forcible manner in which Mr. Macneill has presented his client's case, and the result is, that I find I can reach only one conclusion, which is, that the fish were caught that morning within said limit. The evidence of Captain Newcombe of the state of the three halibut which he took out of the ice in the hold is, that "They were all alive, everyone I handed up; they were good lively fish, all flapping on deck," and this is confirmed by Moore, who says they "were alive—quite lively" and "wriggled on the deck" close by the feet of the master of the "Valiant." To meet this testimony there is the denial of the master, and of his cousin Mark Courage and Peter Sunde, that there had been any fish caught that day, and evidence was also given by various witnesses as to the length of time halibut will live or shew signs of life out of water on ice, or otherwise, under varying conditions. No evidence, however, was adduced that could reasonably explain the degree of vitality exhibited by these fish on the theory that they had been caught the previous night before 9.15 and since kept in ice, and the testimony of Captain Newcombe, who is the most experienced and reliable of all the witnesses on the subject is opposed to it. Moreover, this view is further supported by the fact that certain of the dories and skates of gear "had every appearance of being just hauled out of the water," and, lastly, I am the more inclined to reject the story of Captain Courage, because I regret to say the answers he gave to Captain Newcombe were unquestionably untrue, both as regards his statement that there was nothing but bait and ice in the hold, and that he had not been inside the three mile limit that day, and also, later, after he admitted that he had been inside, that he had gone in only for the purpose of getting his position. In view of these deliberate misstatements, no Court could give credence to his evidence, as against that of witnesses of unimpeached veracity, and since the facts on vital points are irreconcilably in conflict, I have no other course open to me than to find them against the defendant. It would now be unprofitable to go into other features of the case, and express my opinion thereon, so I shall content myself with saying, generally, that they have not escaped my attention.

CAN.

EX. C. 1914

THE KING v. "VALIANT."

The result is, that judgment will be entered against the "Valiant," and she is, together with her tackle, rigging, apparel, furniture, stores and cargo, hereby forfeited to the Crown.

Judgment for the Crown.

CAN.

S. C. 1913

CANADIAN PACIFIC R. CO. (defendants, appellants) v. McDONALD (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. December 23, 1913.

1. APPEAL (§ II A—35)—TO SUPREME COURT OF CANADA—AMOUNT IN DISPUTE—WORKMEN'S COMPENSATION CASES.

An appeal to the Supreme Court of Canada from the King's Bench (Que.) is not shewn to be within the jurisdiction as involving a matter in controversy to the sum or value of two thousand dollars [R.S.C. 1906, ch. 139, sec. 46], and will be quashed for want of jurisdiction, where the defendant employer is the appellant from a provisional judgment under the Workmen's Compensation Act (Que.) for $450, loss of the workman's earnings for six months, and for an annuity to the workman of $337 payable only so long as his physical condition as affected by the injury justifies the continuance of the compensation, and subject to change within a four-year period, if the appellant advances no proof of its actuarial or commercial value in view of the contingencies of the payments and the inalienability of the compensation itself; no capitalization of the "rent" payable to the workmen under the Workmen's Compensation Act, 9 Edw. VII. (Que.), ch. 66, can be considered on the question of jurisdiction until the exercise of the option as to payment to an insurance company of a sum not exceeding $2,000 on the measure of permanent incapacity being ascertained.

[*Lapointe* v. *Montreal Police Benevolent Society*, 35 Can. S.C.R. 5, and *Aqueduct Co.* v. *Verrett*, 42 Can. S.C.R. 156, referred to; *McDonald* v. *C.P.R.*, 7 D.L.R. 138, 22 Que. K.B. 207, appeal therefrom quashed.]

Statement

MOTION to quash an appeal, for want of jurisdiction, from the judgment of the Court of King's Bench, appeal side, *McDonald* v. *Canadian Pacific R. Co.*, 7 D.L.R. 138, 22 Que. K.B. 207, affirming the judgment of Fortin, J., in the Superior Court for the District of Montreal, by which the plaintiff's action was maintained with costs.

Vipond, for the respondent, supported the motion.
Holden, K.C., contra.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is a motion to quash for want of jurisdiction. The question raised is not free from difficulty, but, after careful consideration of the Act and of the jurisprudence of this Court, I have come to the conclusion that the motion must be granted.

The dispute between the parties to this litigation is with respect to the right of the plaintiff to compensation for injuries measured by the terms of the Workmen's Compensation Act of the Province of Quebec, and the question is: Does the thing in

controversy amount to the sum of $2,000? (See section 46 (*c*), Supreme Court Act.)

The compensation payable to an injured workman, under the Act, takes the form, in the case of permanent incapacity, of an annual "rent" or pension which continues during his life; but, as its amount is subject to revision (see sec. 26 of the Act), it cannot be said to be a life rent within the ordinary meaning of that term (Planiol, vol. 1, Nos. 2251 and 2783). The quantum of the rent is determined by the extent to which the earning power of the plaintiff has been reduced as the result of the injury received. That is the basis of the compensation, so that, if his earning power improves at any time within four years after judgment rendered (sec. 26), the amount of compensation awarded is liable to be reduced on cause shewn, and, if that earning power is restored, the right to compensation ceases altogether. There is this other element of contingency to be considered—the uncertainty of human life—and, in the present case, on the medical evidence, I gather that the expectation of life is very short.

It is true that the Act (9 Edw. VII. ch. 66) provides, by sec. 2 (*c*), that the capital of the "rent" shall not, except in the case mentioned in article 5, exceed $2,000. This does not mean that the employer is entitled, on payment of that sum, to escape his liability. The purpose of the statute, following the principle of the French Act, is to introduce periodical payments in lieu of a capital payment so as to protect the workman and the employer. The combined effect of secs. 2 (*c*) and 9 is to enable the workman to demand, as soon as his permanent incapacity to work is ascertained, that the "rent" payable to him shall be capitalized, and that the capital which will produce this "rent"—reduced to $2,000 if it exceeds that sum—shall be paid not to himself, but to an insurance company. It is to be observed also that there is grave doubt as to whether it can be said that the permanent incapacity to work can be ascertained until the four years' period, during which the amount of the pension is subject to revision, has expired. In any event, it is only when this option is exercised that any "capital of the rent" comes into existence. That being the measure and the nature of the plaintiff's right, is it possible for us to say that there is in controversy between the parties a thing which has a value realizable in money to the extent of $2,000? I fail entirely to see how a right, the existence of which is dependent upon so many contingencies and which, under the terms of the statute is intended to provide the workman with a pension payable quarterly *only so long as his physical condition as affected by the injury is such as to justify its payment*, can be said to have any commercial value at all. It is not a thing which is *in commercio*, more particularly in view of those provisions of the statute which make the pension inalienable, not seizable (sec. 12), and subject to revision by the Court as above stated.

CAN.

S.C.
1913

C. P. RY.
v.
MCDONALD.

Sir Charles Fitzpatrick, C.J.

The practice of this Court in cases arising in Quebec seems to be against our jurisdiction. In *Toussignant* v. *County of Nicolet*, 32 Can. S.C.R. 353, Taschereau, J., speaking for the Court, said:—

> It is settled law that neither the probative force of the judgment nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount.

In *Talbot* v. *Guilmartin*, 30 Can. S.C.R. 482, the relief asked for included a condemnation to pay $18,000, money alleged to have come into the hands of the appellant, and, notwithstanding, the Court refused to entertain the appeal. The last case is *La Compagnie d'Aqueduc de la Jeune Lorette* v. *Verrett*, 42 Can. S.C.R. 156, in which it was held that this Court was without jurisdiction. In that case the plaintiff asked for a declaration that certain rights and privileges to construct an aqueduct were exclusive. The value of those rights was shewn, on affidavit, to far exceed the appealable amount.

On the whole, therefore, I am of opinion that we are without jurisdiction, because, as the Chief Justice said, in *Macdonald* v. *Galivan*, 28 Can. S.C.R. 258, "there is no direct claim for a definite sum of $2,000," or as the Chief Justice said, in *Lapointe* v. *The Montreal Police Benevolent and Pension Society*, 35 Can. S.C.R. 5, the "value of the demand is a contingent one depending upon his life."

It may be that I have been influenced in reaching this conclusion by the fact that the Quebec Workmen's Compensation Act specially limits appeals (see sec. 22), and to allow an appeal here in a case like this would be contrary to the spirit of the Act. In any event, in case of doubt, the question should be resolved against jurisdiction. *Interest reipublicæ ut sit finis litium.*

Davies, J. (dissenting)

DAVIES, J. (dissenting):—Our jurisdiction to hear this appeal is challenged by a motion to quash on the ground that the "matter in controversy" does not "amount to the sum or value of $2,000," within sec. 46 of the Supreme Court Act. The action was one brought by a workman against his employer under the Workmen's Compensation Act of Quebec, R.S.Q. 1909, art. 7321 *et seq.* The claim of the plaintiff was to recover $450 for one-half year's earnings during incapacity to earn wages before action and also for a life rent or indemnity of $337 per annum. The judgment awarded the plaintiff a life rent of $247.50 per annum to commence on the 24th December, 1911.

The capitalized value of this life rent or annuity at 3% would amount to $8,266; at 4% to $6,175; at 5% to $4,940; and at 6% to $4,116.66; and if such capitalized value can be taken to be directly involved in this case as a matter in controversy between the parties no doubt could exist as to our jurisdiction.

While in the ordinary case of a life rent or annuity its value would be simple of calculation, in cases such as this its continuance would be subject to so many contingencies that its value would be difficult, if not impossible, for an appeal Court to determine. That value would depend largely upon the condition and state of health in which the injuries of the annuitant arising from the accident left him. The ordinary annuity tables, owing to the contingencies arising from the condition and state of health of the workman, might be quite inapplicable and the difficulties of placing an estimate upon its value almost insuperable.

The evidence in the record of the case we have now before us affords an excellent illustration of these difficulties; and if we were driven to estimate the value of the life-rent from this evidence we might well conclude that the case is not within our jurisdiction.

The two medical men examined as experts differed on some material points. Dr. De Martigny's opinion was that as the result of the accident two surgical operations were necessary, one to cut off one of the workman's legs very high up near the thigh and the other to cut off one of his arms. Dr. Archibald did not concur in this view so far as the arm was concerned.

For us, as an appeal Court, to attempt to determine the contingencies of life or death which might follow one or both of these operations so as to estimate the value of the life-rent and determine whether we have jurisdiction to hear the appeal is a course which, I feel certain, our Supreme Court Act never contemplated as one of our duties: *Lapointe* v. *Montreal Police Benefit Pension Society*, 35 Can. S.C.R. 5. It seems to me, however, that the Workmen's Compensation Act relieves us of all these difficulties and establishes the value of the life-rent for us. Article 7329 of the Revised Statutes of Quebec (1909) reads as follows:—

> As soon as the permanent incapacity to work is ascertained, or in case of death of the person injured within one month from the date of the agreement between the employer and the parties interested, or if there be no agreement, within one month from the date of the final judgment condemning him to pay the same, the employer shall pay the amount of the compensation to the person injured or his representatives, or, as the case may be, and at the option of the person injured or of his representatives, shall pay the capital of the rent to an insurance company designated for that purpose by order in council: 9 Edw. VII. ch. 66, sec. 9.

That section confers upon the injured workman, who has obtained judgment for a life-rent, the right to demand payment of "*the capital of the rent* to an insurance company designated by order in council," and imposes upon the employer the obligation to make the payment of such capital when demanded.

That being so, it appears to me that the capitalized amount of the life-rent awarded the workman is a matter in controversy in this action directly flowing from the judgment awarding the life-rent itself; and it being declared by art. 7322, sub-sec. 2,

CAN.

S. C.
1913

C. P. RY.
v.
MCDONALD.

Davies, J.
(dissenting)

that the capital shall not exceed $2,000, in cases such as this that amount at least is in controversy.

The Workmen's Compensation Act of Quebec, by imposing the obligation upon the employer of paying over the capital representing the life-rent to a company as security, in part at least, for the payment of the life-rent to the workman, has put a statutory value for that purpose upon the life-rent.

In my opinion such a correlative right and obligation arising directly from and being a direct consequence of the judgment awarding the life-rent gives us jurisdiction in cases where such capitalized value is not less than $2,000, which it obviously is not in this case.

The statute does not release the defendant from its obligation to pay the life-rent adjudged to the plaintiff, but capitalizes it at an arbitrary maximum limit of $2,000. It confers upon the plaintiff the right within one month from the date of the final judgment to compel "payment of the capital of the life-rent (not exceeding $2,000) to an insurance company."

In the case now before us that maximum limit would obviously be the sum which the plaintiff had a right to demand should be paid and which the defendants were bound to pay over. Unless, therefore, we are prepared to say that we could enter upon a consideration of the contingencies or possibilities under which that $2,000 might be reduced it seems to me the appeal is within our jurisdiction.

Idington, J.

IDINGTON, J., concurred in the opinion of the Chief Justice.

Duff, J.

DUFF, J.:—The question to be determined on this application is whether or not we have jurisdiction to entertain the appeal under sec. 46 (*c*) of the Supreme Court Act; in other words, whether in the suit out of which this appeal arises "the matter in controversy . . . amounts to the sum or value of $2,000."

The effect of the accident from which the respondent suffered was to produce "an absolute and permanent incapacity" within the meaning of art. 7322 (*a*) of the Revised Statutes of Quebec, 1909, and the respondent, therefore, became entitled to a "rent" for life equal to 50% of his yearly wages, subject to any question which might arise under art. 7322 (2), R.S.Q. 1909, and to the contingency of "revision" under art. 7346. The respondent, moreover, is entitled, at his option, under art. 7329, R.S.Q. 1909, to require the appellants to pay the capital of the "rent" to an insurance company "designated for that purpose by order-in-council."

It seems to be manifestly impossible to say that the amount "demanded" by the respondent in his action was equal to the sum of $2,000. The respondent "demanded" a judgment entitling him to a life-annuity which, in the aggregate, might or might not amount to that sum. I think that is not sufficient to bring the

case within the first alternative of sub-sec. (c) of sec. 46 of the Supreme Court Act.

As to the second alternative ground of jurisdiction, under that sub-section, I am inclined to think that "the matter in controversy" can only "amount to . . . the value of $2,000," within the meaning of the words to be construed, when the plaintiff is claiming something other than the mere payment of money. That seems to be the more natural construction, and it was, moreover, the view which was taken by this Court, apparently, in *Lapointe* v. *The Montreal Police Benevolent and Pension Society*, 35 Can. S.C.R. 5. Assuming, however, that in this case "the matter in controversy" ought to be regarded as the right claimed by the plaintiff to be paid the statutory annuity subject to the statutory incidents and conditions (and that the case, consequently, is covered by the sub-section in question, if the value of that right can be said to amount to $2,000), I think the appellants still fail because there are no grounds before us justifying the conclusion that the right claimed and established has a value equal to that sum. Unfortunately the accident has left the respondent's expectation of life in a state of very grave uncertainty, and not only has no attempt been made to put a capital value upon the right established by the judgment he has recovered, but it would seem that any attempt to do so could hardly, in the circumstances, be expected to result in any conclusion sufficiently definite to serve as a guide for the purposes of this application.

Counsel for the appellants rested exclusively upon the provision of art. 7322 (2), arguing that this enactment was a statutory declaration as to the value of the annuity when the incapacity is permanent. I am afraid I cannot follow this contention. There is nothing whatever to indicate that, in fact, the legislature had in mind any such object in framing this provision; in any case, it would still be our duty to apply sec. 46 (c) of the Supreme Court Act according to the proper construction of the words used by the Parliament of Canada, and we should be obliged to hold that our jurisdiction, under that provision, only arises when "the matter in controversy" is, in fact, shewn to amount to "the sum or value of $2,000." The requirement imposed by art. 7329, R.S.Q. 1909, by which the employer comes under an obligation to pay the capital of the "rent" to an insurance company, does not help the appellants. It may be open to dispute whether, on the one hand, this article contemplates that the incidence of the obligation established by the judgment shall fall thenceforth upon the insurance company exclusively (the employer being relieved and the amount to be paid being determined by arrangement between the employer and the insurance company), or, on the other hand, the sum here required to be paid to the insurance company is merely intended to stand as security for the due performance by the employer of his obligation. Whichever view

CAN.
S. C.
1913
C. P. RY.
v.
MCDONALD.
Duff, J.

be taken of the effect of the article it can give no help to the appellants on this application. If the moneys paid are intended to stand as security only, then it seems plain that such an obligation to provide security, as a right incidental to the judgment, can afford no final criterion for determining the value of the matter in controversy in the proceedings leading up to the judgment. If, on the other hand, it is to be regarded as the purchase price of an annuity to be paid to the plaintiff by the insurance company, we have no means before us of ascertaining, with any degree of certainty, the amount of it; and until, at all events, the sum has been actually determined by payment, the attempt to ascertain the probable amount of it, in effect, resolves itself into an attempt to appraise the value of the plaintiff's right with all the attendant difficulties already indicated.

Anglin, J.

ANGLIN, J.:—Our jurisdiction in this appeal depends upon whether the matter in controversy, according to the plaintiff's claim based on the R.S.Q. 1909, arts. 7321 *et seq.*, amounts to the sum or value of $2,000: Supreme Court Act, sec. 46.

Except the decision in the case of *Lapointe* v. *Montreal Police Benefit Pension Society*, 35 Can. S.C.R. 5, I know of no authority binding on this Court which requires us to hold that where the plaintiff's right to an annuity or pension is the subject of litigation, the value of the matter in controversy is to be deemed limited to the amount of the first annual payment. There are dicta of some Judges susceptible of such an interpretation, to be found in cases in which the actual claim in the action was limited to a single instalment of a periodical payment. But these cases are so obviously distinguishable that reference to them is unnecessary. In such cases it is the settled jurisprudence of this Court that jurisdiction will not be entertained, although the effect of the judgment in appeal may be to determine the rights of the parties in regard to payments which, in the aggregate, must amount to a sum greater than $2,000. Although it is on the authority of such cases that the *Lapointe*, 35 Can. S.C.R. 5, decision is based, under the doctrine of *stare decisis* I bow to its authority, but, if free to do so, I would respectfully decline to follow it. An ordinary annuity or pension has a market value capable of ascertainment and that value is the amount in controversy where the judgment in the action determines directly the right to the entire annuity or pension and all future payments thereof are exigible by process issued under such judgment. The *Lapointe* case, however, is not decisive of the question of jurisdiction now before us. In the present case, as is pointed out by my Lord, the Chief Justice, we are not dealing with an ordinary annuity. The pension, or the "rent," as the statute terms it, awarded by the judgment is inalienable, and its amount is subject to revision during the ensuing four years and to reduction if the plaintiff's

earning capacity should increase. (Art. 7346.) The evidence of Dr. deMartigny discloses that the plaintiff may have to undergo one or perhaps two serious and perilous operations in the near future. It is not unreasonable to assume that in determining the amount of the compensation awarded this view of the situation was accepted. There is no evidence before us of the plaintiff's expectation of life. In the peculiar circumstances of this case it would probably be very difficult to obtain testimony, and it would seem to be extremely unlikely that reliable actuarial evidence could be procured that the annuity or pension claimed by the plaintiff, if awarded as claimed, would have a value of not less than $2,000. Upon that aspect of the case, quite apart from the authority of the *Lapointe* decision, I would not be prepared to affirm jurisdiction.

The matter in controversy, however, is to be regarded from the point of view of the defendants as well as from that of the plaintiff. It is true that in extent the plaintiff's right and the defendants' responsibility are correlative; but the real value of the matter in controversy may perhaps be better appreciated if regarded from the point of view of the liability imposed upon the defendants, who are seeking to appeal. Under art. 7329 the defendants may, at the option of the plaintiff, be required to "pay the capital of the rent to an insurance company designated for that purpose by order in council." It is this feature of the present case which distinguishes it from *Lapointe* v. *Montreal Police Benefit and Pension Society*, 35 Can. S.C.R. 5. By sub-sec. 2 of art. 7322 it is provided that:—

> The capital of the rents shall not, however, in any case, except in the case mentioned in art. 7325, exceed $2,000.

The present case is not within art. 7325. As a direct result of the judgment in many cases under the Act, the defendants may be required to pay to an insurance company a sum of $2,000.

It has been suggested that this sum is to be paid merely by way of security; that it remains the property of the defendants to be repaid to them when the rent ceases; and that payment of it does not relieve them from their liability to pay the rent itself. If that be the purpose and effect of the payment of the capital to an insurance company, there is, no doubt, much to be said in favour of the view that the capital so payable is not the real matter in controversy between the parties, but only something incidental to the claim and judgment, which does not confer jurisdiction: *Talbot* v. *Guilmartin*, 30 Can. S.C.R. 482.

As at present advised, I am, with respect, unable to take that view of the legislation. Nowhere in the Act is it stated that the capital of the rent to be paid to the insurance company, under art. 7329, is to stand merely as security. On the contrary, by art. 7331 provision is made for determining the conditions upon which the Lieutenant-Governor in Council may authorize insur-

CAN.

S. C.
1913

C. P. RY.
v.
MCDONALD.

Anglin, J.

ance companies "*to pay* the said rents in virtue of this sub-section." And, by art. 7340, it is provided that the compensation shall be secured by a privilege upon the defendant's property "so long as the sum necessary to *procure* the required rent has not been paid to an insurance company."

In view of these provisions of the statute, the purpose of the payment of the capital of the "rent" provided for by art. 7329 seems to me to be not the giving of security for the continued payment of the rent itself by the defendants, but the purchase or procuring for the plaintiff, from an authorized insurance company, of a pension or annuity equal in amount to the compensation to which the judgment entitles him. Subject to a possible right of refund *pro tanto* in the event of a revision of the compensation under art. 7346, the capital, when paid to the insurance company, would, in the view which I suggest, cease to be the property of the defendants and become the property of the insurance company, which would, thereafter, assume the sole liability for the rent. If this were not intended, but the real purpose were merely the giving of security for the future payment of the rent by the defendants, I find it difficult to understand why an insurance company should be selected as the depositary. If as a direct result of the judgment, therefore, the defendants would be liable, at the plaintiff's option, to pay a sum of $2,000, I would be prepared to hold that they might appeal to this Court. From their point of view, in that case, their liability to pay a sum of $2,000 would be a real matter in controversy in the action. But it is not, in the present case, necessary to determine what is the proper construction of the Quebec legislation, and as the question was not argued, it is not desirable to do so.

On the view of the statute to which I am at present inclined, the $2,000 is a maximum and it was not intended to require the defendant to pay that sum in every case regardless of the physical condition or the state of health of the plaintiff. In many cases in which an annuity larger than that awarded to the present plaintiff is given, the nature of the injuries sustained or the delicate health of the injured person would enable the defendant to procure an insurance company to undertake his obligation for a sum less than $2,000. No doubt it is the policy of the Government to authorize a sufficient number of insurance companies to deal in these "rents" to secure to defendants the benefit of real competition. To determine what capital sum a defendant would be required to pay under the statute, in order to procure for the plaintiff a "rent" from an insurance company, would necessitate the giving of evidence on which a finding of the plaintiff's expectation of life under all the circumstances of the case could properly be based, and actuarial testimony of the market value of his annuity based upon such expectation. The contingency of revision would also have to be taken into account. I cannot think

that the Supreme Court Act contemplates our entering upon such an inquiry to determine jurisdiction. But if it does, we have not the necessary evidence in the present case. Upon the material before us it is not possible to say what is the market value of the plaintiff's annuity; it is not possible to say what sum the defendants might be required to pay as capital of the rent to an insurance company under art. 7329. It is, therefore, not established that the matter in controversy amounts to the sum or value of $2,000.

Anglin, J.

For these reasons I concur in granting the motion to quash this appeal.

BRODEUR, J.:—I concur with the Chief Justice.

Brodeur, J.

Appeal quashed with costs.

BUTCHER v. STUCKEY.

ALTA.
S. C.
1914

Alberta Supreme Court, Scott, J. January 27, 1914.

1. FIRES (§ I A—6)—FROM THRESHING ENGINE—FAILURE TO EXTINGUISH.

Where the defendant in removing his threshing engine from the plaintiff's premises, upon which he had been threshing grain under contract with the plaintiff, takes inefficient means to extinguish the ash-pile from his engine with the result that fire spreads therefrom, the omission constitutes negligence.

Statement

ACTION for damages to the plaintiff's grain and granary alleged as caused by the defendant's negligence in omitting to extinguish the ash-pile from his threshing engine upon quitting the premises, and for wrongful seizure under a threshers' lien.

Judgment was given for the plaintiff on the negligence claim and for the defendant as to the alleged excessive seizure.

J. W. McDonald, for the plaintiff.

J. L. Fawcett, for the defendant.

Scott, J.

SCOTT, J.:—The plaintiffs' claim is for $545 for damages to their grain and granary by fire which they alleged was caused by the defendant's threshing engine, and $800 damages for wrongful distress and sale by the defendant of certain grain.

The defendant was threshing for the plaintiffs on their farm, and having finished on October 2, 1912, he removed his engine and threshing outfit about 3.30 p.m. on that day. One of the plaintiffs, who lives about half a mile distant, was the first to see the fire, and he saw it about an hour after the engine was removed. It is not shewn how long it had been burning before he saw it. The engine had been stationed about 30 or 40 feet west of the granary and a strong wind was blowing from the west that afternoon. There was a conical pile of ashes at the place where the engine was stationed and the grass and straw around it and between it and the granary were burned. This affords strong evidence that the fire had spread from the ash-pile. For the defendant it was shewn that it was the custom to sprinkle 30 or 40 times a day the ashes as they were removed from the engine.

ALTA.
S. C.
1914
BUTCHER
v.
STUCKEY.
Scott, J.

This was usually done by a hose from the boiler under 120 pounds pressure, but it appears that, at the time the engine was removed, they were sprinkled from a pail, with the probable result that the fire was not wholly extinguished.

That the fire started from the ash-pile is the only reasonable theory, as it appears that no one had been near the place from the time the engine was removed until after the fire started. I therefore, hold that the fire was due to the negligence of the defendant.

The defendant broke open the plaintiffs' granary and removed therefrom and sold certain grain belonging to them. He claims that he was entitled so to do by virtue of a thresher's lien.

The quantity of grain removed and sold by the defendant was slightly in excess of that required, when sold at the market price, to satisfy his lien and the cost of hauling same to market at the rate of 7½c. per bushel. The excess amounted to $17.50, for which amount the defendant delivered to the plaintiffs a marked cheque stating it on its face to be the balance in full of threshing account. Plaintiffs never presented the cheque for payment. It is now on the files of the Court, and, in view of what I am about to state, I see no reason why it should not be delivered to the plaintiffs or why they should not obtain payment thereof from the bank on which it is drawn. I, therefore, order its delivery to them. It is open to question whether the defendant was entitled to sell the grain held by him under his thresher's lien without first obtaining, by the necessary proceeding, the authority of the Court to do so, but it is unnecessary for me to decide that question, as I am of opinion that the plaintiffs have not suffered any damage by his act. The grain was sold at the then market price and there is no evidence that the market price has since increased and the amount deducted by him for hauling the grain to market and disposing of it was not in excess of the amount he would be reasonably entitled to.

The plaintiffs claim that 1,342 bushels of wheat were damaged and 303 bushels totally destroyed by the fire, in all 1,645 bushels. The only evidence as to the quantities was that of one of the plaintiffs to the effect that about 800 bushels were totally destroyed and about 700 bushels damaged, making 1,500 bushels in all. As they claim $480.50 in respect of 1,600 bushels, their claim should be reduced in proportion.

I give judgment for the plaintiffs for $465, made up as follows:—

Loss and damage to grain	$420
Damage to granary	45
	$465

Plaintiffs will also be entitled to costs of suit.

Judgment accordingly.

VANCOUVER ENGINEERING WORKS v. COLUMBIA.

B. C.

S. C. 1914

British Columbia Supreme Court, Murphy, J. March 26, 1914.

1. CORPORATIONS AND COMPANIES (§ IV G 2—116a)—POWERS OF OFFICERS—SCOPE OF APPARENT AUTHORITY—MANAGER.

It is sufficient for persons dealing with the managing director of a company in the ordinary course of business and *bonâ fide*, if the articles of the company shew that he might have the powers which he purports to have, and a promissory note taken in such circumstances is *primâ facie* enforceable.

[*Doctor* v. *People's Trust Co.*, 16 D.L.R. 192, applied.]

2. CORPORATIONS AND COMPANIES (§ IV D 1—77b)—PROMISSORY NOTE, POWER TO MAKE.

Where a company takes, within the purview of its charter powers, a chattel mortgage to protect credits extended by the company, it may be within the ordinary scope of its business, when such mortgage security is threatened by a creditor of the mortgagor, to avert the danger by giving the promissory note of the company as additional security for the creditor's debt and so in effect protecting the company's own mortgage.

Statement

ACTION on a promissory note made by a company, the defence being that the company's memorandum of association does not authorize the transaction out of which the note arose.

Judgment was given for the plaintiff.

Martin Griffin, for the plaintiff.

R. C. Spinks, for the defendant.

Murphy, J.

MURPHY, J.:—The law on the validity of acts by officers of a company is clearly laid down in the judgment of Irving, J.A., delivering the judgment of the Appeal Court in *Doctor* v. *People's Trust Co.*, 16 D.L.R. 192. It is sufficient for persons dealing with the managing director of a company in the ordinary course of business and *bonâ fide*, if the articles of the company shew that he might have the powers which he purports to have.

Section 27 of the articles expressly confers power to sign notes on the officers who did sign the one herein sued upon. The only remaining question is whether the memorandum of association authorizes the transaction out of which this note arose. The company's principal object is that of contractors and builders, with particular reference to public, municipal, and private works, such as paving, etc. They may engage in, *inter alia*, the acquisition of stone, etc. They may do all acts and things necessary or convenient to carry out the objects of their incorporation.

Clearly, I think they can take chattel mortgages to protect credits which they may have extended. If they can, then, under the law as laid down in the above cited case, a person dealing *bonâ fide* in the ordinary course of business is not called upon to enquire whether such chattel mortgage is in fact given for a

B. C.
S. C.
1914
VANCOUVER ENGINEERING WORKS v. COLUMBIA.
Murphy, J.

purpose within the scope of the company's powers or not, where such person in no way relies on such chattel mortgage to establish his case. I think also it may be within the ordinary scope of business for such a company, having obtained a chattel mortgage and being threatened by a creditor of the mortgagor, to give its own note as additional security for the creditor's debt, to the end that no legal proceedings be taken either to upset the mortgage or to impair possibly a security by judgment and execution, the result of which might be to end the mortgagor's business. I think the plaintiff is entitled to judgment with costs.

Judgment for plaintiff.

NEROS v. SWANSON.

ALTA.
S. C.
1914

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Simmons, JJ. April 25, 1914.

1. EVIDENCE (§ VII F—620)—EXPERT EVIDENCE—ENGINEER'S ESTIMATES FROM PLANS.

A finding at the trial on the quantum of damages based on an engineer's estimate of quantities ascertained from plans will be reversed on appeal where a discrepancy, unnoticed at the trial, clearly appears between the condition of the work as shewn by the testimony and that indicated by the plans, if the alterations in the work subsequent to the plans had necessarily made an estimate of quantities on the basis of the plans unreliable.

[*Neros* v. *Swanson*, 1 D.L.R. 833, varied.]

Statement

APPEAL from the judgment of Scott, J., *Neros* v. *Swanson*, 1 D.L.R. 833, involving a finding as to the amount of damages based on an engineer's estimate of railway construction work.

The appeal was allowed and the judgment varied.

J. M. Macdonald, for the plaintiff, respondent.

O. M. Biggar, K.C., for the defendant, appellant.

Harvey, C.J.

HARVEY, C.J.:—The plaintiffs entered into a contract to do certain grading on the Canadian Northern Railway with the defendants, who were themselves sub-contractors of one D. F. McArthur. The work was to be completed by November 1, 1911. It was not completed by that time, and on the 27th of that month the defendants took the work out of the plaintiff's hands. They had the right to do this under the contract by giving three days' notice in writing. The notice was not given, and the learned trial Judge held that they had wrongfully ousted the plaintiffs. This finding is not now questioned, the only question raised on the appeal being the quantity of work done for which the plaintiffs are entitled to compensation. The learned trial Judge found that the plaintiffs were entitled to $3,159.10, from which must be deducted $2,735.52, the value of goods supplied by the defendants

to plaintiffs, and gave judgment for the plaintiffs for the difference, $423.58. [*Neros* v. *Swanson*, 1 D.L.R. 833, 20 W.L.R. 175.]

The statement of claim alleges that the plaintiffs had excavated 16,500 yards of material, for which, with $120 for overhaul and $60 for grubbing, they were entitled to $8,962, and that there still remained under the terms of the contract 800 yards which they were prevented by the defendants from excavating, on which they would have made a profit of $80, which they claim as damages. This claim for damages was disallowed by the trial Judge, and I think quite reasonably, because the work remaining to be done was the most difficult part of the work. The work consisted in excavating for a considerable cut and placing the material excavated on the grade at each end of the cut where filling was necessary. The cut is one of about 700 feet in length and between 15 and 20 feet in depth at the deepest place. According to the specifications, when the cut was completed it should be of a certain width at the base, and the sides should slope back at the ratio of 1½ to 1. At first the cut was made with the requisite width at the base, but having the side walls practically perpendicular. On one side the proper slope was made and as well on the other side for about 75 feet at one end and a few feet at the other. Under the engineer's instructions no attempt was made to slope the remainder, as it was intended to take the material back for some distance to fill in beyond one end of the cut. A commencement was made at excavating this when the defendants took the work out of the plaintiff's hands. The plaintiffs and defendants thereupon requested Mr. Chappelle, the resident engineer for the railway, to measure the work. He was unable to do this until the 2nd of December, at which time further excavation had been made, so that he was then unable to tell exactly how much of this subsequent excavation had been made by the plaintiffs. He therefore measured the cut as if the vertical wall were continuous throughout the length of the cut except as sloped at each end, telling the parties they would have to adjust between themselves the small additional amount of excavation. Sometime subsequently in January, a few days before the trial, the plaintiffs procured an engineer named Lynn to make a measurement and classification. Mr. Chappelle and the plaintiff Neros gave him assistance and information from which he made his measurements and calculations, and Neros swore that the information he gave was correct. The contract contains no provision for the ascertainment of the quantities, but the following evidence is given by Neros:—

Q. It was understood, of course, that you were to get paid on the C.N.R. engineer's estimate? A. Yes.

Q. That is the way they all get paid. There is never a contract made on any railway work that is not on those terms, except day-labour? A. No.

Q. The engineers of the railway for whom the railway is being built,

ALTA.

S. C.
1914

NEROS
v.
SWANSON.

Harvey, C.J.

that is right, isn't it? They give their surveys to the engineers of the railway for whom the railway is being built? A. Yes.

Q. That is both as to quantities and classification? A. Yes.

Mr. Chappelle gave the quantity excavated as 7,174 yards, classified to amount to $2,760.81, not including the small excavation referred to above, which the learned trial Judge states "was shewn to be about 100 yards," which the same engineer classified to amount to $27.10. Lynn's measurement gave 9,210 yards, classified so as to amount to $3,130.60. The learned trial Judge accepted the latter.

It is not necessary to consider whether we are bound to accept the measurements and classification of the railway engineer, because Mr. Biggar, for appellant, has shewn, to my satisfaction, that the difference between the two is apparent and not real. Mr. Lynn did not state what particulars he received to enable him to make his measurements and calculations, but he did produce a plan shewing the cross-sections for each fifty feet from which he ascertained the quantities. These cross-sections shew both sides of the cut sloped as they would have been if the work had been completed according to the specifications. In the deep part they shew also an excavation back of the sloped side, which is the one referred to as made for the purpose of obtaining further filling material. The quantity of this latter he measured and found to be 1,865 yards, which is not included in the 9,210, the total being 11,075. The company's engineer, without having measured this excavation, estimated it at 3,800 to 4,000 yards, which, added to the quantity he ascertained by his measurements of 7,174, would make his total from 10,974 to 11,174, which is practically identical with Mr. Lynn's total.

From Lynn's plan it is apparent that if the information he received was correct it was insufficient or was misunderstood, and, in consequence, he has included what should not have been included, and his result is therefore erroneous. On the other hand, in view of the trial Judge's finding that the quantity not included in Mr. Chappelle's estimate was shewn to be 100 yards, there seems no reason why his computation, with that addition, should not be accepted. The amount would then be $2,760.81 and $27.10, or $2,787.91 instead of $3,130.60. The amount allowed should, therefore, be reduced by $342.69, the difference between these two sums.

The plaintiff Neros, on the day of the issue of the writ, swore, in an affidavit made for the purpose of attaching by garnishee proceedings the moneys owing from the contractor McArthur to the defendants, that the defendants were justly and truly indebted to the plaintiffs in the just and full sum of $8,962, as shewn in par. 4 of the statement of claim. As above stated, this was stated to be for 16,500 yards of material excavated, though, as shewn above, the total quantity excavated was less than half that. In his cross-examination he stated that before he made

the affidavit he had made a rough measurement of the work and found that it was about 12,000 yards. He admitted also that he knew there was a contra account for supplies which he knew amounted to at least $1,300 or $1,400. In view of these facts, I am of opinion that the plaintiffs are not entitled to any special consideration either in the matter of costs or otherwise.

I would, therefore, allow the appeal with costs and vary the judgment in plaintiff's favour by reducing it by $342.69, which would leave it at $80.90 with the costs appropriate to a judgment of that amount.

Harvey, C.J.

STUART, J., concurred with HARVEY, C.J.

Stuart, J.

BECK, J., concurred with SIMMONS, J.

Beck, J.

SIMMONS, J.:—The plaintiffs were sub-contractors of the defendants between stations 186 and 205.5 on the Canadian Northern Railway. The plaintiffs' contract consisted of making a cut and a fill between these stations. When the plaintiffs' contract was nearly completed, the defendant ousted the plaintiff and continued the work of cutting away the hill for the purpose of making a fill beyond the limit of plaintiffs' contract. A dispute as to the amount of earth removed from the cut by the plaintiffs arose, and both parties requested the resident engineer to estimate this amount, and this was done by him some five days after the defendants took over the work, and he estimated the amount due to the plaintiffs at $2,787.91. They were not satisfied with this, and employed one Lynn, an engineer, to estimate the amount which they had taken out.

Simmons, J.

The learned trial Judge found that the defendants had wrongfully ousted the plaintiffs, and allowed them $3,130.60 on the basis of Lynn's measurement. [*Neros* v. *Swanson*, 1 D.L.R. 833, 20 W.L.R. 175.]

It appears that when Lynn made his computation the defendants had removed a considerable part of the hill on the south side beyond the cut required by the plaintiffs' contract. Lynn had to rely on what the plaintiffs told him as to how far south the plaintiffs' excavations extended. The cross-cuts of sections on the work found by Lynn to have been excavated by the plaintiffs shew the south side to be sloping, as it would probably have been sloped if no more had been taken out than was required by the profile and specifications of the railway company. The evidence at the trial warrants the inference that the south side of the cut was almost perpendicular when the plaintiffs ceased work, and I think the balance of probabilities is in favour of the view that the difference between the estimates of the two engineers is accounted for by this circumstance. The discrepancy between the actual shape of the cut on the south side as disclosed by the evidence (oral), and as shewn by the cross-sections of Lynn, apparently was not brought to the attention of the trial Judge, but it was the main ground urged before us for rejecting the

ALTA.
S. C.
1914
NEROS
v.
SWANSON.
Simmons, J.

estimate of Lynn, and is the ground on which the members of the Court have concluded that the judgment should be reversed and judgment entered on the basis of the estimate of Chappelle, the resident engineer.

I would therefore allow the appeal and enter judgment for the plaintiff for the amount found due in the judgment of the Chief Justice. As it is quite obvious that if counsel for the defendants had brought before the trial Judge the argument relied on before this Court the trial would probably have resulted in judgment for the proper amount, I would allow no costs of the appeal.

Appeal allowed.

ALTA.
S. C.
1914

MITCHELL v. ALBERTA STEAM LAUNDRY.

Alberta Supreme Court, Walsh, J. April 17, 1914.

1. SPECIFIC PERFORMANCE (§ I D—27)—PARTNERSHIP—AGREEMENT FOR ONE PARTNER BUYING OUT THE OTHER.

While an agreement for the purchase by one partner of the other's share may be the subject of specific performance in a proper case, that remedy must be refused where the alleged agreement was vague and uncertain as to whether the liabilities were to be assumed or divided and as to other material points.

Statement

ACTION on an alleged agreement for the sale of an interest in a partnership.

The action was dismissed.

F. E. Eaton, for the plaintiff.

McGillivray, for the defendant.

Walsh, J.

WALSH J. (oral):—I doubt very much if either the Statute of Frauds or the Sales of Goods Ordinance applies to such a contract as this. The contract was practically one for the dissolution of a partnership involving the purchase by the defendant company of the plaintiff's interest in the partnership. Although I have not had time to consider the question at all, I am rather inclined to think that it is not a contract for the sale of goods or wares, or merchandise. It is, I think, something more tangible, more substantial, in the shape of personal property, than an interest in a partnership concern, which is intended to be covered by those two statutes. I think such an agreement as this, in a proper case, is one in which specific performance could be decreed. I do not think, however, that any decree for specific performance can be made in this case. The contract is too vague, too uncertain, to enable the Court to say, with any certainty, what it is. The letters which are in evidence shew simply the price which was agreed upon between the parties for the plaintiff's interest in the partnership assets. It is quite plain, from the oral evidence, that there were a great many other things involved in the carrying out of this arrangement with respect to which nothing definite seems to have been arrived at at all. One of the terms was that the plaintiff was not to engage in a similar

business, but the exact arrangement in that respect is very uncertain. He was to place his services at the disposal of the defendant company for some time, but the same lack of certainty is evidenced there. Then there is a doubt as to what the contract really involved. The contention on one side is that there was a sale of the assets and assumption of the liabilities by the defendant company, and on the other hand that the liquid assets were to be divided evenly between the parties, and the liabilities to be assumed in even shares by them. I find it so impossible, from the evidence before me, to determine exactly what the contract was in any of these respects, that it would be a matter of impossibility to decree specific performance of it. Even if specific performance could not be decreed on this ground, on this ground of uncertainty, I suppose that the plaintiff might have some right to damages for breach of contract, but I do not find the contract definite enough even for that. If I was to assess damages, I do not see that I could give him more than nominal damages in any event. He says himself that he has suffered damage to the extent of $2,000, but that is something which simply rests in his mind, without anything tangible to fasten it to. From his own statement the business at the time of these negotiations was a prosperous going concern, making a large dividend, and it is on the same footing now, according to him, and there is absolutely nothing before me by which I could say that any damage has been suffered by him by reason of the breach of the contract. So that in any event, if I was to assess damages to him it would be for a purely nominal amount. I certainly do not intend to pay any attention at all to the allegation of the defendant company as to the liabilities being larger than stated by the defendant at the meeting on December 15. They undoubtedly were larger, but I do not think that that was a material representation at all, because it was so easily capable of adjustment. It would have been quite competent for the defendant company, if these negotiations had been carried through, to have adjusted the matter by deducting from the agreed price the excess of the liabilities over the amount which the plaintiff placed them at, and in that way no possible prejudice could have resulted to the defendant by this over-statement of the liabilities.

I think, however, from what has appeared before me, it is eminently a case in which a decree for dissolution of the partnership might be made with the consent of both parties. I am satisfied, from what I have heard, that in an action brought for that purpose, a decree for dissolution would be granted, but it is not asked for by the pleadings, and even if plaintiff asked for it now, I could not, in view of that fact, grant it without the consent of the defendant. If by consent they wish a decree, that can be done, but only in that way. I will have to dismiss the action with costs.

Action dismissed.

ALTA.

S. C.

1914

STATE BANK OF BUTLER v. BENZANSON.

Alberta Supreme Court, Walsh, J. April 8, 1914.

1. JUDGMENT (§ IV B 1—232)—FOREIGN JUDGMENT—ACTION UPON.

A competent foreign judgment becomes in the domestic law district a simple contract debt; action may be brought either for the original cause of action or upon the foreign judgment.

2. JUDGMENT (§IV B 1—232)—FOREIGN JUDGMENT—JURISDICTIONAL MATTERS.

A foreign judgment on a promissory note or other personal demand will not be recognized and given effect to in Alberta where the defendant was not served in the foreign law district and had not appeared in the action there brought, nor otherwise attorned to the jurisdiction of the foreign court.

[*Belcourt* v. *Noel*, 9 D.L.R. 788, and Annotation to same, referred to.]

Statement

TRIAL of action on a promissory note, after recovery of judgment thereon in a foreign jurisdiction.

Judgment was given for the plaintiff.

A. B. Macdonald, for the plaintiff.

L. T. Barclay, for the defendant.

Walsh, J.

WALSH, J.:—The plaintiff moved for judgment on the pleadings and upon the admissions contained in the examination for discovery.

The making of the note is admitted, as well as the fact that it has not been paid, except to the amount for which the plaintiff gives credit in its statement of claim. This leaves for consideration only the defence that a judgment was, before the commencement of this action, recovered against the defendants in respect of this same cause of action in a foreign Court of competent jurisdiction. I do not think that this would under any circumstances be a good defence. The action in the foreign Court would, undoubtedly, result in the simple contract debt being merged in the judgment, but that would be a result merely of local application. The judgment so recovered would in this jurisdiction be considered as but a simple contract debt, and the plaintiff could, I think, sue here in either form of this simple contract liability, either on the judgment or the original cause of action, or he could sue upon one and, in the alternative, upon the other. It appears, however, from the defendant's examination for discovery that he was out of the jurisdiction of the foreign Court when that action was brought, and that he did not defend it.

The judgment so recovered is, therefore, one which would not be recognized by this Court, so that the plaintiff is, of necessity, thrown back upon his original cause of action, and for that reason is entitled to maintain this suit: *Belcourt* v. *Noel*, 9 D.L.R. 788, and Annotation following.

The plaintiff is entitled to judgment for the amount of his claim, as set out in its statement of claim, with costs, including the costs of this application.

Judgment for plaintiff.

UNION MACHINERY CO. v. THOMPSON RIVER LUMBER CO.

B. C.

S. C.

1914

British Columbia Supreme Court, Gregory, J. March 12, 1914.

1. DAMAGES (§ III P 2—343)—SALE OF GOODS TO BE MANUFACTURED—LOSS OF PROFITS—SPECIAL ORDER FOR UNMARKETABLE GOODS—CONDITIONAL SALE ON RENTAL AGREEMENT.

On the refusal to accept goods manufactured to order and not of a marketable class, the damages may be assessed at the amount of profit which the manufacturer would have made on the order, although the goods were by the terms of the order to remain after delivery the property of the manufacturer on a rental to be applied on the purchase price under the conditional sale contract.

[*Re Vic Mill Ltd.* [1913] 1 Ch. 183, [1913] 1 Ch. 465, applied; *Sawyer* v. *Pringle*, 18 A.R. (Ont.) 218; and *Arnold* v. *Playter*, 22 O.R. 608, distinguished.]

Statement

ACTION in damages for breach of contract upon an accepted order for goods to be manufactured.

Judgment was given for the plaintiff.

Geo. E. Housser, for the plaintiff.

Douglas Armour, for the defendant.

Gregory, J.

GREGORY, J.:—The defendant contends that it is not a contract of sale, but an executory agreement for a future sale on the performance of certain named conditions by the defendant, and cites *Sawyer* v. *Pringle*, 18 A.R. (Ont.) 218, 20 O.R. 111; and *Arnold* v. *Playter*, 22 O.R. 608, but these were actions of a very different nature, in which the plaintiffs sought to recover the full amount of the purchase or contract price and at the same time rendered themselves, by seizing and selling the property in question, unable to deliver to the defendant upon payment. I am unable to extract any principle from these cases applicable to the one before me. The document here sued on is in form a lease, and entitled a "conditional agreement of sale."

It arose out of a distinct proposal to furnish defendant with the machinery therein described, and it was distinctly accepted. The transaction was unquestionably in fact an order for goods to be manufactured and I do not think it can be treated any differently because on the form of a conditional sale agreement. If it is to be treated as a lease pure and simple, it must not be forgotten that the uncontradicted evidence is that the goods were not, as ordered, saleable on the market, being a special order, and, if not saleable, for that reason surely not leaseable either, and in such a case the measure of damages might be the whole rental fixed by the lease itself, viz., $6,000.

If I am right in treating the contract as an order for goods to be manufactured and supplied, then I am unable to accept any rate but that laid down in the very similar case of *Re Vic Mill Ltd.*, [1913] 1 Ch. 183 affirmed by the Court of Appeal,

B. C.
S. C.
1914
Gregory, J.

[1913] 1 Ch. 465, where it is distinctly ruled that the plaintiff is entitled to the profits which he would have made if the contract had been carried out, which, in the present case, have been shewn to be $1,700.20 by uncontradicted evidence. I, therefore, feel compelled to allow the plaintiff damages to this amount and there will be judgment accordingly.

Judgment for plaintiff.

B. C.
S. C.
1914

Re COMER Estate.

British Columbia Supreme Court, Gregory, J. February 19, 1914.

1. EXECUTORS AND ADMINISTRATORS (§ I A—3)—WHO MAY BE APPOINTED—TRUST COMPANY AS EXECUTOR—SYNDIC.

Under the British Columbia practice letters probate of a will may issue direct to a trust company authorized in that behalf without the intervening appointment of a syndic, but the company must appoint a suitable person to take the executor's oath, and an authenticated copy of the resolution of appointment should be verified by affidavit and filed with the application for the probate.

Statement

APPLICATION by a trust company authorized under the B.C. Trust Company's Regulation Act, for the probate of a will.

The application was granted.

W. S. Lane, for the application.

Gregory, J.

GREGORY, J.:—This is an application by the Royal Trust Co. for the probate of the will of the deceased, and the question has been raised whether the company shall appoint a syndic to take letters for it or whether the letters may be issued direct to the company. Under the English practice a corporation aggregate must appoint a syndic. The established practice in this province, and, it is alleged, in Ontario, has been to issue the letters direct to a corporation, and I see no reason for disturbing that practice, as it appears from the whole tenure of the Trust Companies' Regulation Act, R.S.B.C. 1911, ch. 43, that it is intended that the corporation shall be executor. In the present case the company has ample power to take under sec. 1, sub-sec. 4, and sec. 2 of ch. 69 of the British Columbia Statutes, 1905. The practice to be adopted should be that the company should appoint some person to take the executor's oath and swear to the administration of the estate by the company, and the letters would then issue to the company. Before the registrar passes the papers he should be thoroughly satisfied that such appointment has been duly and regularly made in accordance with the by-laws of the company, and I think it would be well to require the production of a sealed copy of the resolution of appointment, duly verified by affidavit, to be produced and filed with the other papers.

Application granted.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

BANK OF MONTREAL v. ITALIAN MERCHANTS' EXCHANGE.

B. C.

1914

British Columbia Supreme Court, Murphy, J. April 7, 1914.

WITNESSES (§ IV—60)—*Credibility — Corroboration.*]—Action to recover money paid on a cheque owing to the fraud of the defendant.

C. Wilson, K.C., for the plaintiff.

Patullo, for the defendant company.

Robinson, for the defendant, Masi.

MURPHY, J.:—Further consideration has confirmed the impression I formed at the trial that I should accept the evidence of Pasto. I saw no reason to doubt him because of his demeanour in the witness-box, and there are admitted facts which corroborate his testimony such as the absence of any credit in defendants' books for the account in question. Again the condition of defendants' bank account at the time of the second deposit shews a motive for again using the cheque, for, even if dishonoured a second time, several days would be gained by its use as the bank credited it the day it was deposited. If this evidence is accepted then the securing payment of the cheque was a fraud in which defendant Masi was an active participant and there must be judgment against both defendants for the amount claimed and I so order.

Judgment for plaintiff.

Re EVANS.

MAN.

1914

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 20, 1914.

[*Re Evans*, 15 D.L.R. 218, affirmed.]

INFANTS (§ I C—11)—*Parent's right to custody—Rights of father—Inability to furnish suitable home—Welfare of Child.*]—Appeal from the decision of Curran, J., *Re Evans*, 15 D.L.R. 218, 26 W.L.R. 468.

A. Monkman, for the appellant.

W. H. Curle, for the respondent.

THE COURT dismissed the appeal.

MAN.

1914

COOPER v. ANDERSON.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. April 21, 1914.

[*Cooper v. Anderson*, 9 D.L.R. 287, affirmed.]

EVIDENCE (§ XII A—921*a*)—*Weight and effect—Stale demands.*]—Appeal by the plaintiff from the decision of Macdonald, J., *Cooper v. Anderson*, 9 D.L.R. 287, 23 W.L.R. 241.

W. M. Crichton, and *E. A. Cohen*, for the plaintiff.

A. E. Hoskin, K.C., *A. B. Hudson*, *M. J. Finkelstein*, and *E. R. Levinson*, for the defendants.

THE COURT dismissed the appeal without calling on the respondents' counsel.

MORRISON v. WILSON.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 20, 1914.

[*Morrison v. Wilson*, 14 D.L.R. 815, reversed.]

TRIAL (§ II E—196)—*Preliminary questions to jury—Basis for determining point of law—Malicious prosecution.*]—Appeal by the defendant from the decision of Metcalfe, J., *Morrison v. Wilson*, 14 D.L.R. 815, 26 W.L.R. 317.

W. M. Crichton, and *E. A. Cohen*, for the plaintiff.

H. J. Symington, for the defendant.

THE COURT allowed the appeal and granted a new trial.

SASK.

1914

NORTHERN TRUST CO. v. GAGNON.

Saskatchewan Supreme Court, Elwood, J., in Chambers. April 9, 1914.

COURTS (§ II C—186)—*Jurisdiction of special officers—Master in Chambers.*]—Appeal from an order of the Master in Chambers made in a mortgage action on the ground that his jurisdiction was limited to the judicial district of Regina, while the action was in the judicial district of Moose Jaw.

N. Gentles, for appellant.

F. W. Turnbull, for respondent.

ELWOOD, J.:—The rules, as amended, give the Master in Chambers, in my opinion, jurisdiction in all actions in the Supreme Court. The nature of the jurisdiction is that possessed by the Local Master in the various Judicial Districts; but he is not limited to the Judicial District of Regina. The old rule before the amendment did limit his jurisdiction to that Judicial Dis-

triet, and the fact that it is omitted from the amendment indicates to my mind that it was clearly intended that he should have jurisdiction in actions pending in any Judicial District.

The appeal will therefore be dismissed with costs.

Appeal dismissed.

SASK.
1914

McPHERSON v. GRAND COUNCIL PROVINCIAL WORKMEN'S ASSOCIATION.

CAN.
1914

Supreme Court of Canada. May 18, 1914.

BENEVOLENT SOCIETIES (§ II—6)—*Local lodges—Rights and powers of—Sale of assets to rival society.*]—Appeal by the defendants McPherson, et al., from the judgment of the Supreme Court of Nova Scotia, *Grand Council Provincial Workmen's Association* v. *McPherson*, 8 D.L.R. 672.

THE COURT dismissed the appeal with costs.

BURT v. CITY OF SYDNEY.

Supreme Court of Canada. May 18, 1914.

HIGHWAYS (§ III—104)—*Changing grade of street—Subway—Damages to landowner.*]—Appeal by the plaintiff from the judgment of the Supreme Court of Nova Scotia, *Burt* v. *City of Sydney*, 15 D.L.R. 429, whereby the dismissal of the action at the trial has been affirmed.

THE COURT dismissed the appeal with costs, Sir Charles Fitzpatrick, C.J., and Idington, J., dissenting.

HUTCHISON v. CITY OF WESTMOUNT.

Supreme Court of Canada. May 18, 1914.

HIGHWAYS (§ II A—23)—*Rights of abutting owner—Opening up streets in subdivision.*]—Appeal by the plaintiff from the judgment of the Court of King's Bench of Quebec (Appeal side), *Hutchison* v. *City of Westmount*, 3 D.L.R. 333.

THE COURT dismissed the appeal with costs.

Re WALKER v. WILSON.

ONT.
1914

Ontario Supreme Court, Middleton, J., in Chambers. January 27, 1914

PROHIBITION (§ II—5)—*Division Court in Ontario—Power of transfer—Prohibition prematurely asked.*]—Motion by defendant for prohibition to a Division Court on the ground that

ONT.
1914

he did not reside within the territorial limits of the Fourth Division Court in the County of Haldimand in which the action was brought, and that the cause of action did not arise there. The defendant filed a notice disputing the claim and the jurisdiction, but made no application to the Division Court Judge to transfer the cause. The motion for prohibition was launched without waiting for the question to be disposed of at the trial in the Division Court.

J. B. Mackenzie, for applicant.

J. H. Spence, for the plaintiff, contra.

MIDDLETON, J.:—On the return of the motion, the absence of jurisdiction was admitted, the plaintiff expressing his intention to move before a Division Court Judge for transfer to a Court which has jurisdiction; but objection is taken to this motion as premature—the plaintiff contending that, until the motion in the Division Court for a transfer has been made and refused or until the question of jurisdiction has been discussed and dealt with at the trial, a motion for prohibition cannot be made. This is the effect of the judgments in *Re Watson* v. *Woolverton* (1889), 22 O.R. 586 (note), and in *Re Hill* v. *Hicks and Thompson* (1897), 28 O.R. 390.

It is manifestly most inconvenient that a motion of this type, where the expense is entirely disproportionate to the amount involved, should be launched, where the Division Court will, without expense, set the matter right. The proceedings in the Division Court are not entirely without jurisdiction, as the Judge has power to transfer the case to the proper Court.

Objection is also taken to the form of the summons. It is possibly not entirely accurate; but the defendant has waived this by entering his dispute. Besides, prohibition will not lie for a mere irregularity in the proceedings in the Division Court; and nothing more than an irregularity exists here.

The motion is dismissed with costs.

CAN.
1914

YOCKNEY v. THOMPSON.

Supreme Court of Canada. May 18, 1914.

LAND TITLES (Torrens system) (§ IV—40)—*Caveat—Agreement to give mortgage.*]—Appeal by the defendant from the judgment of the Court of Appeal for Manitoba, *Thompson* v. *Yockney* (No. 2), 14 D.L.R. 332, 23 Man. L.R. 571, affirming the decision of Mathers, C.J.K.B., *Thompson* v. *Yockney* (No. 1), 8 D.L.R. 776, 23 Man. L.R. 571.

THE COURT dismissed the appeal with costs.

THEATRE AMUSEMENT CO. v. STONE.

CAN.

1914

Supreme Court of Canada. May 18, 1914.

CORPORATIONS AND COMPANIES (§ V E 2—220)—*Rights of shareholder — Action by—Account of undue profits made by directors personally.*]—Appeal by defendants from the judgment of the Supreme Court of Alberta, *Stone* v. *Theatre Amusement Co.*, 14 D.L.R. 62, allowing an appeal by the plaintiff shareholder in an action seeking to compel the directors to account for certain profits alleged to have been made by them in the company's dealings with the Canadian Films Exchange.

THE COURT dismissed the appeal with costs.

BEAMISH v. RICHARDSON.

Supreme Court of Canada. May 18, 1914.

CONTRACTS (§ I D 2—50)—*Mutuality—Dealing in options on stock exchange—Privity of clearing-house association.*]—Appeal by the defendant in an action from the judgment of the Court of Appeal for Manitoba, whereby the plaintiff Richardson et al., was awarded judgment for balance due them as grain brokers upon transactions for the purchase and sale of grain on the Winnipeg Grain Exchange. The appellant pleaded the illegality of the transactions as being marginal dealings without a *bonâ fide* intention of acquiring the merchandise or shares. The judgment appealed from is reported *sub nom. Richardson* v. *Beamish*, 13 D.L.R. 400, 21 Can. Crim. Cas. 487, 23 Man. L.R. 306.

THE COURT allowed the appeal with costs, Sir Charles Fitzpatrick, C.J., and Duff, J., dissenting.

Re BRAMPTON LOCAL OPTION BY-LAW.

ONT.

1914

Ontario Supreme Court, Middleton, J., in Chambers. January 2, 1914.

INTOXICATING LIQUORS (§ I C—33)—*Local option—Settling voters' list.*]—Motion by M. B. Chantler for an order of prohibition to the Judge of the County Court of the County of Peel from adding certain names to the voters' list.

B. F. Justin, K.C., for the applicant.

W. H. McFadden, K.C., for the County Court Judge.

No one appeared for the other persons notified.

MIDDLETON, J., held that, under the new provisions of the

ONT.
1914

Municipal Act, 1913, the intention is to give finality to the voters' list and at the same time to allow the necessary amendments to be made up to the latest possible moment so that the exact list of those entitled to vote upon a by-law may be ascertained before the voting takes place. The Judge may add the name of any person who by the revised voters' list appears entitled to vote on the by-law and whose name ought to have been included by the clerk on the list. There is no warrant for the addition of names improperly omitted from the revised voters' list. The function of the Judge is in this respect limited to the correction of the clerk's action. As here tenants and nominees of corporations have no right to vote, the provisions of sec. 265 of the Municipal Act, 1913, have no application.

Prohibition was granted restraining the County Judge from including the names of any who do not appear by the revised voters' list as entitled to vote.

QUE
1914

Re BOSTON SHOE CO.

Quebec Superior Court (District of Montreal), Beaudin, J. March 13, 1914.

CORPORATIONS AND COMPANIES (§ IV G 5—130)—*Proceeding by liquidator against officer or employee for money alleged to have been misapplied.*]—Inscription in law as upon a demurrer by claimant to a part of the liquidator's contestation in the winding-up under R.S.C. 1906, ch. 144.

A. Rives Hall, K.C., for claimant.

P. Beulac, K.C., for liquidator.

BEAUDIN, J.:—The claimant has filed a claim for $10,000, amount of a cheque of 24th January, 1908, representing a loan by said claimant to the company in liquidation. The liquidator contests this claim and denies the indebtedness and by paragraphs 4, 5, 7, 8, 9, 10, 11 and 12, proceeds to say that claimant was a director of said company and by his mismanagement created a deficit of $100,000 for which he is accountable, and besides claiming the rejection of the claim, prays subsidiarily to a set off of the claim by said sum of $100,000.

The claimant has filed a demurrer to said allegations and part of the conclusions claiming compensation, on the ground, among others, that the liquidator seeks to set up against the respondent's claim, which is liquidated, a contra claim for unliquidated damages.

This proceeding of the liquidator is an unusual one in the province, and I have no knowledge that it was ever raised here, although the proceeding is well recognized in law, has been

made use of very often in Ontario, and more particularly in England where this part of our law has been derived.

The claimant does not deny that the remedy exists in law, but contends that it cannot be taken advantage of, in an incidental proceeding, such as the contestation of a claim, but is an independent procedure which must be initiated as a principal proceeding, and cannot be used to delay the payment of a liquidated claim such as the one filed by said claimant and based on a cheque:—

The proceeding is taken under section 123 of the Winding-up Act, which reads as follows:—

When, in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director manager, liquidator, receiver, officer or employee, and upon such examination, may take an order requiring him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust as the Court thinks fit.

This section of the Canadian Act is an almost *verbatim* reproduction of sec. 215 of the English Act, and an examination of the procedure in England has confirmed me in the opinion that the proceeding to be taken under that section, is an independent and principal proceeding, and cannot be taken incidentally as has been done here on the contestation of a claim: see Palmer Winding-up Act, 10th ed., 641 *et seq.*

The same rule seems to be followed in Ontario: see Parker and Clark's Company Law, 519 *et seq.*

The inscription in law of the claimant is maintained with costs against the liquidator esqualité, and the Court rejects from the record, paragraphs 4, 5, 7, 8, 9, 10, 11, 12, of the contestation, and that part of the conclusions which reads as follows:—

And further, that the Court doth examine into the conduct of claimant as director of the company in liquidation, and, after such examination, doth declare that claimant, as such director, is accountable and liable for the said deficit, and doth order claimant to pay and contribute to the assets of the company the sum of $100,000, or such other less sum as the Court may determine, after setting off the amount of any claim which the Court may allow in favour of claimant against said company in liquidation.

QUE.
1914

And the Court reserves to said liquidator esqualité any right which he may have in law to proceed against the claimant in virtue of said sec. 123 of said Winding-up Act or otherwise.

Order accordingly.

LEFEBVRE v. LACHINE, JACQUES CARTIER and MAISONNEUVE R. CO.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. April 24, 1914.

ARBITRATION (§ III—17)—*Expropriation under Railway Act (Can.)—Appeal to Superior Court in Quebec province—Revision—Jurisdiction of Court of Review (Que.).*

Handfield & Co., for plaintiff.

H. Jodoin, for defendant.

The judgment of the Court of Review was as follows:—

THE COURT, having heard the parties by their respective counsel, upon the respondent's motion praying for the dismissal and the setting aside of the petitioner's inscription for revision of the judgment rendered in the Superior Court, in and for the district of Montreal, on March 9, 1914; having examined the record and proceedings had in this cause, and maturely deliberated:—

Whereas the respondents did expropriate, under the authority of Order No. 13993 of the Board of Railway Commissioners, in conformity with sections 157, 158, 159, 160, 191, 192, 193, 194, 196, 197, 200, 201 and 204 of the Railway Act, ch. 37, R.S.C. 1906, and amendments thereto, lands belonging to the said appellant as shewn on said plan, profile and book of reference approved by Order No. 13993 and by the notice of expropriation which is part of the record in this case.

Whereas, by the award of the arbitrators, taken in authentic form before J. U. Meunier, notary public, March 8, 1913, duly served upon the interested parties on March 10, 1913, the expropriating party was condemned to pay the sum of nine hundred dollars ($900) to the proprietor-appellant.

Whereas, said award was so rendered by the majority of the arbitrators, the other arbitrator being present, in accordance with sub-section 3 of sec. 197 of the Railway Act.

Whereas, on March 19, 1913, the appellant did ask the Superior Court, through a petition, for the issue of a writ of appeal to the Superior Court for the District of Montreal, from said award, and this under the authority of sec. 209 of the Railway Act, which permission was granted by his lordship Mr. Justice Beaudin, and on April 8, 1913, said appeal was served upon the respondents.

QUE.
1914

Whereas, the respondents did contest said appeal which was finally heard by his lordship Mr. Justice Dunlop, who, on the 9th of March, 1914, rendered his judgment dismissing plaintiff's appeal, thus maintaining the award as rendered by the arbitrators.

Whereas it clearly appears that the proceedings taken by said Lefebvre before the Superior Court, constitute an appeal created by statutory law, viz., sec. 209, ch. 37, R.S.C. 1906, as the whole appears more fully by the petition asking for the issue of a writ of appeal, copy of the petition or declaration being attached to said writ that was served after its issue was permitted by the said Court, and by the judgment rendered by his lordship Mr. Justice Dunlop, March 9, 1914, as hereinbefore mentioned.

Whereas, the said Lefebvre, on March 26, 1914, did serve upon the respondents, the Lachine, Jacques-Cartier and Maisonneuve Railway Company, copy of an inscription for review before three Judges of the Superior Court sitting as a Court of Review, appealing or asking for the review of the judgment of his lordship Mr. Justice Dunlop.

Whereas, the Court of Review for the District of Montreal has no jurisdiction whatever to hear such an appeal or to review the judgment so rendered.

Whereas, the said Lefebvre having exhausted the right of appeal created by sec. 209 of the Railway Act, a statutory law, is now prevented from asking this Court for the review of said judgment which judgment is conclusive, binding and final under said Railway Act and under the law applicable.

Doth dismiss and set aside the said inscription in review of the said petitioner-appellant with costs, and it is ordered that the record be remitted to the Court below.

Appeal quashed.

BRIZARD v. HEYNEN.

MAN.
1914

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 16, 1914.

HUSBAND AND WIFE (§ III A—143)—*Alienation of wife's affections—Damages.*]—Appeal by one defendant in an action brought to recover damages for alienation of the affections of the plaintiff's wife.

At the trial the jury gave a verdict in favour of the plaintiff for $2,500 against the defendant Heynen who appealed.

W. H. Trueman, and *W. Hollands*, for the plaintiff.

H. P. Blackwood, and *A. Bernier*, for defendant.

MAN.

K. B.
1914

RICHARDS, J. (delivering the judgment of the Court), said there is, in the most extreme view that could be taken, nothing more than ground for suspicion, which is not enough to justify a verdict. I should add that there was no direct testimony whatever against the defendant—all of the direct evidence being in his favour. In my opinion, the learned Judge should, at the close of the evidence for the plaintiff, have withdrawn the case from the jury for lack of evidence, and granted a nonsuit.

I would allow the appeal with costs, set aside the judgment in the Court below and enter a judgment there of nonsuit with costs.

Appeal allowed.

ALTA.

1914

A. & P. STEVEN Ltd. v. DICK.

Alberta Supreme Court, Beck, J. March 20, 1914.

SALE (§ II D—40)—*Machine—Inspection—Notice of defective working.*]—Action to recover the price of installing passenger elevators.

J. C. Brokovski, for the plaintiff.

D. S. Moffat, for the defendant.

BECK, J., held that it was not necessary for him to decide what particular thing was the matter with the machine, providing he come to the conclusion that, in some respects the machine, by reason either of its construction or its method of construction, the material of which it was constructed, or the method of its being placed in position and set in operation, was not working correctly. He had come to that conclusion notwithstanding the evidence with regard to the method in which it was from time to time run.

The important words of the provision in red ink at the top of this contract are, "we undertake to replace where practicable any defective material reported to us in writing within six months after delivery." This is extended to one year which means that that report in writing has to be within that time. I have some considerable doubt as to whether these words are applicable to an entire and essential and indispensable part of the machinery. It says "defective material." That seems to me to suggest rather a piece or part of the machine rather than the entire machine itself or a machine which, although part of a larger collection of machines, making a complete apparatus, is, in itself, a distinct and complete machine; but supposing it does not apply to a controller, I think that, under the circumstances, the plaintiff company had notice which is sufficient under that provision.

ALTA.

1914

All that it was necessary to do on the part of Dick under the circumstances was to say, "this machinery or this material is not doing its work"; it was the business then of A. & P. Steven, or some one representing them, having notice that the thing was not working right, themselves to investigate it and ascertain what, in their opinion, was the cause of the trouble, and, having ascertained that, to supply what they themselves would see fit to supply as a means of curing the defect. Taking that view of it, and I am pretty well satisfied that that is the right view, it seems to me that sufficient notices were given to comply with that clause to Gorman, Clancey & Grindley.

Judgment was given for plaintiffs with an allowance in damages to defendants to be set off.

WHITE v. NATIONAL PAPER CO.

ONT.

1914

Ontario Supreme Court, Middleton, J., in Chambers. March 11, 1914.

PRINCIPAL AND AGENT (§ III—36)—*Compensation—Commission on accepted orders when filled—Failure to complete.*]—Trial of action to recover commission under a contract.

Hamilton Cassels, K.C., for the plaintiff.

C. A. Masten, K.C., and *J. H. Spence*, for the defendants.

MIDDLETON, J., directed judgment to be entered for the plaintiff. He said: The contract, in the first place, provides for payment of commission on all accepted orders; and this is the dominating and controlling clause, to which all other provisions are subsidiary. This general provision is followed by a clause providing that the commission is to be payable "immediately the order is shipped, and failing the customer paying the account we shall deduct from the first settlement with you the commission paid on said order." This does not limit the generality of the primary obligation, and shews that the commission is not to be paid unless the subject of the order is actually shipped.

The parties were contracting upon the assumption that each would perform its obligations. The commission was to be paid upon all orders accepted. Some of these orders would be for immediate delivery, some for future delivery. The commission was not to be paid until the goods were shipped, that is, until the time provided for shipment. The defendants cannot free themselves from liability to pay commission, by breach of contract.

ONT.

1914

KOHLER v. THOROLD NATURAL GAS CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 9, 1914.

DAMAGES (§ III A—40)—*Measure of compensation—On contracts—Oil and gas.*]—Appeal by defendants from an order of Boyd, C., whereby their appeal from the report of a Local Master had been dismissed.

H. H. Collier, K.C., for the appellants.

W. T. Henderson, K.C., for the plaintiffs, respondents.

HODGINS, J.A. (delivering the judgment of the Court):—The damages are, to my mind, if any were recoverable, assessed upon a wrong principle. They were allowed for at the contract-price, and no deduction is allowed for the cost of the production. See *Silkstone and Dodsworth Coal and Iron Co.* v. *Joint Stock Coal Co.* (1877), 35 L.T.R. 668.

It is asserted that the cost of producing this particular gas was nil, or practically nil, because all the expenditure had been gone to previously; but that is not sufficient, I think, to dispose of the question. The wells were closed and opened during that period; two wells were drilled in September; and a proportion of the initial cost of producing must be attributed to this supply. It is only their profit that can be recovered as damages, and no evidence was given on that head, nor was anything said as to whether they could not have supplied others with the gas meanwhile.

On the whole, I think the appeal should be allowed with costs, and the action dismissed with costs.

MULHOLLAND v. BARLOW.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. March 13, 1914.

TRESPASS (§ I A—17)—*Remedy.*]—Appeal by plaintiff from the judgment of Falconbridge, C.J.K.B., dismissing the action and finding in favour of defendant upon a counterclaim.

W. M. McClemont, for the appellant.

S. F. Washington, K.C., for the defendant, respondent.

THE COURT varied the judgment below and in other respects dismissed the appeal without costs.

FRETTS v. LENNOX, ETC. MUTUAL FIRE INS. CO.

ONT.

1914

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Magee, J.A., Sutherland, and Leitch, JJ. March 6, 1914.

INSURANCE (§ VI C—350)—*Extent of injury or loss; of recovery—70 per cent. clause—Automobile.*]—Appeal by the defendants from the County Court of Frontenac in favour of plaintiff for $375 for insurance upon an automobile.

W. S. Herrington, K.C., for the appellants.

E. Gus Porter, K.C., for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs.

As to the defendants' contention, that at most they are only liable to an amount not exceeding 70 per cent. of the value of the property destroyed, the words of the application on which the defendants rely are as follows:—

"And it is further understood and agreed between the assured and the company that, where the buildings are not the property of the assured, this company will in no case pay an amount to exceed 70 per cent. of the actual cash value on the loss of the 'property destroyed or damaged by fire.'"

The buildings here referred to are those mentioned in the application; and, even if the words "property destroyed or damaged by fire" apply to the automobile, or if the claim itself applies to the automobile, which was insured at large, there is no evidence that "the buildings are not the property of the assured;" so that the plaintiff's claim is not limited to 70 per cent. of his loss.

BAIN v. UNIVERSITY ESTATES LIMITED.

Ontario Supreme Court, Latchford, J., in Chambers. March 2, 1914.

WRIT AND PROCESS (§ II A—16)—*Service out of jurisdiction—Conditional appearance.*]—Appeal from the order of the Master in Chambers giving the defendant leave to substitute a conditional appearance under Ontario Rule 48 in place of the ordinary appearance entered.

A. B. Cunningham, for the plaintiffs.

Grayson Smith, for the defendants.

LATCHFORD, J., held that the defendant corporation was a necessary or proper party to the action, and the Court therefore has jurisdiction. No useful purpose can be served by the orders appealed from while they render uncertain and embarrassing the position of the plaintiff. When a case is shewn within the rule

ONT.
1914

(Ontario Rules of 1913, rule 25*g*) there is no reason why a conditional appearance should be entered. The case of *Standard Construction Co.* v. *Wallberg* (1910), 20 O.L.R. 646, is still an authority, former Con. Rule 162*g* remaining unchanged in the revision.

The order appealed from was reversed, costs to the plaintiff in any event.

[A motion subsequently made to Middleton, J., for leave to appeal to the Appellate Division was refused, March 11, 1914.]

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. BRADEN.

Ontario Supreme Court, Britton, J. March 2, 1914.

CORPORATIONS AND COMPANIES (§ V B—175)—*Shares—Subscription—Subscriber acting as director—Waiver of notice of meeting—Lack of prospectus—Status of original subscriber.*]—Trial of action for calls upon shares of stock in the plaintiff company incorporated under the Ontario Companies Act. The defendant was one of the provisional directors of the company, and the directors had allotted all the stock subscribed for at a meeting, formal notice of which had been waived in writing by all parties who were then stockholders. At the statutory meeting of the shareholders similarly held under a waiver of all formal requirements, the defendant who was present was elected a director and as such signed important documents. A formal notice of allotment of the shares was sent to the defendant on the date of the provisional directors' meeting.

C. A. Moss, and *J. E. Swinburne*, for the plaintiff company.

W. F. Langworthy, K.C., for the defendant.

BRITTON, J., held that the defendant had waived any formalities in reference to this stock. The calls were properly made; the defendant had notice of these calls; he not only signed the agreement that he would take the shares, but he signed in the books of the company an undertaking to accept the shares if they were allotted to him, and they were so allotted. The object of the Act, 7 Edw. VII. ch. 34, in requiring a prospectus, was to protect the public and not to protect a promoter or an original subscriber for stock. If a prospectus was necessary, the defendant is one of those to blame for not having one issued and filed. To allow it as a defence in the action would be allowing the defendant to take advantage of his own wrong.

Judgment was given for the plaintiffs.

Re GAULIN AND CITY OF OTTAWA.

ONT.

1914

Ontario Supreme Court, Middleton, J. March 4, 1914.

MUNICIPAL CORPORATIONS (§ II C 3—60)—*By-law—Submission of water scheme—Unauthorized question to be voted upon by the electors.*]—Motion to quash a city by-law.

G. F. Henderson, K.C., and *F. B. Proctor*, for the City of Ottawa.

MIDDLETON, J., ordered the by-law to be quashed. He said he would not interfere with the municipal action for any mere irregularity, but thought it his duty to interfere when what was proposed would have the effect of preventing any fair expression of the wishes of the electorate from being obtained.

The by-law in question is not within what is permitted by the Municipal Act, because it is an endeavour, by the substitution of a tricky and adroitly drawn question, practically to preclude any true expression of the views of electors upon the question proposed to be submitted.

[It subsequently appearing that the defendant corporation intended, notwithstanding the quashing of the by-law, to go on and take the vote, apparently upon the theory that a vote may be taken by a municipality without a by-law so directing, an action was brought by Gaulin against the city of Ottawa for an injunction restraining the taking of the vote. A motion for an interim injunction was, on March 7, 1914, turned into a motion for judgment and a permanent injunction granted by Middleton, J.]

Re McKENZIE AND VILLAGE OF TEESWATER.

Ontario Supreme Court, Britton, J. March 5, 1914.

MUNICIPAL CORPORATIONS (§ II C 3—60)—*By-law—Public library site.*]—Motion to quash a by-law of the village of Teeswater which purported to grant to the public library board certain lands owned by the village.

W. Proudfoot, K.C., for the village corporation.

BRITTON, J., dismissed the application with costs.

CLARK v. ROBINET.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 9, 1914.

VENDOR AND PURCHASER (§ I E—25)—*Syndicate agreement—Rescission.*]—Appeal by defendants from the judgment of

ONT.
1914

Lennox, J., *Clark* v. *Robinet*, 5 O.W.N. 143, in an action for a declaration that the plaintiff's farm was free from any claim or claims under a so-called syndicate agreement.

F. D. Davis, for the appellants.

E. S. Wigle, K.C., for the plaintiff.

THE COURT allowed the appeal with costs and dismissed the action.

HOPKINS v. CANADIAN NATIONAL EXHIBITION ASSOCIATION.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 11, 1914.

EXHIBITIONS (§ I—5)—*Trade privileges — Concessions.*]—Appeal by the plaintiff from the judgment of Latchford, J.

R. U. McPherson, for the appellant.

G. R. Geary, K.C., and *Irving S. Fairty*, for the defendants.

THE COURT dismissed the appeal with costs.

GLYNN v. CITY OF NIAGARA FALLS.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 6, 1914.

[*Glynn* v. *City of Niagara Falls*, 15 D.L.R. 426, 29 O.L.R. 517, 5 O.W.N. 285, affirmed.]

STATUTES (§ II D—126)—*Retrospective operation — Action against municipality for defects in highway.*]—Appeal by defendant city from the judgment of Boyd, C., at trial, *Glynn* v. *City of Niagara Falls*, 15 D.L.R. 426, 29 O.L.R. 517.

A. C. Kingstone, for the plaintiffs, the respondents.

MULOCK, C.J. (delivering the judgment of the Court.:—The question involved in the case is not, I think, one of non-repair but of a nuisance. The electric lighting system was under the control and management of the defendants. Owing to the length of the chain, the public when using the street were in danger of injury by the current if they came in contact with the chain: *Sydney* v. *Bourke*, [1895] A.C. 441; *Bathurst* v. *Macpherson* (1879), 4 A.C. 256. The limitation contained in sec. 13 of the Public Authorities Protection Act constitutes no defence, as sec. 17 enacts that the Act shall not apply to a municipal corporation. The cause of action arose and the writ was issued before the Public Utilities Act was assented to. It is a rule of

ONT.

1914

construction that rights of parties should not be defeated by new Acts unless the intention of the Legislature is clear that they are to have a retrospective effect. No such intention appears in the Act, and therefore, it is not to be construed as having a retrospective operation. Further, it would, I think, be doing violence to the language of the section if it were construed retrospectively. It begins thus: "No action shall be brought . . . but within six months after the act committed," etc. Actions already brought are by the language of this section excluded from its operation; its plain meaning being that it shall only apply to actions thereafter brought.

THE COURT dismissed the appeal.

SCRIMGER v. TOWN OF GALT.

Ontario Supreme Court, Kelly, J. March 10, 1914.

WATERS (§ I C 1—18)—*Municipal drainage ditches.*]—Action by two persons, Scrimger and Williamson, for an injunction restraining the defendants, the municipal corporation of Galt, from constructing or maintaining a sewer or drain so as to bring water into Moffat's creek in excess of the natural flow, and from injuriously affecting the plaintiff's rights in respect of the water of the creek, and from laying down a drain across the land of the plaintiff Scrimger.

P. Kerwin, for the plaintiffs.

R. McKay, K.C., and *J. B. Dalzell*, for the defendants.

KELLY, J., gave judgment in the plaintiffs' favour with costs. He said: An owner of land has no right to rid his land of surface-water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor; and a municipal corporation has no greater right in this respect than a private landowner: Gould on Waters, 2nd ed., pp. 529-530. Cities and towns have no greater right than individuals to collect in artificial channels upon their streets and highways mere surface-water distributed in rain and snow over large districts, and precipitate it upon the premises of private owners: *ib.*, p. 531.

Nor does the Municipal Act, in giving municipalities, in a proper case, power to pass by-laws in relation to the disposal of surface-water, so enlarge the power of the defendants as to justify them in the course they here adopted.

ONT.

1914

SMITH v. RANEY.

Ontario Supreme Court (Appellate Division), Boyd, C., Riddell, Middleton, and Leitch, JJ. March 9, 1914.

REFORMATION OF INSTRUMENTS (§ I—1)—*Mistake.*]—Appeal by the plaintiffs from County Court of the county of Simcoe. The action was to recover possession of land, and judgment was given dismissing the action and allowing the counterclaim for rectification of the conveyance of the land made to the defendant by the plaintiffs.

A. E. H. Creswicke, K.C., for the appellants.

M. B. Tudhope, for the defendant.

THE COURT allowed the appeal and directed judgment to be entered for the plaintiffs. In order that a deed may be reformed by the Court there must be at least two things established, namely, an agreement differing from the document, well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement; and a mutual mistake of the parties by reason of which such agreement was not properly expressed by the deed: *McNeill* v. *Haines*, 17 O.R. 479.

Re HILKER.

Ontario Supreme Court, Middleton, J., in Chambers. March 11, 1914.

HABEAS CORPUS (§ I C—14)—*Infant—Removal of from jurisdiction—Father's application.*]—Motion for a habeas corpus against the Children's Aid Society of Waterloo, on behalf of the father of an infant made a ward of the society. The writ was asked to compel the restoration of the child to the custody of the father because the foster parents with whom the society had placed the child in Ontario under the Children's Aid Protection Act (Ont.) after a judicial finding that it was a neglected child within the meaning of the statute, had removed from Ontario and taken the child with them.

A. R. Hassard, for the applicant.

J. R. Cartwright, K.C., for the Children's Aid Society of Waterloo, the respondents.

MIDDLETON, J.:—I do not think that I should grant a writ of *habeas corpus*, under the circumstances. In *Regina* v. *Barnardo*, 23 Q.B.D. 305, where there was a case of strong suspicion, it was said that the writ ought to be granted so that a return might be made shewing that the child was out of the jurisdiction as alleged, and thus the truth of the return might be tried; but where the truth and the fact set up are not only admitted, but

ONT.

1914

the facts are stated by the applicant, no useful purpose would be served by the formal issue of a writ and by having a formal return which it is not desired to controvert. Clearly, the applicant must resort to the Courts of the Province where the child now is. These Courts alone have jurisdiction over its person.

In so saying, I do not desire to deny that our Courts might exercise a coercive jurisdiction to compel the bringing back of the child to Ontario, if it was thought that the child had been removed therefrom contumaciously, and with a view of defeating proceedings taken or to be taken in our Courts.

The motion is, therefore, refused. Costs are not asked.

Re JONES AND TOWNSHIP OF TUCKERSMITH.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. March 12, 1914.

MUNICIPAL CORPORATIONS (§ II C 3—60)—*By-law — Closing street—Quashing.*]—Appeal by the Township of Tuckersmith from the order of Middleton, J., quashing a township by-law for the closing and disposing part of a street and the village of Egmondville.

E. S. Robertson, and *H. S. Hays*, for the appellants.

W. Proudfoot, K.C., for certain ratepayers, the respondents.

THE COURT set aside the order quashing the by-law, and referred the matters in question upon the appeal and motion to quash to the Judge assigned for the trial of the action of *Jones v. Township of Tuckersmith*, and directed that the Judge should not be bound by the decision now appealed from.

LINAZUK v. CANADIAN NORTHERN COAL AND ORE DOCK CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 31, 1914.

MASTER AND SERVANT (§ II B 8—181)—*Breach of statutory duty—Contributory negligence of servant.*]—Appeal by the plaintiff from the judgment of Britton, J., upon the findings of a jury, dismissing the action.

H. E. Rose, K.C., for the appellant.

THE COURT set aside the judgment and ordered a new trial; costs of the first trial and of this appeal to be costs in the cause.

ALTA.

1914

GIER v. VAN AALST.

Supreme Court of Alberta. Trial before Scott, J. April 2, 1914.

BROKERS (§ II B 2—15)—*Real estate—Compensation—Failure to complete transaction—Division of profits.*]—Trial of an action in respect of a division of profits on sale of land.

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

H. P. O. Savary, for defendant.

SCOTT, J., held that there was an agreement between the parties that the defendant was to undertake the sale of the property and on a sale being made was to receive a half share of the profits of payments made thereon, but that arrangement should continue only for a reasonable time. When it was made the defendant was engaged in the real estate business. He afterwards closed up that business entirely, and having done so the plaintiff was entitled to put an end to the arrangement.

Injunction granted to restrain the defendant from selling plaintiff's three-fifths interest in each lot. Reference to take accounts. Further directions and costs reserved.

N. S.

1914

MILLETT v. SILVER.

County Court of District No. 2, Nova Scotia, His Honour Judge Forbes. January 15, 1914.

SALE (§ II C—35)—*Implied warranty — Fitness for purpose.*]—Trial of action for the price of barrels sold and delivered for use as potato barrels.

McLean, K.C., and *Margeson*, for plaintiff.

W. H. Fulton, K.C., for defendant company.

JUDGE FORBES held upon the evidence that the barrels were not fit to keep potatoes in and certainly were not fit to ship potatoes in to the West Indies or any warm climate. The plaintiff had admitted that he told the defendants the barrels were dry barrels and he told defendants this before shipment or delivery. The plaintiff's counsel urges that this piece of evidence cannot be received as the defendant admits the contract is contained in the letters. I am sure the barrels were not dry barrels as shipped to defendant, and it is not important that I should reject this piece of testimony as I have found the barrels were not fit even to store or keep potatoes in and the plaintiff did certainly give an implied warranty that the barrels would be fit for potatoes, that is at the very worst, fit for keeping or storing potatoes, and from plaintiff's own evidence he knew the defendant was a shipper or exporter of potatoes.

The action was dismissed.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

ONT.

1914

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 18, 1914.

CORPORATIONS AND COMPANIES (§ IV G 4—125)—*Managing director—Transactions with — Account — Fiduciary relationship.*]—Appeal by the defendant and cross-appeal by the plaintiffs from the judgment of Kelly, J.

A. J. Russell Snow, K.C., for the defendant.

J. L. Whiting, K.C., and *A. B. Cunningham*, for the plaintiffs.

THE COURT varied the judgment of the trial Judge by directing that the defendant should have credit for $2,000 upon a claim allowed against him at $8,166.66; and, with this variation, dismissed the defendant's appeal. No costs of that appeal to either party. The plaintiffs' cross-appeal dismissed with costs.

LABINE v. LABINE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 18, 1914.

PARTNERSHIP (§ I—3)—*Mining claim.*]—Appeal by the plaintiffs from the judgment of Latchford, J.

G. H. Watson, K.C., and *T. W. McGarry*, K.C., for the appellants.

R. McKay, K.C., and *A. G. Slaght*, for the defendant, the respondent.

THE COURT dismissed the appeal with costs.

NEOSTYLE ENVELOPE CO. v. BARBER-ELLIS LIMITED.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 9, 1914.

[*Neostyle Envelope Co. v. Barber-Ellis Co.*, 12 D.L.R. 385, 4 O.W.N. 1585, reversed.]

CONTRACTS (§ I C 1—15)—*Consideration—Failure.*]—

C. S. MacInnes, K.C., and *Christopher C. Robinson*, for the appellants.

APPEAL by plaintiffs from the judgment of Falconbridge, C.J.K.B., *Neostyle Envelope Co. v. Barber-Ellis Ltd.*, 12 D.L.R. 385, 4 O.W.N. 1585, at trial dismissing the action, the Court reversed the judgment appealed from and substituted for it a

ONT.
1914

judgment for the plaintiff for the damages sustained by reason of the respondent's breach of the agreement, and directed reference to the Master in Ordinary to ascertain the amount of the damages.

FINE v. CREIGHTON.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 20, 1914.

SPECIFIC PERFORMANCE (§ I E—30)—*Objections to title—Refusal to accept conveyance.*]—Appeal by the plaintiff from the judgment of Kelly, J.

A. Cohen, for the appellant.

L. E. Awrey, for the defendant, the respondent.

THE COURT dismissed the appeal with costs.

MAN.
1914

TOCHER v. THOMPSON.

Manitoba King's Bench, Macdonald, J. February 16, 1914.

SET OFF AND COUNTERCLAIM (§ I A—2)—*Breach of contract—Unliquidated demand — Set-off.*]—Action to recover one-half of the expenses of threshing grain and the cost of seed grain under an agreement and for an account of grain sold by the landlord under a crop payment lease.

H. F. Maulson, and *L. St. G. Stubbs*, for the plaintiff.

S. H. McKay, for the defendant.

MACDONALD, J.:—The defendant alleges that the plaintiff has not threshed the whole crop, and has not delivered to the plaintiff his one-half share thereof, but that there remains on the demised premises a large amount of grain threshed and a further quantity unthreshed over and above what is required for feed, and claims the right to set off against the claim of the plaintiff the one-half share thereof.

The right of set-off can only apply where the claim on either side is liquidated, and here the quantity and value of the remaining crop are unascertained.

SWANSON v. McARTHUR.

Manitoba King's Bench, Prendergast, J. March 10, 1914.

CONTRACTS (§ II D 4—185)—*Railway construction — Sub-contract.*]—Trial of action for certain work performed in railway construction under a sub-contract between plaintiff and defendant McArthur. The Eastern Construction Company were

made co-defendants as assignees for McArthur's interest in the sub-contract.

W. H. Trueman, for plaintiff.

C. P. Wilson, K.C., and *W. C. Hamilton*, for McArthur.

G. H. Laird, and *E. F. Haffner*, for the Eastern Construction Company.

PRENDERGAST, J., on consideration of the evidence ordered judgment to be entered for the plaintiff for $17,952.68 and interest, together with costs subsequent to August 4, 1913, the date of the partial settlement and as provided therein.

SMITH v. BOND.

Manitoba King's Bench, Curran, J. April 20, 1914.

CONTRACTS (§ II D 2—173)—*Unsurveyed lands—Purchase rights on Crown lands to be located for the buyer—Title.*]—Action by a purchaser for the return of money paid under a contract for the sale of land on the ground that the vendor had not made title to a portion thereof. The defendants Bond and Ellis set up that the agent, through whom the plaintiffs bought, had no authority to represent to the plaintiff that the defendants had title to the lands.

J. F. Kilgour, and *S. R. Flanders*, for defendants.

CURRAN, J., said the plaintiff was entitled to judgment against the defendant Ellis for the sum of $800 made up of $460 staking fee on the Brown lands and $160 survey fee on the same lands. He found it difficult to accept the plaintiff's statement that he thought he was buying from the defendants an absolute title to the five sections of land, when he must have known that what was proposed to him was a purchase of unascertained and unsurveyed lands in British Columbia, in the names of the various parties and for the various areas set out in the document Ex. 1. It was apparent from the terms of Ex. 1, that the lands were to be staked and advertised in the names therein set out which were the names submitted to the defendant Stewart by the plaintiff.

Judgment would be entered for the plaintiff for $800 and costs against the defendant Ellis and the action dismissed as to the other defendants with costs.

ONT.

1914

REX ex rel. BAND v. McVEITY.

Ontario Supreme Court, Kelly, J., in Chambers. March 17, 1914.

QUO WARRANTO (§ III—37)—*Leave—Extension of time.*]—Appeal by the defendant from two orders of the Master in Chambers of March 6, 1914, the first refusing to set aside a previous order extending until March 6, the time for service upon the defendant of a notice of motion in the nature of a *quo warranto* under the Municipal Act, and the second extending the time for ten days further.

The defendant also asked for an order dismissing the *quo warranto* proceeding, on the ground that he was not served within the time prescribed by sec. 165 of the Municipal Act, 1913.

J. A. Macintosh, for the plaintiff.

KELLY, J.:—After careful consideration, I have reached the conclusion that the extension of time was properly granted. The appeal must be dismissed with costs.

RUSSELL v. KLOEPFER LIMITED.

Ontario Supreme Court, Latchford, J. March 16, 1914.

FRAUDULENT CONVEYANCES (§ III—10)—*Mortgage—Fraudulent preference—Assignments and Preferences Act, R.S.O. 1914, ch. 134.*]—Action to set aside a mortgage made by one Leatherdale to the defendant company as a fraudulent preference against his other creditors.

J. T. Mulcahy, for the plaintiff.

J. F. Boland, for the defendant company.

LATCHFORD, J., said that Mr. Dawson acting for the defendant company knew that Leatherdale's position was hopeless. Dawson's real and dominating purpose was to obtain from a person in insolvent circumstances security for a past stale debt to the prejudice of the debtor's other creditors, the very kind of a preference the statute was passed to prevent.

Judgment would be entered declaring the mortgage void and directing that the registration thereof be vacated, with costs.

ONT.

1914

SCHOFIELD v. R. S. BLOME CO.

JOHNSTON v. R. S. BLOME CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 31, 1914.

MASTER AND SERVANT (§ II B 3—135)—*"Defective system"—Building Trades Protection Act—Workmen's Compensation—Reasonable safety, when negatived.*]—Appeals by the defendants from the judgments of Middleton, J.

R. McKay, K.C., and *C. V. Langs*, for the appellants.

T. Hobson, K.C., and *A. M. Telford*, for the plaintiff Schofield, respondent.

A. M. Lewis, for the plaintiff Johnston, respondent.

THE COURT dismissed the appeals with costs.

KOSTENKO v. O'BRIEN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 17, 1914.

MASTER AND SERVANT (§ II 2—46)—*Defective system—Finding of fact by trial Judge—Appeal.*]—Appeal by the defendants from the judgment of Sutherland, J.

G. H. Watson, K.C., for the appellants.

A. G. Slaght, for the plaintiff, respondent.

THE COURT vacated the judgment of Sutherland, J., which was in favour of the plaintiff for the recovery of $900 and costs, and ordered that the case should be opened up and the trial continued before Sutherland, J. The appellants to pay the costs of the appeal forthwith after taxation, and also to pay the additional costs, if any, occasioned to the respondent if the trial is continued at Toronto.

Re DARCH.

Ontario Supreme Court, Lennox, J. March 17, 1914.

LIFE TENANTS (§ III—26)—*Repairs—Power to mortgage to keep up the property.*]—Petition by Thomas Darch under the Settled Estates Act, heard at London Weekly Court.

T. G. Meredith, K.C., for the petitioner.

N. P. Graydon, for James Darch.

M. P. McDonagh, for the Official Guardian.

LENNOX, J., made an order authorizing the tenant for life

ONT.
1914

to borrow upon the mortgage of the lands to pay the probable expense of putting the premises in repair and of paying certain tax arrears.

The mortgage will provide for an insurance to the full insurable value of the buildings when put into a state of repair by the expenditure of the $900 referred to. The mortgage-money, when obtained, will be placed in the hands of the Official Guardian, to be applied for the purposes aforesaid; the $900 to be paid out from time to time upon progress certificates of the contractor, approved by the solicitor for the applicant.

In the absence of any special provision in the will or settlement, as here, the life-tenant has a right to the full enjoyment of the property, and is not liable for permissive waste. He is not liable for accidental injury or inevitable accident, as, for instance, loss by fire or tempest; and is not bound to insure. But there must be insurance as a condition of authorizing this incumbrance upon the property, and to obtain the loan upon favourable terms; and both parties, life-tenant and remaindermen, are interested. The insurance premiums, therefore, from time to time, will be borne in the proportion of one-third by the life-tenant and two thirds by those in remainder.

Re CLAREY AND CITY OF OTTAWA.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Magee, J.A., Sutherland, and Leitch, JJ. March 27, 1914.

MUNICIPAL CORPORATIONS (§ II C 3—60)—*By-laws — Waterworks by-law—Expenditure of money.*]—Appeals by the corporation of the city of Ottawa from orders made by Lennox, J., on November 29, 1913, and January 7, 1914, quashing by-laws passed by the city council.

I. F. Hellmuth, K.C., and *F. B. Proctor*, for the appellant corporation.

G. F. Macdonnell, for the applicant, the respondent.

THE COURT dismissed the appeals with costs.

HARRISBURG TRUST CO. v. TRUSTS AND GUARANTEE CO.

Ontario Supreme Court, Lennox, J. March 19, 1914.

TRUSTS (§ II A—43)—*Removal and substitution of trustees —Bonds—Corporation mortgage.*]—Application by the plaintiffs from an order appointing a trustee under a mortgage made by the Woodstock Thames Valley and Ingersoll Electric Rail-

way Company to the plaintiff company, in lieu of the plaintiff company.

M. H. Ludwig, K.C., for the plaintiffs.

W. T. McMullen, for the bondholders other than the defendants.

Grayson Smith, for the defendants.

LENNOX, J., held that he had power to make the appointment as matter of inherent jurisdiction as well as under the Trustees and Executors Act (Ont.). Mr. J. G. Wallace, K.C., would be appointed the new trustee in accordance with the wishes of the majority of bondholders. Leave would be reserved to any bondholder to apply hereafter to have the security (which would be fixed by the junior registrar) increased in case the condition of the railway company should change or appear to make it necessary to increase it.

Costs of all parties to this application to be paid out of the funds of the railway company.

SMITH v. HAINES.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. April 1, 1914.

EVIDENCE (§ II E 7—187)—*Fraud in contract—Sale of shares—Burden of proof.*]—Appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B., dismissing the action without costs.

I. F. Hellmuth, K.C., and *W. J. Elliott*, for the appellant.

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

THE COURT set aside the judgment and ordered a new trial; costs of the former trial and of the appeal to be costs in the cause.

HEWITT v. GRAND ORANGE LODGE OF BRITISH AMERICA.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Sutherland, Latchford, and Leitch, JJ. March 6, 1914.

INSURANCE (§ III F 2—148)—*Forfeiture — Mutual benefit assessments—Notice.*]—Appeal by the plaintiff from the judgment of Kelly, J., at the trial, dismissing an action brought to recover $1,000 on an endowment certificate issued to one James Hewitt the deceased, father of the plaintiff. The plaintiff was a residuary legatee under the will. The contention of the defendants was that Hewitt was not in "good standing" at the time of his death.

ONT.
1914

A. J. Russell Snow, K.C., for the appellant.
J. A. Worrell, K.C., for the defendants, the respondents.

THE COURT allowed the appeal and directed that there should be judgment for the plaintiff and the executors if they consent to be added as plaintiffs, for the amount claimed with suitable interest and costs; or if the executors decline, they may be added as defendants and payment made to them.

BECK v. LANG.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Riddell, J. April 23, 1914.

SOLICITORS (§ II C—30) — *Compensation — Litigation in wife's name—Husband's liability to solicitor.*]—Appeal by the plaintiffs from the judgment of Middleton, J.

H. T. Beck, the appellant, in person.
A. B. Armstrong, for the defendant, the respondent.

THE COURT allowed the appeal with costs, and ordered that judgment should be entered for such amount as should be found due by a taxing officer, or such amount as the parties should agree upon.

SNIDER v. SNIDER.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 24, 1914.

PLEADING (§ V—348)—*Reply—Estoppel—Relevancy — Substance—Form—Superfluous language.*]—Appeal by the defendants, the foreign executors of T. A. Snider, deceased, from the order of Britton, J., restoring certain paragraphs of the plaintiff's reply, which had been struck out by an order of the Master in Chambers.

W. J. Elliott, for the appellants.
G. H. Watson, K.C., and *H. E. Irwin*, K.C., for the plaintiff, the respondent.
F. C. Snider, for the defendant the Canadian executor.

THE COURT made an order consolidating this action with one subsequently brought by the same plaintiff, and varied the order of Britton, J., by providing that the appellants should be in the same position as if they had entered a conditional appearance as to the claim made in the reply if and so far as it set up a claim different from that originally made by the plaintiff. Costs in the cause.

ONT.

1914

KREUSZYNICKI v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 4, 1914.

MASTER AND SERVANT (§ II A 4—101) — *Railway cases — Shunting cars — Actionable Negligence — Precautionary duties — "Defective system," when negatived—Workmen's compensation—Common law.*]—Appeal by the plaintiff from the judgment of Middleton, J.

C. M. Garvey, for appellant.

Angus MacMurchy, for the defendants, the respondents.

THE COURT ordered a new trial with leave to amend as advised. The costs of the former trial and of this appeal to be costs to the defendant in any event.

MERCANTILE TRUST CO. v. STEEL CO. OF CANADA.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 5, 1914.

MASTER AND SERVANT (§ II A 4—101) — *Railway cases — Shunting—Negligence—Precautionary duties.*]—Appeal by the defendants the Grand Trunk Railway Company from the judgment of Middleton, J., at trial.

D. L. McCarthy, K.C., for the appellants.

W. S. McBrayne, for the plaintiffs, the respondents.

THE COURT dismissed the appeal with costs.

RUDDY v. TOWN OF MILTON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. April 22, 1914.

MUNICIPAL CORPORATIONS (§ II G 3—236)—*Defects in sewers —Drainage—Natural watercourse—Obstruction by inadequate culvert—Injury to private property—Damages—Quantum.*]—Appeal by the defendants from the judgment of Middleton, J.

A. McLean Macdonell, K.C., and *W. I. Dick*, for the appellants.

George Bell, K.C., for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

ONT.

1914

LIMEREAUX v. VAUGHAN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Riddell, J. April 23, 1914.

TRUSTS (§ I D—24) — *Resulting trusts — Conveyance to daughter of land purchased by mother—Improvidence and absence of independent advice.*]—Appeal by the defendant from the judgment of Britton, J.

J. C. McRuer, for the defendant.

S. H. Bradford, K.C., for the plaintiff.

THE COURT dismissed the appeal with costs.

GEORGE WHITE & SONS CO. LIMITED v. HOBBS.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 7, 1914.

SALE (§ III A—57)—*Rights of parties on breach of warranty—Notice of defects—Imputed knowledge of contents of written agreement.*]—Appeal by the defendant from the judgment of Falconbridge, C.J.K.B.

T. N. Phelan, for the appellant.

I. F. Hellmuth, K.C., for the plaintiffs, respondents.

THE COURT affirmed the judgment, with a modification, the terms of which are to be agreed upon by counsel or settled by one of the Judges. Costs to be paid by the appellant.

GNAM v. McNEIL.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Hodgins, J.A., Riddell, and Leitch, JJ. May 7, 1914.

CONTRACTS (§ I D 3—55) — *Definiteness — Compromise of suit.*]—Appeal by the plaintiff from the judgment of Britton, J.

H. H. Dewart, K.C., and *D. S. McMillan*, for the appellant.

D. L. McCarthy, K.C., and *T. L. Monahan*, for the defendant, the respondent.

THE COURT dismissed the appeal, with costs if asked for.

FORRESTER v. LAFONTAINE.

SASK.

1914

Saskatchewan Supreme Court, Elwood, J. April 11, 1914.

LIS PENDENS (§ II—10)—*Registration—Motion to vacate—Pleading not justifying any lien or charge on land.*]—Appeal by defendant from an order of Parker, M.C., refusing to vacate a *lis pendens*.

T. D. Brown, for defendant.

B. D. Hogarth, for plaintiff.

ELWOOD, J., allowed the appeal, holding that the mere fact that the plaintiff sued for the registration of a certificate of *lis pendens* did not entitle him to maintain the registration of it until the trial. The pleadings on their face must shew the facts from which it would appear that he had a claim or a lien on the land. Where such does not appear upon the pleadings, the registration may, on motion in Chambers, be ordered to be cancelled.

Re MORTGAGES ON UNPATENTED LANDS.

The Master of Titles, Saskatchewan. March 28, 1914.

LAND TITLES (Torrens system) (§ IV—40)—*Caveats—Mortgages on unpatented land.*]

MILLIGAN, Master of Titles, held that a registrar of a land registration district can file a caveat upon unpatented land in respect of a claim under an unregistrable mortgage given by a person alleging a purchase of land from the Crown only if the caveat is accompanied by an affidavit in Form G. to the Land Titles Act of Saskatchewan.

SASKATCHEWAN SUPPLY CO. v. McFARLAND.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Elwood, JJ. March 16, 1914.

APPEAL (§ VII M 3—570)—*Findings of trial Judge—Reversal.*]—Appeal in an action for goods sold and delivered.

Hartney, for the appellant.

Cruise, for the respondents.

THE COURT on a consideration of the evidence disagreed with the findings of fact by the trial Judge upon the alternative claim. The appeal was allowed and the judgment below set aside and judgment entered for the defendant with costs.

MAN.

1914

RURAL MUNICIPALITY OF LORNE v. ARNOLD.

Manitoba King's Bench, Macdonald, J. March 25, 1914.

BOUNDARIES (§ II A—8)—*Plans—Surveys—Conflict as to monuments—Onus.*]—Trial of action to declare that the defendant had wrongfully entered into possession and obstructed part of a road allowance, and for an injunction and damages.

A. Dubuc, for plaintiff.

R. M. Noble, for defendant.

MACDONALD, J., said that the conflict of evidence created such a doubt that he must conclude that the plaintiff had failed to make out a case. The case was one in which proceedings might be taken under the Special Surveys Act, R.S.M. 1913, ch. 182, to finally dispose of the matter should the municipality persist in its claim.

The action was dismissed with costs.

DIXON v. COMLEY.

Manitoba King's Bench. Trial before Prendergast, J. March 10, 1914.

BROKERS (§ II B—10)—*Real estate agents—Compensation—Agreement to divide commissions.*]—Action to recover $1,812.55 being one-half of the commission received by the defendant from the Land and Homes of Canada Company Limited.

H. P. Blackwood, for the plaintiff.

E. B. Fisher, for the defendant.

PRENDERGAST, J., on reviewing the evidence found that the defendant did not agree to divide with the plaintiff the commissions that he might earn on the sale of the lands in question. As to the alternative claim made by the plaintiff on the ground of misrepresentation, the plaintiff's position was that even if there was no agreement that he should have one-half of the defendant's commission, he was induced to give his services for 50 cents an acre, on the latter's fraudulent representation that he was himself getting only 25 cents, and that, on that ground the agreement should be set aside, and he should be allowed remuneration on a *quantum meruit*. The misrepresentation, if any, did not bear on the nature or value of the services which the plaintiff would be expected to render, nor at all on the remuneration which he would receive therefor, and the learned Judge said he was inclined to doubt, as a proposition of law,

whether the plaintiff could recover in the circumstances he alleged, but the main point was, that on the evidence he could not find as a fact that the defendant did make the statement that he was receiving only 25 cents on the deal.

There would be judgment for the defendant with costs and the counterclaim would be dismissed without costs.

MAN.
1914

WRIGHT v. FITZPATRICK.

Manitoba King's Bench, Macdonald, J. March 25, 1914.

LANDLORD AND TENANT (§ III D 3—110)—*Distress—Wrongful seizure—Damages—Injunction.*]—Trial of an action for damages for illegal distress.

H. F. Tench, for the plaintiff.

MACDONALD, J., said the distress was wrongful, but, considering the conduct of the parties throughout, the damages were only nominal and judgment would be entered for the plaintiff for $1.00.

The injunction was made perpetual, with costs.

Re ALLEN ESTATE.

N. S.
1914

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., in Chambers. January 10, 1914.

EXECUTORS AND ADMINISTRATORS (§ IV C 1—100)—*Settlement of decedent's estate—Payment of legacies—Time for.*]—Hearing on originating summons taken out by the surviving executor to determine certain questions arising under the will of Eva M. Allen, deceased.

H. S. McKay, for Allen and R. K. Bent.

J. E. Read, for Arnold C. Bent.

TOWNSHEND, C.J., held that the moneys received or to be received from the executors of Norman H. Bent should be divided into two parts as directed in the will of Eva M. Allen and that Arnold C. Bent was entitled in full to one of the said parts at once according to the terms of the will.

N. S.

1914

SCHLESINGER v. CROWE.

Nova Scotia Supreme Court, Ritchie, J. March 6, 1914.

FRAUDULENT CONVEYANCES (§ IV—16)—*Preferences—Knowledge of transferrer's insolvency—Indefiniteness of contract of sale.*]—Trial of action against the sheriff of the county of Hantz for damages for taking and selling plaintiff's goods under execution. The defence to the action was that the goods were the property of one Gillespie who, being insolvent, transferred them to the plaintiff, and that such transfer was fraudulent and void under the Assignments Act (N.S.). The plaintiff joined issue and replied that the goods were bought for value and in good faith without any notice of Gillespie's insolvency.

H. W. Sangster, for plaintiff.

J. L. Ralston, for defendant.

RITCHIE, J., said that the first question for consideration was whether or not the alleged sale from Gillespie to the plaintiff was really a sale or merely a continuation of the relationship of sales agent, in which capacity the plaintiff had previously acted for Gillespie. Although he had been in considerable doubt about this he came to the conclusion that there was no sale, but it was merely a continuation of the previously existing relationship of sales agent. The levy was made within 60 days from the written transfer of November 28. Gillespie was insolvent at the time and this was known to all concerned, consequently the transfer cannot stand under the Assignment Act of Nova Scotia because it is an unjust preference in favour of certain creditors, namely, the creditors represented by H. A. Purdy to whom the plaintiff had given a bill of sale and covenant to pay $1,500.

Except as to a trifling article, valued at $3.50, which had been seized and which had not formed part of the Gillespie stock, the action will be dismissed with costs.

SUTCLIFFE v. BENNETT.

Nova Scotia Supreme Court, Graham, E.J., Russell, and Ritchie, JJ. February 14, 1914.

NEW TRIAL (§ III B—16)—*Erroneous verdict—Insufficiency of evidence to sustain.*]—Appeal from the judgment of Longley, J., in an action for alleged wrongful distress and for failure to put premises in tenantable repair according to agreement in consequence of which plaintiff's goods were alleged to have been

damaged and valueless. On the trial the jury found a verdict for plaintiff for $1,000.

N. S.
1914

H. Mellish, K.C., and *E. D. King*, K.C., for appellant.

James Terrell, for respondent.

GRAHAM, E.J. (delivering the judgment of the Court):—The verdict of $1,000 is altogether unreasonable and contrary to the evidence. It is unnecessary to consider the clause for forfeiture and whether under the terms of the clause in the memorandum of agreement the demand for rent should have been made with all the formalities of the common law or not: *Manser* v. *Dix*, 8 D.M. & G. 703, 44 Eng. R. 561; and *Phillips* v. *Bridge*, L.R. 9 C.P. 48.

There must be a new trial, the defendant's costs to be costs in the cause.

INDEX

CASES—*continued.*

CASES—*continued*.

CASES—*continued.*

CAVEATS—

See LAND TITLES.

CHATTEL MORTGAGE—

CHOSE IN ACTION—

Assignment of, see ASSIGNMENT.

COMPANIES—

See CORPORATIONS AND COMPANIES.